DECISIONS AND ORDERS

OF THE

NATIONAL LABOR RELATIONS BOARD

VOLUME 290

JULY 29, 1988, THROUGH SEPTEMBER 26, 1988

PUBLISHED BY THE BOARD

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1991

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

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*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

** Unassigned.

Theatre and Amusement Janitors Union, Local 9, Service Employees International Union, AFL–CIO (Blumenfeld Enterprises, Inc.) *and* Yhya Mohamed. Case 20–CB–7404

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On April 28, 1988, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent Union filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Theatre and Amusement Janitors Union, Local 9, Service Employees International Union, AFL–CIO, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge's finding that Charley Huber was an agent of the Respondent, as he held the office of president of the Local on November 17, 1987. We, therefore, find it unnecessary to rely on the judge's alternative finding that Huber, even if he were not president, was an apparent agent for the Respondent.

Christine Ralls, Esq., for the General Counsel.
William Sokol, Esq. (Van Bourg, Weinberg, Roger and Rosenfeld), of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried in San Francisco, California, on February 23, 1988. The initial charge was filed by Yhya Mohamed, an Individual, against the Theatre and amusement Janitors Union, Local 9, Service Employees International Union, AFL–CIO (the Union), on October 9, 1987, and amended on November 24, 1987.[1] The complaint, issued on December 18, 1987, and amended at trial, alleges the Union refused to permit Mohamed to view specified hiring hall records in violation of Section 8(b)(1)(A) of the National Labor Relations Act. In its answer, the Union denied the commission of any unfair labor practices.

All parties were provided opportunity to present oral and documentary evidence, cross-examine witnesses, and present oral argument. Counsel for the General Counsel presented an oral argument, and a posthearing brief has been received from Respondent.[2]

On the entire record, including my observation of the demeanor of the witness, and after due consideration of all pleadings and Respondent's brief, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The Union admits its status as a labor organization and stipulated that Blumenfeld San Francisco Theaters (Blumenfeld), a partnership with an office and place of business in San Francisco, California, where it is engaged in the operation of movie theaters and the exhibition of motion pictures, during the calendar year ending December 31, 1986, derived gross revenues in excess of $500,000 from such business and purchased and received goods and materials valued in excess of $5000 which originated from points outside the State of California. However, the Union asserts that Blumenfeld is not the appropriate entity to derive jurisdiction in this proceeding and therefore claims the Board lacks jurisdiction.

It is Respondent's position that it is a "minuscule union" predominately concerned with representing janitors at racetracks; thus, most of its operations are not encompassed within the Board's jurisdiction. The Union did not adduce any evidence in support of this position. The Union did stipulate that from time to time it had collective-bargaining agreements with Blumenfeld and the last contract requiring them to hire janitors from the Union under an exclusive hiring hall provision, which has expired, was being followed by Blumenfeld and the Union in 1987. Accordingly, I find this claim of lack of jurisdiction to be without merit.

The most recent collective-bargaining agreement effective August 1, 1980, provides in relevant part:

> Section 2. Union Security
>
> (a) Union Membership: Membership in good standing in the Union not later than the thirty-first (31st) day following the beginning of employment or not later than the thirty-first (3lst) day following the effective date of this Agreement, whichever is later, shall be a condition of employment.
>
> (b) Hiring: When new or additional employees are needed, the Employer shall notify the Union of

[1] All dates are in 1987 unless otherwise indicated.

[2] The transcript was corrected by letter dated March 10, 1988, from the reporting service and a copy of the letter was sent to all parties.

> the number of classifications of employees needed. Applicants for jobs shall be referred by the Union to the Employer for employment on a nondiscriminatory basis.
>
> The Employer shall be the sole judge of the competence of all applicants and reserves the right to reject any applicant referred by the Union. The Employer agrees within seven (7) days of the date of hiring to notify the Union of the name or names and addresses of the persons hired and the theatres to which such persons are assigned.
>
> In hiring, the Employer shall give preference to applicants previously employed in the building service industry in the local labor market area.
>
> If the Union is unable to refer to the Employer suitable applicants for employment within a reasonable time, the Employer may hire persons from other sources provided the Employer on the date of hiring shall notify the Union of the same and address of each person hired.

Mohamed has never worked in a Blumenfeld theater but has been dispatched by the Union to work in other theaters and for various television stations, and is dependent on the Union on matters affecting his employment.

The complaint alleges, and I find, based on the stipulation and admitted uncontroverted facts, that Blumenfeld is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Similarly, I further find the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Only one witness appeared and testified, Mohamed. Mohamed has been a union member since 1972. He signed the out-of-work list "years ago." The list contains only the members' names and telephone numbers. At any one time, there were only about 15 names on the list. Usually, the same 15 members' names were on the list. As each new list was posted, Mohamed signed it. As a member was dispatched, his name would be crossed off the list. During 1987, Mohamed visited the Union 2 to 3 days a week seeking work. The list was hung on a wall and he frequently consulted it to determine if he would be dispatched. He was consistently told there was no work. The turnover rate was apparently slow; the list was changed approximately every 5 months.

In mid-1987, Mohamed began to suspect that members were being dispatched out of order.[3] While he was at the union hall seeking work, he observed on the table used by the dispatchers four or five dispatch slips for several television stations, including KGO and KPIX. He does not know if the individuals dispatched to these jobs had their names crossed off the out-of-work list as he did not check. At the time he observed these dispatch slips, he talked to an individual called Kelly, who was indisputably a dispatcher for the Union. Mohamed asked Kelly if there was any work for him. Kelly replied "there's nothing, there's nothing for you, there's no job, it's kind of slow." After observing the dispatch slips, Mohamed asked about them if there was no work and Kelly said:

> Well those people had been request [sic]. I said this is not true request, I've been working Channel 5, I've been working Channel 7, I've been working all the building or this TV station that Local 9 has and these are the ones that put me to work. You can't say that. Well he says it's nothing, I can't do anything, there's no work for you.

Mohamed never talked to any individuals he suspected received a dispatch, whether or not he believed their names were crossed off the list. He thought some names were not taken off the list after the members had been dispatched. Mohamed testified he would be told that certain individuals were dispatched and yet would still see their names on the list. Mohamed was unsure whether there were two or three copies of the dispatches, but it is undisputed that there were at least two; one to be given to the Employer and one to be placed in the members' file which was maintained by the Union.

On November 16, Mohamed telephoned the Union and spoke to an individual he identified as Louie's wife. It is undisputed that Louie also dispatched members and was assisted by his wife. He asked her if there was any work for him and she replied:

> There is no work for you. Then I ask her well I like to have a copy for the dispatch for the past six months because all the time I call she's no work and I'd like to get a copy.[4] She said no we have to get an order for that from the court and she hung up on me. I tried to call her again and she hung up again.

The next day, November 17, Mohamed went to the union hall and saw Charley Huber.[5]

---

[3] There is no allegation in the complaint that the Union violated the Act by making out-of-order dispatches.

[4] Respondent claimed in its opening argument that Mohamed sent a letter to the Union claiming, "My attorney has advised me to ask for referral lists from the Union." The letter was not placed in evidence. Respondent understood that the reference to "my attorney" was either an attorney or field examiner for Region 20 and raised as a defense to the complaint the claim that the charge had been solicited by the Region. I find this claim has not been shown to be meritorious. On cross-examination Mohamed said no one told him to ask for the dispatch slips and he did not tell Kelly his attorney advised him to ask for the dispatch slips. Inasmuch as Mohamed's testimony is uncontroverted, Respondent has failed to substantiate this allegation of solicitation of the charge by the Region. See generally *Plumbers Local 136 (Shaw Co.)*, 280 NLRB 847 (1986).

[5] Respondent denies Huber is the president of the Local. I credit Mohamed's uncontroverted testimony that he referred to Huber as the president during the described conversation that day, November 17; and Huber admitted he was president of the Local. Furthermore, neither Huber nor Kelly, who was also present, claimed that Huber was no longer president. This conclusion is supported by a Labor Organization Annual Report, Form LM-3, submitted by Respondent to the United States Department of Labor pursuant to the Labor Management Reporting and Disclosure Act of 1959, as amended, and Title VII of the Civil Service Reform Act, which indicates Huber was the president in 1986 and the next regular election for officers was December 1987. Mohamed testified, without dispute, that Huber was president of the Local since he

Continued

Mohamed asked Huber if Huber could assist him in getting work, since there had been other members dispatched. Huber asked his name and when told referred to a suit Mohamed had initiated against the union, which cost them $700 for attorney's fees. Mohamed again asked Huber for work. Huber replied: "Well we can't do that. The Executive Board they say there's no work for you." Mohamed then told him he as president should be able to assist him. Huber rejoined: "There's no work, there's no work for you and I'm President doesn't mean any good, because I'm President I can't do anything."

Mohamed then asked to get a copy of the Union's dispatches for the past 6 months indicating that he thought others had been dispatched out of order when he should have been dispatched. Huber told him they could not give him the information without a court order and referred him to their attorney. The Union never gave Mohamed a copy of the requested dispatches or offered to let him review the documents in the union hall. Mohamed telephoned the Union's attorney three times, left his name and telephone number, but his calls were never returned.

B. *Analysis and Conclusions*

The Union's position is that they are not under a legal obligation to let one member see the files of all the other members.

As was held in *Operating Engineers Local 825 (Building Contractors)*, 284 NLRB 188, 189 (1987):

> A union has an obligation to deal fairly with an employee's request for job referral information and that an employee is entitled to access to job referral lists to determine his relative position in order to protect his referral rights. *Teamsters Local 282 (AGC of New York)*, 280 NLRB 733, 735 (1986); *Operating Engineers Local 324 (AGC of Michigan)*, 226 NLRB 587 (1976). Moreover, it has been held that "A union breaches its duty of fair representation in violation of Section 8(b)(1)(A) of the NLRA when it arbitrarily denies a member's request for job referral information, when that request is reasonably directed towards ascertaining whether the member has been fairly treated with respect to job referrals." See *NLRB v. Carpenters Local 608*, 811 F.2d 149 (2d Cir. 1987), enfg. 279 NLRB 747 (1986).

Respondent argues that Mohamed offered no "good reasons" for his request which it claims "is overbroad and burdensome . . . it invades the privacy of the members, and Mohamed has always been allowed to see the out-of-work list." I find these arguments unpersuasive and lacking in merit.

As previously indicated, a union member has the right to protect his right to fair treatment by the union in matters affecting his employment. *Miranda Fuel Co.*, 140 NLRB 181, 189 (1962). In that decision, the Board quoted from *Electrical Workers IUE Local 801 v. NLRB; NLRB v. General Motors Corp.*, 307 F.2d 679, 683 (D.C. Cir. 1962), as follows:

> Among the most important of labor standards imposed by the Act as amended is that of fair dealing, which is demanded of the union in their dealings with employees. . . . The requirement of fair dealing between a union and its members is in a sense fiduciary in nature and arises out of two factors. One is the degree of dependence of the individual employee on the union organization; the other, a corollary of the first, is the comprehensive power vested in the union with respect to the individual.

In this case, Mohamed indicated he was on the out-of-work list for years without dispatch and suspected he was not being treated fairly by the Union. He suspected other members were dispatched out of order and the mentioning of a prior suit he filed against the Union further raised his suspicions of unfair treatment. Instead of taking steps to allay his concerns, the Union referred Mohamed to their attorney. There was no claim of unduly burdensome efforts required to meet the request for the dispatch slips as the basis for denial when Mohamed spoke to anyone at the Union. Only after union representatives denied his requests did counsel raise the claim that the request was unduly burdensome.

I find this claim is not colorably valid. On the one hand Respondent asserts it is so minuscule as to avoid the Board's jurisdiction, and on the other presents assertions that reviewing personnel files for dispatch slips is so burdensome as to overcome a member's right to information relevant to determining if he is receiving fair treatment when he fails to receive a dispatch. The uncontroverted evidence of record is that there were few dispatches over the 6-month period encompassed in the request in a "minuscule" Union. There was no evidence that there were logistical problems in providing the information. Huber and Louis' wife did not make such a claim at the time Mohamed made his requests. If there are impediments to providing the information, Respondent has not demonstrated them.

Similarly, Respondent failed to substantiate its claim that the personnel files of its members contain confidential material. There is no evidence of what they contained other than dispatch slips. Again, it was not until after the Union refused to provide the information that a claim of confidentiality was raised. I find there is no basis to conclude that the material contained in the files warrants designating them confidential. Even if I assume there are confidential matters contained in the files, as noted above, there was no reasonable impediment demonstrated to Respondent's extracting the dispatch slips from the files. Thus, I conclude Respondent's refusal to honor Mohamed's request was arbitrary.

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became a member. Any change in officers after such a long tenure would likely be the subject of common knowledge and/or susceptible to documentation; no documentation supporting the claimed change of union presidents was submitted. Based on the absence of any evidence that there was a change in officers, the situs of the conversion in the office rather than outside in the hall, and the failure of Huber and Kelly to disclaim Mohamed's assertion, I find Huber was president of the Union on November 17, 1987. Additionally, assuming Huber was no longer president, his failure to correct Mohamed's understanding in the presence of the uncontroverted agents, makes Huber an agent for Respondent during the time here pertinent and renders the Union responsible for his statements and actions.

As found in *Operating Engineers Local 324 (AGC of Michigan)*, 226 NLRB 587, 598–599 (1976):

> A union is a service agency, designed to further the interests of the employees it represents. There is no reason for it to be a closed society, unresponsive to reasonable requests of the unit employees. As the Court of Appeals for the District of Columbia Circuit noted in *I.U.E., Frigidaire Local 801 v. NLRB*, supra, 307 F.2d at 683 (per J. Burger), a union, as the agent of employees, is subject to the positive obligation set forth in Restatement (Second), *Agency* Section 381 (1958): "To use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have." On the evidence before me, there is nothing to show that the [members'] request required Respondent to exert efforts which might be described as unreasonable and beyond the call of duty described.

In the circumstances of this case, I find Respondent violated Section 8(b)(1)(A) of the Act by arbitrarily denying Mohamed's request for the dispatch records for the preceding 6 months. Mohamed clearly requested the information to ascertain if he was being fairly treated by the Union when he failed to receive job referrals and he was entitled to and had a reasonable need for that information.

CONCLUSIONS OF LAW

1. Blumenfeld Enterprises, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.
3. By arbitrarily refusing to provide Yhya Mohamed with copies of dispatches for a specified 6-month period as lawfully requested by him, the Union has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found the Union has engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, I recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act. Having found that the Union unlawfully refused to provide Yhya Mohamed with the previously described information, I recommend that, on request duly made, it be ordered to do so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Theater and Amusement Janitors Union Local 9, Service Employees International Union, AFL–CIO, San Francisco, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing arbitrarily to honor requests for information regarding referrals for employment by failing to provide Yhya Mohamed with copies of the dispatch slips reflecting dispatches from its hiring hall for a discrete 6-month period.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, provide to Yhya Mohamed copies of the dispatch list for the 6 months preceding his request.

(b) Post at its business offices and other places where notices to their members are customarily posted copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to provide Yhya Mohamed with copies of dispatch slips reflecting all referrals from our hiring hall for the 6 months preceding his request.

WE WILL NOT arbitrarily refuse to honor members' reasonable requests for information pertaining to the referral of members to positions with employers.

WE WILL NOT in any like or related manner restrain or coerce employees or applicants for employment in the

exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, provide Yhya Mohamed with copies of our dispatch slips reflecting all referrals from our hiring hall for the 6-month period preceding his request.

THEATRE AND AMUSEMENT JANITORS UNION LOCAL 9, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

TRW Vidar, a Division of TRW Corporation *and* Teamsters-Warehousemen Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO.[1] **Case 31–CA–10771**

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On June 9, 1983, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.

The judge found that the Respondent's announcement, 1 week before the representation election, that it would lay off a number of employees was an unlawful, implied threat of layoff if the Union won the election. The Respondent excepts to this finding, claiming that the layoffs were justified by business considerations and that the announcement thereof was unrelated to the union campaign. We find merit in the Respondent's exceptions.

The Union filed its petition for a representation election on October 9, 1980; after a hearing on December 18, 1980, an election was scheduled for January 16, 1981,[4] at the Respondent's facilities on Southwood Drive and Tank Farm Road in San Luis Obispo, California. The Respondent manufactures telecommunications equipment, including telephone-switching and transmission devices. It is uncontested that during the period 1979 to 1980, the Respondent's business, which is heavily influenced by the housing market, declined because of an increase in the mortgage interest rate, which led to a decrease in the number of housing starts. In December 1980, the Respondent decided to remove itself from the telephone-switching business, to consolidate some of its operations, and to reduce the number of employees at certain locations. There is no claim that the Respondent lacked a substantial business justification for deciding to take the action described above.

To effectuate its plan, the Respondent determined it would (1) phase out 150 employees at its Sunnyvale, California facility between January and June 1981; (2) lay off employees at the San Luis Obispo facilities on February 27, 1981; and (3) lay off employees in Melbourne, Florida, on January 16, 1981. The Respondent put together an "overall communication plan" designed to inform all employees at all affected locations at the same time of its proposed reductions in force. The Respondent's plant production manager, Ray Antunez, held a meeting of Tank Farm Road employees on January 9. Antunez read a letter from the Respondent's vice president and general manager, A. B. Lipscomb, explaining the business need for a layoff and noting that the layoff would affect San Luis Obispo and Melbourne. Antunez advised the employees that approximately 19 Tank Farm Road employees would be laid off on February 27. An employee who attended this meeting testified that Antunez did not refer to the Union during his speech.

The Respondent's plant manager, Mac Brinton, held a meeting with Southwood Drive employees on January 12. Brinton announced that because of

[1] On November 2, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We agree with the judge that the Respondent discriminatorily enforced its no-access rule in violation of Sec. 8(a)(1) when it refused to allow off-duty employees the use of the company cafeteria to discuss the Union, while allowing other off-duty employee groups the use of the cafeteria for nonwork-related activities. However, in affirming the judge's decision in this regard, we do not adopt his reliance on *A. W. Schlesinger Geriatric Center*, 263 NLRB 1337 (1982). Fn. 2 of the Board's decision in *A. W. Schlesinger* reveals that the Board did not find in that case that the respondent there had disparately enforced its no-access rule. In addition, we find it unnecessary to pass on the issue, not raised by the complaint, of whether the Respondent's conduct would have violated the Act in the absence of discrimination. See *Methodist Hospital of Gary*, 263 NLRB 411 fn. 3 (1982), enfd. 733 F.2d 43 (7th Cir. 1984). We shall modify the judge's recommended Order to conform to the violation found.

Chairman Stephens agrees that the cease-and-desist provisions of the recommended Order should be modified by deleting the reference to "an unlawfully broad no-access rule" and replacing it with the provision contained in our modification of the Order. Because he considers the issue actually litigated, even if not alleged, he would reach this result by granting the Respondent's exception to the judge's overbreadth finding on the ground that *Tri-County Medical Center*, 222 NLRB 1089 (1976), modified the holding of *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973), only to the extent that it is now lawful for an employer to maintain a clearly disseminated rule denying access to off-duty employees only if that rule is limited in its application to "the interior of the plant and other working areas" and to those parts of "parking lots, gates and other outside nonworking areas" for which a business justification for denying access can be shown. *Tri-County*, supra. Chairman Stephens would adhere to the *Tri-County* rule as formulated, and, as the cafeteria is plainly not in an "outside area," he would find that a rule such as the Respondent's rule, so long as it is not discriminatorily enforced, is lawful as applied to the cafeteria. Chairman Stephens would overrule *Hudson Oxygen Therapy Sales Co.*, 264 NLRB 61, 72 fn. 2 (1982), to the extent it holds otherwise.

[4] All dates are in 1981 unless otherwise indicated.

poor economic conditions 19 employees would be laid off in late February. Vickie Wobermin, an employee who attended this meeting, testified that Brinton also stated "with the union organizing going on, he didn't want to hide anything. He wanted to be right up front and let them—let everyone know that there would be a layoff."

The judge found that the Respondent's announcement of layoffs during the critical preelection period constituted an implied threat of loss of employment in violation of Section 8(a)(1). The judge questioned the timing of the announcements at the San Luis Obispo facilities, both of which were made within 1 week of the January 16 election. In this regard, the judge referred to the testimony of Kent Anderson, the Respondent's director of human resources. Anderson admitted that the announcement of the employee layoffs at the San Luis Obispo facilities could have been made after the election because those layoffs were not to occur until February 27. The judge thus determined that the Respondent had some flexibility in timing the layoff announcements inasmuch as the actual layoffs were scheduled for different times at different locations. The judge also was not convinced that the Respondent had a definite company policy, which required such advance notice of layoffs. Finally, the judge referred to the statement made by Mac Brinton to the Southwood Drive employees. Considering the facts surrounding the layoff announcements as well as other evidence of antiunion hostility, the judge found that the Respondent's layoff announcements were implied threats of loss of employment in violation of Section 8(a)(1).

We do not agree with the judge's findings in this regard. There is no dispute that the Respondent had substantial and legitimate business reasons for consolidating its operations and laying off employees; there is no claim to the contrary. Additionally, there is no claim that the timing of the Respondent's decision to consolidate its operations or the schedule of layoffs was motivated by anything other than legitimate business reasons.

Unlike the judge, we do not see the timing of the layoff announcements as lacking in business justification. The Respondent has a policy of giving as much advance notice as possible to employees who are being laid off. In this particular situation, the Respondent desired to coordinate its announcements so that all employees at all affected locations were informed at the same time. The Respondent's management expressed the need to present a consolidated communications plan to all affected employees so that they would understand the entire operating plan. As the Respondent had scheduled employee layoffs in Melbourne, Florida, on January 16, coincidentally the date of the Board election, the Respondent had little choice but to make its announcement prior to that date. Although the layoff announcements occurred prior to the election, there is no evidence that the timing thereof was for an unlawful purpose.

We also do not agree with the judge's conclusions regarding the statements made by Mac Brinton on January 12 to the Southwood Drive employees concerning being "up front" with the "union organizing going on." The judge concluded that this statement could be construed by employees as being a "coercive threat rather than [an] honest forecast." We do not find anything in Brinton's statement that connects the presence of the Union to the Respondent's need to lay off employees. There is nothing in his statement that, either expressly or impliedly, contains either a threat of reprisal or promise of benefit. There is no evidence that the Respondent was influenced in its actions by the representation election or that the Respondent acted in any way inconsistent with its usual business practices.[5] Under these circumstances, there is nothing in the Act that prohibits an employer from truthfully advising its employees of forthcoming layoffs. Accordingly, we find that the Respondent did not violate the Act by announcing employee layoffs.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, TRW Vidar, a Division of TRW Corporation, San Luis Obispo, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Discriminatorily enforcing its no-access rule against employees who engage in union activities."

2. Delete paragraphs 1(b) and 1(c) and reletter the subsequent paragraphs.

3. Substitute the attached notice for that of the administrative law judge.

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[5] See *Aunt Millie's Sauces*, 259 NLRB 278 (1981).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminatorily enforce our no-access rule against employees who engage in union activities.

WE WILL NOT threaten to withhold employee work reviews if a union wins an election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

TRW VIDAR, A DIVISION OF TRW CORPORATION

Eugene L. Kusion, Esq., for the General Counsel.
Richard R. Pace, Esq. (Hill, Farrer & Burrill), of Los Angeles, California, and *Phillip R. Pearson, Esq.*, of Redondo Beach, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of a charge filed on January 13, 1981, by Teamsters-Warehousemen Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Union), the General Counsel of the National Labor Relations Board (Board), by the Regional Director for Region 31, Los Angeles, California, duly issued a complaint and notice of hearing on March 25, 1981, against TRW Vidar, a Division of TRW Corporation (Respondent), alleging that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act (the Act). On April 6, 1981, the Respondent filed an answer denying the material allegations in the complaint.

A hearing was duly held before me in Santa Maria, California,[1] on December 8, 1981. At the close of the General Counsel's case, the Respondent moved to dismiss paragraphs 8 and 9 of the complaint for failure of proof, which allege that the Respondent on January 9 and 12, 1981, "impliedly threatened to lay off certain of its employees if the Union won the election." I denied the motion. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. Thereafter, the General Counsel and the Respondent filed briefs. In its brief the Respondent seeks dismissal of the allegations in the complaint "out of hand" for failure of proof. For the reasons set forth, I deny the Respondent's application for dismissal in its entirety.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Respondent, at all times material, has been a corporation organized under and existing by virtue of the laws of the State of Ohio, with an office and principal place of business located in San Luis Obispo, California, where it is engaged in the manufacture of telecommunication equipment.[2] In the course and conduct of the Respondent's business operations during the preceding 12 months, these operations being representative of its operations at all times material, the Respondent annually purchases and receives goods or services valued in excess of $50,000 directly from suppliers located outside the State of California for use at its San Luis Obispo, California location. The complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Furthermore, the complaint alleges, the Respondent admits, and I find that at all times material, Gerald Cross, the Respondent's personnel director, Mac Brinton, its plant manager, and Ray Antunez, its production manager at the San Luis Obispo, California plant have been, and are now, supervisors within the meaning of Section 2(11) of the Act and agents of the Respondent acting on its behalf.[3]

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that Teamsters-Warehousemen Local 381, International Brotherhood of Teamsters, Chauffeurs, Ware-

[1] The transcript indicates that the hearing was held in Los Angeles, California, but this is incorrect. It was held in Santa Maria, California.

[2] Regarding its operations in San Luis Obispo, California, the Respondent maintains a facility located at 1050 Southwood Drive, and two annex facilities at Tank Farm Road.

[3] Kent Anderson, the Respondent's director of human resources working at its "Division Headquarters" in Sunnyvale, California, and John Lane, its production supervisor at the San Luis Obispo, California facilities both testified at the hearing. It is obvious from their testimony that they are supervisors within the meaning of Sec. 2(11) of the Act and agents of the Respondent acting on its behalf, and I so find.

housemen & Helpers of America is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The complaint alleges, in substance, that the Respondent violated Section 8(a)(1) of the Act by discriminatorily refusing to allow employees the use of the company cafeteria during nonworking hours for protected or concerted activities, by impliedly threatening its employees with layoffs if the Union won the election, and by threatening its employees with the withholding of work reviews if the Union won the election. The Respondent denies these allegations.

A. *Background*

The evidence shows that the Union commenced its organizational activities at the Respondent's Southwood Drive and Tank Farm Road Annex facilities in San Luis Obispo, California, in May 1980, and its activities continued through January 1981. The Respondent's brief asserts that, "On October 9, 1980, the Union, Teamsters Local 381, filed a petition for a representative election among the Respondent's production and maintenance employees. On December 18, 1980, following a hearing conducted by the Board, an election was ordered for January 16, 1981.[4] Gerald Cross, the Respondent's personnel manager at its San Luis Obispo, California facilities testified that during this period he was fully aware that some of the employees were engaging in activities in support of the Union, attending union meetings, wearing union campaign buttons, and distributing union "flyers or propaganda."[5]

B. *The Evidence*

1. The Respondent's refusal to allow employees to use its cafeteria for a union-related meeting

Vickie Wobermin, employed by the Respondent at its San Luis Obispo, California facilities since September 1971, and an active participant in the Union's organizational campaign at these facilities,[6] testified that she had distributed a notice, prepared by herself, to "test department personnel—the technicians and test specialists," scheduling a meeting to be held on Tuesday, December 2, 1980, at 4 p.m. in the Southwood Drive facility cafeteria.[7] Wobermin asserted that the reason therefore was that because of the pending Board election scheduled for January 16, 1981, the results of which could have "serious consequences" for the Respondent's "professional-technical employees," these employees should be fully informed regarding what union representation would mean, "ramifications of what geting in a union would do to us." Wobermin related that the meeting had been arranged for 4 p.m. and to last until 4:30 p.m. because the day-shift technicians completed their work shift at 4 p.m., while the night-shift technicians, her own work shift, did not commence work until 4:30 p.m.; therefore, all these employees would have a reason for being at the plant and would already be physically on the premises for the schduled meeting time. She added that this also acted to set the meeting during nonwork hours.[8]

Wobermin testified that on December 2, 1980, at 4 p.m., she appeared at the plant cafeteria with Kathy Tpomala, another technician employee, and that present were Larry McNamee, a day-shift technician, and several other employees. Wobermin stated that McNamee evidenced surprise at her presence there and advised her that the personnel manager, Gerald Cross, had "notified the group leaders that none of their people were to attend this meeting . . . they were told that they could not attend." Wobermin added that while she was in the cafeteria she observed Cross and Carl Findlay, the "warranty night-shift supervisor" walk up and down the hallway in front of the cafeteria entranceway several times.[9] According to Wobermin, she remained in the cafeteria until 4:30 p.m., with no other employees appearing to attend the meeting, whereupon she reported "immediately to work."

Wobermin recounted that approximately 2 days later she wrote a letter to the Respondent's management through "direct line . . . a direct communication letter between management and employees" in which she "ask[ed] why we were not allowed permission to have our meeting in the cafeteria."[10] Wobermin related that she subsequently received an answer from the Respondent typewritten across the bottom of her original "direct line" letter and posted on the "direct line board" which stated that, "we had not gotten an authorization to hold our meeting, and if they allowed us, they would have to allow other people to have meetings in the cafeteria." She testified that during the approximately 10 years she had been employed by the Respondent, she was unaware of any company rule requiring that employees obtain prior authorization from the Respondent to hold meetings on company premises. Wobermin added that she knew about, and had observed herself, various employee group meetings being held in the cafeteria during nonwork hours involving, "Weight Watchers . . . the racquetball club and the bowling league."

Gerald Cross testified that on or about December 1, 1980, he became aware of the efforts of some test specialists and technicians to holo a meeting in the Southwood Drive facility cafeteria, which was scheduled for December 2, 1980, at 4 p.m. for the purpose of discussing union matters. Cross stated that he had been given a copy of the meeting notice by Production Supervisor Rudy Buchmann, who had told him that the notices

[4] The representation hearing was held on or about October 30, 1980.

[5] Cross had testified at the representation hearing on October 30, 1980, and acknowledged subsequently learning in December 1980 that the Board had scheduled an election for January 16, 1981.

[6] Wobermin was a member of the Union's employee organizing committee, attended union meetings, distributed union literature, and wore union buttons.

[7] See G.C. Exh. 2.

[8] Gerald Cross confirmed in his testimony that technician and test specialists were not normally scheduled to work between 4 and 4:30 p.m.

[9] Wobermin testified that Cross and Findlay were approximately 20 feet from the cafeteria entranceway when this was occurring.

[10] See G.C. Exh. 6. This form is provided by the Respondent and after completion by an employee is placed in a box located in the hallway at the Southwood facility specifically for these communications.

were being distributed in the plant cafeteria, and he knew the date, time, place, and reason for the meeting. He related that after learning of the intended meeting, it was decided by himself in concert with "other members of management" not to allow these employees to hold the meeting because they had not requested nor received approval.

Cross testified that, "The company has a broad, general no-access policy to the premises where employees are denied permission to the plant before or after hours." He related that the "no-access" rule applies only to the plant interiors and other "working areas" and not to the parking lots or sidewalk areas. Cross maintained that prior permission from management to use the Respondent's premises for meetings is always required as "standard operating procedure" and that the employees had been made aware of this through "past practice."[11] Cross stated that the only written rule embodying the Respondent's "no-access policy" was a memorandum dated January 18, 1980, issued by him and posted on the plant bulletin board. The subject of the "Memo" *is* "I.D. Badges," and the stated purpose thereof being "to help [the Respondent] keep unauthorized people out of the plant, and to ensure our visitors are properly identified." The particular rule that allegedly encompasses the Respondent's "no-access" policy rule states, "No employee will be allowed access to the plant for personal reasons during off hours."[12] He continued that the Respondent has allowed various employees' groups, such as the company basketball team, the company bowling team, the company racquetball club, and a "Weight Watchers" group, to use the Southwood Road facility cafeteria during nonwork hours, but that permission for such use was always requested and received beforehand as standard operating procedure.[13] Cross added that the Respondent has also denied employee requests on behalf of groups seeking access and use of the Respondent's premises, i.e., permission was denied to hold a math class in the facility that would have been accredited through Questa College, and to hold a local San Luis Obispo United Fund group meeting at its premises.

Cross testified on direct examination that he had not instructed "certain group leaders of the technicians and test specialists to tell their employees that they could not attend that meeting." He also denied personally telling "some of the test specialists and technicians themselves that they could not . . . use the cafeteria of the company to hold the meeting to discuss the union, even if it was before or after work hours." The Respondent's counsel, however, had previously submitted a "summary of facts and statement of position" dated February 9, 1981, to the Board's Region 31 during the investigatory stage of this proceeding in apparent response to the Union's charge filed herein and seeking the dismissal of the charge in its entirety. This document states

> The Company has a broad, general no-access policy which prohibits employees from entering the plant prior to the beginning of their scheduled shift, or from remaining on the premises after their workday has been completed.
>
> Pursuant to this rule, Cross informed the technicians group that it could not conduct its meeting on company premises after regular working hours. He stated that although they were free to discuss the Union or any other matter they wished during breaks or lunch periods, they could not utilize the company cafeteria after or before their normal workday for the purpose announced in their notice. To the best knowledge of the Company's management, the proposed meeting was not held.[14]

On cross-examination, Cross attempted to explain this apparent inconsistency by asserting that what actually occurred was that he had not personally informed the technicians and test specialists that they could not conduct their planned meeting on the Respondent's premises, but instead had instructed Rudy Buchmann to tell the group leaders to advise these employees that the meeting could not be held, and Cross believed that the group leaders had done so.

2. The Respondent's layoff of employees

Kent Anderson, the Respondent's director of human resources, testified that the Respondent, as part of its business, is engaged in the manufacture of "telephone switching and transmission equipment, which is heavily influenced by housing starts—the housing industry—as well as interest rates, mortgage interest rates." He related that because the exceedingly high mortgage interest rates during 1979–1980, which resulted in a depressed housing market "which, in turn, has severely depressed the purchase of capital telephone equipment in the telephone in-

[11] Cross testified that such requests to use company premises for meeting purposes were made orally to him or to "a sponsor of the employees' committee," whenever the employees' committee were going to meet," such as the bowling team.

[12] In substance, the rest of this "Memo" provides: that employees wear their identification badges when at the facilities; requires visitors to obtain and wear color-coded badges based on the reasons for their visit while at the facilities; and that, "A list of employees authorized to be in the plant, between 6/p.m. and 7 a.m., and weekends, will be maintained by the security guard. All others must have prior authorization by a manager or Supervisor I. Exceptions to this rule include personnel regularly scheduled to work second or third shift, and employees working overtime." See G.C. Exh. 4. Moreover, according to Cross, the Respondent enforces this rule as follows, "we have a guard service that comes on at 4:00 o'clock, locks the plant; in the main plant at 4:30 the guard makes a round to check and see who's in the operation," with Cross also checking after hours to see "who is around." The facility is locked until 7 a.m. and any employee seeking entrance sooner "must sign in if they're coming in to work early." When employees "are coming in after hours, then notice is left with the guard service that people would be coming in" to use the cafeteria, with such notice being given by Cross or his security assistant. Cross added that the meetings to be held in the cafeteria after work are generally attended by employees already on the premises and do not require notice to the guards for them to gain access to the facility.

[13] Cross testified that permission has also been granted to individual employees who are also college students to use equipment on the plant premises "to complete a requirement for graduation," but the Respondent has denied other individual employees such use of equipment for "other personal reasons."

[14] G.C. Exh. 3. This document was admitted into evidence over the objection of the Respondent's counsel. See *Harowe Servo Controls*, 250 NLRB 958 (1980).

dustry . . . our whole industy was depressed," resulting in lower sales and the loss of a "significant amount of money." Anderson stated that in late December 1980, the Respondent decided to "get out of the switching business entirely because of continued depression of the business" and, based on its "bookings and operating forecast," made plans for "some reductions in our work forces in various locations, plus some consolidation of some activities."

Anderson continued,

> What was decided was that we were going to have to close out Sunnyvale manufacturing plant on Borregas Avenue and move all of our ITS switching products to Melbourne, Florida; and what transmission product work that we were doing in Sunnyvale was going to have to be moved back to San Luis Obispo.
>
> At the same time, we also knew that we were going to have to make some reductions in force at Melbourne, Florida in January based on our operating plan, and begin the layoffs at Sunnyvale in January.
>
> We also knew that we were going to have to be making some small number of cuts at San Luis Obispo at the end of February.

Anderson recounted that the Borregas Avenue facility in Sunnyvale, California, employed about 150 employees who were going to be time-phased "completely out of the facility by the end of June, 1981," starting in January 1981. He added that the layoffs of employees in the reduction in force at the Respondent's Melbourne, Florida facility was scheduled for January 16, 1981, with layoffs at the San Luis Obispo, California facilities scheduled for February 27, 1981.

Anderson testified,

> There had been rumors about the fact that Borregas possibly would be closing—had been rumors for a considerable amount of time. We felt that it was very important that we put together a consolidated communication plan to all employees in the division, explaining to them exactly how they were personally affected, and how the entire transition of our business out of Sunnyvale's manufacturing plant to our other two locations, how it all tied together; how each employee was affected.

According to Anderson, as part of "an overall communication plan" regarding the closing of the Sunnyvale plant and the projected layoffs at both the Melbourne, Florida, and San Luis Obispo, California facilities, the Respondent notified all its employees at these locations on January 9, 1981, about its above plans and about the scheduled layoffs of employees. He stated that the purpose of this was to allay employee concerns about their jobs, "part of our plan was to make sure that all employees understood the entire operating plan . . . at the same time so there would not be further concerns about when the next shoe would drop, something like that."[15] While Anderson did not personally participate in the planning of the layoffs at the Respondent's San Luis Obispo facilities, he acknowledged that, given the fact that the Board election was scheduled for January 16, 1981, and the layoffs of employees had been scheduled for February 27, 1981, the announcement of such layoffs made on January 9, 1981, could have been made after the election had been held, but that the Respondent's "feeling was that all employees in the division deserved to know exactly what was happening throughout the division at the same time, and how it affected them." He concluded, "I think it's based on good employee relations practice."

The evidence shows that the Respondent's "communication plan" was accomplished as follows: a "Memo" dated January 9, 1981, from A. B. Lipscomb, the Respondent's vice president and general manager, explaining the reasons for the proposed consolidation and reduction in work force at its various facilities,[16] was read to all employees by managerial and/or supervisory personnel who were instructed how to accomplish this in a separate "Memo" to them from Lipscomb, dated similarly January 9, 1981, and which, among other things, directed them to hold meetings with the employees under their supervision or report.[17] Another "Memo," also dated January 9, 1981, this time from Lipscomb and the appropriate respective plant manager involved, was to be distributed to the particular employees actually designated and scheduled for layoff at a subsequent time.[18]

Mac Brinton, the Respondent's San Luis Obispo facilities' plant manager, testified[19] that on or about Decem-

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[15] Anderson's testimony concerning this on cross-examination was somewhat equivocal. Although he maintained that all the Respondent's employees "knew about the slowness in our business" and "were concerned about their job security in varying degrees," he could not base this on any actual statements made to him or to any other management representative by employees indicating such concern. Anderson was called as a witness for the Respondent.

However, on redirect Anderson testified that he had received feedback indirectly from employees about this since the Respondent had held a number of employee meetings during which management representatives discussed issues, problems, complaints, and "things they would like to see improved" with the employees.

[16] See R. Exh. 5. The "Memo," in substance, recites the economic basis for the recession in the Respondent's business and the accompanying need for consolidation of its operations and reductions in work force through layoffs, and its hopes for a brightening future to "get Vidar back on the growth track." The Respondent also sets forth its plans for assisting employees with "layoff benefits." This notice announces a general layoff and does not specifically indicate the number of employees or, regarding those employees, who would actually be terminated.

[17] See R. Exh. 4. This "Memo," in substance, places responsibility for communicating the Respondent's "plans for consolidation of operations and reduction of work force to those employees who report to you," on managers and supervisors, and lists a format through employee meetings, which they were to follow.

[18] See R. Exh. 6. This "Memo," in substance, explains the reasons for the Respondent's "business slowdown," the need for the layoffs to accomplish a reduction in work force, the date of termination of the employee, as in the case of the San Luis Obispo facility, being February 27, 1981, and an offer of assistance to find new employment for those employees terminated.

[19] Brinton testified as a witness for the Respondent.

ber 14 or 15, 1980, there was a meeting of all the plant managers and the director of operations in San Jose, California, at which the decision was made to consolidate operations and reduce the work force by layoffs because of "business factors" and "current production rate forecasts;" which projected declining sales and the need to reduce the level of production. He stated that since "well, it's company policy that once a decision has been made to try and both make that decision to those affected known as rapidly as possible, and to synchronize a decision so that all the various geographical locations were informed at the same time," it was decided to make the announcement of consolidation and layoffs on January 9, 1981. Brinton continued that there had been approximately four layoffs of employees in the last 5 years and, when he was asked if an announcement was made to employees in advance he responded, "There was a recent one in October and we had [an] announcement ahead of time there. We have, in the early 70's we had a layoff and used that same approach there. It really depended upon the situation and the timing."[20] He added that actually 52 employees, not 19, were laid off at the San Luis Obispo facility on February 27, 1981.

Concerning the timing of announcements of layoff, Gerald Cross testified that the Respondent had scheduled a layoff of employees in the engineering department for late March or early April 1980, and had made a prior general announcement to the employees in February 1980. He stated that subsequently the six individual engineers involved were notified regarding their selection for layoff, "so that the total notice would be minimum of a month, but probably less than two."

a. *The Tank Farm Road Annex meeting on January 9, 1981*

Diana Keppel, employed by the Respondent from October 30, 1978, until October 30, 1981,[21] testified that on or about January 8 or 9, 1981, about 10 a.m., she attended a meeting of employees and management representatives held in the plant lunchroom.[22] She related that Ray Antunez, the plant production manager, addressed the gathered employees[23] and read a letter to them from A. B. Lipscomb, the Respondent's vice president and general manager, which stated that, "due to economy, that there would be a layoff, and that one of the plants would close, and that the layoff would affect Melbourne, Florida, and San Luis Obispo." Keppel continued that Antunez then advised the employees that, "about 19 employees would be laid off, and that would happen around—I mean on February the 27th, 1981. That it would be done by seniority." She added that Antunez had not mentioned anything about the Union or the organizing campaign during this meeting, and that this was the very first time she had heard about the proposed layoffs.

Cynthia Stevens, employed by the Respondent from March 1979 until February 1981[24] testified that she also had attended the meeting held during the morning of January 9, 1981, in the lunchroom at the Tank Farm Road Annex One, during which "head of production," Ray Antunez, spoke to a group of production employees.[25] She stated that to the best of her recollection, Antunez did not read from a letter when he addressed the employees, but instead told them directly, "That because of inflation, the company needed to lay off 19 people. They weren't doing very well economically." Stevens related that Antunez advised the employees that the layoffs would take effect on February 27, 1981. She continued that Antunez had not mentioned the Union during his speech and that this was the first time that the Respondent had notified its Tank Farm Road Annex employees that there would be layoffs. Stevens added that she was subsequently given 2 weeks' notice prior to February 27, 1981, that she was one of the 19 employees to be laid off, and during this 2-week period she obtained other employment.

Ray Antunez[26] the Respondent's production manager at its San Luis Obispo Tank Farm Road Annex facilities, testified that the meeting with employees held on January 9, 1981, at the Tank Farm Road Annex One building, he "[b]asically . . . read the memo verbatim to the employees," referring to Lipscomb's "Memo" dated January 9, 1981, directed to all employees.[27] This memo states, in part, "Unfortunately, there will also be some layoffs—at Melbourne immediately and at San Luis Obispo in February." Antunez related that he did not make any statements other than what was written in the "Memo" nor did he say anything afterward other than to answer a few questions that were asked by the employees present. Antunez denied that he had said anything about "the union, the union organizing campaign and the upcoming election." However, on cross-examination, Antunez acknowledged that he also may have told the employees that the layoffs would occur on the basis of se-

[20] On cross-examination Brinton acknowledged that the Respondent's policy to announce layoffs as soon as possible in advance thereof was not a "concrete policy." He also testified, on cross-examination, regarding a layoff that occurred in April 1980, that he could not recall when the announcement of such layoff was made; and for a scheduled October 1981 layoff, the announcement was made anytime between a week to a month in advance.

[21] Keppel, called as a witness for the General Counsel, worked as a production employee at the Respondent's Tank Farm Road Annex facility during all the times relevant. She functioned as a member of the Union's "in-plant organizing committee," attending union meetings herself and asking other employees to attend such meetings, distributing union literature to employees, and wearing union buttons.

[22] Keppel testified that she was advised about the meeting by her group leader, Mary Salazar, and that her production supervisor, John Lane, was also present at this meeting.

[23] Keppel stated that there were approximately 12–14 employees present at the meeting, including Cynthia Stevens, Bobby Wright, and Danny Skaggs.

[24] The evidence shows that Stevens worked as a production employee at the Respondent's Tank Farm Road Annex facility during all the times relevant under the same supervisors as Keppel, with Mary Salazar as her group leader and John Lane as her production supervisor. Stevens testified that she was active in the Union's organizational campaign, attending union meetings, distributing union literature, and wearing union buttons. She testified as a witness for the General Counsel.

[25] Stevens stated that there were 10 employees present at this meeting, including Keppel.

[26] Antunez testified as a witness for the Respondent.

[27] See R. Exh. 5. Also see fn. 16.

niority and that he may have said some other things that were not included in the "Lipscomb memo."[28]

b. *The Southwood Drive meeting on January 12, 1981*

Vickie Wobermin testified that on the Monday before the election scheduled for January 16, 1981, she attended a meeting in Plant Manager Mac Brinton's office at Southwood Drive, San Luis Obispo, California, at which 15–18 night-shift technicians and/or test specialists were present. She stated that "group leaders" had been apprised of the meeting and that they in turn notified the employees to attend. Wobermin related that present representing management were Brinton, Kent Anderson, Carl Findley, her immediate supervisor, and Bruce Austin, her "group leader." She continued that Brinton, "announced that due to the bad economic conditions, that there would have to be a layoff of 19 people on the assembly line. . . . He said that with the union organizing going on, he didn't want to hide anything. He wanted to be right up front and let them—let everyone know that there would be a layoff," with such layoffs scheduled for "late February" 1981. Wobermin added that this was the first time she had heard about projected layoffs at the San Luis Obispo facilities.[29]

3. The Respondent's employee work reviews

a. *The meeting on January 12, 1981*

Keppel testified that the Respondent issues employee work performance reviews in March and September of each year, which provide the basis for employee wage increases. Keppel related that on Monday, January 12, 1981, 4 days before the Board-scheduled election, she attended a meeting in the lunchroom at the Tank Farm Road Annex facility at 10 a.m., having been advised about the meeting by her group leader, Mary Salazar. She recounted that present at the meeting were about 12 employees[30] and for management, Gerald Cross and John Lane. Keppel stated that Cross spoke to the employees telling them, "That if the Union won the election—if we won the election—that was, the organizers—that [everything] would be [at] a standstill and there would not be any reviews, because they would be negotiating [would take a long time, possibly 9 months]. . . . That there would be negotiating and that possibly [after that] they would go on strike. But there would be no reviews."

Keppel continued that Cross spoke for about "half an hour" or less and although he mentioned "other things" that she could not clearly remember, since the Respondent had held "so many meetings" in and around this time, she particularly recalled Cross speaking about the employee work reviews because that topic was the "most penetrating" one he had discussed. Keppel added that she particularly remembered this,

> Because if there was not to be any reviews, it would definitely sway the vote of the employees, because that's what everyone waits for, are the reviews. That's when we get our raise in pay.

She stated that the Respondent granted pay raises to its employees on the basis of the work performance reviews.

Although the testimony of Cynthia Stevens concerting this meeting was, in most part, similar to that given by Keppel regarding what was said about the work performance reviews, yet concerning some of the other aspects of the meeting, it differs in some respects. Stevens testified that about 3 or 4 days prior to the Board's election, held on January 16, 1981, she attended a meeting during the morning in the Tank Farm Road Annex facility lunchroom. She related that Mary Salazar, her group leader, had told her about the meeting and that there were about 30 employees who attended it, including Keppel, Lemus, and Carolyn Scaggs. Stevens continued that Gerald Cross and Mac Brinton represented management at the meeting and that Cross told the employees, "That during the negotiations, the job reviews are—everything would be at a standstill, which would mean that job reviews—which would mean that the March reviews would be at a standstill because their hands were tied."[31] She added that the job reviews, given in March and September of each year, covered "production, punctuality, everything," and was the basis for determination of the amount of pay raise an employee would receive, if any.[32]

Stevens testified that this meeting lasted between "half an hour, perhaps an hour" and that other topics were discussed by Cross and Brinton, for example, the "pros and cons of union versus company benefits," and a comparison of employee benefits was shown by means of a slide projector and screen presentation, between "other electrical companies that are union" and the Respondent's. However, on cross-examination, Stevens acknowledged that the slide projection presentation might have occurred at a subsequent employee meeting held by management prior to the Board election.

Gerald Cross testified that the January 12, 1981 meeting was held for the purpose of educating the Respondent's employees "as to what collective bargaining was about."[33] Cross stated that he spoke from "a prepared text,"[34] which he did not depart from at any time during his presentation except for one instance when he explained to the employees the meaning of the term "chal-

[28] Antunez testified that Plant Manager Mac Brinton had instructed him to read the "Memo" to the employees at the meeting.

[29] Although Brinton and Anderson testified, they did not deny any of this testimony.

[30] Keppel named employees Cynthia Stevens, Betty Lemus, Bobby Wright, and Danny Skaggs as having been among the employees who attended the meeting.

[31] Stevens denied that Cross had actually stated at this meeting, "If the Union wins, however, our hands would be more or less tied while the company bargained with the union; that is, we couldn't make any changes unless both sides agreed or until the company had satisfied its bargaining obligation," instead of what she had testified to.

[32] Wobermin testified that the work reviews included quality of work, dependability, adaptability, and cooperation, and that the employees' wage increase depended on this review.

[33] Cross' testimony concerning the time and place of this meeting was similar to that given Keppel and Stevens. According to Cross, he and John Lane were present at the meeting for management and that "about 30" employees were in attendance.

[34] See R. Exh. 2.

lenged ballot," which appears therein. Cross related that what he stated to the employees at the meeting was that

> If the Company wins [the election], it will be free to make whatever changes it deems appropriate. The election rules prohibit us from making any specific promises concerning changes. I really can't say anything more than that at this time.
>
> If the Union wins, however, our hands would be more or less tied while the Company bargained with the Union—that is, we couldn't make any changes unless both sides agreed or until the Company had satisfied its bargaining obligation.

Cross denied that he had discussed or mentioned the March work reviews, or said that wages or benefits would "be frozen" or "be at a standstill." Cross added that visual aids were used in his presentation in the nature of slide projections "in conjuction with the prepared text," and that he did not "speak extemporaneously."

John Lane, the Respondent's production supervisor at its Tank Farm Road Annex facility, testified that he had attended the January 12, 1981 meeting at which Cross addressed approximately 30 to 37 employees. He stated that this was an informational meeting to inform employees about "a bargaining possibility with the Union." Lane recounted that Cross spoke to the employees from a prepared text[35] and "[did] not recall any extemporaneous speaking whatsoever." He added that Cross never told the employees that the March reviews would be at a "standstill, cancelled or frozen," nor did Cross mention the March reviews at all during his presentation.[36]

b. *Posted notices concerning work reviews*

Diana Keppel testified that sometime during the month preceding the election held on January 16, 1981, she observed a "bulletin" posted on the bulletin board at the Tank Farm Road Annex location[37] which stated, "That if we won the election, that there wouldn't be no reviews, because the company would be negotiating with the union." She stated that this "bulletin" had a TRW Vidar letterhead and was posted on the bulletin board where management usually places its notice to employees. Keppel related that the "bulletin" was signed by Gerald Cross or Mac Brinton.[38]

Vickie Wobermin testified that there are two bulletin boards located at the Southwood Drive facility on which the Respondent posted "notices of company policies and any memos . . . pictures of our picnics and Halloween costume parties, and things like that." She related that during the Union's organizational campaign, about a month or 3 weeks before the election, or even before that, the Respondent inaugurated a procedure entitled "Question of the Day," which was in the form of a typed, mimeographed, or xeroxed "plain paper" notice, which contained a question, and then an answer to such question. Wobermin continued that about 3 weeks before the election she observed a "Question of the Day" posted on the bulletin board that stated

> [T]he question asked what would happen to our reviews if the union negotiations were still going on. And the answer said that everything would be frozen—that there would be no reviews, because everything had to stay the same way during the negotiations.[39]

Gerald Cross testified that, "during the course of the campaign which preceded the union election on January 16,"[40] he caused to be posted on the company bulletin boards, "a number of bulletins" which collectively were called "Questions of the day.' Cross stated that the source of these "Questions of the Day" was Richard R. Pace, the Respondent's legal counsel at the trial, denying that he personally had authored them. He related that not all the "Questions of the Day" given to him by Pace were posted, but that of those that were, Respondent's Exhibits 3(a) through 3(m) composed all of those that were posted on the bulletin boards. Cross denied that he had ever posted a "Question of the Day" that dealt with the March work reviews or that stated "if the Union won the election, that the reviews would be at a standstill," frozen, postponed, or canceled.

Cross testified that during winter 1980, he did author and publish "possibly over 20" memos, some of which he could not recall regarding content, but that he did clearly remember that none of these "dealt with reviews" except for one dated December 5, 1980, directed to "all supervisors." This memo, according to Cross, in substance instructed the supervisors "to sit down with their employees and review goals . . . and what improvements they noted should be made between September of 1980 and March of 1981," which would be of assistance to the supervisors "when they did their reviews in March."[41] Cross denied authoring or posting any memo dealing with the March reviews being frozen, postponed, or canceled for any reason.

Mac Brinton also denied having authorized, published, or posted a "Question of the Day," bulletin or memorandum dealing with the freezing, postponing, or canceling

[35] Lane, on direct examination, identified R. Exh. 2 as the prepared text used by Cross to give his speech, after Lane had looked at the exhibit, "Without going through the whole thing." On cross-examination, however, he admitted that he had not had a copy of the prepared text at the meeting when Cross spoke to the employees. Lane stated that he had looked at the "top sheet" of the text after the meeting, and from the statements made by Cross to the employees, he could identify this exhibit as the prepared text.

[36] Lane testified that he personally did not address the employees at this meeting, which lasted "somewhere around an hour."

[37] Keppel testified that there is only one bulletin board at this facility, used by both management and employees to post notices, and that the Respondent usually posts material related to work rules and regulations, "job-related" notices, and "anything pertaining to our job from management."

[38] Keppel denied that the "bulletin" was "in the form of something called a Question of the Day," more about which appears subsequently.

[39] On cross-examination, Wobermin was shown R. Exhs. 3(j) and 3(f), whereupon she stated that neither of these exhibits were the "Question of the Day" that she referred to regarding the March work reviews.

[40] The Respondent, in its brief, states, "During the month of January 1981, the Respondent conducted a vigorous campaign in opposition to the Union's organizing efforts."

[41] See R. Exh. 7.

of the March work reviews. He stated that the "Questions of the Day" orginated out of the personnel department. Although Brinton testified that he had authored "a lot" of company memorandums during the winter of 1980, he denied that any of these concerned employee work reviews.

c. *Acts of interference, restraint, and coercion*

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

4. The Respondent's refusal to allow employees to use its cafeteria for a union-related meeting

The complaint alleges that in violation of Section 8(a)(1) of the Act, the Respondent discriminatorily refused to allow employees the use of the company cafeteria during nonworking hours for the purpose of conducting a meeting to discuss the Union. The Respondent denies this allegation.

a. *Analysis and conclusions*

In its "statement of position" dated February 9, 1981, the Respondent's counsel asserts that the Respondent became aware of the intent of its "technical employees" to hold a meeting in the company cafeteria at 4 p.m. by obtaining a copy of the notice announcing such meeting. The "statement of position" continues

> No permission had been requested by the authors either to circulate the notice or to hold the meeting.
>
> The Company has a broad, general no-access policy which prohibits employees from entering the plant prior to the beginning of their scheduled shift, or from remaining on the premises after their workday has been completed.
>
> Pursuant to this rule, Cross informed the technicians' group that it could not conduct its meeting on company premises after regular working hours.[42]

The Respondent additionally asserts that its "broad, general no-access policy," is encompassed in a memo dated January 18, 1980, from its personnel manager, Gerald Cross, to all its employees which states, in pertinent part, "No employees will be allowed access to the plant for personal reasons during off hours."[43]

From all of the foregoing, it is clear that the issue to be resolved regarding the above is the validity of the Respondent's "no-access policy" rule, and pursuant thereto, the lawfulness of its refusal to permit its employees the use of the company cafeteria for a union-related meeting during nonworking hours.

In *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973), the Board stated

> Under well-settled principles applicable to employees activities . . . an employer may not, absent special circumstances, prohibit employees lawfully on the premises from engaging in union solicitation on their own time. However, it is also well settled that nonemployees are not entitled to enter an employer's premises to engage in union activity there.[6] Accordingly, to dispose of the issue here, we must determine which of these principles applies to an off-duty employee, i.e., whether, notwithstanding an employer rule to the contrary, he has a right to enter or remain on an employer's premises if he wishes to do so for this purpose.
>
> In our view, he does not, for his status is more nearly analogous to that of a nonemployee, and he is subject to the principles applicable to nonemployees. This is so because the interests to be balanced in determining the validity of such a rule are very different as between an employee on the premises in connection with his work and an off-duty employee who seeks to enter. The former involves a balancing of statutory rights of self-organization against the employer's interests in production, safety, or discipline, and in this situation the statutory rights prevail (unless it can be shown that interference with those rights is essential) because an employer may not close off this normal channel of communication among the workers without proper justification.[7] The latter situation, however, requires a balancing of the employees' Section 7 rights against the employer's private property rights.[8]
>
> It seems apparent that for purposes not protected by this Act off-duty employees and nonemployees would be invitees to the same extent, and one is no more entitled than the other to admission to the premises. We are unable to conclude that a different rule is required where union organization is involved, and absent a showing of inability to reach the employees otherwise, we see no justification for holding that an employer's right to control ingress to his property must give way for that purpose.
>
> In view of the above, we find that the balance between the competing interests in this situation is properly struck by holding that, where an employer's no-access rule is nondiscriminatory, i.e., it denies off-duty employees access to the premises for any purpose and is not disparately applied against union activities, it is presumptively valid absent a showing that no adequate alternative means of communication are available.[9] As there is no such showing here, and no evidence that rule D was discriminatorily enforced, we conclude that Respond-

[42] See G.C. Exh. 3 at 6. Although there is uncontroverted testimony by Wobermin in the record that the Respondent had given as one of its reasons for denying the employees the use of the cafeteria, that the employees had failed to obtain prior management consent for the meeting, it appears from the Respondent's brief that it does not now maintain that this was a significant consideration in its refusal of such permission. As stated by the Respondent in its brief,

> Evidence showed that in most instances, permission to use the plant after hours was requested in advance. No such permission was sought by the group seeking to discuss union matters. However, for the purposes of this proceeding, it is stipulated that had such permission been requested, it would have been denied.

[43] See. G.C. Exh. 4. The written rule contains no requirement that prior permission be obtained from management by employees seeking any dispensation therefrom.

ent did not violate the Act by promulgating or maintaining this rule.

[6] *N.L.R.B.* v. *The Babcock & Wilcox Company*, 351 U.S. 105, 113.

[7] *N.L.R.B.* v. *The Babcock & Wilcox Company*, *supra* at 112; *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793, 804.

[8] See *Diamond Shamrock Co.* v. *N.L.R.B.*, 433 F.2d 52 (C.A. 3, 1971).

[9] Prior cases, particularly *McDonnell Douglas Corporation*, 194 NLRB 514, are distinguishable on their facts. However, to the extent *McDonnell Douglas Corporation*, *supra*, remanded 472 F.2d 539 (C.A. 8), and *Diamond Shamrock Co.*, 181 NLRB 261, enforcement denied 443 F.2d 52 (C.A. 3), are inconsistent with the holding herein, they are hereby overruled.[44]

Subsequently, however, the Board narrowed the scope of *GTE Lenkurt*, supra,[45] in *Tri-County Medical Center*, 222 NLRB 1089 (1976), wherein it stated

> The holding of *GTE Lenkurt* must be narrowly construed to prevent undue interference with the rights of employees under Section 7 of the Act freely to communicate their interests in union activity to those who work on different shifts. We conclude, in order to effectuate the policies of the Act, that such a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is cle[a]rly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.[46]

The Respondent alleges in its brief,

> It is well-settled under the authorities cited above that an employer's published, non-discriminatory, no-acess rule is presumptively valid, absent a showing by the union that it has no adequate alternative means of communication available to it.[47] It is also clear from these same authorities that such a rule is not violatie of the Act if it meets the following three criteria: (1) It limits access solely with respect to the interior of the plant and other working areas; (2) it is clearly disseminated to all employees; and (3) it applies to off-duty employees seeking access to the plant for any purpose, and not just to those employees engaging in union activity.[48] Uncontradicted evidence introduced at the hearing on this matter clearly established that each of these criteria was satisfied in the instant case.

I do not agree with the Respondent's assessment of the evidence.[49]

The doctrine enunciated by the Board in *GTE Lenkurt* requires that an employer's no-access rule deny all off-duty employees access to its premises for any purpose and not be disparately applied against employees engaged in union activities in order that such rule be presumptively valid absent a showing that no alternative means of communication are available.[50] Moreover, in narrowing the construction of its holding in *GTE Lenkurt*, the Board in *Tri-County Medical Center* now required for the validity of a no-access rule that the rule limit access solely with respect to the interior of the plant and other working areas, be clearly disseminated to all employees, and apply to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.[51]

The evidence clearly shows that although the Respondent's no-access rule purports to deny all off-duty employees access to "the plant for personal reasons" yet the Respondent admittedly allows some off-duty employees the use of the company cafeteria for meeting purposes as "exceptions in its application of the rule." The Respondent permits its company bowling, basketball, and racquetball club teams to hold meetings in the company cafeteria. Additionally, it has allowed a "Weight Watchers" group to also use this facility for meeting purposes, as well as individual employees to use its facilities off hours. The record also discloses that the Respondent has also denied employee requests on behalf of groups seeking access to, and the use of, the plant premises, i.e., permission was denied to hold a math class in the facility under the aegis of Questa College, and the Respondent refused authorization to a local United Fund group to hold a meeting on its premises.

[44] In *GTE Lenkurt*, the Board considered an employee work rule that, in substance, prohibited off-duty employees from entering or remaining on the employer's premises for any purpose. The no-access rule in *GTE Lenkurt*, supra, read, "An employee is not to enter the plant or remain on the premises unless he is on duty or scheduled for work."

[45] In substance, the decision in *GTE Lenkurt*, supra, held that when an employer's no-access rule denies all off-duty employees access to the premises for any purpose and is not discriminatorily applied only against employees engaged in union activities, the rule is presumptively valid absent a showing by the Union that no adequate alternative means of communication is available to it. *Tri-County Medical Center*, supra.

[46] *Bulova Watch Co.*, 208 NLRB 798 (1974); *Litho Press of San Antonio*, 211 NLRB 1014 (1974), enfd. 512 F.2d 73 (5th Cir. 1975); *Golden Oak Mining Co.*, 218 NLRB 416 (1975). Also see *Continental Bus System*, 229 NLRB 1262 (1977).

[47] The Respondent cites in support of its contention, *GTE Lenkurt*, supra; *Dart Industries*, 210 NLRB 1086 (1974); *All-Glass Aquarium Co.*, 214 NLRB 117 (1974); *Diamond Shamrock Co.*, supra.

[48] In this connection, the Respondent cites *Tri-County Medical Center*, supra, *Litho Press of San Antonio*, supra; *Bulova Watch Co.*, supra; *Golden Oak Mining Co.*, supra; *The Mandarin*, 221 NLRB 264 (1975); *Continental Bus Systems*, supra.

[49] I do agree with Respondent, however, that its no-access rule, which provides that, "No employee will be allowed access to the plant for personal reasons during off hours," was disseminated to all employees. The Respondent's no-access policy was "reduced to writing" as a rule and posted on the company bulletin board on or about January 18, 1980, several months prior to the advent of the Union's organizational campaign. *Howard Johnson Co.*, 242 NLRB 386 (1979). Moreover, none of the parties asserts that such a posting of the rule was inadequate notice to the Respondent's employees and not a "clear dissemination" thereof. Although Wobermin testified that she was unaware of any company rule requiring that employees obtain prior authorization from the Respondent to hold meetings on company premises, even if this was construed as her having no knowledge of the non-access rule itself, this would not change my above finding. (See *Wometco Coca-Cola Bottling Co.*, 255 NLRB 431, 444 fn. 58 (1981).) Furthermore, I agree with the Respondent that this rule is applicable only to off-duty employees as stated.

[50] The General Counsel does not assert that the Respondent's no-access rule is invalid and in violation of Sec. 8(a)(1) of the Act because there was no alternative means of communication available.

[51] Also see *Continental Bus Systems*, supra.

The General Counsel asserts that "By refusing to allow the test technicians and test specialists group the use of the company cafeteria in order to discuss the Union, while at the same time, allowing other groups the use of the cafeteria for non-work related activities during non-work hours, Respondent discriminatorily enforced its no-access rule in violation of Section 8(a)(1) of the Act." I agree.

As set forth, the Board in *Tri-County Medical Center* found that the holding of *GTE Lenkurt* must be narrowly construed "to prevent undue interference with the rights of employees under Section 7 of the Act freely to communicate their interest in union activity to those who work on different shifts."[52] The Board then required, as one of the criteria for establishing the validity of a no-access rule, that it be applicable, "to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." This same language was again reiterated by the Board in *Continental Bus Systems*, supra.

In *E. I. du Pont & Co.*, 263 NLRB 159, 174 (1982), during the week of a Board election the company promulgated and enforced a rule denying vacationing employees access to its plant except for the purpose of voting. Just prior to the commencement of their vacation, two employees had requested permission to enter the plant while they were on vacation, but were denied such permission on the ground that it was the week of the election. One of the employees testified unconditionally that he was unaware of any rule restricting access to the plant by vacationing employees. Additionally, the evidence showed that in the past, retired employees had been allowed in the plant for social visits in the cafeteria and elsewhere with other employees. The Board affirmed without comment the holding of the administrative law judge that

> It is obvious that denial of permission for Merriman and Sharp to enter the plant during their vacation was a departure from the past practice and was imposed for the purpose of limiting employee union activities prior to the Board election. I find this was an unwarranted limitation of their Section 7 rights and a violation of Section 8(a)(1) of the Act. *Tri-County Medical Center, Inc.*, 222 NLRB 1089 (1976); *GTE Lenkurt, Incorporated*, 204 NLRB 921 (1973).

In *Harrison Steel Castings Co.*, 262 NLRB 450, 456 (1982), the employer had a no-access policy barring off-duty employees from its plant premises unless the employee could show that he or she had business in the plant. Although the employer "freely conceded" that the rule was relaxed and leniently applied regarding those seeking entry for legitimate reasons, the evidence also showed that employees gained access during their off-duty hours for personal convenience unrelated to any busines interest of the employer. The Board affirmed the ruling of the administrative law judge who, citing *Tri-County Medical Center*, supra, and *GTE Lenkurt*, supra, found therein.

> Here, it does not appear that the scope of the rule was ever formally communicated to employees. And the record amply discloses that the rule did not apply to those seeking access for all purposes, with exceptions to the ban being undefined and freely conferred. . . . Accordingly, the nonaccess policy involved here did not meet the standards of legitimacy set forth in *Tri-County Medical Center*, supra.

Again, in *A. W. Schlesinger Geriatric Center*, 263 NLRB 1337, 1341 (1982), the employer had issued a memorandum to its employees stating, in pertinent part, that "Off duty employees may not attempt to organize the SEIU on . . . Center property . . . inside in non-work areas because the Personnel Policies states, 'Employees should not loiter around the buildings or grounds when not on duty or receive visitors while they are on duty.'" The Employer's director had organized an employee "Committee" to disseminate "more information about the Union prior to the election." The committee then held meetings for employees in Respondent's chapel. The Board affirmed the findings of the administrative law judge therein that

> With regard to inside areas, a no-access rule must be clearly disseminated to all employees and apply to off-duty employees seeking access for any purpose. *Tri-County Medical Center, Inc.* [supra]; *Central Solano County Hospital Foundation, Inc., d/b/a Intercommunity Hospital*, 255 NLRB 468 (1981). Any ambiguity is to be construed against the party which promulgates the rule. *Eastern Maine Medical Center* [253 NLRB 224 (1980)]; *Continental Bus System, Inc.*, [supra]. Most importantly, the rule was discriminatorily applied to permit off-duty employees to engage in activities on behalf of the committee or to attend committee meetings while prohibiting off-duty employees from engaging in union activities.[53] Accordingly, I find that Respondent vio-

[52] This is consistent with the Board's finding in *GTE Lenkurt* that off-duty employees entering or remaining on an employer's premises are subject to principles that "requires a balancing of the employees' Section 7 rights against the employer's private property rights."

[53] The Respondent asserts in its brief,

> First, the abstract theory that an employer necessarily forfeits the right to enforce otherwise valid rules concerning the use of its property simply by failing to follow its own rules was squarely rejected by the U.S. Supreme Court in *N.L.R.B.* v. *United Steelworkers*, [357 U.S. 357 (1958)] . . . . In the instant case, it is clear that the union is asking the Board to do what the Supreme Court refused to do in *United Steelworkers*—invalidate an otherwise valid rule simply because the employer did not accord to the union the same privileges which it accorded to itself.

I do not agree. What the Supreme Court actually held in the *United Steelworkers* case as stated therein was that,

> Employer rules prohibiting organizational solicitation are not in and of themselves violative of the Act, for they may duly serve production, order and discipline. See *Republic Aviation Corp.* v *Labor Board*, 324 U.S. 793; *Labor Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105. In neither of the cases before us did the party attacking the enforcement of the no-solicitation rule contest its validity. Nor is the claim made that an employer may not, under proper circumstances, engage in non-coercive anti-union solicitation indeed his right to do

Continued

lated Section 8(a)(1) by promulgating and maintaining an overly broad rule denying access to off-duty employees and by discriminatorily applying such a rule to interfere with activities on behalf of the Union.[54]

so is protected by the so-called 'employer free speech' provision of Section 8(c) of the Act. *The very narrow and almost abstract question here derives from the claim that, when an employer himself engages in anti-union solicitation that if engaged in by employees would constitue a violation of the rule--particularly when his solicitation is coercive or accompanied by other unfair labor practices--his enforcement of an otherwise valid no-solicitation rule against the employees is itself an unfair labor practice.* We are asked to rule that the coincidence of these circumstances necessarily violates the Act, regardless of the way in which the particular controversy arose or whether the employers conduct to any considerable degree created an imbalance in the opportunities for organizational communication. For us to lay down such a rule of law would show indifference *to the responsibilities imposed by the Act primarily on the Board to appraise carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases and in light of the Board's special understanding of these industrial situations.*

There was no indication in the record . . . that the employees, or the union on their behalf, requested the employer, himself engaging in anti-union solicitation, to make an exception to the rule for pro-union solicitation.

No attempt was made . . . to make a showing that the no-solicitation rules truly diminished the ability of the labor organizations involved to carry their message to the employers.

We do not at all imply that the enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in anti-union solicitation may not constitute an unfair labor practice. All we hold is that there must be some basis in the actualities of industrial relations, for such a finding. [Emphasis added.]

This is exactly what the Board has done in the various cases cited herein. Also see *AMF, Inc.*, 228 NLRB 1406, 1416 (1977); *Wometco Coca-Cola Bottling Co.*, supra; *G. H. Bass & Co.*, 258 NLRB 140, 144 (1981); *St. Francis Hospital*, 263 NLRB 834 (1982). Moreover, no-access rules are subject to somewhat different principles than are applicable to no-solicitation, no-distribution rules. See *The Mandarin*, 221 NLRB 264 (1975); *Barney's Club, Inc.*, 227 NLRB 414 (1976); *Harvey's Resort Hotel*, 236 NLRB 1670 (1978).

[54] Also see *Intercommunity Hospital*, 255 NLRB 468 (1981), in which the Board found that the Employer's no-access rule did not meet "the *Tri-County* standard" because it did not prohibit access for all purposes and because "In addition, employees testified that they were permitted to remain in the hospital after work while waiting for rides or car-pools." The employer's rule stated, "When you are off duty, visits to the hospital should be limited to friends or relatives who are patients or on official business with the hospital." *St. Vincent Hospital*, 244 NLRB 331 (1979), in which the Board affirmed an administrative law judge's ruling that an employer's no-access rule stating, "Employees may not enter on hospital premises or remain thereon except as required by the work relationship unless they are themselves patients of the hospital or visiting a patient of the hospital," did not meet the *Tri-County Medical Center* criteria since, among other reasons, the rule was not strictly enforced. The ALJ found that "employees frequent the cafeteria before and after their shifts, off-duty employees return to the hospital for employee parties, to visit patients, to visit on-duty employees, and to attend educational courses that apparently are not required as a condition of retaining employment. Some employees habitually enter the premises a half hour or so before their shift commences and remain for a period of time after the shift ends. Respondent's administrator admits that the rule would be difficult to enforce and it is clear that no serious effort was made to enforce it except during the period of the election campaign." *Baptist Memorial Hospital*, 229 NLRB 45 (1977), in which the Board affirmed the holding of an administrative law judge that the Employer's no-access rule was invalid because, among other reasons, "employees [were] not restricted for all purposes. The hospital permits, for example, employees to visit patients or to pick up their paychecks during their nonduty hours, citing *Tri-County Medical Center.*

In the instant case, the Respondent's no-access rule does not meet all the criteria established by the Board in *Tri-County Medical Center*, supra, to be held valid. The rule was not strictly enforced in its application to all off-duty employees seeking access to the plant for any purpose,[55] with exceptions to the ban being undefined and inconsistently applied.[56] The Respondent permitted off-duty employee groups access to the company cafeteria for meeting purposes, i.e., the bowling, basketball, and racquetball teams, and a "Weight Watchers" group, and denied the use thereof to a college-sponsored mathematics class and a "local United Fund" group. The Respondent failed to identify what criteria it used, if any, to determine whether off-duty employees would be granted or denied access to the plant. Moreover, while the evidence shows that the Respondent initially gave its employees' reasons to support the denial of the use of the company cafeteria for a union-related meeting, these reasons were apparently down-played or withdrawn as justification therefor in its brief.[57] In effect, because no specific reason for its action has been advanced other than the no-access rule itself, any ambiguity therewith must be construed against the Respondent, the party that promulgated such rule.[58]

I further find that the Respondent's no-access rule is invalid as being overbroad. In order for such a rule to be valid it must "limit access solely with respect to the interior of the plant and other working areas."[59] In *Hudson Oxygen Therapy Sales Co.*, 264 NLRB 61, 72 (1982), the Board affirmed the finding of an administrative law judge that the following no-access rule was overbroad and therefore invalid:

> No one except employees during their scheduled working hours is permitted to enter the Plant unless permission has been granted by the appropriate supervisor or higher management. It should be noted that this regulation forbids you to enter the plant

[55] *E. I. du Pont*, supra; *Harrison Steel Castings Co.*, supra; *A. W. Schlesinger Geriatric Center*, supra; *Intercommunity Hospital*, supra; *St. Vincent Hospital*, supra; *Baptist Memorial Hospital*, supra; *Tri-County Medical Center*, supra; *GTE Lenkurt, Inc.*, supra. Additionally see for interest *Northeastern University*, 235 NLRB 858 (1978); *Trustees of Columbia University*, 225 NLRB 185 (1976); and *Methodist Hospital of Gary*, 263 NLRB 411 fn. 3 (1982).

[56] *Harrison Steel Castings Co.*, supra.

[57] According to Wobermin's uncontradicted testimony, the reasons given by the Respondent for denying permission to the off-duty employees to hold the meeting in the company cafeteria were, that the employees had failed to obtain prior authorization to use the company cafeteria for such a meeting, and that if the Respondent permitted these employees such use of the cafeteria it would "have to allow other people to have meetings in the cafeteria." Since the evidence shows that these reasons have no validity in fact because the Respondent's no-access rule, as written, did not require permission for any exceptions to its application nor make any exceptions thereto at all; all employees were not made aware of any such requirement; and the Respondent already had allowed "other people," employee groups and, in the case of the "Weight Watcher's group," perhaps nonemployees, access and use of its company cafeteria, there arises a strong inference under the circumstances in this case that the reasons offered were pretextual and that the actual reason for denying these off-duty employees the use of the company cafeteria was the purpose of such meeting, it being a union-related meeting.

[58] *A. W. Schlesinger Geriatric Center*, supra; *Eastern Maine Medical Center*, 253 NLRB 224 (1980); *Continental Bus Systems*, supra.

[59] *Tri-County Medical Center*, supra; *Continental Bus System*, supra.

during your off-hours unless you have been called in to perform a job asignment.

The administrative law judge therein stated,

> Since the rule here denies off-duty employees access to "any of its [the plant's] facilities, including the plant lunch room" it is invalid. No business reasons are advanced to justify no-access to . . . the lunchrooms and other nonworking areas.[34]

[34] *Continental Bus Systems*, supra at 1262.

The above is based on one of the criteria established by the Board in *Tri-County Medical Center*, supra.

Again, the Board in *St. Vincent Hospital*, supra, affirmed the holding of an administrative law judge that an employee no-access rule was invalid as not meeting the *Tri-County Medical Center* criteria "inasmuch as it does not clearly limit the restriction to the interior of the building." The no-access rule in *St. Vincent Hospital* read,

> Employees may not enter on hospital premises or remain thereon except as required by the work relationship unless they are themselves patients of the hospital or visiting a patient of the hospital.

The administrative law judge stated therein,

> There is no evidence that Respondent has ever sought to widely disseminate to its employees its interpretation of the term . . . "premises" to mean only the interior of the building

Moreover, in *Panavision, Inc.*, 264 NLRB 1284, 1286 (1982), the Board adopted a hearing officer's findings which stated,

> Since the Board's decision in *Tri-County Medical Center, Inc.*, 222 NLRB 1089, the Board has held that, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates and other outside non-working areas will be found invalid. The Board has even refined *Tri-County* to prohibit denial of access to off-duty employees for union organizational activities in certain non-work areas *inside* the plant (e.g., the cafeteria). *Maywood, Inc.*, 251 NLRB 979; *Central Solano County Hospital Foundation, Inc.*, 255 NLRB 468.

In the instant case the Respondent's no-access rule, that "[n]o employee will be allowed access to the plant for personal reasons during off hours," squarely falls within the purview of the above recited cases. The Respondent's refusal to allow off-duty employees the use of its company cafeteria for a meeting renders invalid as overbroad the use of the term "plant" in its rule without more or some interpretation of this term to employees in a lawful context.[60]

[60] In *Woodview Rehabilitation Center*, 265 NLRB 838 (1982), the Board affirmed the finding of an administrative law judge that an employer's no-access rule, "Employees are not permitted access to the interior of the Home or outside work areas during off-duty hours, unless they have received prior authorization from a Department Head or the Administrator," was "facially valid." The administrative judge stated,

> The new no-access rule, prohibiting employee access to both the interior of the home and *outside work areas* during off-duty hours without prior employer authorization, contrary to General Counsel, is not inconsistent with *Tri-County Medical Center, Inc.*, 222 NLRB 1089 (1976), since this rule (a) deals only with work areas; (b) was widely disseminated; and (c) applies generally and not merely to employees engaged in union activity. Moreover, there is no suggestion that Respondent was including parking lots and similar *nonwork* areas within the rule.

In the instant case, however, there was actual indication that the Respondent included the company cafeteria, a nonwork area, as encompassed within the definition of the term "plant" as used in its no-access rule.

After carefully considering the Respondent's contentions in its brief regarding this issue, which I reject as being contrary and inconsistent with Board and court law, although these contentions have a certain logic and under the circumstances present in this case, I find that the Respondent maintained and discriminately enforced an invalid no-access rule when it refused to allow employees the use of the company cafeteria during nonworking hours for the purpose of conducting a meeting to discuss the Union, with the Respondent thereby violating Section 8(a)(1) of the Act.

5. The Respondent's layoff announcements as implied threats of layoff

The complaint alleges that on or about January 9 and 12, 1981, the Respondent impliedly threatened to lay off certain employees if the Union won the election, in violation of Section 8(a)(1) of the Act. The Respondent denies these allegations.

a. *Analysis and conclusions*

To reiterate briefly, the evidence shows that the Respondent, about mid-December 1980, decided to close its Borregas Avenue facility in Sunnyvale, California, and to lay off employees at its Melbourne, Florida, and San Luis Obispo, California plants because of depressed economic conditions in the telecommunications equipment industry resulting in lower sales and a significant loss of earnings for the Respondent. The Borregas Avenue facility employees were to be time-phased out over a period commencing in January 1981, with completion at the end of June 1981, when this facility would be closed down. The reductions in force at the Respondent's Melbourne, Florida facility was scheduled for January 16, 1981, and at its San Luis Obispo, California facility on February 27, 1981, with the layoff of employees to take place on those respective dates.

On January 9, 1981, the Respondent held a meeting with its employees at its Tank Farm Road Annex facility in San Luis Obispo, during which the plant production manager, Roy Antunez, advised the employees present that there would be layoffs of employees in February 1981. Diana Keppel and Cynthia Stevens, who had been employees at the time and present at this meeting testified that this was the first time they had heard about proposed layoffs of employees at the San Luis Obispo facilities. They also testified uncontradictedly that no mention

was made at this meeting about the Union or the Union's organizational campaign. This meeting occurred 1 week before the Board's scheduled representation election to be held on January 16, 1981.

Additionally, on January 12, 1981, the Respondent held a meeting with its employees at its Southwood Drive facility in San Luis Obispo where Plant Manager Mac Brinton, announced the layoff of 19 assembly line employees scheduled for "late February, 1981." Vickie Wobermin testified that Brinton also stated, "that with the union organizing going on, he didn't want to hide anything. He wanted to be right up front and let them—let everyone know that there would be a layoff." Wobermin also recounted that this was the first time that she had heard about proposed layoffs at the San Luis Obispo facilities.[61] This meeting occurred just 4 days prior to the election.

The General Counsel contends that "the timing of Respondent's layoff announcements is inherently suspect and that the announcements themselves must be interpreted as implied threats intended to coerce employees in violation of their Section 7 rights. It is submitted, therefore, that Respondent's announcements of layoffs during the critical pre-election period constituted implied threats of loss of employment in violation of Section 8(a)(1) of the Act." Although the issue is a close one, under the circumstances of this case I agree with the General Counsel.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-617 (1969), the Supreme Court stated,

> At the outset we note that the question raised here most often arises in the context of a nascent union organizational drive, where employers must be careful in waging their antiunion campaign. Regarding conduct generally, the above-noted gradations of unfair labor practices, with their varying consequences, create certain hazards for employers when they seek to estimate or resist unionization efforts. But so long as the differences involve conduct easily avoided, such as discharge, surveillance, and coercive interrogation, we do not think that employers can complain that the distinctions are unreasonably difficult to follow. Where an employer's antiunion efforts consist of speech alone, however, the difficulties raised are not so easily resolved. But we do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, [Section 8(c) of the Act] merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of Section 8(a)(1). Section 8(a)(1), in turn, prohibits interference, restraint or coercion of employees in the exercise of their right to self-organization.
>
> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in Section 7 and protected by Section 8(a)(1) and the proviso to Section 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

The Supreme Court's logic, as set forth above, is equally applicable to the issue presented and now under consideration. An employer has a right to run its business as it sees fit subject generally of course to various applicable laws and, particularly, as affects this case, to its employees' Section 7 rights under the Act. In balancing these respective rights the Supreme Court's direction that consideration must be given to the employees' economic dependence on their employers and the effect of this relationship, comes into play and becomes an important factor. Initially, while there is no allegation that the Respondent's decisions concerning plant closure and employee layoffs was violative of the Act,[62] still it should be remembered that this decision was made in December 1980, subsequent to the advent of the Union's organizational campaign and the Board's hearing in the representation case involving the Respondent and the Union. Moreover, the economic conditions that were the basis for the Respondent's decision to close one of its plants and lay off employees at its other facilities, were in existence for some time prior thereto, and the announcements were made to employees on January 9 and 12, 1981, after the date of the Board election had been announced and within 1 week of the holding of such election on January 16, 1981.

Additionally, the actual implementation of the Respondent's decision concerning plant closure and employee layoffs was scheduled for different dates at different facilities, giving the Respondent, in all actuality, some flexibility in the timing of any announcement. The Borregas Avenue facility was scheduled for "phase-out" between January and June 1981, and employee layoffs at the Melbourne, Florida, and San Luis Obispo, California facilities were set for January 16 and February 27, 1981, respectively.

The Respondent asserts that, "the announcements, to avoid rampant rumors, at other locations, had to be made prior to layoffs at the Melbourne plant which were scheduled to begin on January 16, 1981." However, it would appear from the evidence that the Respondent had tolerated similar "rampant rumors" previously regarding the possibility of the closing of the Borregas

[61] Although the Respondent in its brief declares that, "Furthermore, both Mac Brinton and Ray Antunez stated that during the respective announcements, the union and upcoming election were never mentioned," only Antunez so testified. Wobermin's testimony thus remains unrebutted and is credited by this and for other considerations set forth.

[62] The uncontradicted evidence shows that the Respondent had a "substantial business justification" therefore.

Avenue plant and for a "considerable amount of time,"[63] without taking any immediate action to dispel, explain, or "avoid" such rumors among its employees. It further occurs to me, concerning the layoffs at the Melbourne, Florida, and San Luis Obispo, California facilities, that these plants are separated by the width of the North American Continent being located on the east and west coast of the United States, respectively. Be that as it may, Kent Anderson, the Respondent's director of human resources,[64] candidly admitted in his testimony that given the fact of the Board's election scheduled for January 16, 1981, and that employee layoffs at the San Luis Obispo facilities were not to become effective until February 27, 1981, the Respondent could just as well have announced the layoffs after the election than before, as it did, although he added that it was "better employee relations practice" to have made the announcement when the Respondent did and to all its employees at the same time.

Furthermore, the credited testimony of Vickie Wobermin shows that at the January 12, 1981 meeting with employees at its Southwood Drive facility in San Luis Obispo, the Respondent's plant manager, Mac Brinton, along with announcing the Respondent's decision to lay off production employees at its San Luis Obispo facilities, also remarked that, "with the Union organizing going on, he didn't want to hide anything. He wanted to be right up front and let them—let everyone know that there would be a layoff." Again applicable as analogous is the Supreme Court's statement in the *Gissel* case that, "[T]he Board has often found that employees who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts." Although I am cognizant of the fact that the layoffs were of assembly employees and did not involve the technical employees who were present at this meeting, yet the election was only *4* days away at the time of this announcement and involved plant closure and layoffs at two other facilities so that the employees at the meeting could well have taken such announcement as possibly applicable to them in the future and as "coercive threats rather than honest forecasts," analogously.[65]

Finally, although there is evidence in the record that it was the Respondent's policy to notify employees affected by a company decision as soon as possible, and that employee layoffs in the past were announced in advance, yet the record also shows that the actual timing of such advance announcements varied and in those prior instances appeared not to have been required to be considered in the context of a "labor relations setting," as here.

In the total context of this record, I find and conclude that the timing of the announcement in its relation to the January 16, 1981 election was motivated by antiunion hostilities also manifested elsewhere in the Respondent's conduct and, therefore, the Respondent's announcements of layoffs during the critical preelection period constituted implied threats of loss of employment in violation of Section 8(a)(1) of the Act.[66]

6. Alleged threats to withhold work reviews

The complaint alleges that the Respondent threatened its employees orally and by posted notice to withhold work reviews and keep March reviews at a standstill if the Union won the election, all in violation of Section 8(a)(1) of the Act. The Respondent denies these allegations.

a. *Analysis and conclusions*

Diana Keppel testified that sometime in December 1980, she observed a "bulletin" posted on the bulletin board at the Respondent's Tank Farm Road Annex facility, which stated that employee work reviews would not be given if the Union won the election, "because the company would be negotiating with the Union." Keppel attributed the notice to either Mac Brinton or Gerald Cross and indicated that it had a "TRW Vidar" letterhead. Vickie Wobermin testified that "about three weeks" before the election she saw a "Question of the Day" posted on a bulletin board at the Respondent's Southwood Drive facility that asked the question, in substance, what would happen to employee work reviews during the Union negotiations, and answered that, "everything would be frozen—that there would be no reviews, because everything had to stay the same way during the negotiations." Brinton and Cross denied either authorizing, publishing, or posting such notices, and the Respondent even questions the actual existence thereof.[67]

[63] See the testimony of Kent Anderson.

[64] Anderson is "responsible for all the personnel administration programs" and "involved . . . in the area of communication of [layoff decisions to the employees]."

[65] Threats to employees made shortly before a scheduled election are not to be taken lightly because they may influence the outcome of the election. *Hilton Inn*, 232 NLRB 873 (1977).

[66] *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 814 (1980); *J. P. Stevens & Co.*, 244 NLRB 407 (1979). Contrast *Aunt Millie's Sauces*, 259 NLRB 278 (1981), where the Board found that there was a valid business reason for the employer's decision, as is true of the instant case, but also that the announcement thereof, when made to employees, was not inconsistent with its usual practices and "there was no mention of the Union or of the pending election at the time the initial terms of employment were announced."

Moreover, the cases cited by the Respondent in support of its contentions regarding this issue, in all actuality do not do so and are readily distinguishable from the instant case. In *R. J. Reynolds Tobacco Co.*, 240 NLRB 620 (1979), the Board affirmed an administrative law judge's finding that an employer's action in telling employees during an election campaign that, "something big is going to happen after this election is over," did not constitute a violation of Section 8(a)(1) of the Act. However, the ALJ's finding was based on the ambiguity of such statement since it was equally susceptible "of an interpretation as either a threat of reprisal or a promise of benefits" and "of an innocuous interpretation." In the instant case the statements of layoff were clear and unequivocal. Other differences are also plainly apparent between the cases.

It is similarly apparent from a reading of *C & E Stores*, 221 NLRB 1321 (1976), that this case also fails to support the Respondent's position. Most importantly, in the instant case the layoff and the dates thereof had actually been set and included in the announcements of layoffs, although this in and of itself is not violative of the Act.

[67] Although the Respondent admits that, "During the pre-election campaign, the Respondent posted a number of bulletins which collectively were called 'Questions of the Day' on various bulletin boards at its facility," it also asserts that it posted no "Question of the Day" other than those contained in R. Exh. 3(a-m). This exhibit contains no "Question of the Day" that specifically makes reference to employee work reviews.

Furthermore, Keppel testified that on Monday, January 12, 1981, 4 days before the Board's scheduled election on January 16, 1981, Cross held a meeting of employees at the Tank Farm Road Annex facility where he told the employees that if the Union won the election, there would be no work reviews because everything would be at a "standstill" while negotiations proceeded. Cynthia Stevens, who had also attended the January 12, 1981 meeting, testified similarly regarding what Cross had told the employees at this meeting. She stated that Cross had said that during negotiations between the Respondent and the Union, the Respondent's "hands would be tied" and therefore "everything would be at a standstill" including the March employee work reviews.

Cross denied that he had mentioned anything about the March work reviews or that they would not be forthcoming. He also denied stating to the employees that wages or benefits would "be frozen" or "be at a standstill." However, Cross acknowledged that he had read the following from a prepared text, which he followed without departure except for one explanatory instance,

> If the union wins, however, our hands would be more or less tied while the company bargained with the union—that is, we couldn't make any changes unless both sides agreed or until the company had satisfied its bargaining obligation.

John Lane, a production supervisor also present at this meeting, testified that Cross spoke directly from a prepared text, which Lane identified as Respondent's Exhibit 2, and "I do not recall any extemporaneous speaking whatsoever." He also testified that Cross had never stated that the March reviews would be at a standstill, canceled, or frozen during his presentation at this meeting.

From the above it is obvious that the resolution of this issue depends substantially on a credibility determination between the witnesses for the General Counsel and the Respondent, respectively. I admittedly have found such a determination to be difficult and distressing at best. As the administrative law judge observed in *Cas Walker's Cash Stores*, 249 NLRB 316, 321 (1980):

> Resolution of credibility conflicts are often difficult, requiring the weighing of equally plausible narrations of testimony of witnesses who appear to be telling the truth and who are no more prejudiced and biased than others who are telling a wholly different story. Of times, there are no fatal inconsistencies nor contradictions for the determiner of factual issues to seize upon to arrive at a firm conclusion. In those instances, the trial judge or jury must rely upon a sixth sense and instinct, which makes the resolution of certain conflicts somewhat unsatisfactory, leaving the chance, somewhat slight and many times significant, that the final decision was erroneous. A reasonable doubt remains.

Although I have found that some of the above observations hold true in this case, still reasonable, appropriate, and valid credibility resolutions can be and have been made based on a careful review of all the evidence, my observation of witness demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole.[88]

After carefully considering all of the above factors, I tend to credit the account of what occurred regarding the events bearing on the issue under consideration, as given by the General Counsel's witnesses, for the reasons that their testimony was generally forthright, mostly clear and unequivocal, and consistent with each other and the other evidence present in the record. Moreover, while I also believed much of the general testimony given by the Respondent's witnesses, yet when it came to bear on the crucial incidents that gave rise to the allegations of unlawful conduct on the Respondent's part, the emphasis of their testimony was directed toward acquitting such conduct of any tinge of unlawfulness as opposed to the truth of what actually occurred.[89] Their testimony at times was contradictory and equivocal and inconsistent with the other evidence in the record, as will be referred to hereinafter.

Initially, and in reinforcement of my above credibility determination, is that Vickie Wobermin was still employed by the Respondent at its Southwood Drive facility in San Luis Obispo at the time she testified in this matter. As an employee of the Respondent, her testimony, adverse to its positions here, was given at consider-

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[88] *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Casting's*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976). I have also taken note in such resolutions that even witnesses whose demeanor and forthrightness of testimony engendering belief will often give testimony that in part may seem inconsistent or unclear because of the passage of time requiring the remembrance of things and events past.

[89] Cross testified that he followed a prepared text (R. Exh. 2) in addressing the employees at the January 12, 1981 meeting and did not deviate therefrom except once, to explain to them the meaning of the term "challenged ballot." However, the copy of the text in evidence is replete with sentences that have been crossed out, indicating that Cross omitted these in his presentation. Additionally, question marks appear alongside certain paragraphs, and words and sentences are underlined there creating ambiguities regarding what these signified to Cross and whether he intended to or did in fact elaborate on these as he had done with the term "challenged ballot," one of which significantly was the phrase "*we couldn't make any changes*" if the Union won the election and the Respondent's hands were more or less tied, "changes" impliedly encompassing wages and undefined benefits and other conditions of employment.

Moreover, John Lane, a management employee and present at this meeting, also testified that Cross had spoken from a prepared text and not extemporaneously and had not departed therefrom. After reviewing R. Exh. 2, he identified it as a copy thereof. However, his testimony regarding this became suspect when, on cross-examination, it was revealed that Lane did not have a copy of the prepared text before him at the meeting nor had he seen it prior thereto. And, according to his own testimony, it was only after the meeting had concluded that he had the opportunity to "glance at the top sheet" of the text, but he "did not go through the whole thing."

As the evidence shows, the Respondent, during the month of December 1980, and admittedly during the month of January 1981, up until the time of the election on January 16, 1981, "conducted a vigorous campaign in opposition to the Union's organizing efforts." Thus, the Respondent's antiunion feelings were obvious to its management personnel, whose interests would be furthered by support of their Employer's position thereon rather than opposition or indifference thereto. I do not mean to infer or suggest that this is in any was unlawful, unless manifested by these employees in a manner violative of the Act. It is mentioned to give perspective in focusing events and management personnel actions that occurred here.

able risk of economic reprisal, including loss of employment or promotion, and therefore unlikely to be false.[70] Additionally, at least as applicable to Cynthia Stevens, if not to Diana Keppel as well, and although laid off for economic reasons, Stevens left the Respondent's employ prior to the hearing and under circumstances that show a decided lack of animosity and bad feelings between she and the Respondent, therefore she had no apparent reason to testify as she did other than as to her own recollection.[71]

Also of some significance in resolving this issue in favor of the General Counsel, aside from the above credibility findings, is the fact that although Cross testified that at the January 12, 1981 meeting, he not only refrained from mentioning anything about employee work reviews, but also did not tell the employees that wages or benefits would "be frozen" or "be at a standstill." The evidence shows that Cross did read, as part of his presentation from the prepared text, the following,

> Myth No. 2—
> *If the Union wins, there will be a quick contract.* Don't count on it. First, contract negotiations are often lengthy and can end up being drawn out over a long period of time. And the employees wait for raises and improvements in benefits while this takes place.[72]

Aside from the contradiction implicit in the above between Cross' denial regarding what he actually said about wages and benefits and what he read above, and albeit my crediting the testimony of Keppel and Stevens as to what he told the employees at this meeting, even assuming arguendo that Cross did not actually mention employee work reviews by name and that such *would not* be forthcoming if the Union won the election, yet the clear and unequivocal impression that this would be the case was conveyed to the employees by this statement as being the only possible implication and meaning the employees could draw.

Rank-and-file employees are generally much less sophisticated in concepts and nuances of labor relations law than are management employees, especially when managements' actions are orchestrated by labor relations' counsel. The Respondent's practice and procedure concerning employee raises was to issue employee work reviews in March and September of each year on which the amount of the raises, if any, were based. Thus, employees were well aware that without work reviews as in the past, no salary raises would be granted, and as Keppel so credibly testified, "that's what everyone waits for, are the reviews. That's when we get our raises in pay."[73] With this as background, Cross advised the employees that if the Union won the election, the Respondent's "hands would be more or less tied while the company bargained with the Union," that no changes could be made unless both parties agreed or bargaining had been satisfied. Soon thereafter Cross stated to them that bargaining negotiations could be lengthy, "drawn out over a long period of time," and that employees would then have to "wait for raises and improvements in benefits while this takes place." It was therefore obvious to the employees that if the Union won the election, the Respondent was telling them that no raises or improvements in benefits would be granted while it negotiated with the Union, and implicit in this therefore was the withholding of the next work reviews, the March review.[74]

Regarding the posting of written notices, the Respondent, in its brief, states that the sole support for the "Phantom Wage Freeze Notice" was the testimony of Vickie Wobermin. This is incorrect since Diana Keppel also testified that she had seen a notice concerning employee work reviews at the facility where she worked. The Respondent maintains that the Union's failure to produce the notice supports its position of the nonexistence thereof. However, these would be notices prepared and posted by the Respondent's personnel department, i.e., "Question of the Day," and in their control, so how could the Union or the General Counsel produce such notices unless the employees had removed them from the company bulletin board, an act that I am sure the Respondent does not encourage or condone regarding posted notices. Moreover, Cross' testimony to the effect that the "Questions of the Day," which were introduced into evidence by the Respondent, constituted all those that were produced during the campaign and that contained nothing about work reviews, was not corroborated under oath by Pace, the Respondent's counsel, who allegedly authored all such notices. Although I am sensitive to the ramifications of counsel testifying at the same hearing in which he is representing a client, in the instant case a witness testified to seeing a document alleged by an adverse witness to be nonexistent. Certainly Pace's testimony would have some bearing thereon.

The Respondent also asserts, in support of its denial that it posted any notices threatening to withhold employee work reviews if the Union won the election, that Cross published a memorandum dated December 5, 1980, to "Supervision" instructing them to review their employees' performances in preparation for the "March 1, 1981, Performance Reviews," which shows that the Respondent actually intended to issue such reviews.[75]

[70] The Board has long held that testimony against the interests of one's employer while still in its employ is entitled to added support. *7-Eleven Food Store*, 257 NLRB 108 (1981); *Shop-Rite Supermarket*, 231 NLRB 500 (1977); *DePaul Community Health Center*, 221 NLRB 839 (1975); *Georgia Rug Mill*, 131 NLRB 1304 (1961). Although I am also aware that Wobermin was apparently a strong and active union adherent, I do not believe that this fact without more offsets the peril inherent in an employee testifying against the employer while still so employed.

[71] *Tri-County Tube*, 194 NLRB 103, 107 (1971). Stevens testified that after notifying her of her intended layoff effective 2 weeks hence, the Respondent actively assisted her in obtaining other employment with a different company, although Stevens thereafter found a better job by herself before she started on this other position.

[72] R. Exh. 2 at 6.

[73] It is no wonder that Keppel and Stevens remembered Cross' statements concerning this clearly while other topics he spoke about were vague or forgotten entirely. To these employees, the work reviews and possibly resulting pay raises were of paramount importance, taking precedence over everything except job loss by layoff, discharge, or plant closure.

[74] Again the Supreme Court's holding in the *Gissel* case rings true concerning employer-employee relations.

[75] R. Exh. 7.

However, even assuming that this was true when this memorandum was issued on December 5, 1980, the Respondent's position could have changed as the Union's organizing campaign heated up and its own campaign in opposition thereto substantially increased in response to Board notification to the parties about December 18, 1980, of the now-pending election to be held on January 16, 1981. Credited testimony that notices to the contrary were posted by the Respondent directed to the employees amply shows that such a change might well have occurred.

With the above in mind, the question to be resolved now is whether such statements made by the Respondent, orally and in writing, constitute a violation of Section 8(a)(1) of the Act. The Respondent asserts in its brief, "Even if it is found that Respondent did state that March reviews would be 'at a standstill,' such statements are lawful under the Act." I do not agree that such statements made by the Respondent are lawful under the Act.

The Board in *Signal Knitting Mills*, 237 NLRB 360, 361 (1978), set forth the principles applicable to the issue presented. The Board stated

> It is well established that an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending, *is to act precisely as it would if a union were not in the picture*. In the instant case, however, Respondent posted a notice which purported to set forth the consequences, vis-a-vis potential increases in wages or benefits, of the Union's filing of objections to an election. However, the notice contained no qualifying language indicating that the "freeze" *would apply only to benefit and/or wage increases not in accord with Respondent's past practice*. Further, *the notice indicated that the Union was the sole cause of the wage and benefit freeze, thus placing the onus of the employees' potential loss of financial improvements on the Union*. Accordingly, we find that the notice, on its face, conveyed to employees the message that their union activity would harm their prospects for improved wages and benefits and, therefore, threatened and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act in violation of Section 8(a)(1) of the Act. [Emphasis added.]

In the instant case the Respondent had a longstanding policy of reviewing employee work performances twice a year, in March and September, and granting or withholding wage increases based on these employee work reviews. It is uncontested that if the Union were not in the picture, such work reviews would have issued as in prior years. Thus, the Respondent's threats to withhold employee work reviews, in actuality a threat to deny employees the basis for wage increases as in the past, was unlawful. Moreover, by indicating expressly or impliedly that this would only occur if the Union won the election and the Respondent had to negotiate with it, the Respondent was indicating to the employees that the Union was the sole cause of their being denied their work review and thus any wage increases, thereby placing the onus of such potential loss of financial improvements on the Union. The threatening and coercive effect of the Respondent's statement is most cogently illustrated by Keppel's testimony that,

> Because if there was not to be any reviews, it would sway the boat of the employees because that's when we get our raises in pay.

Accordingly, I find and conclude that the Respondent's statements made orally and by posted written notice, conveyed to its employees the message that their union activity, i.e., voting in favor of the Union in a Board-conducted election, would harm their prospects in the exercise of the rights guaranteed them in Section 7 of the Act in violation of Section 8(a)(1) of the Act.[76]

IV. THE EFFECT OF THE UNFAIR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In light of the standards set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), I conclude that a broad remedial order is inappropriate since it has not been shown that the Respondent has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental rights. Accordingly, I recommend the use of the narrow injunctive language "in any like or related manner" in the recommended Order.

CONCLUSIONS OF LAW

1. The Respondent, TRW Vidar, a Division of TRW Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters-Warehousemen Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen &

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[76] *United States Gypsum Co.*, 254 NLRB 339 (1981); *Air Express International Corp.*, 245 NLRB 478 (1979); *Signal Knitting Mills*, 237 NLRB 360 (1978). Also see *Champion Road Machinery International Corp.*, 264 NLRB 927 (1982). I do not find merit to the Respondent's assertion that the cases cited by the General Counsel in its brief and by me here are "readily distinguishable from the facts of the instant case." I do find, however, such distinguishability concerning the cases cited by the Respondent in its brief in support of its contentions, i.e., in *Patsy Bee, Inc.*, 249 NLRB 901 (1980), the administrative law judge and the Board found that the evidence did not establish the existence of "*a failure to abide by established practice*," among other things, as was established in the instant case.

Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by

(a) Denying to its off-duty employees equal nondiscriminatory access to its facilities for purposes of engaging in activities protected by Section 7 of the Act.

(b) Promulgating and discriminatorily enforcing an unlawfully broad no-access rule.

(c) Impliedly threatening its employees with layoff if the Union won the election by unlawfully timing its announcements thereof during the critical preelection period because of anitunion hostilities.

(d) Threatening to withhold its March employee work reviews if the Union won the election.

4. That the unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[77]

ORDER

The Respondent, TRW Vidar, a Division of TRW Corporation, San Luis Obispo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying its off-duty employees equal nondiscriminatory access to its facilities for purposes of engaging in activities protected by Section 7 of the Act.

(b) Promulgating and discriminatorily enforcing an unlawfully broad no-access rule.

(c) Impliedly threatening its employees with layoff if the Union won an election.

(d) Threatening to withhold its March employee work reviews or any such reviews if the Union won the election.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its San Luis Obispo, California facilities, including the Southwood Drive and Tank Farm Road Annex facilities, copies of the attached notice marked "Appendix."[78] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[77] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[78] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Fayard Moving & Transportation *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Locals 991, 270, and 988, AFL–CIO.[1] Case 15–CA–10357

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On May 12, 1988, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Fayard Moving & Transportation, Gulfport, Mississippi, New Orleans, Louisiana, and Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On November 2, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Clement Kennington, Esq., for the General Counsel.
Edward Champagne, Esq. and *Sidney F. Rothschild, Esq.*, of New Orleans, Louisiana, for the Respondent.
Otto Simon, Esq. (Simon, Wood & Crane), of Mobile, Alabama, for the Petitioner.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This matter was heard before me on 22 October and 12 November 1987 in New Orleans, Louisiana, pursuant to a complaint issued on 31 July 1987. That complaint was based on a charge filed on 6 July and amended on 5 August 1987. In its answer, Respondent admitted the commerce and jurisdictional allegations. Respondent also admitted that it is an employer engaged in commerce and that Charging Parties are labor organizations within the meaning of Section 2(5) of the Act.

The complaint alleges Respondent violated Section 8(a)(1) and (5) of the Act by refusing to execute a written contract embodying agreement of the parties.

The parties have had a long history of collective bargaining. Beginning in 1968 when Locals 270 and 991 were certified as representatives of employees in Respondent's Gulfport, Mississippi, and New Orleans, Louisiana facilities, Respondent and the Local Unions have agreed to successive collective-bargaining agreements. The most recent agreement expired on 31 October 1986.

The most recent contract involved bargaining units in New Orleans, Louisiana; Gulfport, Mississippi;[1] and Houston, Texas, of "all local and long distance freight and furniture drivers, packers, loaders and unloaders, warehousemen, truck helpers and mechanics excluding all other employees, including office clericals, supervisors, guards and watchmen as defined in the Act [sic]."

The parties exchanged contract proposals in October 1986. On 16 December 1986, the parties met in New Orleans. According to testimony by Jerry Burnthorn, secretary-treasurer and business agent for Local 991, the parties reached agreement during that meeting. Burnthorn, acting on behalf of all three locals, presented an "interim agreement" to Respondent's president, Ed Fayard. Fayard signed that interim agreement on 6 January 1987.[2] Burnthorn signed the interim agreement on 7 January 1987. The interim agreement provides:

INTERIM AGREEMENT

BETWEEN

TEAMSTERS LOCAL UNION 991,
TEAMSTERS LOCAL UNION 270,
TEAMSTERS LOCAL UNION 988,

AND

FAYARD MOVING AND TRANSPORTATION, INC.

It is agreed that one company wide contract will serve the Mobile, Alabama, New Orleans, Louisiana, and Houston, Texas local unions.

All parties of the contract that expired October 31, 1986 are agreed to except as amended in this letter of agreement and will remain in effect through October 31, 1989.

The Union agrees that the three (3) day sick leave will only be paid for proven illnesses or accident when verified by a doctor, and will not be pyramided or paid when not used.

Fayard Moving and Transportation agrees to keep in effect the Automated Benefits Services group insurance with the following effective rates:

November 1, 1986–$40.60 per week
November 1, 1987–42.90 per week

[1] Although Respondent has a facility in Gulfport, that facility is served by Local 991 out of Mobile, Alabama.

[2] Although Fayard wrote the date January 6, 1986, all witnesses agree that he actually signed the agreement on January 6, 1987.

November 1, 1988–45.00 per week

WAGES

November 1, 1986	No increase
November 1, 1987	$0.25 cents per hour increase 1/4 cents per mile increase
November 1, 1988	$0.25 cents per hour increase 1/4 cents per mile increase

Ed Fayard admitted that he read, then signed, the interim agreement on 6 January 1987. However, Fayard testified that he understood the interim agreement to be nothing more than an agreement to continue to apply the terms of the 1983–1986 collective-bargaining contract, with the specific exceptions noted in the interim agreement, until the parties were able to negotiate a new contract. Jerry Burnthorn, on the other hand, contended that the parties agreed to a contract on 16 December 1986 and that the interim agreement was executed preliminary to execution of the full written contract. That written contract was prepared by Burnthorn in accord with the terms of the interim agreement.

Subsequently, Ed Fayard refused to sign the written contract. Jerry Burnthorn presented the written contract to Ed Fayard on 2 February 1986. Fayard specifically refused to sign the contract when he and Burnthorn met on 19 March 1987. Subsequently, Fayard again refused to sign the complete written contract on 7 May 1987. Present at the 7 May meeting were the business agents of all three locals, Jerry Burnthorn of Local 991, Ed Turner of Local 988, and Wallace Collins of Local 270, along with Ed Fayard's daughter Cindy Piper, who is Respondent's office manager, and Fayard's sister Leta Blake, who is an officer of Respondent.

According to Cindy Piper, the Locals, during the 7 May meeting, agreed to attempt to reconcile Ed Fayard's problems with the contract, through a "side agreement" which would not be included in the written contract. Both Jerry Burnthorn and Ed Turner disputed Piper's testimony. Burnthorn and Turner testified that the Locals never agreed to a "side agreement." Ed Fayard, who also testified about the 7 May meeting, did not testify about a "side agreement."

Conclusions

There is a dispute as to what occurred when the parties met on 16 December 1986 in New Orleans. However, the parties agree that an interim agreement was executed by both Respondent and Jerry Burnthorn. Burnthorn testified, without rebuttal, that he was acting on behalf of all three Locals when he signed the interim agreement.

The Board has consistently refused to permit a party to a written agreement to vary the terms of the agreement by providing a "contemporaneous or prior oral agreement or undertaking." *Air-Vac Industries*, 259 NLRB 336, 342 (1981).

I am bound to accept the parties' interim agreements as conclusive proof of the parties' understanding. The interim agreement is clear. By refusing to execute the presented collective-bargaining agreement that was prepared in accord with provisions of the interim agreement, Respondent violated Section 8(a)(1) and (5) of the Act. See *Fashion Furniture Mfg.*, 279 NLRB 705 (1986); *Georjan, Inc.*, 281 NLRB 952 (1986).

Moreover, I find that the Union did not agree on 7 May to attempt to reconcile Respondent's problems through a "side agreement." Both Jerry Burnthorn and Ed Turner testified credibly that they did not agree to such an arrangement. Additionally, Ed Fayard, who was present during that meeting, never claimed that the Union agreed to a "side agreement." Therefore, I discredit the testimony of Cindy Piper that the Union agreed to treat Fayard's problems in a "side agreement."

Conclusions of Law

1. Fayard Moving & Transportation, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Locals 991, 270, and 988 are labor organizations within the meaning of Section 2(5) of the Act.

3. By refusing to execute and sign the collective-bargaining agreement agreed on between it and the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The above unfair labor practices affect commerce within the meaning of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I recommend that Respondent be ordered to execute the collective-bargaining agreement agreed on with the Union and to comply with its terms retroactively to 1 November 1986. In addition, the Respondent shall make whole employees in the bargaining units and the Union for losses, if any, suffered, because of Respondent's refusal to sign the agreement in the manner set forth in *Ogle Protection Services*, 183 NLRB 682 (1970), plus interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

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[3] Under *New Horizons for the Retarded*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 Amendment to 26 U.S.C § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Fayard Moving & Transportation, Inc., Gulfport, Mississippi; New Orleans, Louisiana; and Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to execute the collective-bargaining agreement agreed on by the Respondent and Locals 991, 270, and 988.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by the Locals, forthwith execute the contract on which agreement was reached with the Union or, if the Union does not request such execution, bargain collectively in good faith, on request, with the Union as the exclusive representative of the employees in the bargaining units and, if an understanding is reached, embody such understanding in a signed contract.

(b) Give retroactive effect to the terms and conditions of employment of the contract, and make whole its employees and Locals for any loss they suffered by reason of Respondent's failure to execute the agreement in the manner set forth in this decision.

(c) Post at its Gulfport, Mississippi, New Orleans, Louisiana, and Houston, Texas facilities copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to execute the collective-bargaining agreement agreed on between us and Locals 991, 270, and 988 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request by the Union, forthwith execute the contract on which agreement was reached between us and the Locals or, if the Locals do not request such execution, WE WILL bargain collectively in good faith, on request, with the Locals as exclusive representatives of our employees in the bargaining unit in Gulfport, Mississippi; New Orleans, Louisiana; and Houston, Texas, and, if an understanding is reached, embody such understanding in a signed contract.

WE WILL give retroactive effect to the terms and conditions of employment of the contract, and make whole employees and the Locals for any loss suffered by reason of our failure to execute the agreement, with interest.

FAYARD MOVING & TRANSPORTATION

Bill Johnson's Restaurants, Inc. *and* Myrland R. Helton. Case 28–CA–5041

July 29, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On April 30, 1980, the National Labor Relations Board issued its Decision and Order[1] in this proceeding finding, inter alia, that the Respondent violated Section 8(a)(4) and (1) of the Act by filing a civil complaint in an Arizona state court with the intent of impeding the Board's processes and punishing the Charging Party and others for exercising their rights guaranteed by Section 7 of the Act.

On November 12, 1981, the United States Court of Appeals for the Ninth Circuit issued a judgment[2] enforcing the Board's Order in its entirety. The Respondent thereafter sought and was granted certiorari in the United States Supreme Court. The Supreme Court issued its opinion on May 31, 1983, vacating the Board's Order and remanding the case to the court of appeals with instructions to remand the case to the Board for further proceedings consistent with the Court's opinion.[3] The Respondent and the General Counsel then filed statements of position with the Board, and the Respondent filed a supplemental statement in response to the General Counsel's statement. On consideration of the record and the parties' statements in light of the Supreme Court's opinion, the Board makes the following findings and conclusions.

I. FACTUAL BACKGROUND

Myrland R. Helton, a waitress at the Respondent's "Bill Johnson's Big Apple East" restaurant, was discharged on August 8, 1978. She then filed an unfair labor practice charge, alleging that her discharge resulted from efforts to organize a union. On September 20, 1978, the General Counsel issued a complaint alleging that her discharge violated the Act. On that day, Helton, joined by three fellow waitresses and a few nonemployees, picketed the restaurant, carrying signs asking customers to boycott the establishment because it had been charged with unfair labor practices. The Respondent's manager confronted the picketers and threatened to "get even" with them "if it's the last thing I do." The Respondent's president telephoned the husband of one of the picketing waitresses and impliedly threatened that the couple would "get hurt" and lose their home if the wife continued to picket. Nevertheless, the picketing continued on September 21 and 22 when the picketers, in addition to carrying signs, distributed leaflets listing the employees' specific complaints regarding working conditions. On September 25, attorneys for the Respondent filed a complaint in the Superior Court of Arizona alleging that Helton and the other demonstrators had engaged in mass picketing, harassment, blocking ingress to and egress from the restaurant, and creating a threat to public safety.[4] A second count claimed that the leaflet was libelous, alleging that it contained false and outrageous statements published by defendants with malicious intent to injure the Respondent. The complaint sought, inter alia, compensatory and punitive damages.[5]

On September 26, Helton filed an additional unfair labor practice charge with the Board, alleging that the state court suit was filed in retaliation for the employees' protected concerted activities and because she had filed an unfair labor practice charge. The General Counsel thereafter issued a second complaint, asserting that the Respondent's filing of the state court suit violated Section 8(a)(4) and (1) of the Act. The two complaints were consolidated for hearing. The judge, inter alia, found the 8(a)(4) and (1) violations as alleged and, as noted, the Board thereafter adopted the judge's decision, and the Board's decision was subsequently enforced by the Ninth Circuit.

Meanwhile, the parties to the state court suit had cross-moved for summary judgment on the claim and counterclaim. On March 15, 1979, the state court issued an order that granted the defendants' motion for summary judgment on the business interference claims, but left the libel claim for trial. The order further dismissed the abuse-of-process count in the counterclaim, but left the libel count of the counterclaim for trial.

II. THE SUPREME COURT'S OPINION

In vacating the Ninth Circuit's judgment, the Court initially acknowledged that Section 8(a)(1) and (4) are broad remedial provisions and that lawsuits filed by employers may be powerful instruments of coercion or retaliation. Nonetheless, the Court found that overriding these concerns were the first amendment right of access to the courts and the States' compelling interest in maintaining domestic peace. In light of these overriding interests, the Court ruled that the Board may not enjoin

[1] 249 NLRB 155.
[2] 660 F.2d 1335 (9th Cir. 1981) (as modified on denial of rehearing and rehearing en banc Mar. 2, 1982).
[3] 461 U.S. 731.
[4] These allegations will be referred to as the Respondent's business interference claims.
[5] The defendants to this suit thereafter filed a counterclaim accusing the Respondent of, inter alia, abuse of process and libel.

a well-grounded lawsuit regardless of the employer's motivation in filing it. Conversely, the Court stated that the Board can enjoin a lawsuit that lacks a reasonable basis if it was filed with the intent to retaliate against employees exercising their rights under the Act.

The Court indicated that when confronted with the allegation that the filing and prosecution of a lawsuit violates the Act, the Board must first determine whether the suit has a "reasonable basis" in law or fact.[6] If the suit lacks a reasonable basis, the Board may proceed with the unfair labor practice proceeding and determine whether the suit was filed with a retaliatory motive. Should the Board determine that a reasonable basis for the suit exists, however, then the Board may not enjoin the suit, but must stay its unfair labor practice proceeding until the state court suit has been concluded. If the state court ultimately finds merit in the employer's suit, the Court stated that the employer should also prevail before the Board because the filing of a meritorious lawsuit, even with a retaliatory motive, is not an unfair labor practice. The Court further indicated, however, that when the state court judgment goes against the employer or the suit is

> withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and § 8(a)(4) unfair labor practice case.[7]

The Court further noted that if the Board found a violation it could order the employer to reimburse the employees for their attorneys' fees and other expenses, as well as any other proper relief that would effectuate the policies of the Act. We shall apply these principles enunciated by the Supreme Court in resolving the unfair labor practice case before us.

III. THE SETTLEMENT AGREEMENT

Subsequent to the Supreme Court's opinion, the parties to the state court lawsuit entered into a settlement agreement that dismissed all remaining claims and counterclaims in the lawsuit with prejudice.[8] That agreement, in pertinent part, provided:

> 1. All parties, by and through their attorneys, agree to execute a stipulation to dismiss with prejudice all claims and counterclaims in the lawsuit entitled *Bill Johnson's Restaurants v. Helton et al.*, Civil No. C-375470, now pending in Maricopa County Superior Court. Each party agrees to bear its own costs and expenses; provided however, that Bill Johnson's Restaurants, Inc. shall pay the reasonable attorneys' fees and costs incurred by defendants in the subject lawsuit, not to exceed the total sum of $8,000.00, as previously required by the NLRB, if and to the extent approved by the Supreme Court of the United States when it renders a decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, No. 81-2557.

The settlement agreement, by its terms, did not settle the instant unfair labor practice charge, nor did it discuss the effect of the Supreme Court's holding on the unfair labor practice issue.[9]

IV. THE PARTIES' POSITIONS

Following the remand of this proceeding to the Board, the parties submitted statements of position. The General Counsel argues that the Respondent's settlement of the libel claim is equivalent to a withdrawal of that suit. She argues, therefore, that, pursuant to the Supreme Court's decision, withdrawal may be viewed as establishing that the libel suit lacked merit. Alternatively, the General Counsel contends that the Board should now make factual findings in order to determine whether the libel claim had merit because the parties' settlement agreement has precluded a state court adjudication of that claim's merits. She argues that in making these factual findings, the Board should affirm the judge's earlier finding that the statements in the leaflet were true and therefore that the libel claim was without merit. The General Counsel also requests that the Board order the Respondent to make the Charging Party and her fellow employees whole for all legal and other expenses incurred by them in defending against the Respondent's lawsuit, including expenses incurred in relation to their answer and counterclaims.

The Respondent, on the other hand, urges the Board to dismiss the relevant allegations of the complaint and to deny the state court defendants any reimbursement of their legal expenses. Noting that the state court denied the defendants' motion for summary judgment on the Respondent's libel claim, the Respondent argues that it would be inappropriate, in light of the Court's decision, for the Board to find that its suit lacked merit and to order

[6] The Court indicated that the Board could apply the "genuine issue" test used in adjudging motions for summary judgment when making its reasonable basis determinations. 461 U.S. at 745 fn. 11.

[7] 461 U.S. at 747.

[8] As noted above, the only remaining issues in the lawsuit were the Respondent's libel claim and the employees' libel counterclaim.

[9] The agreement is drafted as if the Court's opinion had not issued, even though the agreement was signed by the parties in June 1983 and the Court had issued its opinion on May 31, 1983.

reimbursement. The Respondent also rejects the General Counsel's argument that the settlement agreement demonstrates that its suit lacked merit by noting that a settlement agreement may not be used as evidence of the validity or invalidity of a claim under the Federal Rules of Evidence. It further argues that the General Counsel's alternative argument that the Board should adopt the judge's factual findings that the claim lacked merit must be rejected because the Court specifically found that the judge had improperly decided that issue instead of leaving it for the state court to resolve.

V. CONCLUSIONS

A. *Business Interference Claims*[10]

We conclude that the Respondent violated Section 8(a)(4) and (1) by filing and prosecuting the business interference claims. As noted above, the state court granted the defendants' motion for summary judgment on that claim. That judgment constituted a final adjudication establishing that that claim lacked a reasonable basis in law or fact. The Supreme Court has advised that we should defer to the state court judgment unless we can provide a cogent explanation for refusing to do so. 461 U.S. at 749 fn. 15. The Respondent has not presented any argument why we should not defer, nor does the record suggest any reason for not doing so.

Furthermore, we find that the record establishes that the Respondent filed its suit in retaliation for the employees' exercise of their Section 7 rights. The administrative law judge considered the intent question and concluded that the Respondent had filed its lawsuit to retaliate against Helton for filing the 8(a)(3) charge and to punish the picketers for engaging in protected concerted activity. 249 NLRB at 165. This conclusion was based on his finding that the Respondent's manager had threatened to "get even" with the picketers.[11] Based on his assessments of demeanor and credibility, the judge also found that the Respondent's president called the husband of one of the picketers and referred to the couple losing their new home and "getting hurt by all this." 249 NLRB at 161–162. We have carefully reexamined the record and now reaffirm the judge's findings and conclusions regarding the Respondent's retaliatory motive in filing the suit.

Accordingly, we find that the two requisite elements of a meritless suit and a retaliatory motive exist for establishing a violation. Pursuant to the Supreme Court's decision, we shall therefore order appropriate relief to remedy the unlawful filing and prosecution of the business interference suit.

B. *Libel Claim*

The resolution of whether the Respondent's filing and prosecution of its libel claim violated the Act presents a more troublesome issue. The state court's denial of the defendants' motion for summary judgment established that this claim had a reasonable basis.[12] Pursuant to the Supreme Court's decision, the Board was therefore required to stay the unfair labor practice proceeding until the state court suit had been concluded. The state court suit has been concluded through the parties' settlement of that claim. The Supreme Court, however, did not address the effect of a settlement as a means of concluding a suit. Rather, it discussed only the effect of the state court reaching a decision on the claim's merits, the employer withdrawing its suit, or the claim otherwise being shown to be lacking in merit. As explained below, we find that the General Counsel has failed to establish that the Respondent's libel claim was baseless and we will therefore dismiss the complaint as it applies to the filing and prosecution of the libel claim.

We reject the General Counsel's argument that the settlement of the libel claim is equivalent to the withdrawal of the claim and thereby establishes that the claim lacked merit. That result is contrary to Rule 408 of the Federal Rules of Evidence, which states that a settlement agreement may not be used as evidence to establish the validity or invalidity of a claim. Furthermore, finding a violation where the parties have settled the claim would discourage settlements, particularly in situations like this one where the state court had found that the claim presented a genuine issue of material fact.

We next address the General Counsel's alternative contention that as the state court has been precluded from deciding the merits of the libel claim, we should now do so. Contrary to the position of the Respondent, we find nothing in the Supreme Court opinion that precludes us from deciding the

[10] In determining whether the filing of the Respondent's lawsuit was an unfair labor practice, we find it necessary to analyze the two claims contained in that suit separately. This approach is suggested in the Supreme Court's opinion, when, after noting that the state court had denied the defendants' motion for summary judgment on the libel claim, the Court indicated with respect to the business interference claims that "if [they] have been finally adjudicated to be lacking in merit, on remand the Board may reinstate its finding that [the Respondent] acted unlawfully by prosecuting these unmeritorious claims." 461 U.S. at 750 fn. 15. The libel claim was still pending in state court when the Court issued its opinion, thus indicating that the Board might arrive at a different conclusion with respect to its reasonable basis and ultimately its merits.

[11] The Respondent's manager also asked for and recorded the names of the picketers who were present, and these individuals were among those named as defendants in the state court suit.

[12] We find that the Respondent did not waive consideration of the state court's denial of summary judgment on this claim by failing to bring the state court's ruling to the attention of the administrative law judge prior to his decision. See 461 U.S. at 749 fn. 15.

merits of this claim in order to resolve the unfair labor practice allegation.[13] Nor does the parties' settlement agreement, which settled only the state suit, preclude us from determining the state suit's merits solely for the purpose of resolving the unfair labor practice case.[14] Nonetheless, we decline the General Counsel's invitation to enter that thicket. Our expertise lies in resolving labor law questions that arise under the Act, rather than deciding claims that arise under state law.[15] Moreover, our limited resources do not permit us to engage in the resolution of state law claims.[16]

Because we decline to act as state court triers of fact and because the General Counsel has not otherwise shown, as required by the Supreme Court's decision, that the Respondent's libel claim lacked merit or was withdrawn, we conclude that no violation of Section 8(a)(4) and (1) of the Act has been proven.[17] Accordingly, we will dismiss the complaint insofar as it applies to the filing and prosecution of the libel claim.

[13] The Court found that the judge had erred by determining that the libel claim lacked merit instead of deciding whether the claim presented a genuine issue that the state court should decide. It further found that the Board must stay its unfair labor practice proceeding until the state court action had concluded. The opinion, however, does not say that the Board should refrain from deciding the merits of the claim when, as here, the state court action has concluded and the state court has not rendered a judgment on the merits of the claim. Our determination of the merits would have no legal effect on the state forum, of course, and would be undertaken solely for the purpose of resolving the unfair labor practice allegation.

[14] By the same token, we find nothing in the Court's opinion that requires us to decide the state court suit in the event that the parties settle the suit. The Court did find that when the state court initially decides that the employer's suit presents triable issues but ultimately determines that the suit lacks merit, the Board can proceed to adjudicate the unfair labor practice. We do not agree with our colleague's assertion in the second paragraph of fn. 2 of his dissent that this finding means that the Board can disregard the trial court's interlocutory determination and substitute its judgment on the suit's merits. Rather, that finding simply reflects the Court's conclusion that the Board is bound by the state court's ultimate determination of the suit's merits. In the same way, the Court clearly held that the Board is bound by the state court's determination that the suit has merit because the Board must then dismiss the unfair labor practice complaint even if the suit was filed with a retaliatory intent. 461 U.S. at 747. In sum, we do not believe that the Court indicated anywhere in its decision that the Board should decide the merits of the employer's lawsuit filed in the state court.

[15] In this regard, we note the distinction that exists between a reasonable-basis determination, which the Court specifically authorized us to undertake, and a determination of the merits of a state claim. The former involves the limited inquiry of whether a genuine issue exists, whereas the latter requires the Board to conduct a trial on the merits under the legal standards and procedures that the state court would apply.

[16] Although "willing to entertain the possibility that the Board might someday be presented with a case so fraught with complex state law issues [that the Board] should decline to give relief," our dissenting colleague states that the determination of this libel claim is not beyond our expertise because it is a state claim governed by a Federal standard. He then concludes that we should therefore decide the merits of the libel claim by relying on the findings of the administrative law judge, which were adopted by the Board and enforced by the Federal circuit court. We question the wisdom in doing so. Although we may be able to decide certain state law claims, the fact remains that the Board is not a court of general jurisdiction. We do not decide cases that are pursued through the state court systems. Rather, Congress has delegated power to us to decide cases that arise under the Act. That is where our expertise lies. We also note that our colleague's standard, that the state suit be "so fraught with complex state law issues" before the Board would not decide it, provides insufficient guidance to the parties in determining whether the Board will or will not hear such cases. Conversely, our decision not to decide these state law claims provides the parties in future cases with the necessary guidance to aid their resolution of those cases.

[17] In light of our finding that the General Counsel has not shown that the Respondent's libel claim lacked merit or that the Respondent withdrew that claim, we need not decide whether the Respondent filed its libel claim with a retaliatory motive.

VI. REMEDY

Having found that the Respondent's filing and prosecution of the business interference claims violated the Act, we shall order the Respondent to cease and desist from engaging in such conduct. In accordance with the Supreme Court's decision, we shall order the Respondent to reimburse the employees for all attorneys' fees and other expenses that they incurred in defending against the wrongful business interference suit. Those expenses were incurred solely because the Respondent instituted its lawsuit, an action that we have found violated the National Labor Relations Act. In order to vindicate our interest in enforcing the Act, we have the statutory authority pursuant to Section 10(c) to authorize such relief. That authority does not exist, however, with respect to the counterclaims filed by the employees. In filing those counterclaims, the employees sought to avail themselves of those remedies that the State has provided to compensate the injuries suffered as a result of abusive process and libel. The issue of whether to award legal expenses associated with those counterclaims is therefore solely one for the state forum to decide in enforcing the laws of its State. No Federal interest is implicated. Consequently, we deny the General Counsel's request to order the Respondent to reimburse the employees for those expenses incurred in filing their counterclaims.

ORDER

The National Labor Relations Board orders that the Respondent, Bill Johnson's Restaurants, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Filing or maintaining a baseless lawsuit against employees in retaliation for their engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) In the manner set forth in the remedy portion of the Supplemental Decision, reimburse the Charging Party, Myrland R. Helton, and all other named party defendants, for legal expenses up to a maximum of $8000 incurred in defense of the business interference claim of its lawsuit styled as *Bill Johnson's Restaurants v. Myrland R. Helton*, No. C-375470, in the Superior Court of the State of Arizona, in and for the county of Maricopa.

(b) Post at each of its restaurants located in Phoenix and Mesa, Arizona, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN STEPHENS, concurring and dissenting in part.

When, as a consequence of employees exercising their rights under Section 7, their employer files a suit in state court against them, the Board may enjoin the prosecution of that suit only on a two-fold finding that (1) the employer is acting out of retaliatory motives, and (2) there is no reasonable basis in fact or law for the suit. This is the holding of the Supreme Court's opinion which remanded the instant proceeding back to us for further consideration. At that time, the Respondent's suit was still pending in an Arizona superior court. Although the Respondent's business interference claim against its employees had been dismissed on a motion for summary judgment, its libel claim, as well as the employees' counterclaim for libel, was awaiting trial, the state court having denied the parties' cross-motions for summary judgment.

Events, however, soon overcame the case. Within the month following the Supreme Court's May 1983 decision, the parties executed a settlement agreement that provided for dismissal with prejudice of the entire state proceeding and for the payment of up to $8000 by the Respondent to the employees to compensate for attorney's fees and court costs. Interestingly, the settlement did not attempt to dispose of the Board proceeding. Thus, as of this juncture, the question before the Board is no longer whether we should enjoin a pending state court suit, but whether the Board can order remedial relief against the Respondent for a retaliatory suit which was terminated, not by a final adjudication by a state court, but rather by a settlement.

I agree with my colleagues that the record indisputably supports a finding of retaliatory motive by the Respondent in filing suit on the business interference count, and I further find such a motive in its filing of the libel claim. I also join my colleagues in concluding that the business interference claim, which did not survive a motion for summary judgment, was baseless and was therefore an unfair labor practice which we should remedy. However, I part company with the majority's conclusion that we should refrain from considering whether the libel claim lacks merit. The Board should address the question and on finding that the state claim was groundless and filed for retaliatory motives, an appropriate remedy should be ordered. Furthermore, while I concur with my colleagues on the effect to be given to the settlement agreement, I believe some elaboration is warranted.

As my colleagues properly concede, there is nothing in the Supreme Court's opinion that precludes us from considering the libel issue. Indeed, the Court held that the Board could "proceed to adjudicate" the unfair labor practice issues if "judgment goes against the employer in the state court . . . or if his suit is withdrawn *or is otherwise shown to be without merit*." *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983) (emphasis added). They stay their hand, however, because of the fear that we would be entering a "thicket" of state law claims. I am willing to entertain the possibility that the Board might someday be presented with a case so fraught with complex state law issues we should decline to give relief even though the possibility exists that the respondent's lawsuit is both baseless and unlawfully motivated. But that is surely not this case, and I cannot conclude that we should decline to consider the issue here simply because we can speculate that other very different cases might arise in the future.

Although the libel claim at issue here is a claim under state law, it is one that—as a substantive matter—is governed by Federal standards rooted in a Federal labor policy that has been defined in part by Board decisions. Thus, in *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), the Supreme Court held that the National Labor Relations Act did not completely preempt state court libel actions arising out of labor disputes; but the Court set out a Fed-

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

eral standard for determining whether a particular libel could be found to be actionable in such cases. This standard—a requirement that the statements in question be found to have been made with actual malice in the sense that they were "published with knowledge of their falsity or with reckless disregard of whether they were true or false"—was based on the Court's earlier first amendment decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and on the standards that the Board has applied in determining whether alleged defamations constitute conduct unprotected by the Act. *Linn*, supra, 383 U.S. at 61, 65.[1] A state court that substitutes state common law principles for that standard and permits a state law remedy for speech that would be protected under Federal law is properly reversed. *Letter Carriers v. Austin*, 418 U.S. 264, 281–287 (1974). Thus, I cannot see any basis for concluding that the determination whether the Respondent's libel claim has merit is beyond our "expertise," as my colleagues suggest.

In fact, because the administrative law judge lacked the guidance subsequently provided by the Supreme Court in this case concerning *when* the Board may consider the merits of a retaliatory state court suit, the judge has already effectively decided the merits of the libel claim. He found that the allegations that the Respondent claimed were libelous were, in fact, true. 249 NLRB at 162–163.[2] Affirming the decision that the prosecution of the libel claim was an unfair labor practice, the court of appeals held that, although there was some ambiguity in the picketing waitresses' leaflet concerning whether all their listed grievances against the Respondent had been made the subject of Board charges, there was no evidence at all to show that "the picketers made the statements with reckless disregard for the truth or falsity of the statements." 660 F.2d at 1343. It further held that the Respondent's suit lacked any "reasonable basis in fact." Ibid.

It is clear to me, therefore, that although there is no state court adjudication either for or against the Respondent, and although the Respondent settled, rather than withdrew, its libel claim, that claim is one that has been "otherwise shown to be without merit." *Bill Johnson's*, supra, 461 U.S. at 747. The General Counsel has therefore met the requirements approved by the Court for finding that the filing and prosecution of a lawsuit is an unfair labor practice: it was brought for a motive unlawful under the Act and it is lacking in merit. I would find the violation and provide the appropriate remedy, i.e., reimbursement for the costs of defending against the claim.

On the separate issue of what effect to give to the parties' settlement, I agree with my colleagues in striking a middle ground that rejects both the General Counsel's and the Respondent's respective contentions, but I would make some additional observations. First, to hold, as the General Counsel asserts, that a settlement is tantamount to an admission of nonmerit (particularly on the heels of a judicial finding that material issues of fact or law exist) would, as the majority reasons, tend to discourage the resort to settlements as a means to resolve disputes. However, I would suggest that the rule we announce today, which rejects the Respondent's argument that the settlement of the state suit should automatically be given preclusive effect regarding the Board proceeding, does create a certain disincentive to settlement. A Board respondent may well ask itself what advantages there are to settle its state claims short of final adjudication if it must face further litigation of the matter before the Board. Perhaps the way around this problem is to pursue a strategy which the Respondent here curiously did not follow: attempt to resolve both the state court litigation and the Board proceeding in one fell swoop, taking into account the standards which the Board applies in approving settlements.[3]

Consideration of the state and Federal claims together, for settlement purposes, not only recognizes

[1] The Court has since clarified *Linn* by explaining that it was "grounded in federal labor policy, though the suit had constitutional overtones." *Babbitt v. Farm Workers*, 442 U.S. 289, 309 fn. 16 (1979).

[2] It is true that the Supreme Court declared that here "[i]t was not the ALJ's province to make . . . factual determinations" regarding the meritoriousness of the libel claim as well as the one for business interference. See part V of the Court's opinion, 461 U.S. at 748. But, contrary to the Respondent, I do not read the Court's restriction on the scope of the Board's factual inquiry in deciding whether to enjoin a pending state suit (i.e., limited to whether the employer's evidence raises a genuine and material issue of fact) to be applicable once the suit is settled.

Similarly, while the Court also suggested that the decision of a state court on the question whether a lawsuit presents triable factual issues is entitled to deference, 461 U.S. at 749 fn. 15, I do not believe that the Arizona superior court's finding of triable issues on the libel claim at the summary judgment stage precludes the Board from finding that the suit lacks merit. Again, the reason turns on the status of the state litigation at the time the Board proceeds with the unfair labor practice case: When the Board seeks to enjoin a pending state suit, the trial court's finding of a triable issue should normally lead the Board to suspend its own proceedings, as the Court said. However, once the state action is concluded either by a final judgment or withdrawal of the suit, the General Counsel may then consider whether to continue prosecution of the Board case. As the Court itself stated, "If judgment goes against the employer in the state court . . . the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and § 8(a)(4) unfair labor practice case." 461 U.S. at 747. It is entirely conceivable that the employer may have initially withstood a defense motion for summary judgment by establishing existence of triable facts, only to have final judgment entered against the employer. The fact that the Court would still allow the Board to proceed against the employer in such a case must logically mean that the Board can at some point disregard a trial court's interlocutory determination that the suit may have merit and make its own determination of the merits of the employer's state suit.

[3] See, e.g., *Independent Stave Co.*, 287 NLRB 740 (1987).

the State's interest in resolving private disputes short of full-blown litigation, but also protects the important and distinct interest that the Federal Government has in enforcing its labor laws. It is, of course, arguable that the Board's action against the Respondent is similar to the common law action for malicious prosecution available under state law.[4] The general rule applied in such actions is that a settlement of the underlying suit will automatically bar the malicious prosecution action.[5] The theory is that, in settling the initial suit, the plaintiff in the malicious prosecution case is presumed to concede the existence of probable cause for the former action and therefore is not entitled to prevail on his or her action. Whatever the validity of that rule in the state law context (and however the Board action may resemble one for malicious prosecution), it should not be applied in the instant case to foreclose the Board from vindicating the Act's policies against an employer's taking coercive, retaliatory action against its employees for the exercise of their statutory rights. As appears to be borne out by the void in the settlement agreement here, there is no assurance that this Federal interest will be taken into account when the parties agree simply to dismiss the claims and possible counterclaims in the employer's state lawsuit. A defending employee may well be glad simply to see the state suit dismissed, without regard to the Labor Act's policies of deterring such misconduct in the future and of making the aggrieved employee whole for his or her losses. Thus, the result that we reach in this case today with respect to the settlement issue, does not represent a retreat from the Board's strong policy favoring settlements. I would view it as simply insisting that all the appropriate interests be consciously considered in compromising the claims.

[4] See *Bill Johnson's Restaurants*, supra, 461 U.S. at 747 fn. 14, noting that "[t]he Board's power to take such action [against retaliatory lawsuits] is not limited by the availability to injured employees of a state-court malicious prosecution or other action."

[5] See cases cited in 52 Am.Jur.2d, *Malicious Prosecution*, § 43 at 211–212 (1970).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT file or maintain baseless lawsuits against employees in retaliation for their engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse Myrland R. Helton, and all other named party defendants, for legal expenses up to a maximum of $8000 incurred in defense of the business interference claim of our lawsuit styled as *Bill Johnson's Restaurants v. Myrland R. Helton*, No. C-375470, in the Superior Court of the State of Arizona, in and for the county of Maricopa.

BILL JOHNSON'S RESTAURANTS, INC.

Northern Illinois Terrazzo & Tile Company *and* Tile, Marble, Terrazzo Finishers, Shopworkers & Granite Cutters International Union, Local No. 47, AFL–CIO. Case 30–CA–9578

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On January 20, 1988, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified,[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Northern Illinois Terrazzo & Tile Company, Rockford, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent excepted, inter alia, to the judge's finding that the Union's March 20, 1984 letter to the Respondent was unambiguous. In adopting the judge's finding that the letter did not operate as a notice to terminate the area 1 agreement, we find that the letter in itself may have been ambiguous but that any ambiguity was easily clarified by reference to the area 1 agreement in the Respondent's possession.

The Respondent also excepted to the judge's finding that the Union's June 14, 1984 letter to the Respondent did not prevent the area 1 agreement from rolling over on May 31, 1985, because it was untimely. We agree with the judge that this letter did not prevent the agreement from rolling over on May 31, 1985. In doing so, however, we find that the language of the letter, which simply refers to current changes in wages and benefits pursuant to the new association agreement, cannot be construed as a notice to terminate or as a request to modify the rolled-over contract as of a date almost 1 year later.

We, therefore, agree with the judge that the cases cited by the Respondent, *Champaign County Contractors Assn.*, 210 NLRB 467 (1974), and *Oakland Press Co.*, 229 NLRB 476 (1977), are inapposite, although not for the same reason. Thus, regardless of the timeliness of the Union's letter, in those cases unlike here, the language of the documents could be construed as expressing an effective notice to terminate an existing contract.

Chairman Stephens notes that the Respondent has implicitly conceded that, if its argument based on the March 1984 letter is rejected, then it would be bound by the area 1 agreement at least until May 31, 1985.

Paul Bosanac, Esq., for the General Counsel.
Greg A. Cheney, Esq., of Rockford, Illinois, for the Respondent.
James Judziewicz, of Milwaukee, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was heard in Milwaukee, Wisconsin, on October 26, 1987, based on an unfair labor practice charge filed by Tile, Marble, Terrazzo Finishers, Shopworkers & Granite Cutters International Union, Local No. 47, AFL–CIO (Local 47 or the Union), on April 24, 1987, and a complaint issued by the Regional Director for Region 30 of the National Labor Relations Board (the Board) on June 17, 1987. The complaint alleges that Northern Illinois Terrazzo & Tile Company (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by refusing to furnish the Union with information necessary and relevant to collective bargaining. Respondent's timely filed answer denies the commision of any unfair labor practices.

All parties were afforded full opportunity to examine and cross-examine witnesses, argue orally, and submit briefs. Briefs, which have been carefully considered, were submitted by the General Counsel and the Respondent.

Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is a corporation with an office and place of business in Rockford, Illinois, where it is engaged as a construction industry employer in the business of hard tile contracting. Jurisdiction is not in issue. The complaint alleges, Respondent admits, and I find and conclude that Respondent is, and has been at all times material, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICE

A. *The Union and its Jurisdiction*

The Union, with about 100 active members, represents employees who perform tile, hard tile, marble, and terrazzo work, assisting tile layers, terrazzo mechanics, and marble masons in the State of Wisconsin. James Judziewicz is its business representative, president, secretary, and treasurer.

For collective-bargaining purposes, the Union has divided Wisconsin into two areas. Area 1 includes all the State except the counties in the southeast corner. Within area 1, the Union bargains with the Madison Area Ceramic Tile Contractors Association for a contract that covers hard tile, terrazzo, and marble work. In 1984, that Association had seven to nine members; it now has five

to seven. About 30 independents, employers who are not members of the Association, also sign the area agreement.

Area 2 encompasses the southeastern portion of the State, encompassing Milwaukee, Sheboygan, Racine, Kenosha, and adjacent counties. Within area 2, the Union negotiates with the six-member Milwaukee Contractors Association for three separate agreements covering hard tile, ceramic tile, and terrazzo. Twenty to twenty-five independent employers also sign the area 2 agreements.

At issue is whether Respondent was party to the area 1 contract after its May 31, 1984 expiration date.[1]

B. *Respondent's Relations with the Union*

As noted, Respondent is a ceramic tile, terrazzo, and marble contractor with its business located in Rockford, Illinois. It has a work force of 15 to 20 employees, only 1 or 2 of whom may be working in Wisconsin, within the jurisdiction of Local 47, at any given time. In the course of its business, it contracts to provide either materials or labor, or both. Its president is Louis D'Agnolo.

In 1981, Judziewicz learned that Respondent was performing hard tile work on a Beloit, Wisconsin shopping center within area 2. On January 24, 1981, he requested that Respondent sign the area 2 agreement, enclosing a copy of that contract, a map of the Union's jurisdiction, the wage scales, and remittance forms. The contract was returned signed by D'Agnolo on Feburary 2, 1981. That contract had a term of June 1, 1980, through June 1, 1982, but provided, in article XIX, that it would continue "*from year to year thereafter, unless terminated by written notice (by certified mail) given by either party to the other not less that ninety (90) days prior to said expiration date, or any anniversary thereof.*" (Jt. Exh. 1; G.C. Exh. 2.)

Similarly, on September 29, 1981, having noted that Respondent was performing work within area 1 at the University of Wisconsin, in Platteville, Judziewicz asked Respondent to sign the 1981–1984 area 1 contract. Respondent signed and returned that agreement on November 8, 1982. The area 1 contract had a May 31, 1984 expiration date and, in article XV, included the same continuation language as the area 2 agreement. (G.C. Exh. 4.)

On January 24, 1984, D'Agnolo signed the 1982–1984 Terrazzo Helpers' agreement for area 2. Although the contract contained, in article XXIV, the same continuation language as the 1980–1982 Tile Helpers' agreement, D'Agnolo specified in writing on the signature page that Respondent was only bound through the June 30, 1984 expiration date. (G.C. Exh. 5.)

C. *1984 Negotiations and Renewals*

On March 20, 1984, the Union sent notices of contract termination to various contractors, including Respondent. Although that notice did not specify by area the contract to which it pertained, it expressly referred to the 1982–1984 contract that expired on June 30, 1984, which set forth its termination language in article XXIV. Comparison of that letter with the various contracts establishes that it could only have been referring to the area 2 Terrazzo Helpers' agreement, referred to above. (R. Exh. 1; G.C. Exh. 5.)

Sometime in 1984, the Union also sent timely notices of contract termination to the employer associations in areas 1 and 2; other than the March 20, 1984 letter referred to above, no such notices were sent to the independent employers in either area. Sometime prior to June 8, 1984, agreement was reached with the Madison Area Tile Contractors (area 1) and, on June 8, notice of that agreement and its improved benefits was sent to the independent contractors who had signed the prior agreement, including Respondent. (G.C. Exh. 10.) Similarly, the Union and the Milwaukee Contractors Association reached agreements covering the ceramic, hard tile, and terrazzo work in area 2.

On June 14, 1984, the Union sent a letter to Respondent and other independents, requesting that they sign and return offer sheets for both the area 1 and area 2 agreements that had been reached with the employer associations. (G.C. Exhs. 7a–d.) Either shortly before or soon after he received that letter, D'Agnolo had an early morning telephone conversation with Judziewicz. In that conversation, D'Agnolo stated that he would sign the area 2 contract, but would discuss a contract in area 1 at such time as he had work within that area. He told Judziewiez that he would not sign an area 1 agreement at that time because he often found himself competing at a disadvantage with nonsignatory contractors when he was working in area 1. D'Agnolo signed the offer sheet and contract for the Tile Helpers in area 2, but did not sign either an offer sheet or a contract with the Union for area 1.[2]

On November 29, 1984, Judziewicz sent Respondent a letter listing the hourly wage and benefits rates applicable to the area 1 contract "*effective December 1, 1984 through May 31, 1985 as per the current 1984–1987 Working Agreement.*" He sent Respondent a similar letter setting forth the area 1 wages and benefits for the period of June 1, 1985, through May 31, 1986, on May 24, 1985. There is no indication in this record that Respondent replied to these letters or implemented any of the changes.

D. *The Requests for Information*

About March 1986, Judziewicz learned that Respondent was working on a project near Stevens Point, Wisconsin, within area 1. He called D'Agnolo and was told that Respondent was only supplying materials. In that conversation, as Judziewicz recalled it,[3] D'Agnolo

[1] The complaint alleged refusals to furnish information with respect to work performed in both areas 1 and 2. The parties reached a stipulation with respect to area 2 and that is no longer at issue.

[2] Judziewicz did not recall any such conversation, but he did not expressly deny that it had occurred. Noting that Judziewicz referred to a telephone conversation of the prior week in his June 14 letter, and noting further that he admitted that his coverage of the entire State of Wisconsin spread him very thin, I must conclude that D'Agnolo's recollection is more accurate than that of Judziewicz.

[3] D'Agnolo disputed the existence of this phone conversation, but it is consistent with the correspondence that followed.

denied that Respondent had a contract with the Union in area 1. Judziewicz suggested that he check his files.

On March 7, 1986, Judziewicz wrote Respondent, advising that the Union considered Respondent bound to the terms of the area 1 working agreement and expected Respondent to comply with its terms. The Union offered to provide Respondent with the names of contractors who were signatory to that agreement with whom it could subcontract for labor. On March 11, Respondent's attorney, Greg Cheney, replied, again denying the existence of any contractual relationship and suggesting that the Union take its contentions to the AFL–CIO Jurisdictional Disputes board. On March 13, Judziewicz sent Cheney a copy of article XV of the area 1 agreement, the "roll-over" clause. On March 21, Cheney replied to the Union's lawyer, Matthew Robbins, asserting that Judziewicz's letter of March 20, 1984, had ever been reached. (G.C. Exhs. 11(a)–(d).)

On March 26, 1986, Robbins wrote Cheney, asserting that the March 20, 1984 letter only pertained to the area 2 contract; the 1981–1984 area 1 agreement, he wrote, was never terminated and continued in effect from year to year. He demanded compliance with the terms of that agreement. On April 4, 1986, Cheney demanded documentation to support the Union's claim. (G.C. Exhs. 11(e)–(f).)

On May 28, 1986, the Union filed a grievance alleging that Respondent had violated the subcontracting provisions of the area 1 agreement. On the same date, it also wrote Respondent, asserting that its belief that Respondent had violated the agreement derived from Respondent's "conduct of subletting work covered by our agreement to a non-signatory contractor." Further asserting a need based on its collective-bargaining responsibilities, the Union demanded the following information for the period of June 1, 1984, to the present:

> Payroll records, tax forms, and travel expense information; time cards for all employees; history of subcontracting; all contracts with others to perform hard or composition tile work; records pertaining to the purchase of materials to fulfill committments to customers; and billings and receipts for contracted work. [G.C. Exhs. 11(g)–(h).]

On June 25, 1986, Cheney supplied the Union with copies of the subcontracting agreement between Sjostorm & Sons, Inc., the general contractor on the Stevens Point project, and Wausau Tile, Sjostorm's subcontractor for the furnishing and installation of ceramic and 5-percent guarry tile. Also provided was the agreement between Respondent and Wausau Tile in which Respondent contracted to share profits or losses on that job and to provide materials. That contract stated:

> It is the intent that all labor be furnished through WAUSAU, but if for some reason the progress schedule cannot be met, it is hereby agreed that both parties will do whatever is necessary to properly man the job. [G.C. Exh. 11(i).]

On March 5, 1987, the Union again demand to meet with respect to its grievance and repeated its demand for information. In the letter (G.C. Exh. 12), the Union asserted that its belief that Respondent had violated both the area 1 and area 2 agreements emanated from work done by Respondent on Beloit College and the Rock County Correctional Institution. At hearing, the Union also asserted that other contract violations by Respondent, at least one of which had been the subject of a grievance settled favorably to the Union, gave it cause to believe that Respondent was violating its contractual obligations.

Respondent did not provide the Union with the requested information.

E. *Analysis and Conclusions*

1. The continuation of a collective-bargaining relationship in area 1

In *John Deklewa & Sons*, 282 NLRB 1375, 1377–1378 (1987), the Board overruled earlier precedent governing 8(f) cases[4] and held:

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) . . . and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

See also *W. B. Skinner, Inc.*, 283 NLRB 989 (1987), in which the Board, finding no repudiation of an 8(f) agreement, found Section 8(a)(5) violated by the employer's refusal to furnish requested information.

Respondent, by virtue of a prehire agreement, was party to the 1981 through May 31, 1984 area 1 agreement with the Union. That contract provided that it would contiue in force and effect after May 31, 1984, unless written notice was given by either at least 90 days in advance of the termination date. The first question to be resolved here is whether that relationship did, in fact, continue after May 31, 1984. The General Counsel asserting that neither party gave timely notice to the other of an intent to terminate or modify that agreement, argues that it did. Respondent contends that the Union terminated the agreement as of either May 31, 1984, or May 31, 1985. The record compels me to agree with the General Counsel.

Respondent's first contention is that the Union's letter of March 20, 1984, was ambiguous and was reasonably construed by D'Agnolo as terminating the area 1 and area 2 agreements. This construction it without merit. That letter, although not expressly specifying by area the agreement to which it applied, twice refers to the 1982–1984 agreement in the singular and identifies it by its 2-year term, its expiration date, June 30, 1984, and its duration of agreement article within that contract, which provides for termination or automatic renewal, article XXIV. Only the area 2 Terrazzo Helpers' agreement bears those identifying characterisfics. The area 1 agree-

[4] *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973).

ment had a 3-year term, June 1, 1981, through May 31, 1984, and only 15 articles; the duration of agreement article was article XV. I find no ambiquity in the March 20 letter, which might have lead D'Agnolo to act to his detriment in reliance on his interpretation of it. At most, there was a unilateral mistake as to the intent of this letter caused by D'Agnolo's failure to read it properly and to compare it with the contracts in his files. Such a unilateral mistake cannot support abrogation of the collective-bargaining relationship.[5]

Respondent also contends that the Union's actions, in sending Respondent the offer sheets for area 1 and area 2 on June 14, 1984, establish that Judziewicz also believed that the prior area 1 agreement between Respondent and the Union had been timely terminated. I cannot agree. Judziewicz explained that he regularly let the agreements with the independent contractors "roll over" and then subsequently sought their voluntary consent to the terms of the new agreements that had been negotiated with the Associations because he did not have the time to negotiate with each of them. He preferred the certainty of the continuation of the old agreements to the possible loss of the Employers as a signatory contractor. Considering the nature of the industry and the number of small contractors involved, such an explanation does not appear contrived or implausible.

Further, Respondent asserts that if the 1981–1984 contract rolled over, the Union's June 14, 1984 letter constituted a request to modify that rolled-over agreement and thus prevented it from again rolling over or renewing on its next anniversary date, May 31, 1985. This contention, while interesting, is without merit. In *Connecticut Power Co.*, 217 NLRB 766 (1984), the Board held that a party incurs no bargaining obligation when it proposes a midterm modification of a contract, which contains no reopener language. The other party may accept or reject the proposed modification, but may not compel the proposing party to bargain over it or any other matter. Here, Respondent was free to reject the Union's proposal, but was not free to treat it as terminating the agreement or opening that agreement for further negotiations.[6]

The Union's rejected request that Respondent execute a new offer sheet on June 14, 1984, did not prevent the 1981–1984 agreement from rolling over again on My 31, 1985, when neither party served a timely notice of termination.

Finally, Respondent claims that D'Agnolo's statements to Judziewicz around June 14, 1984, constituted a repudiation of the area 1 agreement as of either May 31, 1984, or May 31, 1985, under the *Deklewa* principles. *Deklewa* holds that either party may repudiate an 8(f) agreement on its expiration. D'Agnolo told Judziewicz that he would discuss future contracts when he again had work in area 1. That statements is hardly a repudiation of their existing agreement. Moreover, it came during the term of the rolled-over agreement, and not on its expiration, and was hot the written notice required by the contract.

Accordingly, I conclude that Respondent and the Union had a continuous, unrepudiated collective-bargaining relationship and collective-bargaining agreement in area 1 after May 31, 1984, and through at least May 28, 1986, when the Union made its request for information.

2. The request for information

On May 28, 1986, the Union requested information from Respondent that would show whether Respondent had performed, or was performing, work within area 1, and whether Respondent had met, or was meeting, its contractual obligations to the Union with respect to such work. The Union's request was based on information it had received that indicated Respondent was, in fact, performing such work and on prior instances where Respondent had worked within the Union's jurisdiction without notifying the Union that it was doing so.

The General Counsel contends, and Respondent does not appear to dispute, that the Union is entitled to receive the requested information.[7] I agree. In *W. B. Skinner*, supra, 293 NLRB at 990, a case involving an unrepudiated 8(f) contract, the Board held that a union that suspected the employer was not fulfilling its contractual obligations was entitled to information necessary to police that agreement. The Board stated:

> It is well settled that a labor organization, in its capacity as a collective-bargaining representative, is entitled, on appropriate request, to information from the employer that is needed for the proper perfromance of its duty to police compliance with a collective-bargainiong agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Certain data, such as wage and related information pertaining to employees in the bargaining unit, is presumptively relevant because such data "concerns the core of the employer-employee relationship." *Curtiss-Wright Corp v. NLRB*, 347 F.2d 61 (3d Cir. 1965). In addition, if requested information relates to an existing contract provision, it thus is "information that is demonstrably necessary" to the union "if it is to perform its duty to enforce the agreement." *A. S. Abell Co.*, 230 NLRB 1112–1113 (1977).

The information requested by the Union pertains to article II, union security; article III, hours of work; article IV, wages (including travel and overnight expenses); and article XI, general and miscellaneous provisions (includ-

[5] I note that when D'Agnolo spoke with Judziewicz about the offer sheets for both areas, which Judziewicz had sent to D'Agnolo about June 14, 1984, D'Agnolo did not contend that the Union had terminated the area 1 contract or the collective-bargaining relationship. According to his own testimony, which I credited, D'Agnolo merely stated that he would discuss future contracts with Judziewicz at such time as he had work within area 1. This tends to establish that D'Agnolo was not relying on the March 20 letter at that time.

[6] The cases cited by Respondent are inapposite. In *Champaign County Contractors Assn.*, 210 NLRB 467 (1974), the union *timely* furnished the employer with a copy of the Federal Mediation and Conciliation Service notice of contract termination and this was deemed adequate notice of termination. In *Oakland Press Co.*, 229 NLRB 476 (1977), the Board found a *timely* notice to amend a contract to constitute a termination notice, thus satisfying the contract's termination clause. In neither case had there been an untimely proposal to modify an agreement.

[7] Respondent's only arguments went to the continued existence of the collective-bargaining relationship.

ing hiring and subcontracting restrictions) of the rolled-over agreement.' It is thus information that is both presumptively relevant and necessary to the Union's policing of that agreement.

Based on all the foregoing, I find and conclude that the Union was entitled to the information requested in its May 28, 1986, and March 5, 1987 letters and that Respondent's refusal to furnish that information violated its obligation to bargain with the Union in good faith, in violation of Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. By refusing, during the extended term of its 1981–1984 area 1 agreement with the Union, to supply the Union with relevant information that was related to the wages and other benefits of unit employees and necessary to the Union's duty to enforce compliance with its agreement, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

2. The unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in an unfair labor practice, I shall recommend that it be ordered to cease and desist thereform and take certain affirmative action necessary to effectuate the policies of the Act. I shall recommend that Respondent be required to provide the Union with the information requested in the Union's letters of May 28, 1986, and March 5, 1987. Inasmuch as compliance with this recommended Order appears to be neither difficult nor complex, I decline to recommend the inclusion of a visitatorial clause in the recommended Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Northern Illinois Terrazzo & Tile Company, Stevens Point, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing, during the term of a collective-bargaining agreement with Tile, Marble, Terrazzo Finishers, Shopworkers & Granite Cutters International Union, Local No. 47, AFL–CIO, to supply the Union, on request, with relevant information related to the wages and benefits of the employees and necessary for the Union to properly administer the collective-bargaining agreement.

(b) *In any like or related manner* interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish the Union with the information sought in its letters of May 28, 1986, and March 5, 1987.

(b) Post at its Rockford, Illinois office and worksites within area 1 of the State of Wisconsin copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELAITONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse, during the term of a collective-bargaining agreement with Tile, Marble, Terrazzo Finishers, Shopworkers & Granite Cutters International Union, Local 47, AFL–CIO to supply the Union, on request, with relevant information concerning wages and benefits paid to unit employees and other relevant information that is necessary for the Union to administer the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the Union with the information sought by it in its letters of May 28, 1986, and March 5, 1987.

NORTHERN ILLINOIS TERRAZZO & TILE COMPANY

Bowie Hall Trucking Inc. *and* Chauffeurs, Teamsters, & Helpers Local No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO,[1] Petitioner. Case 11–RC–5454

July 29, 1988

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On October 6, 1987, the Regional Director for Region 11 issued a Decision and Direction of Election in the above-entitled proceeding in which he found appropriate for collective bargaining a systemwide unit of drivers and mechanics that is broader than the Petitioner's requested single-facility unit.[2] The Regional Director therefore directed an election among the drivers and mechanics at the Employer's terminals in LaPlata, Maryland; Toano, Virginia; and Eden, North Carolina.[3]

In accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision. The Petitioner contended that a unit limited to the Eden terminal is appropriate based on the existence of local autonomy, the absence of substantial interchange, and the geographic distance between the terminals. The Employer filed a statement in opposition to the Petitioner's request for review. The Board granted the request for review by telegraphic order dated November 27, 1987.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case and has decided to reverse the Regional Director's finding that only a systemwide unit is appropriate.

The Employer is a Maryland corporation engaged primarily in the interstate and intrastate transportation and distribution of beverages. From its terminals in LaPlata, Eden, and Toano, the Employer operates approximately 51 trucks. The LaPlata terminal, which also is the Employer's corporate headquarters, opened in 1974 and has 66 employees. The Eden terminal, which is near the Miller Brewery, opened in June 1987 and has 14 employees. The Toano terminal, which is near the Anheuser-Busch Brewery, opened in July 1987 and has 23 employees.[4] The LaPlata terminal is about 250 miles from the Eden terminal and 115 miles from the Toano terminal. The Eden terminal is about 220 miles from the Toano terminal. All three terminals are located near interstate highways and major transportation arteries. There is no history of collective bargaining at any of the terminals.

The Employer maintains all corporate records, including personnel files, at the LaPlata terminal. In addition, all corporate officers and directors are employed at LaPlata. The president formulates policies, procedures, and benefits that are uniformly administered at all three terminals, and purchases equipment for each terminal. The vice president is responsible for the operation of the Employer's centralized payroll and accounting office at LaPlata. The operations manager implements corporate policies, oversees the Employer's operations, and has final authority over the hiring of drivers and the disciplining of employees other than for safety-related reasons. The Employer's two safety officers implement safety rules, ensure compliance with Federal and local government regulations, administer safety tests to and conduct background checks on new hires, and make final decisions on the disciplining of employees for safety-related matters. The director of maintenance oversees the preventive maintenance of all the Employer's trucks, assigns to mechanics jobs involving major repairs, monitors major repairs, and makes final decisions on the hiring and disciplining of all mechanics.[5] Regarding the Employer's operations, there is a central dispatch system at LaPlata that schedules the movement of drivers and equipment.

The terminal managers of the Eden and Toano terminals oversee the daily paperwork, take fuel readings that are forwarded to LaPlata, and serve as the Employer's liaisons with the Miller and Anheuser-Busch Breweries, respectively. Virgil Chambers, the terminal manager at Eden, conducts the

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Petitioner requested a unit of drivers and mechanics employed by the Employer at its Eden, North Carolina terminal. The unit found appropriate by the Regional Director is as follows:

> All over-the-road and local drivers, driver mechanics, and mechanics employed by the Employer at its LaPlata, Maryland, Toano, Virginia, and Eden, North Carolina locations; but excluding all office clerical employees, casual employees, guards and supervisors as defined in the Act.

[3] No election was held because the Petitioner did not submit an expanded showing of interest. In this regard, the Petitioner contended at the hearing that its showing of interest was limited to the Eden, North Carolina terminal because Virginia and Maryland are outside of its territorial jurisdiction. Citing *John Sundwall & Co.*, 149 NLRB 1022 (1964), the Regional Director found, however, that the Board has consistently refused to predicate an appropriate unit finding upon the scope of a local union's territorial jurisdiction.

[4] Although the terminal facility at Toano is relatively new, the Employer has operated trucks from parking lots in the area since 1975.

[5] There is some specialized equipment at LaPlata for work involving complicated mechanical repairs.

initial screening for Eden's new hires.[6] The terminal managers at both Eden and Toano assign routine work, such as trailer checks, to mechanics; approve overtime; issue oral warnings; and are consulted with respect to major disciplinary decisions that are made by company officials at LaPlata.[7] The Eden terminal is open for operation 24 hours a day, 5 days a week. Chambers works 8 or 9 hours per day and talks with the Employer's president, Jameson, at least once each day.

The Employer hires individuals from the Eden area to work at the Eden terminal, and employees at Toano and LaPlata are hired from their respective areas. Each terminal employs "road drivers" who operate "sleeper equipment" and are on the road for a week at a time, and "local drivers" who work regular hours and drive only during their shifts. Each terminal also employs driver/-mechanics who operate trucks and perform repairs; the Employer's only "straight mechanics" are at LaPlata. The Employer has uniform job qualifications at all three terminals.[8] A single employee manual/driver handbook is applicable to all employees. Regarding wages, all drivers are paid a flat amount based on the number of loads transported, and all mechanics are paid by the hour based on experience. All employees share uniform benefits, including vacations and holidays.

With respect to job duties, Toano mechanics perform less complicated repairs than do Eden mechanics, who in turn perform more basic repairs than LaPlata mechanics. All employees except for Eden mechanics wear uniforms.[9] Regarding drivers, Toano drivers also load the trucks at the Anheuser-Busch Brewery, while employees of the Miller Brewery load the trucks that are then picked up by Eden drivers. In terms of driver destinations, Jameson testified that due to government regulations that limit daily driving times per driver to 10 hours, local Eden drivers generally drive to either Toano or LaPlata and back, transferring their loads to driver/mechanics at those terminals for delivery to customers. Additional transfers are caused by the fact that Eden drivers make relatively short trips in order to accommodate the particular needs of the Miller Brewery. Further, both local and road drivers stop at other terminals in order to refuel. Regarding the employees' contact with the other terminals, Jameson testified that over 80 percent of the time local or road drivers leaving from the Eden terminal go to or through one of the other terminals. Jameson further estimated that an Eden driver would remain at Toano or LaPlata for about an hour, or long enough to check and drop off the trailer, contact central dispatch, and hook up another trailer for the return trip to Eden. Jameson also testified that 80 percent of the time LaPlata road drivers go through Eden, and that LaPlata local drivers frequently pass through Toano.[10]

The record indicates that two drivers were permanently transferred between LaPlata and Toano at their requests, but that as of the time of the hearing, the Employer had not required any transfers. In addition, although the Employer's equipment is assigned to a specific terminal, equipment has been transferred due to breakdowns and was transferred for the startup of the Eden terminal.

It is well established that, when considering a multifacility operation, a single-facility unit is presumptively appropriate for collective bargaining. This presumption, however, can be rebutted by a showing of functional integration so substantial as to negate the separate identity of the single-facility unit. In making this determination, the Board considers such factors as centralized control over daily operations and labor relations, skills and functions of the employees, general working conditions, bargaining history, employee interchange, and geographical location of the facilities in relation to each other. *Sol's*, 272 NLRB 621 (1984).

In this case, the Regional Director found that the Employer's operations are integrated and that management and labor relations are centrally controlled, with the Eden terminal manager making only routine decisions on day-to-day matters. The Regional Director further found that all employees have similar skills and working conditions. Although acknowledging the lack of current evidence of interchange between the terminals, the Regional Director noted that the three-terminal system is relatively new; there were two transfers between LaPlata and Toano's predecessor location; and on over 80 percent of the runs a driver will stop at one of the other terminals for a vehicle check, to

[6] Applicants for positions at Toano are screened by telephone by an official from LaPlata.

[7] Although the central dispatch office sends particular drivers and trucks to the breweries that the Employer services, the Miller Brewery usually calls the Eden terminal directly if a truck that was left at the brewery is ready to be picked up. The Employer's president, John G. Jameson, testified that in such a case the Eden drivers on duty generally decide among themselves who should pick up the truck. Jameson conceded, however, that the terminal manager would have the authority to assign the work in the event of a dispute among the drivers.

[8] Drivers and driver/mechanics must meet certain government regulations, have 2 years' experience and a clean driving record, and pass a physical. Mechanics are required to have experience.

[9] Jameson attributed the differences in mechanics' responsibilities at the various terminals and the lack of uniforms for the drivers at Eden to the "start-up" nature of the Eden and Toano terminals.

[10] Maynard L. Smith, a driver/mechanic from Eden, testified that he had never driven a load to either the LaPlata or Toano terminals. Smith also testified that he has never had contact with LaPlata and Toano local and road drivers who stop at Eden to inspect their trucks.

refuel, or to drop off a trailer. Relying on these factors and citing *Dayton Transport Corp.*, 270 NLRB 1114 (1984), the Regional Director found the evidence sufficient to rebut the presumption favoring the single-facility unit.[11]

We find, contrary to the Regional Director, that the presumptive appropriateness of the single-facility unit has not been rebutted. In this case there is no bargaining history among the unit employees, and no labor organization seeks to represent the employees on a broader basis. See *United Artists Communications*, 280 NLRB 1056 (1986). Additionally, we find that the Eden terminal manager makes more than routine day-to-day decisions. In this regard, although central management has the final authority with respect to hiring and major disciplinary decisions, the Eden terminal manager conducts the initial screening for new hires and is consulted with respect to major disciplinary decisions. Cf. *Penn Color, Inc.*, 249 NLRB 1117, 1118 (1980).

Most importantly, we also find that there is no evidence here of substantial or significant employee interchange between the three terminals. The Employer's generalized testimony that 80 percent of Eden local or road drivers pass to or through one of the other terminals does not convince us that the drivers here have the same frequency of "interchange" as in *Dayton Transport*.[12] While at the other terminals, the Eden drivers do not, as in *Dayton Transport*, temporarily transfer to jobs at those terminals. They may exchange trailers; they do not interchange work. In this case, two employees were transferred between LaPlata and Toano on their requests. The Board has held, however, that employee interchange made at the convenience of employees is "not entitled to much weight in determining the scope of the appropriate unit."[13] 249 NLRB at 1119 (citing *Renzetti's Market*, 238 NLRB 174 fn. 8 (1978)). Therefore, we find that here there is no substantial evidence of employee transfers, and that there is only generalized testimony about employee contacts.

Finally, although the geographic separation of the terminals is not determinative in view of the nature of the Employer's operation, *Dayton Transport*, above, we find that this factor gains significance when, as here, there are other persuasive factors that support a single-facility unit.

Therefore, relying particularly on the lack of significant employee interchange, the absence of any bargaining history among the unit employees, and the fact that no labor organization seeks to represent the employees on a broader basis,[14] we find that the Petitioner's requested single-facility unit is an appropriate unit.

Accordingly, we shall reverse the Regional Director and direct an election in the following unit, which we have found appropriate:

> All over-the-road and local drivers, driver mechanics, and mechanics employed by the Employer at its Eden, North Carolina, location; but excluding all office clerical employees, casual employees, guards and supervisors as defined in the Act.

[Direction of Election omitted from publication.]

[11] *Dayton Transport* also involved an employer engaged in the transport of commodities. In that case the Board, reversing the Regional Director, found that there was sufficient evidence to overcome the presumptive appropriateness of the requested single-facility unit. Specifically, the Board relied on the employer's centralized management, the similarity of skills and shared community of interest among employees, and the frequency of interchange of drivers on a short-term or temporary basis. Regarding the latter, the Board found that drivers from one terminal would drop loads at the next terminal to be picked up by a driver there, and would thereafter be dispatched on another run from the intermediate terminal. The Board found that such instances of driver "interchange" between the employer's three terminals occurred about 400–425 times in the past year. The Board in *Dayton Transport* also found that the nature of the employer's business rendered the distance between the terminals less critical to a determination of the proper unit scope.

[12] In this regard we note that Smith, the only employee witness, testified that he has never driven a load to an intermediate terminal and has never had contact with the Toano and LaPlata drivers who stop at Eden.

[13] The Employer has filed a motion for leave to adduce additional evidence to prove that since the hearing it has eliminated all local driver positions at the Eden terminal and that there have been several incidents involving the transfer of employees among the three terminals. The Employer submitted Jameson's affidavit with its motion. Jameson stated that the Employer decided to eliminate Eden local driver positions in October 1987. Regarding transfers, Jameson stated that Eden local driver Light was transferred to an Eden road driver position; Eden local drivers Mabe and Carter were terminated on November 9, 1987, after refusing transfers to local driver positions in LaPlata; LaPlata road driver Pace was transferred to a Toano local driver position; and LaPlata road driver Tillet was transferred to a road driver position in Toano.

We deny the Employer's motion. In this regard, even accepting the allegations in Jameson's affidavit as true, such evidence would be insufficient to warrant a different result.

[14] These factors were also significant in *Penn Color*, above, and *NLRB v. Foodland, Inc.*, 744 F.2d 735 (10th Cir. 1984), enfg. 261 NLRB 995 (1982), in which the Board found single-facility units appropriate for collective bargaining.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 469, AFL–CIO (Coastal Tank Lines)[1] ***and*** **Alex Carlucci.** Case 22–CB–5466

July 29, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On October 30, 1986, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief,[2] and the General Counsel filed a brief in support of the judge's decision, an answer to the Respondent's exceptions, and a cross-exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges, and we find, an arbitrary failure of the Respondent to inform employees it represents that it had agreed with their Employer that the employees were not covered by a pension plan. Although we agree with the judge's statement that the Respondent's conduct in secretly exempting the employees from pension coverage and allowing the employees to believe for 10 years that they were covered constitutes "an egregious breach of its fiduciary duty," we do not adopt the remedy provided by the judge.

We find that the unlawful act was a failure to *inform* about pension coverage—not a failure to *provide* that coverage. The authority of the Board to fashion appropriate remedial orders pursuant to Section 10(c) of the Act does not extend to imposition of punitive or penal remedies.[4] In ordering the Respondent to provide pension coverage comparable to that which the employees thought they were being provided, the judge imposes a punitive order. Although punitive damages may be appropriate in some forum in the unique circumstances of this case, the Act does not designate the Board as the appropriate forum.

Based on the Respondent's failure to inform employees regarding their exclusion from pension coverage, we shall order the Respondent to reimburse the effected employees the difference between the actual cost to employees to obtain comparable pension coverage individually had they been informed of the lack of coverage in April 1976 and the cost of obtaining such coverage currently. This remedy is consistent with the Board's 10(c) authority to order a violator of the statute to "take such affirmative action . . . as will effectuate the policies of [the] Act." This remedy is also consistent with Section 10(c)'s "requirement that a proposed remedy be tailored to the unfair labor practice it is intended to redress."[5] Based on the complaint and the issues that were litigated, the Respondent's only obligation was to inform employees of its inability to negotiate pension coverage for them—the General Counsel did not allege failure to provide that coverage itself.

The judge cites *O.K. Machine & Tool Corp.*, 279 NLRB 474 (1986). In that case the Board reversed the judge's remedy requiring the respondent to reimburse employees directly for pension contributions unlawfully withheld. The Board required that these funds be directed to the pension fund rather than to the individual employees. The judge here recognized that *O.K. Machine* does not directly support the award herein, as he only provided a "cf." citation. We fail to see any analogy.

Perhaps a more closely analogous case is *Teamsters Local 282 (Transit-Mix Concrete)*, 267 NLRB 1130 (1983), enfd. 740 F.2d 141 (2d Cir. 1984), cited by the judge in his analysis section. The respondent union there arbitrarily failed to inform employees of an arbitrator's decision requiring that they contact their employer at least once a year while on layoff in order to maintain their seniority. The Board, with court approval, ordered the respondent to (1) request that the arbitrator reopen the proceedings to provide for notice to employees and a retroactive grace period for employees who were dropped from the seniority list; (2) post

[1] On November 2, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent also filed a motion to reopen the record and motion for oral argument. The General Counsel filed an opposition. The Respondent's motion for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties. The Respondent's motion to reopen the record to permit introduction of evidence not available at the time of trial is denied as there is no showing that the documents were previously unavailable nor is there an adequate explanation of why the documents could not have been located at the time of the hearing and, in any event, the documents do not alter our decision in this matter.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193–200 (1941); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938); see also *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961).

[5] *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984).

copies of the arbitration award at its meeting halls and publish them in its newspaper; and (3) make whole those employees who lost work by payment of an amount equal to that which they would have earned. In our view the monetary award in *Transit-Mix* was properly "designed to recreate the relationships that would have been had there been no unfair labor practice."[6]

The judge's remedy in the present case goes one step further than recreating what "would have been." Given the way the General Counsel drafted the complaint, there is no basis for finding that the Respondent should have provided pension coverage. Had the Respondent satisfied the alleged duty of fair representation, there would still have been no pension coverage. No violation of the Act occurred when the Employer and the Respondent agreed to exclude the affected employees. Employees affected by this lack of coverage would have had to find alternative coverage. The judge's remedy requires the Respondent to go beyond the consequences of its unlawful action and is thus punitive. In contrast, in *Transit-Mix* the consequences of the union's unlawful act was to deprive employees of benefits to which they had an affirmative entitlement.[7]

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 469, AFL–CIO, Newark, New Jersey, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Inducing employees to become members or to change their employment status by assuring them of contractual pension coverage while permitting their Employer to avoid such coverage for them.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse the owner-drivers of Coastal Tank Lines who were employed at its Woodbridge (Avenel) terminal in the manner set forth above in this decision.

(b) Post at their business office, meetings halls, and at all places where notice to members are customarily posted copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Mail to each owner-driver a copy of the attached Appendix. Copies of the notice shall be provided by the Regional Director for Region 22, and shall be signed by the Respondent's authorized representative.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegation in paragraph 12 of the complaint is dismissed.

[6] *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1976).

[7] The judge also cites *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995 (1986), in which the Board ordered a make-whole remedy for the failure to process a grievance. As we have explained, however, the judge's remedy here made the employees more than whole for the failure to inform.

Member Cracraft notes that she would find a remedy such as the one given in *Local 3036*, supra, to be speculative and punitive, unless the General Counsel showed the grievance was meritorious.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT induce employees to join our union or to change their employment status by assuring them that they are covered by a pension fund under a collective-bargaining agreement when, in fact, they are not.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse all owner-drivers of Coastal Tank Lines who were employed at its Woodbridge (Avenel), New Jersey terminal for the difference between the actual cost to employees to acquire comparable pension coverage individually had they

been informed of the lack of such coverage in April 1976 and the cost of obtaining such coverage currently.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 469, AFL–CIO

Gary A. Carlson, Esq., for the General Counsel.
Timothy R. Hott, Esq. (Hott, Margolis & Hernandez), of Jersey City, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 469, AFL–CIO (Respondent), has engaged in unfair labor paractices in violation of Section 8(b)(1)(A) of the National Labor Relations Act (the Act). Specifically, Respondent is alleged to have arbitrarily failed, for almost a 10-year period, to inform employees it represents that it had agreed with their employer that they were no longer to be covered by a pension plan. Respondent is also alleged to have arbitrarily failed to process a grievance of one of those employees over the failure of their employer to contribute to the pension fund on behalf of the grievant. Respondent's answer placed those allegations in issue and averred, inter alia, that the provisions of Section 10(b) of the Act bar further proceedings in this case.

I heard this case in Newark, New Jersey, on 4 and 5 August, 1986.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The pleadings establish, and I find, that Coastal Tank Lines, Inc. (Coastal) is engaged in the business of transporting freight. Its operations meet the Board's standard for the assertion of jurisdiction.

The pleadings also disclose that Respondent is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

In or about 1969, Coastal had a freight terminal in Woodbridge, New Jersey. Drivers on its payroll were represented by Respondent. Coastal also used the services there of about 24 owner-operators who were unrepresented. It is this latter group of drivers who are involved in the instant case.

In early 1976, Coastal expanded its operations at the terminal by its purchase of a competitor, P. B. Mutrie Motor Transportation, Inc. and by adding Mutrie drivers to the unit represented by Respondent. Coastal also took steps then to restructure the arrangement it had with the owner-operators.

B. Initial Contract Covering the Owner-Operators

Coastal posted a notice at the Woodbridge terminal informing those owner-operators that it would meet with them in late January of that year to discuss the impact of the Mutrie merger. That meeting was held at a restaurant close to the Woodbridge terminal. Present at that meeting for Coastal were its area supervisor, Don Woods, and its terminal manager, Glen Austin. No one from Respondent was at the meeting. The Charging Party, Alex Carlucci, testified about what transpired at that meeting; no one from Coastal testified. Carlucci's account, Which I credit, describes that meeting, as follows.

Woods told the approximately 24 owner-operators present then that, when the merger with Mutrie took place in about March 1976, all the owner-operators would be required to become members of Respondent. Carlucci and many other owner-operators voiced objections to joining Respondent. They asked what they were going "to get out of it." Woods responded that they would be covered by the health, welfare, and pension plan provided for in Coastal's and Mutrie's contracts with Respondent and that they would enjoy job security and all the other benefits provided for in those contracts.

About a week later, Coastal's terminal manager informed the owner-operators that William Johnson, Respondent's recording secretary then, wanted to meet with them at his office. Virtually all the owner-operators went to Respondent's offices in early February 1976. According to the testimony of the Charging party, Carlucci, Johnson assured them then that, on their becoming members, they would be covered under the drivers' collective-bargaining agreement for all benefits, including health, welfare, and pension. Johnson testified that he could have had six or eight conversations with Carlucci about the merger but he did not "remember what the substance of them [was]." In response to clearly leading questions, Johnson indicated by his answers that the owner-operators had agreed then to be represented by Respondent; he denied that he made any promises to them to induce them to become members of Respondent. I credit Carlucci's testimony over the vague, conclusory account offered by Johnson.

Carlucci's further testimony as to a meeting at the Woodbridge terminal on 16 or 17 February 1976, which testimony I credit, discloses that various Coastal officials, including Woods, met with Respondent's recording secretary, Johnson, and with about 13 owner-operators. The owner-operators informed Woods and Johnson that they were reluctant to become members of Respondent but that they would join, provided they were guaranteed a contract, the same as that covering the "company drivers."

Several days later, according to Carlucci, a meeting was held at Respondent's office. Present then were

Woods and other Coastal officials, Carlucci as temporary steward for the owner-operators, the steward for the company drivers, John Maxwell, and lastly, Johnson, who conducted the meeting. The first item of business had to do with the dovetailing of the Coastal and Mutrie company drivers onto one seniority roster and details of a contract covering them. When those matters were resolved, the participants addressed the concerns of the owner-operators. As to those, Woods stated that Coastal had had a change of mind and decided that it would not give the owner-operators the health, welfare, and pension benefits provided for in the contract covering the company drivers. Carlucci further testified that he then informed Johnson that the owner-operators would not become members of Respondent and that they might, instead, picket the Woodbridge terminal when the merger took place. As noted above, no Coastal official testified. Johnson's testimony was vague, and did not directly controvert Carlucci's account. I credit Carlucci's testimony.

Carlucci filed an unfair labor practice charge in early 1976 against Coastal alleging that the dispatch system at Woodbridge, when the merger was to take effect, would unlawfully discriminate in favor of drivers represented by Respondent. On 11 March 1976 according to Carlucci, the approximately 24 owner-operators met with Johnson who informed them that he had been in contact with Woods. The owner-operators insisted that they had to have a "confirmed agreement that [Coastal] would pay for health, welfare and pension." Johnson made several telephone calls to Woods and then informed the owner-operators that they "have a contract." Carlucci was elected permanent steward and he indicated that the owner-operators had to get written "specific language" on the whole contract. Carlucci requested withdrawal of the unfair labor practice charge he had filed and his request was approved. Johnson testified for Respondent that Coastal did not agree to Respondent's bargaining demand that the owner-drivers be covered by a pension plan. If, by that testimony, Johnson meant that he never had any of the discussions as related above by Carlucci, I do not credit it. His testimony was conclusory and was given in the form of a summary response to a leading question. I credit Carlucci's account.

In early June 1976, Carlucci obtained from Respondent a copy of the collective-bargaining agreement covering the regular drivers at Woodbridge. Under that contract, Coastal agreed to contribute to a pension plan on behalf of those "company drivers." Carlucci also secured from Respondent then a copy of an addendum to that contract which provided that the owner-operators would be covered by the terms of the contract. That contract, by its terms, was scheduled to expire on 31 October 1976.

The owner-operators at Woodbridge since mid-1976 have been referred to as "owner-drivers" to reflect that, insofar as their driving duties were concerned, they were carried on Coastal's regular payroll as its employees.

C. *The Implementation of the Pension Plan for the Owner-Drivers*

On 21 April 1976, Carlucci received a computer printout sheet from Coastal which showed the Coastal had made a payment of $27.60 to a health and welfare plan and another payment of $98.61 to a pension plan. The printout sheet also disclosed that those moneys were deducted from Carlucci's wages. Carlucci immediately protested to Johnson and to Coastal's terminal manager. Johnson, in Carlucci's presence, telephoned Woods and then informed Carlucci that the deductions had been made in error because Coastal had ageed in its contract with Respondent to absorb the full costs of these plans. Johnson assured Carlucci that he would have his money back in a week. A week later, Carlucci received reimbursement for the sums deducted.

Since then and until December 1985, Carlucci and other owner-drivers regularly received from Coastal computer printouts reflecting that payments were being made on their behalf for health, welfare, and pension coverage. The February 1979 issue of Coastal's employee newsletter contained an article that stated that its owner-drivers receive the same wages and benefits as its regular drivers. Coastal's regular drivers at Woodbridge were covered by the pension plan.

D. *The Termination of Pension Coverage*

Johnson, who was Respondent's recording secretary in 1976, testified that Coastal had never agreed to provide pension coverage for the owner-drivers and thus he offered no explanation as to the circumstances under which that coverage could have ended. For the reasons set out above, I do not credit Johnson's testimony. No one from Coastal testified as to the negotiations governing pension coverage for the owner-drivers. Counsel for the General Counsel stated at the hearing that he had no knowledge as to the circumstances under which Coastal and Respondent had agreed not to provide pension coverage for the owner-drivers. The General Counsel acknowledges that there was such an agreement; the complaint alleges that, on an unknown date in April 1976 Respondent entered into an agreement whereby the owner-drivers would not be covered by the pension plan provisions.

To establish that the owner-drivers were not covered by the pension plan, the General Counsel placed in evidence various letters, copies of which had been furnished to Carlucci when he had first inquired shortly before he filed the unfair labor practice charge in this case, as to the status of his pension account.

The first letter, dated 2 September 1977, was signed by Coastal's vice president of administration, Woods, and was addressed to Johnson, as president of Respondent. Woods wrote that he wished to clarify the negotiated labor agreement to reflect that Coastal had agreed "that no pension contributions were to be made by [Coastal] for owner-operators."

The second letter, dated 16 November 1977, was signed by the attorney for the pension fund and was addressed to Coastal's attorney. That letter stated that the pension fund cannot accept any payments made by Coastal on behalf of the owner-drivers because there is no written agreement therefor and, further, that contributions previously received on their behalf by the pension fund will be returned. There is nothing in the record

before me which explains the circumstances under which this letter or those pertaining to the first letter was written.

The third letter, dated 8 February 1978, was signed by the pension fund's administrator and was addressed to Coastal at its terminal, since removed to Avenel, New Jersey. In that letter, Coastal was advised that its "overpayments" to the pension fund, by reason of its contributions on behalf of owner-operators, would be returned. Coastal was also informed that it was delinquent as to certain contributions for the owner-operators to the separate health and welfare fund.

The next letter is dated 21 February 1978 and was written by Coastal's vice president, Woods, to the administrator of the pension fund. In it he stated that Coastal erroneously paid pension contributions for the owner-drivers and that, "as negotiated . . . [they] were not to participate in the Pension program."

The next letter is dated 2 March 1978 and is addressed to Respondent and to attorneys. It is signed by the pension fund administrator and states that 11 owner-operators, named therein, were being informed that day by separate letters that pension credits for them were being removed based on the 16 November 1977 letter from counsel. Carlucci was not one of those 11. Attached to that 2 March letter was a form letter, also dated 2 March. This form letter had a blank space for the addressee. The body of the letter recited that a copy of the 16 November 1977 letter (described above) was enclosed, that that letter sets forth the reasons why the pension fund cannot accept contributions made by Coastal on behalf of the owner-drivers, and that accrued pension credits were rescinded. No evidence was proffered that that letter was sent to any of the owner-drivers. No attempt was made by Respondent to explain why the names of only 11 of the approximately 24 owner-drivers then were contained in the body of the 2 March letter addressed to Respondent. For that matter, no evidence was proffered that Coastal ever made the contributions referred to therein. The pension fund's records were not proffered to show that it ever credited that account of any owner-driver of Coastal for contributions made by Coastal.

No evidence was offered by Respondent to show that Carlucci, until December 1985, had been informed by it that he was not covered by the pension plan.

E. *The Renewal Agreements*

The General Counsel offered testimony to show that, in all the negotiations for the collective-bargaining agreements that succeeded the first one covering the owner-drivers, the Respondent led Carlucci to believe that he and the owner-drivers continued to be covered by the pension plan. Respondent offered testimony to show exactly the opposite. The testimony bearing on this matter is now set out.

On the expiration of the first contract on 31 October 1976 covering the owner-drivers via the addendum thereto, as discussed above, a renewal contract was entered into for a 3-year period, 1976–1979. An addendum thereto provided for coverage thereunder for the owner-drivers. The only significant change from the first contact was that the owner-drivers agreed to pay 40 percent of the health and welfare premiums. Carlucci testified, and I credit his account, that the principal negotiators, including himself, had agreed that all provisions of the prior contract, which were unchanged, continued in effect. As noted above, he and other owner-drivers continued to receive regular computer printouts from Coastal which disclosed health, welfare, and pension coverage. On the expiration of the 1976–1979 contract, another 3-year renewal agreement, 1979–1982, was entered into along virtually identical lines.

When the 1979–1982 contract was about to expire, Coastal made it known that it was considering closing its Avenel terminal. However, a contract for 1982–1985 was reached. It provided that all wages, hours, and other conditions of employment of owner-drivers were set forth therein. There was no express reference to pension coverage; there was a provision that Coastal would pay $139.33 for health and welfare and that each owner-driver would contribute the balance of the cost of that plan. Article 12 of the 1982–1985 agreement provides that:

> Employees who are covered by this contract and who are receiving either wages or benefits more advantageous than provided for by this Agreement, shall continue to pay such benefits during the terms of this agreement.

The word "pay" in this extract is, from the context, obviously an error; the word intended has to be "receive."

F. *The Closing of the Avenel Terminal*

In November 1985, Coastal locked out the drivers at the Avenel terminal. The owner-drivers there picketed for a short while but became disillusioned apparently because Coastal was going bankrupt. It was then that Carlucci first inquired about his status with the pension fund and when he was given copies of the letters discussed above. Carlucci filed a grievance with Respondent covering Coastal's failure to make contributions on his behalf to the pension fund. Respondent presented the grievance to Coastal. Its vice president wrote on 6 January 1986 to advise Respondent that the grievance was denied "as having no contractual support." Respondent wrote to request a meeting to discuss that grievance and two others. The meeting was held on 26 February 1986. At that meeting Coastal's representatives advised that Coastal had never agreed to contribute to the pension fund on behalf of the owner-drivers to Avenel; Respondent informed Carlucci at that meeting that it had been agreed back in 1978 that there was no pension fund in effect for those owner-drivers.

G. *The Limitation of Actions Defense*

Respondent, by its answer, has averred that Carlucci knew, or in the exercise of reasonable diligence should have known, as early as 1982 and even before then, that there was no pension fund provided for owner-drivers in any agreements between Coastal and Respondent. In its

brief, Respondent relies on the copy of the form letter dated 2 March 1978, discussed above in subsection D. At the hearing, it proffered the testimony of an owner-driver, Wayne Langdon. He testified initially that, when he became an owner-driver in March 1977, he told the steward then (he stated he did not recall if it was Carlucci or the assistant steward) that he thought he was covered by a pension plan but was informed, in response, that he had "no pension." Langdon was not asked to, and he did not, explain why he believed he was covered by a pension plan. Later in his testimony, he related that he received regular computer printouts from Coastal each of which had a printed statement thereon reflecting contributions by Coastal on his behalf to the pension fund. He testified that he asked Coastal why that statement appeared on his printouts and that he was told that the statement was there because of a clerical mistake. Langdon did not testify that he questioned Carlucci or the assistant steward about the statement being on his printout sheets. although that would seem most likely for him to do so because he had testified that he was of the belief initially that he had pension coverage and had been informed by one of them that he had no such coverage. Nor did Langdon testify why he did not pursue his initial inquiry to Coastal when he continued to receive printout sheets with that statement. On cross-examination, Langdon stated that he had crossed a picket line set up by the owner-drivers and that, as a result, Carlucci threw him out of a union meeting being held concerning the owner-drivers.

Langdon's account is not persuasive. It appears to be improbable on critical aspects and inherently unlikely on others. Perhaps it is for those reasons that Respondent's brief makes no reference about Langdon's testimony. In any event, I do not credit Langdon's testimony.

H. *Analysis*

The initial question to be decided is whether the complaint allegations are time barred under Section 10(b) of the Act. Respondent has the burden of supporting that position by affirmative evidence. See *Harvard Folding Box Co*, 273 NLRB 841 (1984). Respondent states in its brief that "at least a dozen owner-operators did receive" notice in 1977 that they were not covered by the pension plan. In support of the quote, Respondent referred only to an exhibit offered by the General Counsel, i.e., the letters furnished Carlucci in late 1985 by Respondent when he inquired about the status of the pension account. There is no probative evidence before me that any of the owner-drivers received such notice. As noted above, Respondent had offered the testimony of Wayne Langdon apparently in support of its contention there that Carlucci was on notice in March 1977 that there was "no pension" for the owner-drivers at Avenel. That testimony was not credited, as observed above. In the absence of any credible evidence in support of the 10(b) defense urged by Respondent. I reject it.

The complaint alleges that Respondent, for unfair, arbitary, and invidious reasons, and in breach of the fiduciary duty it owed to the owner-drivers at Woodbridge (Avenel) whom it represents, failed to inform them it had agreed with Coastal that they would not be covered by a pension plan. The credited evidence disclosed that the owner-operators at Woodbridge changed their status in 1979 to that of owner-drivers and became members of Respondent on the assurances of Respondent that they had contractual guarantees of pension coverage. The testimony also discloses that Respondent had then made an arrangement with Coastal whereby Coastal was exonerated from making contributions to the pension fund for those owner-drivers, called for by the contract; a contract that called for Coastal to make the same contributions for them that were being made for the company drivers at Woodbridge.

Respondent, as the bargaining representative of the unit of owner-drivers at Woodbridge (now Avenel) is charged with a fiduciary responsibility to protect the interests of those employees, a duty it must discharge in complete good faith and honesty of purpose. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). Respondent, by having kept secret from these owner-drivers from virtually the onset of their joining Respondent in 1976 until the end of 1985 its agreement with Coastal in 1976 to exempt Coastal from its contractual obligation to make pension contributions for those owner-drivers and thereby allowed them to continue for almost 10 years in the belief that they were covered by the contractual pension fund, has committed an egregious breach of its fiduciary duty. In *Teamsters Local 282 (Transit-Mix Concrete)*, 267 NLRB 1130 (1983), enfd. 740 F.2d 141 (2d Cir. 1984), the labor organization there was found to have committed an unlawful breach of its duty of fair representation by not having informed unit employees of a favorable seniority award and by not having offered a rational basis for its conduct. In the case before me, the credited evidence establishes that Respondent, when the owner-operators were at the bargaining table in 1976, negotiated a pension plan for them but, almost simultaneously and somehow away from the bargaining table, it privately forgave Coastal its duty to make the contractual contributions to that plan. The owner-operators, unaware of the latter arrangement, then joined Respondent as members and became owner-drivers of Coastal, accepting the attendant changes in their pay. Respondent's conduct is more egregious than the conduct found unlawful in *Transit-Mix*, supra. See also *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995 (1986), for another case where conduct, less egregious than that in the instant case, was held to be violative of the Act. Respondent's conduct, even without a showing that there was a sinister reason behind it, is patently unlawful. I find that Respondent's failure to disclose to the owner-drivers its agreement with Coastal whereby Coastal was relieved of the obligation to contribute to the pension fund constituted a violation of Section 8(b)(1)(A) of the Act.

The complaint further alleges that Respondent unlawfully failed to process Carlucci's grievance against Coastal respecting the pension fund contributions. The General Counsel did not pursue this allegation in the brief filed with me. I find no merit in this allegation. Respondent's brief cogently observes "curiously" that the alleged refusal is "particularly odd in view of the . . . finding that Coastal had no such obligation," a reference to the dis-

missal of Carlucci's unfair labor practice charge against Coastal in Case 22–CA–14321.

REMEDY

To remedy so patent a breach by Respondent of its fiduciary obligations, I find it necessary to provide that the owner-drivers involved here shall be made whole by requiring Respondent to arrange to provide them, as closely as possible, with pension coverage equivalent to that which they would have enjoyed had contributions been made to the pension fund in accordance with the contract terms as the driver-owners knew them to be. Because it appears that the fund may not be able to accept contributions from nonemployers or employers not under contract, it may be necessary for Respondent to arrange for the owner-drivers to obtain coverage directly or Respondent may provide coverage through a recognized institution. Cf. *O.K. Machine & Tool Corp.*, 279 NLRB 474 (1986). Any controversy arising out of this remedial provision can be resolved at the compliance stage.

CONCLUSIONS OF LAW

1. Respondent is a labor organization as defined in Section 2(5) of the Act

2. By having committed a breach of its fiduciary responsibility toward the owner-drivers of Coastal by leading them to believe they had contractual pension coverage while also exonerating Coastal from making the requisite contributions to the pension plan itself, Respondent has violated Section 8(b)(1)(A) of the Act.

3. The unfair labor practices found in paragraph 2 above affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent did not unlawfully fail or refuse to process Carlucci's grievance as alleged in paragraph 12, 14, 15, and 16 of the complaint.

[Recommended Order omitted from publication.]

Amalgamated Industrial Union, Local 76B and its Divisions, Local 92—Local 76 (Local 76B Division) of the United Furniture Workers of America, AFL–CIO (Office Furniture Service, Inc.) *and* Juan Dominguez. Case 29–CB–6514

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On November 20, 1987, Administrative Law Judge Jesse Kleiman issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The amount of the Respondent's gross revenues discussed in sec. III,B,2,b, of the judge's decision should be $4 million not $4000.

Martha Rodriguez, Esq., for the General Counsel.
Harold Chetrick, Esq., of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On a charge filed on 19 November 1986 by Juan Dominguez (Dominguez or the Charging Party), the General Counsel of the National Labor Relations Board by the Regional Director for Region 29, issued a complaint and notice of hearing on 30 January 1987, against Amalgamated Industrial Union, Local 76B and its Divisions, Local 92—Local 76 (Local 76B Division) of the United Furniture Workers of America, AFL–CIO (the Respondent or the Union), alleging that the Respondent had engaged in certain unfair labor practices in violation of Section 8(b)(1)(A) of the National Labor Relations Act (the Act). On 19 May 1987 the Respondent duly filed an answer denying the material allegations in the complaint. The Respondent's answer also contained the following affirmative defenses:

As And For A First Affirmative Defense

Failure to state a cause of action on behalf of Julio Delgado and Rogelio Rodriguez inasmuch as they have not been named as complaining parties in the Complaint and have not charged the [Union] with comitting any wrongful acts with respect to the Union's representation of their rights and interests in the subject arbitration, which is that basis of the instant complaint.

Second Affirmative Defense
Lack of Jurisdiction
Third Affirmative Defense
Statute of Limitations

A hearing was held before me in Brooklyn, New York, commencing on 19 May 1987 and ending 10 July 1987, comprising 11 trial days. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. Both the General Counsel and the Respondent filed briefs. In its brief the Respondent moves for dismissal of the complaint in its entirety for failure of proof. For the reasons appearing hereinafter, I grant the Respondent's motion to dismiss the complaint.

On the entire record and the briefs of the parties and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Office Furniture Service, Inc. (the Employer) is a New Jersey corporation with its principal office and place of business located at 47–44 31st Street, Long Island City, in the borough and county of Queens, city and State of New York,[1] where it is, and has been at all times material, engaged in the business of manufacturing, refinishing, polishing, repairing, and servicing office furniture for wholesale and retail sale and rental, to firms in New York, New Jersey, and Connecticut. In the course and conduct of the Employer's business operating during the preceeding 12 months, these operations being representative of its operations at all times material, the Employer derived gross revenues in excess of $4 million, part of which comprised revenues of approximately $460,000 in retail sales, and purchased and received at its above facility goods and materials valued in excess of $50,000 directly from firms located outside the State of New York. The complaint alleges, and although the Respondent denies this allegation, I find that the Employer is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The Employer occupies the 10th floor of a commercial building located at this address and its various departments such as the carpentry shop, the welding shop, the sheet metal shop, the upholstery shop, and the refinishing shop are all situated on this floor.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that Amalgamated Industrial Union Local 76B and its Divisions, Local 92—Local 76 (Local 76B Division) of the United Furniture Workers of America, AFL–CIO is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act. The complaint also alleges, the Respondent admits, and I find that at all times material, by virtue of Section 9(a) of the Act, the Respondent has been and is now the exclusive bargaining representative for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, of all employees of the Employer in a unit appropriate for the purposes of collective bargaining composed of, "All employees engaged in any and all work that may be necessary in the manufacture and assembly of furniture in all of its branches and all other production work in its plant, excluding clerical help, designers, artists executives and supervisory employees."[2] Additionally, the complaint alleges, the Respondent admits, and I find that at all times material the Respondent and the Employer have maintained and enforced a collective-bargaining agreement covering wages, hours, and other terms and conditions of employment of the Employer's employees in the unit described above and containing therein a grievance and arbitration procedure. Moreover, the complaint alleges, the Respondent admits, and I find that Luis Torres is, and has been at all times material, a business representative of the Respondent, acting on its behalf, and an agent thereof.[3]

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that about 10 September 1986, the Respondent by certain acts and conduct represented discharged employees Juan Dominguez, Julio Delgado, and Rogelio Rodriguez in a "grossly negligent manner at their arbitration" for reasons that were unfair, arbitrary, invidious and a breach of the fiduciary duty owed the employees it represents, and by such acts and conduct the Respondent has restrained and coerced these employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act. The Respondent denies these allegations.

A. *The Evidence*

1. Background

The Employer maintains a furniture refinishing department as part of its business operations. About March or April 1986, the Employer was approached by one of its major customers, Citibank, regarding an office furniture refinishing job. Michael Marshak, the Employer's president, testified that acceptance of this job would require overtime work by the refinishing department employees in order to meet projected delivery dates and, therefore, although his inclination was to decline the job, he first met with these employees to ascertain whether they were willing to take on this work and the overtime required.[4] The refinishing employees unanimously agreed that the Employer should accept the Citibank job because it meant "steady work and a lot of overtime," and the Employer did so. Employed in the refinishing department at the time were Jorge Zapata, the department foreman, Juan Dominguez, Julio Delgado, Rogelio Rodriguez, Luis Osorio, Thomas Lofton, and possibly an employee named Castillo or Salla.[5] Marshak added that as the delivery dates of the Citibank job approached, it became necessary to have the refinishing department employees work overtime on Saturday, 10 May 1986.

2. The 12 May 1986 incidents

Testifying as a witness for the Respondent, Marshak related that on Monday, 12 May 1986, Delgado failed to report for work. Knowing that he had to deliver part of the refinished furniture to Citibank by 6 p.m. on Tuesday, 13 May 1986, and being concerned that Delgado's absence would cause the other refinishing department employees to fall behind on this work, Marshak asked Zapata, Dominguez, and Rodriguez to work overtime that Monday, which these employees agreed to do. However, both Dominguez and Rodriguez, testifying as witnesses for the General Counsel, denied that Marshak had asked them on 12 May 1986 to work overtime that day. Dominguez testified that on Monday, Zapata, not Marshak, had asked him if he could work overtime, not for that day but on the following day, Tuesday, 13 May 1986, because the Employer had a "large job that had to be done." Rodriguez testified that he had not been approached by anyone that Monday regarding overtime work. The evidence shows that Dominguez and Rodriguez left work on 12 May 1986 at 4:30 p.m., their normal quitting time, Rodriguez testifying that he had done so on Zapata's instruction.[6] Moreover, concerning this, another of the Respondent's witnesses, Union Shop Steward Elmo DeSilva, testified that on Tuesday, 13 May 1986, he was advised by Zapata that on Monday, 12 May 1986, Marshak had asked Zapata, Dominguez, and Rodriguez to work overtime that day, but that Dominguez and Rodriguez had failed to do so although they had promised Marshak that they would. According to DeSilva, Zapata also told him that Marshak was angry about this and Zapata thought that there would be trou-

[2] The Employer employs between 60–70 employees in its business operations.

[3] The parties also stipulated that Jorge Zapata, foreman of the Employer's refinishing department, is a supervisor within the meaning of Sec. 2(11) of the Act.

[4] Neither the collective-bargaining agreement between the Employer and the Union nor the Employer's work rules and regulations require employees to work overtime. Overtime work is voluntary and is paid on the basis of "time and a half."

[5] Dominguez, Delgado, and Rodriguez, the employees who are the subject of the instant case, were all discharged on 16 May 1986, having commenced their respective employment with the Employer on 14 March 1978, 14 July 1980, and in 1973. Dominguez testified that his duties encompassed "painting, spraying, everything," and it is not unreasonable to assume that Delgado and Rodriguez performed the same type of work.

[6] It should be noted that Zapata did not appear as a witness in this proceeding. However, Marshak did testify that Zapata had suffered a stroke in May 1987 and was still hospitalized at the time of this hearing.

ble for Dominguez and Rodriguez because they had not worked overtime the previous day.

3. The 13 May 1986 incident

According to the testimony of Dominguez, Delgado, and Rodriguez, on Tuesday, 13 May 1986, as they were about to leave the Employer's shop to cash their paychecks and buy lunch for themselves and Zapata, they were met by Marshak, who using Zapata as an interpreter, requested that they work overtime that day, which they all agreed to do.[7] This conversation occurred at 12 noon and since it concluded about 12:20 p.m. they requested Marshak's permission to leave the premises at that time to go to the bank and the restaurant, which permission Marshak gave stating that there was "no problem." They then left the shop together.

Dominguez, Delgado, and Rodriguez drove to the bank in Rodriguez' van to cash their paychecks. Traffic was heavy and the bank was crowded, therefore it was about 1 p.m. when they left the bank and went to a Chinese restaurant to buy lunch. On the way they had a flat tire, and Rodriguez' spare tire was not inflated. Rodriguez took the spare to a gasoline station a few blocks away, inflated the tire, and returned to the car. After Rodriguez changed the tire, they continued on to the restaurant where they purchased lunch and to a liquor store for a bottle of whiskey for Zapata. On returning to the shop they met Marshak at the building elevators, and Rodriguez apologized for their late return.[8] According to Dominguez, Marshak told them that "[I]t was fine . . . that we had left late and that there was no problem." Marshak and the three employees then rode the elevator to the 10th floor where the Employer's shop is located.

On entering the shop, Dominguez, Delgado, and Rodriguez went to the timeclock area to punch in, it now being 1:40 p.m.[9] When they discovered that their timecards were not in the usual place, they asked Zapata if he knew where their timecards were and Zapata responded that they were going to have a problem because of their late return from lunch. Dominguez, Delgado, and Rodriguez worked overtime that day until 6:30 p.m. and when they went to "punch out" they noticed that their timecards had previously been "punched in" by someone at 2:18 p.m.[10]

The witnesses for the Respondent gave a somewhat different version of what occurred that Tuesday, 13 May 1986. Marshak testified that after learning that morning that Dominguez and Rodriguez had not worked overtime the previous day, he met with Zapata, Dominguez, Delgado, and Rodriguez in the refinishing department and again explained that a partial delivery of refinished furniture was due Citibank that evening at 6 p.m. and that at some cost, delivery trucks were waiting at both ends to pick up and deliver the furniture. Marshak told them that he was very upset about their failure to work the extra hours the previous day as they had agreed to do and both Dominguez and Rodriguez apologized for not having done so, with Dominguez offering as an excuse that he had an emergency that Monday that prevented him from doing overtime work.[11] After the employees promised to work overtime that Tuesday and for the rest of the week, Marshak admitted that he was satisfied. Marshak stated that he had specifically held this meeting at 11:45 a.m. in order not to interrupt the men at their work, and not at a later time because Dominguez and Delgado "characteristically" left the shop for an early lunch on occasion. Both Marshak and DeSilva testified that this meeting ended about 12 noon.[12]

[7] Tuesday is this Employer's payday and these employees normally use their half hour lunchbreak from 12 to 12:30 p.m. to cash their paychecks at a bank and to purchase their lunches, which they then eat at their work stations.

[8] While Rodriguez testified that he had also advised Marshak that they were late in returning because of a flat tire, Dominguez and Delgado testified that Rodriguez had merely apologized to Marshak for their late return without giving a reason.

[9] Their testimony with regard to the time it took between incidents from the time they left to the time they returned during that lunch period was somewhat evasive and guarded, especially that as given by Dominguez.

[10] Dominguez, Delgado, and Rodriguez testified that employees were not required to punch out when they left the shop to cash their checks on Tuesdays, payday, but were required to punch in when they returned. However, Delgado testified that on occasion he punched out when he went out for lunch and punched in on his return. Moreover, while Marshak and DeSilva maintained that the Employer required all employees to punch in and out whenever they left the shop for the lunch or to cash their paychecks, DeSilva testified that on occasion he had failed to punch out on leaving the shop, but he did punch in on returning. DeSilva's testimony also shows that as a welder employee he performed work for the Employer outside the shop and he would leave the building for periods of time aside from his lunchbreak or to cash his paycheck.

[11] Significantly, Dominguez acknowledged on cross-examination that, "It's possible," that he had told Marshak during their conversation on Tuesday, 13 May 1986, that he had failed to work overtime on Monday, 12 May 1986, because an emergency had prevented him from doing so. When they asked what the emergency was about, Dominguez could not remember. Furthermore, when the administrative law judge asked Dominguez why he would give Marshak a reason for not having worked overtime on Monday, when he had previously in his testimony denied having been requested to do so, Dominguez seemed evasive and did not directly answer this question. Thereafter, on redirect examination by the General Counsel, Dominguez again admitted that it was possible that he told Marshak that an emergency had prevented him from working overtime on Monday, and now remembered that the emergency involved "trouble with my feet." When Dominguez was once again questioned why he would tell Marshak about his inability to work overtime on Monday when not asked to do so, his answers were, as before, evasive and unresponsive. Finally, on further redirect examination by the General Counsel, Dominguez testified, "At no time did I tell him that I didn't work overtime because I had an emergency." In connection therewith, I have considered the possibility that Dominguez misunderstood the questions posed by myself, Chetrick, and Rodriguez because of translation difficulties and/or the questions themselves, but the record does not support this.

Moreover, the time factor in Marshak's story is more plausible than that given by the three employees in that it would reasonably *not* take 20 minutes for Marshak to ask and receive the employees' agreement to work overtime that day, while it might take 15 minutes for an apology, an explanation, and then being asked and agree to work overtime, this needing translation between the parties.

[12] DeSilva testified that on Tuesday, 13 May 1986, at about 11:45 a.m., he observed Marshak talking to Zapata, Dominguez, Delgado, and Rodriguez in the refinishing department. He walked over noticing that Marshak was angry and speaking in a loud voice, with Zapata translating his remarks into Spanish for the employees. Marshak told them that they had promised to work overtime the previous day, Monday, and had failed to do so. According to DeSilva, Dominguez and Rodriguez apologized to Marshak for this, Delgado having been absent from work that Monday. The employees agreed to work overtime that Tuesday and Marshak seemed to have accepted their apology and their promises to work the

Continued

Marshak continued that sometime thereafter he left the shop and on his return to the building met Dominguez, Delgado, and Rodriguez at the elevators, each of them carrying a "shopping bag." The time was approximately 2:15 p.m. Rodriguez explained to Marshak that they were late returning from lunch because they had had a flat tire on the way. They all then entered the elevator and went up to the 10th floor. On the shop floor they met Zapata and DeSilva, both of whom were "very agitated" and when he observed timecards in Zapata's hand he instructed Zapata to "punch in" the timecards for these employees, which Zapata did. The time was then 2:18 p.m.[13] Marshak also told DeSilva to find out what actually had happened and then left the area. Marshak stated that because of their failure to work overtime on Monday, 12 May 1986, their late return from lunch on Tuesday, 13 May 1986 (approximately 2-1/2 hours late), and their failure to call in when they had the flat tire to advise the Employer that they would be late in returning from lunch, he decided either on that day, Tuesday, or the next day, Wednesday, 14 May 1986, that he was going to fire these employees.[14] Marshak added that he told DeSilva of his plans to discharge Dominguez, Delgado, and Rodriguez and advised DeSilva to apprise Torres of his decision.

DeSilva testified that after he returned from lunch that Tuesday at 12:25 p.m., Zapata came to the welding area where he worked at "a little after 2:00" that afternoon and asked him if he knew where Dominguez, Delgado, and Rodriguez were. Zapata had three timecards in his hand that he identified as belonging to these employees, and when DeSilva could not tell Zapata their whereabouts, Zapata walked away towards the timeclock area. Soon thereafter Marshak, Dominguez, Delgado, and Rodriguez stepped out of the elevator and Marshak told DeSilva that he was angry at these employees because they had returned from their lunchbreak so late, and he requested that DeSilva and Zapata find out the reason for their late return.[15] Zapata now "punched in" the timecards of Dominguez, Delgado, and Rodriguez, the time being after 2:15 p.m.

DeSilva continued that he and Zapata questioned the three employees regarding their late return and Rodriguez explained that they had a flat tire along the way which caused their lateness. Zapata told the employees that he did not believe their story and when DeSilva checked Rodriguez' hands for grease or dirt smudges, since Rodriguez indicated that he had changed the tire, Rodriguez' hands were clean. Despite the professed skepticism by DeSilva and Zapata, Dominguez, Delgado, and Rodriguez stuck to their story of the flat tire. DeSilva related that he repeated their account of what had occurred to Marshak who angrily stated, "[I]t's bullshit, that didn't happen." Marshak also said that they were constantly doing this, were conspiring against the Employer, and that he had had just about enough, "They're out. I'm firing them." DeSilva added that he asked Marshak to reconsider his decision to fire them but that Marshak was adamant about this.

DeSilva testified that he called Torres at the union office the next day, Wednesday, 14 May 1986, to report this incident but Torres was not there. On Thursday, 15 May 1986, Torres returned his call and, after DeSilva had explained what happened on the previous Tuesday, Torres arranged to meet with DeSilva at the shop on Friday morning, 16 May 1986.[16] The evidence shows that Dominguez, Delgado, and Rodriguez worked overtime on Wednesday of that week,[17] and worked their regular hours 8 a.m. to 4:30 p.m. on Thursday, since Zapata had informed them that there was no overtime work that day.

4. What occurred on 16 May 1986

Testifying as a witness for the Respondent, Torres related that he appeared at the Employer's shop at 10:30 a.m. on Friday, 16 May 1986, and asked DeSilva for a complete account of what had occurred. DeSilva explained that Dominguez, Delgado, and Rodriguez had gone out to lunch on Tuesday, 13 May 1986, at 12 noon and had not returned to the shop until "2:18," and that Marshak was "really mad" and very upset about this and wanted to discharge them. DeSilva also told Torres that Marshak had not fired them on the spot because he wanted to complete the Citibank job before he did so. Torres and DeSilva then went to Marshak's office to discuss the matter. Marshak reminded Torres that he had previously complained to the Union about the latenesses and absences of these three employees and that the Union had done nothing about it. Marshak emphasized that he was through accepting such conduct on the part of these employees and was going to discharge them. Marshak also told Torres that he had asked these employees to work overtime on 12 May 1986 but, after agreeing to do so, they left the shop at their regular quitting time, 4:30 p.m.[18] Torres requested that Marshak suspend these employees for 3 days instead of firing them, but Marshak refused. Torres then advised Marshak that the Union was prepared to take the matter of these discharges to arbitration.[19] According to Torres, he and DeSilva left Marshak's office and spoke to Dominguez, Delgado, and Rodriguez who repeated their account of

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extra hours needed to complete the job. DeSilva added that when he left the shop at noon for lunch he met Dominguez, Delgado, and Rodriguez and they all went down in the elevator together and left the building, then parting company.

[13] The timecards in evidence of Dominguez, Delgado, and Rodriguez, show a punch in time for that day of 2:18 p.m.

[14] Marshak testified:

> We didn't get through with the job. I had drivers who were there on the job till 10 o'clock at night. The sum and substance was the job cost us a couple thousand bucks extra. Citibank was not happy with the situation.

[15] Rodriguez testified that when he tried to explain to Marshak why they had been late in returning from their lunchbreak, he spoke to Marshak in English and he did not know if Marshak understood what he was saying. Rodriguez speaks some English but his main language is Spanish.

[16] Torres testified similarly about this conversation.

[17] Dominguez testified that he was late for work on Wednesday, 14 May 1986, and had unsuccessfully attempted to notify the Employer that he would be in late that morning.

[18] This particular testimony was elicited only after Torres' recollection had been refreshed by leading questions by the Respondent's counsel.

[19] Marshak testified similarly about the conversation but added that he had given Torres the Union's copy of the discharge letter during this meeting.

what occurred on 13 May 1986.[20] Torres advised them that the Union was going to contest their discharge at an arbitration hearing and the employees then returned to work.

DeSilva's account of their conversation with Marshak was similar but more detailed. He testified that Marshak was angry, spoke in a loud voice, banged on the table, and at times became livid with rage. When Torres told Marshak that the Union would oppose the discharges, Marshak responded that he did not care and was prepared "to fight" any union action in this regard. Moreover, when Torres and DeSilva advised the three employees that the Employer was going to fire them, they protested the discharge as unfair because their lateness was due to the flat tire.

Dominguez, Delgado, and Rodriguez all testified that on Friday, 16 May 1986, at the completion of their workday, 4:30 p.m., DeSilva gave them letters of termination from the Employer, and both he and Zapata advised the three employees to take the letters to Torres at the Union.[21] They denied that Torres had spoken to them earlier that day.

5. What happened thereafter

On Monday, 19 May 1986, Dominguez, Delagado, and Rodriguez went to the Union's office to speak to Torres about their being fired. They testified that they told Torres the details of what had occurred leading up to their discharge. Dominguez and Rodriguez denied having been asked to work overtime on Monday, 12 May 1986, as stated in the letter of discharge, Delgado advised that he was absent from work that Monday, and all three employees maintained that their discharges were unfair because a flat tire had been the cause of their late return from lunch on Tuesday, 13 May 1986. They stated that after Torres had listened to their accounts of what had happened, he told them that there was nothing to worry about because the Union had faced similar problems before, and after taking "the case to Court . . . had won and the Employer had had to rehire the employee." Torres said that the Union's attorney would handle the matter and they would have to be patient because the arbitration process would take "more or less one, two months . . . two, four months, I don't know how many." The three employees related that Torres had also told them that they had a "75 to 80 percent chance of winning," and then instructed them to apply for unemployment insurance benefits in the meantime. Dominquez, Delgado, and Rodriguez gave Torres their home addresses and telephone numbers and told him that if he could not contact them by telephone then to write them letters.[22]

Torres testified that the three employees appeared at the Union's offices that day about 4:30 p.m. They showed Torres the dismissal letters and Torres told them that the Union had not as yet received its copy of the letter. After they gave Torres an account of what had happened, Torres advised them that the Union would take their case to arbitration, which could take anywhere from a matter of days to months. At first Torres denied that he had made any comment to them regarding their chances of winning the arbitration case. However, when he was confronted with a statement he had made in an affidavit given to a Board agent during the investigative stage of this proceeding that, "I recall telling them that we have a good chance to win the case," he then acknowledged that, "It's possible I said it yes."

Harold Chetrick, the Union's attorney for the past 20 years, and called as a witness for the Respondent, testified that a few days after 16 May 1986 he received a telephone call from Torres regarding the discharges by the Employer of Dominguez, Delgado, and Rodriguez. Torres gave Chetrick a detailed account of the events leading up to the discharge of these employees and Chetrick asked Torres to meet with him to review the collective-bargaining agreement and then decide how to proceed. Chetrick recounted that he then called DeSilva who related a similar version of what had happened as given previously by Torres. A few days later Torres and Chetrick met at Chetrick's office and reviewed the collective-bargaining agreement, which provides for the arbitration of disputes of grievances that cannot be satisfactorily adjusted otherwise. Torres had previously mentioned to Chetrick that these employees had lateness and absentee problems, and when Torres raised this issue in the context of the arbitration, Chetrick opinioned that, because the Employer "never brought them to arbitration" on these prior matters, "all of those disputes involving lateness have been satisfactorily adjusted" within the meaning of the grievance provisions of the bargaining contract. Chetrick told Torres that "[A]s I see it the only issue involved here is whether or not they should be discharged because they came back late from lunch on that day of May 13th, understanding what happened on May 12th . . . [I]s the drastic remedy of discharge warranted . . . . As far as I was concerned this was the basis of the discharge and I felt that that was unfair, on the basis of [what had occurred]."

[20] Torres first testified that in their account of what happened the employees had said that they returned from lunch at 2 p.m. Subsequently he testified that, "They didn't tell me what time."

[21] Marshak testified that he had prepared the discharge letters on Thursday, 15 May 1986. The letter of discharge is dated 15 May 1986, is addressed to the Union, involves "Juan Dominguez, Julio Delgado and Roger Rodriguez," and reads:

> On May 12th, these three were asked to work overtime on a job and all agreed. Yet at 4:30 each punched out. On May 13th, Tuesday at 11:45, I had a meeting with these three and expressed my concern that because they didn't work, a very important job would be put in jeopardy. They all expressed concern and reassured me they would work overtime until the job was complete.
>
> The same afternoon these three left the building for lunch with out punching out and did not return to work until 2:18 (one hour and 18 minutes late without a call). Each man had a shopping bag in his hand as if he had been shopping.
>
> On May 14th, the next day, both Mr. Delgado and Mr. Dominguez were late to work. All three have a history of lateness and warnings. As a result of their indifferent attitude to their jobs, to myself and the company, we have no alternative but to release these people from our employ. Our inability to make any impression, coupled with their constant lateness, and theft of time leave me no choice. In addition to the violation in the contract, the example they set for the other employees in the company is very poor.

[22] Delgado gave Torres the telephone number of his sister and that of a friend because he had no telephone where he lived.

Chetrick testified that because the basis of their discharge was their late return from lunch on 13 May 1986, he "had no intention of permitting anything to come in involving latenesses, because that is not the issue at this particular arbitration." Chetrick stated that his legal opinion was that the Employer had fired the three employees "because of what happened on May 12th and May 13th," and that the Employer's mention in the letters of discharge about their "indifferent attitude to the job, and . . . their constant latenesses" was merely "windowdressing" to "bolster up the main theme by just showing their general conduct otherwise." Chetrick related that because Marshak seemed to accept the apologies of Dominguez and Rodriguez for not having worked overtime on 12 May 1985 and "was satisfied" by their offers to work overtime the rest of the week, and because their late return from lunch on 13 May 1986 was occasioned by a flat tire suffered on their way to purchase their lunch, the discipline of discharge was unfair. Chetrick added that this was "My legal opinion, my decision, and that was my approach to the case."[23]

Chetrick commenced the arbitration proceeding by letter dated 2 June 1986 sent to the New York State Mediation Board as provided for under terms of the collective-bargaining agreement between the Employer and the Union. By letter dated 18 July 1986 the Mediation Board notified the Union that it had selected Thomas Knowlton as the arbitrator in the matter, and that Knowlton would contact the parties involved to set a hearing date.

Chetrick testified that because the arbitration involved "a very simple issue" he saw no reason to interview the grievants beforehand and therefore did not do so. Chetrick stated:

> Should they be fired because they went out at twelve and came back at two or 2:18, that was the issue, and I felt that no arbitrator should fire a person based on that afternoon, and I felt that the latenesses were not a subject of this arbitration and I was not going to allow them in because they had all been adjusted beforehand. They were not the subject of this, and obviously I didn't want to get that in because that would be more fuel. The arbitrator would say hey, look at the records that these guys had. I knew what Marshak was going to try to do, and now look what he did. This was the straw that broke the camels back. This was deception, this was betrayal, this was backstabbing, and I knew a phrase that Marshak always used in every arbitration, conspiracy. Conspiracy to do him harm. So I did not think it was necessary, really, there was nothing that they could add that would be of help to me, and the fact that there were other people that had been late and they were still working, so what. Those other people, even with their latenesses had not committed this, according to Marshak, dastardly deed of betrayal and what happened on May 12th and May 13th, and I didn't want to get that in. I felt the less in the better.

Dominguez, Delgado, and Rodriguez spoke to Torres again on 25 May 1986 at the union offices, inquiring concerning when the arbitration hearing would take place. Rodriguez testified that Torres asked them to be patient and told them that "it could take a long time." Dominguez testified that Torres had said it would take "approximately a month or two to go to trial." These employees again gave Torres their current home addresses and telephone numbers. During the month of June 1986, Dominguez spoke to Torres on the telephone "about 5 times" and Torres' response was always that this matter took time and to be patient. Delgado related that he had called Torres four times during that month but Torres was unavailable to speak to him each time, and Torres never returned his calls. Rodriguez unsuccessfully attempted to contact Torres twice in June 1986. Torres stated that he spoke to Dominguez over the telephone two or three times prior to the arbitration hearing and that it was his procedure to return all calls made to him while he was away from his desk, as soon as possible.

According to their testimony, Dominguez and Rodriguez met with Torres in mid-July 1986 to inquire about the status of their case. Torres told them that "this took time and to wait." Torres again told them that they had a 75-percent chance of winning the arbitration and that the Union had a good lawyer. Torres denied telling them anything about their chances of winning the case. Rodriguez recounted that he also went alone to the union offices in July to speak to Torres and that Torres reiterated that the employees should be patient, and that the Union's attorney was working on the case. Torres also advised Rodriguez that Marshak "needed Julio Delgado and myself to go back to work" and Rodriguez said that he would be happy to do so. Torres told him he would call him if he had further news about this. Delgado stated that he telephoned Torres on four occasions in July 1986, but was unable to speak to him.

Moreover, Dominguez testified that he attempted to contact Torres by telephone at least five times in August 1986 but was unsuccessful in doing so. Delgado testified that he also had tried to speak to Torres on the phone in August 1986 but was unable to reach him. Finally Dominguez and Delgado went to the Union's offices in August 1986 and in a conversation with Torres were told that the arbitration hearing might take place "in the next few days." Delgado testified that Torres told them that they had to be patient, this takes time but not to worry because they were going to win the case, that they had a "75–80 percent chance of winning." Rodriguez testified that he was out of the country for the month of August 1986 returning to the United States on 31 August 1986.

The Union sent letters to Dominguez, Delgado, and Rodriguez dated 3 September 1986 notifying them that the arbitration hearing was scheduled for Wednesday, 10 September 1986 at 400 Broome Street, New York City, New York, on the fourth floof. Dominguez acknowledged that he received this letter on 8 September 1986, Delgado's letter was returned to the Union by the U.S. Post Office as undeliverable because Delgado was "Not

[23] Torres' account of this meeting was very brief and rudimentary concerning detail but did confirm that such a meeting took place and the topic of conversation.

Known" at the address the letter was sent to,[24] and Rodriguez testified that he did not receive the letter until after the arbitration took place.[25] Dominguez testified that on receipt of the letter he called Rodriguez "so that he could call Julio Delgado." Rodriguez told him that he had not received a copy of the letter. Dominguez stated that, on 9 September 1986, he telephoned Torres and asked him to explain the contents of the letter because he could not read English. After Torres advised him of the date and place of the arbitration hearing, Dominguez asked Torres to contact Delgado and Rodriguez because they had not received copies of this letter. Torres replied that he would do so. Torres' account of this telephone conversation was that Dominguez told him that he had received the letter indicating the hearing's time, date, and place and then Torres advised him that the Union had sent similar letters to Delgado and Rodriguez. Moreover, Chetrick testified that prior to the date of the arbitration hearing, he had called Torres and inquired whether the three employees had been notified regarding the hearing date and Torres had answered that they were.

6. The arbitration hearing

Chetrick testified that on 10 September 1986 he arrived at the New York State Board of Mediation offices at 400 Broome Street, New York City, New Y[illegible] at 9:35 a.m. and found Torres, DeSilva, and Dominguez already there. They waited in the reception area a while for the arrival of Delgado and Rodriguez. Thereafter Marshak and the Employer's attorney arrived, "a fellow named Mr. Krupnick." Chetrick related that he now took Torres, DeSilva, and Dominguez into an anteroom library where he questioned Dominguez about the events of the week of 12 May 1986, leading up to his discharge, using Torres as interpreter. According to Chetrick, Dominguez acknowledged that he had been asked to work overtime on Monday, 12 May 1986, which he agreed to do, but an emergency with his feet prevented him from doing so. Dominguez also told him that Delgado had been absent from work that Monday. Dominguez related to Chetrick that he and Rodriguez had apologized to Marshak the next day for not working overtime on Monday and after they told Marshak that they would positively work overtime for the remainder of that week, Marshak appeared to be satisfied and said that "everything was fine." Dominguez recounted what had happened when the three employees went out to lunch, had a flat tire, and returned from their lunchbreak "at two, a little after." Dominguez told Chetrick that while he did have a lateness problem, the Employer had never taken him to aribitration for lateness. Additionally, Dominguez told Chetrick that there was no requirement by the Employer that employees "punch out" when they left the shop for lunch, about only to "punch in" when they returned. Chetrick spent "thirty, thirty-five minutes" questioning Dominguez.

Chetrick stated that Dominguez' account of what had occurred during the week of 12 May 1986 was consistent with what Torres and DeSilva related had happened that week and, therefore, "As far as I was concerned my strategy remained intact and I was going to approach the arbitration in exactly the manner that I had determined ahead of time."

Chetrick testified that after returning to the hearing room, they found that neither the arbitrator nor Delgado nor Rodriguez had appeared and Chetrick called the arbitrator's office and was told that Knowlton was on his way to the arbitration hearing. Chetrick also called the Union's office and was apprised that Rodriguez had mistakingly gone there instead of directly to the hearing. Rodriguez was instructed to come immediately to the arbitration hearing, which he did.[26] Knowlton now arrived and Chetrick explained that only one of the grievants was present and another was definitely on his way there. When Rodriguez finally arrived, Chetrick requested time to confer with him, which Knowlton granted, and he, Rodriguez, Torres, DeSilva, and Dominguez went to the anteroom library where Chetrick asked Rodriguez "the same general questions" he had previously posed to Dominguez. With Torres acting as interpreter, Rodriguez gave answers to these questions, which were similar to those as given by Dominguez previously.

Chetrick then asked Rodriguez if he knew where Delgado was and Rodriguez replied that he did not know. Chetrick maintained that it was now that he learned for the first time that the Union's letter to Delgado regarding the date, time, and place of the arbitration hearing had been returned to the Union as undelivered, and that the Union had been unable thereafter to get in touch with Delgado. Chetrick testified that he decided to proceed with the arbitration despite Delgado's absence, and when Knowlton inquired about this, he advised Knowlton that the Union would make every effort to locate Delgado and then "let [Knowlton] know where he stands."[27]

Chetrick's account of what then occurred at the arbitration hearing was, in substance, that the hearing was held in an informal manner. The parties agreed that the issue involved in the matter was whether "the facts justify the discharge of these two people." Marshak read an opening statement over Chetrick's vehement but unsuccessful objection, which stated that these employees had promised to, then failed to, work overtime on Monday, 12 May 1986, and then had returned excessively late

[24] While the letter to Delgado was properly addressed, the Union had failed to include his apartment number. Torres testified that after Delgado's letter was returned to the Union as undelivered, he made several attempts to reach Delgado at his sister's telephone number, but nobody answered the phone.

[25] Rodriguez testified that he had advised the Union that his address was 3032 Atlantic Avenue, Brooklyn, New York. The Union sent his letter to Rodriguez' old address, 87-27 114th Street, Jamaica, New York.

[26] Dominguez testified that he had called Rodriguez that morning, 10 September 1986, and told him that the arbitration hearing was scheduled for that day, also giving him the address at which the hearing was to be held.

[27] Knowlton testified that he made inquiry about the absence of Delagado to both the Union and the Employer, "since it is highly unusual that a grievant is not present," and was informed by the Union that Delgado "had been properly notified of the date and place of hearing." Because Delgado never appeared at the arbitration hearing, Knowlton requested that the Union and Chetrick let him know the reason for Delgado's absence.

from lunch on Tuesday, 13 May 1986, this being done notwithstanding the fact that the Employer had an important refinishing job to complete. Marshak made reference to the lateness records of these employees and his forebearance in not taking them to arbitration over this, and in payment for his goodness, they had betrayed him and conspired among themselves to cause him problems. Chetrick objected to the introduction of any evidence relating to the latenesses and absences of these employees and although such evidence was admitted by the arbitrator, Chetrick brought out that all such prior latenesses had been "always adjusted satisfactorily" between the Employer, the Union, and the employees, without resort to arbitration and without prior layoff or discharge. Marshak admitted on cross-examination that he had discharged these employees because of the "scenario of May 12th and May 13th" and that the Employer had introduced records of their prior latenesses "to show the background of these people." Chetrick indicated that there were some contentious and unfriendly exchanges between him and the Employer's attorney, Krupnick. He added that none of the witnesses were sworn and any "testimony" given was not under oath.

Chetrick continued that he decided not to call either Dominguez or Rodriguez as witnesses because he did not want to open a "Pandora's box" of questions by the Employer's attorney as to their latenesses, "if I started to talk about latenesses, which I did not feel, I'd be waiving the very defense that I thought was critical to the case based on the collective bargaining agreement." Chetrick therefore closed his case with a summation that these employees had been fired because they failed to work overtime on 12 May and returned from lunch late on 13 May and maintained that the arbitrator had to decide on "[W]hether the drastic remedy of discharge is warranted based on this." Chetrick added that the arbitration hearing ended on an unfriendly basis between the Union and the Employer. Knowlton again asked about Delgado and Chetrick told him that the Union would attempt to contact Delgado and Chetrick would then notify Knowlton whether Delgado was to be included in the arbitration award. Chetrick then left the building, leaving Torres, Dominguez, and Rodriguez in conversation together.

The testimony of Torres, DeSilva, and Marshak was, in substance, similar in nature to that given by Chetrick. Both Torres and DeSilva testified that Chetrick had questioned Dominguez and Rodriguez as to the events that preceded their discharges and Marshak testified that he had been in an adjacent room with his attorney and overheard some of what was said during Chetrick's conversation with Dominguez. Torres stated that Dominguez had told Chetrick that he had been asked to work overtime on Monday, 12 May 1986, but could not do so. However, Torres recounted that Rodriguez had denied being asked to work overtime that Monday when Chetrick questioned him about this. Torres stated that the arbitrator was not told that Delgado had been absent from work on Monday, 12 May 1986. DeSilva related that most of the talking at the hearing was done by "Marshak's lawyer" and Chetrick. DeSilva testified that during the hearing Torres "once in awhile . . . would lean over to Dominguez and say something to him," and that "a couple of times [Torres] reached over and touched [Rodriguez] and he said something to him . . . . He was speaking Spanish." Torres added that near the end of the hearing the arbitrator asked if Delgado should be included in the award and Chetrick responded yes. Torres also asked Dominguez and Rodriguez at the conclusion of the hearing, to tell Delgado if they saw him, to contact Torres at the Union.

Knowlton's account of what happened at the arbitration was similar to Chetrick's except much less detailed and with less recall. Knowlton testified that he raised the question of the need for an interpreter because the grievants "were obviously Spanish speaking." Knowlton was told by Chetrick that there was a person at the hearing who was bilingual and who could translate if needed. The grievants themselves did not request an interpreter. Statements were made by the Company, its attorney, the Union, and Chetrick, but Knowlton could not remember if the grievants testified or if Marshak answered questions. The parties respective positions on the issue involved in the arbitration was conveyed to Knowlton by their attorneys.

Knowlton related that, as told to him at the hearing, the grievants had agreed to work overtime with regard to an important refinishing job. They had failed to do so and had thereby jeopardized the job's delivery date. The Union agreed that this is what had occurred. The following day these employees took an extended lunch period, which additionally angered the Employer. The grievants had gone to cash their paychecks and had a flat tire along the way, resulting in their late return from lunch. These details were again not challenged by the Union. Knowlton stated that while he admitted the grievants attendance records into evidence, he paid little attention to them in deciding the matter. After Knowlton was asked to and did read the discharge letter in evidence (G.C. Exh. 4) he was asked:

> Q. Sir, after you read the letter, if you had heard testimony of the three grievants to the contrary of what's in this letter might your decision in the award have been different?
>
> A. If I believed their testimony possibly.

Moreover, Knowlton characterized the conduct of the hearing as follows:

> It was informal. It was partly because perhaps I was late. It did not follow some of the usual pattern in which the employer states its case and the union answers. Because, A, there was not to many people there. B, I had the impression that neither attorney had had too much experience with arbitration.[28]

The account of what transpired at the aribitration hearing as given by Dominguez and Rodriguez differed substantially from that given by the Respondent's wit-

[28] Knowlton is 78 years old and appeared to be frail in constitution. He acknowledged that the hearing had been conducted by him in a "very informal manner." From Knowlton's testimony I received the impression that he felt deeply the realization that he had perhaps not exercised sufficient control of this arbitration hearing as was his usual practice.

nesses. Dominguez and Rodriguez testified that on their respective arrivals at the arbitration hearing, Chetrick had not questioned them about the events leading up to their discharge on 16 May 1986.[29] Both Dominguez and Torres stated that they asked Torres to translate what was being said at the hearing[30] and had requested the opportunity to testify regarding what had happened, but Torres failed to comply with these requests, although he initially told Dominguez, "Let's see. If it's possible, we'll see."[31] Moreover, the tenor of their testimony appeared to imply some cooperation or collusion between the Employer and the Union in this matter, to the detriment of these employees.[32] After the hearing they spoke to Torres and asked him why they had not been called as witnesses to tell their story and why Torres had not translated what went on during the hearing and Torres responded that "[E]verything was finished and that everything . . . had been said . . . why did we have to testify?" Dominguez and Rodriguez also inquired regarding when the arbitrator's decision would be forthcoming and Torres said it would take "ten days to two months."

6. What happened thereafter

By letter dated 2 October 1986, Knowlton asked Chetrick to "let me know what has been decided with respect to [Delgado's] inclusion in the case."[33] Chetrick testified that he then contacted the Union by letter inquiring about Delgado, and the Union's response by letter was to the effect that they were trying to locate him but were unsuccessful to date. Chetrick stated that he then telephoned Knowlton but Knowlton was not there and Chetrick told the arbitrator's secretary, Josephine, that the Union was still attempting to contact Delgado but had been unable to do so.[34] "Several days" after Knowlton had written to Chetrick regarding Delgado, Knowlton issued his "Opinion and Award" in the arbitration case. Chetrick sent a copy of the decision to the Union and the Union forwarded copies to Dominguez, Delgado, and Rodriguez.

While Knowlton testified that he did not pay "too much attention" to the grievants' attendance records "in his final analysis," the "Opinion and Award" is replete with references to this. The decision reads:

> All three of the grievants were discharged on or about May 15th for various problems arising from their attendance records coupled with their departure from work without notice after they had agreed to work overtime to finish a particular job . . . . The time-record of each of the grievants indicates frequent absences and/or latenesses in reporting. There had been discussion between the Employer, Mr. Marshak, and each of the three men regarding their attendance.

The decision then relates what occurred on 12 and 13 May 1986 (as discussed earlier) and concludes:

> Mr. Marshak had informed the Union of his difficulties with all three of the grievants with respect to their attendance on a number of occasions but these "warning letters" quite obviously did not have the desired effect. In my opinion, there was sufficient cause for the discharge of each of the men.

Moreover, there was much testimony and numerous exhibits introduced into evidence in the instant case regarding the attendance records of Dominguez, Delgado, and Rodriguez and of other employees. In substance this evidence shows that these employees did have lateness and absenteeism problems but so did some of the other employees, at least two of whom worked in the Employer's refinishing department, Osorio and Lofton. I also note that the testimony of Dominguez, Delgado, and Rodriguez regarding their attendance was at times evasive, guarded, and inconsistent with other documentary evidence in the record, such as warning notices and their timecards.

B. *Analysis and Conclusions*

1. Credibility

The resolution of some of the issues in this case requires a determination of the credibility of the respective witnesses. After carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole.[35] I tend to credit the account of what occurred here, as given by the Respondent's witnesses, and the General Counsel's witness, Arbitrator Knowlton, although I noted some inconsisten-

[29] However, on cross-examination, after denying consistently that Chetrick had spoken to him at all at the arbitration hearing, Dominguez admitted that "Through Torres a few words were spoken," mainly he told Chetrick and Torres that he wanted to testify at the hearing. Dominguez then testified that he had said nothing to Chetrick because he supposed that Torres had told Chetrick the full story of their discharge.

[30] However, in an affidavit given to a Board agent during the investigative stage of this proceeding, Rodriguez stated that, "The lawyers spoke in English and Torres didn't translate for us. I didn't ask him to translate for me." Rodriguez explained this inconsistency as an incorrect translation of what he told the Board agent.

[31] Dominguez testified that he, Delgado, and Rodriguez had made the same request to Torres when they met with him on 19 May 1986 at the Union's office.

[32] Dominguez testified that during the arbitration Marshak, Krupnick, and Chetrick left the room and then returned subsequently and spoke to the arbitrator. He also testified that after the hearing ended, Chetrick, Torres, and Krupnick had a conversation off to the side and when they returned they were laughing. DeSilva testified that near the end of the arbitration hearing, the arbitrator and the two lawyers left the room for a discussion among themselves. Torres testified that at one point during the hearing Chetrick and the arbitrator stepped out of the room.

[33] The letter specifies no time limit within which Chetrick was to notify the arbitrator about Delgado's status in the matter. Knowlton acknowledged that it may have been an error on his part not to set forth such a date in his letter and before issuing his decision that included Delgado.

[34] Knowlton testified that he had received no reply from Chetrick regarding his letter of 2 October 1986 and although Chetrick had told him subsequently, after he had issued his decision, that Chetrick had spoken to his secretary on the telephone soon after receipt of the letter and told her the Union was continuing its search for Delgado, Knowlton's secretary did not recall such a telephone call from Chetrick.

[35] *Northway Nursing Home*, 243 NLRB 544 (1979); *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976).

cies in their testimony as given, primarily in that of Luis Torres. However, on the whole their testimony was given in a forthright manner, was generally corroborative and consistent with each other, and most importantly, apparently consistent with other uncontroverted evidence in the record and therefore most believable. Although I do not discredit all the testimony of the General Counsel's witnesses, yet I found that their testimony, especially that of Juan Dominguez, was at times guarded, defensive, and evasive, especially on cross-examination, and contained inconsistencies with regard to other uncontradicted evidence in the record.[36]

2. The Respondent's affirmative defenses

a. *Failure to state a cause of action regarding Delgado and Rodriguez*

The Respondent alleges in its amended answer that the General Counsel has failed to state a cause of action on behalf of Julio Delgado and Rogelio Rodriguez, "inasmuch as they have not been named as complaining parties in the complaint and have not charged the [Union] with committing any wrongful acts with respect to the Union's representation of their rights and interests in the subject arbitration which is that basis of the instant complaint." However, paragraphs 10 through 15 of the complaint clearly and specifically set forth "a cause of action" on behalf of Dominguez, *Delgado*, and *Rodriguez* and allege wrongful acts and conduct by the Union against all three in violation of Section 8(b)(1)(A) of the Act.[37]

In view of the above I assume that the Respondent means that the General Counsel, in not naming Delgado and Rodriguez in the title caption of the complaint thereby, failed to state a cause of action on their behalf. As the United States Court of Appeals for the Seventh Circuit stated in *American Newspaper Publishers Assn. v. NLRB*, 193 F.2d 782, 800 (7th Cir. 1951):

> All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that the Respondent may be put upon his defense.[38]

Moreover, it is not uncommon and has been accepted by the Board and the courts, that the title caption of a Board complaint list only the name of the party filing the charge, although allegations in the charge and thereafter the complaint set forth the names of other aggrieved parties therein against whom unlawful acts and conduct has allegedly been perpetrated, and for which remedial action is sought.

From all the foregoing, I find and conclude that the Respondent's "First Affirmative Defense" is without merit and is rejected.

b. *Lack of jurisdiction*

The Respondent asserts in its brief in elaboration of this, its second affirmative defense in its amended answer, that the "Board must meet volume standards which [the] Board has imposed upon itself as a minimum for exercising jurisdiction" and therefore, because the General Counsel has alleged in the complaint that during the past year, "the Employer derived gross revenues from retail sales in excess of [$500,000]"[39] and "purchased and caused to be transported and delivered to its Long Island City place of business, products, goods and materials valued in excess of [$50,000],"[40] the General Counsel must meet both these standards in order that the Board exercise its jurisdiction in this matter. The Respondent is mistaken in this assertion.

The Board has determined that where a single-integrated enterprise is engaged in both retail and nonretail operations, it will assert jurisdiction where the employer's operations meet either the retail or nonretail standard provided that either aspect is not "de minimis."[41] According to the record evidence the Employer derived gross revenues during the past year of $4 million of which $460,000 was derived from retail sales. "De minimis"? No way! Since the Employer does a gross volume of business exceeding $500,000, I find that it meets the Board's retail jurisdictional standard, and this would be sufficient for the Board to assert jurisdiction herein.[42]

Moreover, the Employer purchased goods and materials from California and Canada in excess of $50,000 during the past year, which were delivered to its Long Island City, New York place of business. Thus the Employer meets the Board's $50,000 direct inflow stand-

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[36] A significant inconsistency was Dominguez' professed denial that he had not been asked by Marshak to work overtime on Monday, 12 May 1986. On direct examination he testified that he had never been asked by Marshak to work overtime for that Monday, but instead was requested by Zapata to work overtime for the next day, Tuesday. Then he testified on cross-examination that it was possible that on Tuesday he had apologized to Marshak for not having worked overtime the previous day, Monday, and gave as his reason for his failure to do so, that he had an "emergency." Then on redirect examination, after some effort on the part of counsel for the General Counsel, he stated that no one had ever asked him to work overtime for Monday. The question remains why Dominguez would admit having apologized to Marshak for not working overtime on 12 Monday 1986 if he had not been asked to do so, unless he was in actuality requested to work overtime that day.

Moreover, the testimony of Dominguez, Delgado, and Rodriguez with regard to their incidence of lateness and absences was less than candid, to say the least, and even less accurate regarding their receipt of oral and written warning notices. Their timecards and other documentary evidence in the record did not substantiate or corroborate their testimony thereon.

Additionally, their account of the time it took at each step of the way concerning the incident that occurred during their lunchtime on Tuesday, 13 May 1986, was less than believable and was fraught with evasiveness, their testimony was guarded and, in the case of Dominguez, was given in a somewhat defensive and at times hostile manner.

[37] Moreover, the charge filed herein alleges a failure and refusal by the Union "to represent Juan Dominguez, Rogelio Rodriguez and Julio Delgado, regarding their discharge by Office Furniture Service, Inc., for reasons that are arbitrary, invidious and capricious."

[38] Also see *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965), in which the court stated, "The propriety of a pleading is today judged by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought."

[39] *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958).

[40] *Siemons Mailing Service*, 122 NLRB 81 (1958).

[41] *Indiana Bottled Gas Co.*, 128 NLRB 1441 (1960); *Man Products*, 128 NLRB 546 (1960).

[42] *De Marco Concrete Block Co.*, 221 NLRB 341 (1975). Also see *Maaco Auto Painting & Body Work*, 249 NLRB 1296 (1980).

ard[43] and it would assert jurisdiction on this basis. It should be noted that the Board would assert jurisdiction of this Employer under either jurisdictional standard notwithstanding the General Counsel's allegations in the complaint, and I therefore find that the Respondent's "Second Affirmative Defense" is without merit.

c. *Statute of limitations—the 10(b) period*

Section 10(b) of the Act provides:

> That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

Filing with the Regional Director and service on the Respondent both must occur within the 6-month period in order for the charge to be timely. Section 10(b) is a statute of limitations and is not jurisdictional in nature. It is an affirmative defense that must be pleaded and, if not timely raised, waived.[44] The Respondent has timely raised such a defense.

The Respondent contends in its brief that:

> Inasmuch as a copy of the charge in the instant proceeding, allegedly filed by Dominguez on November 19, 1986 was not served upon the Respondent by certified mail on November 20, 1986, the action on behalf of Juan Dominguez is now time barred by the six-month statute of limitations.

The Respondent also contends, "[T]hat it has, unquestionably, been denied minimum procedural due process." I do not agree.

Section 102.14 of the Board's Rules and Regulations provides:

> Upon the filing of a charge, the charging party shall be responsible for the timely and proper service of a copy thereof upon the person against whom such a charge is made. The regional director will, as a matter of course, cause a copy of such charge to be served on the person against whom the charge is made, but he shall not be deemed to assume such responsibility for such service.

As indicated above, filing with the Regional Director and service on the Respondent both must occur within the 6-month period in order for the charge to be timely. Filing occurs when the charge is actually received by the Regional Director or other Board agent. In contrast, service on the Respondent occurs when the charge is placed in the mails or is hand delivered.[45] Moreover, Section 102.111(a) of the Board's Rules and Regulations provides in part:

> Charges . . . may be served personally or by registered or certified mail . . . and the return post office receipt . . . when registered or certified and mailed . . . shall be proof of service of the same.

The Respondent denied receipt of a copy of the charge filed with the Board in its amended answer to this complaint allegation, at the hearing, and in its brief. General Counsel's Exhibit 1(a–i) contains an affidavit of service of designated agent, Lillie Lampkin, which certifies that she served a copy of the charge on the Respondent by "postpaid certified mail" on 20 November 1986. Moreover, this exhibit also contains a green return receipt card for certified mail which shows a delivery date of "12/12/86" and which is addressed to the Respondent. Significantly, the return receipt card is signed by a Ms. "Pietri" who is admittedly one of the Respondent's secretaries. Under the Board's Rules and Regulations the above is sufficient to establish a prima facie case as regards the allegation in the complaint that the Respondent was served with a copy of the charge filed with the Board. The burden of proof now shifts to the Respondent to refute this. Additionally, as regards this issue as it impacts on the Respondent's 10(b) affirmative defense, the Respondent has the burden of proving such a defense.

In its brief the Respondent "[directs the Court's attention] to the fact that the green return receipt card does not have a stamp from the post office which is always present." However, return receipt cards do not always have a post stamp thereon, as evidenced by other green return receipt cards in evidence for certified mail regarding service of a copy of the complaint and notice of hearing herein on Chetrick and Delgado, and service of a copy of an order rescheduling the hearing on Chetrick.[46] The Respondent also maintains that, "Moreover, it is quite difficult to imagine that a particular item sent by certified mail, return receipt requested, would be signed for some twenty-three to thirty days after it was first sent." Yet the Respondent provides a possible explanation for this occurring in its own argument. The evidence shows that during the period from 20 November 1986 through 12 December 1986, the Respondent moved its union offices from Manhattan to Queens in the city of New York. The time lapse in delivery could well be explained by the need of the U.S. Post Office to transfer the certified letter from the Board containing the charge, from the old to the new office location post office for delivery. Additionally, as mentioned by the General Counsel in her brief, the Respondent did not deny that it received some document by certified mail that is represented by the return receipt card in question, but claims that there is no certainty that this card indicates that the document was the charge filed in this case. Aside from the corresponding numbers on the return receipt card and the covering letter mailed along with the charge in

[43] *American Homes Systems*, 200 NLRB 1151 (1972); *Siemons Mailing Service*, supra.

[44] *Federal Management Co.*, 264 NLRB 107 (1982); *McKesson Drug Co.*, 257 NLRB 468 fn. 1 (1981); *Penn Corp.*, 239 NLRB 45 (1978). Moreover, the burden of proving such an affirmative defense rests squarely on the party raising it, in this case the Respondent.

[45] See Board's Rules and Regulations Secs. 102.111(b)(1) and 102.112.

[46] See G.C. Exhs. 1(a–i). Moreover, Chetrick did not deny receipt of these documents or that these return cards were deficient.

the same envelope as is done in the normal course of the Board's Regional Office procedure, the Respondent offered no proof that this return receipt card represented some other document served on it by the Board.

The complaint alleges that the acts and conduct which comprise the unfair labor practices allegedly committed herein occurred on 10 September 1986. The charge was filed with the Board on 19 November 1986 and a copy of the charge was sent to the Respondent by certified mail on 20 November 1986, both services occurring well within the 6-month statute of limitations period. Incidently, actual delivery of the charge was accomplished on 12 December 1986, also within the 10(b) period. In view of the above, I find that the Respondent has failed to sustain its burden of showing that Section 10(b) of the Act bars consideration of the charges herein alleging unlawful conduct on its part, or that its third affirmative defense has any merit.[47]

From all the foregoing, I find and conclude that the Respondent has failed to sustain its burden of establishing the above affirmative defenses, that these affirmative defenses are without merit, and that the Respondent's request to dismiss the complaint on such grounds is denied.

3. The duty of fair representation

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization to "restrain or coerce" employees in the exercise of the rights guaranteed them in Section 7 of the Act, "Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."[48] Section 7 of the Act protects the right of employees to engage in union or other concerted activities or to refrain from such activities. The rights protected by Section 7, however, are limited by the principle of exclusive representation set forth in Section 9(a) of the Act.[49] In view of the restraints imposed on individual employee rights by the principle of exclusive representation, the Courts and the Board have imposed on labor organizations a reciprocal obligation of the Act to fully and fairly represent all the employees.[50] As the Supreme Court of the United States stated in *Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1967):

> It is now well established that, as the exclusive bargaining representative of the employees . . . the Union [has] a statutory duty fairly to represent all of those employees, "and that this duty" includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid aribitrary conduct. . . . A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith.[51]

A labor organization that fails to live up to this obligation unjustifiably restrains employees in the exercise of their Section 7 rights and thereby violates Section 8(b)(1)(A) of the Act.[52] The duty of fair representation gives employees a correlative right under Section 7 to be represented without arbitrary, irrelevant, or invidious discrimination by their exclusive representative.[53] Moreover, it is also clear that the duty of fair representation extends to the investigation and representation of a grievance.[54] At the same time, however, the Board and the Courts have recognized that unions must necessarily be allowed a "wide range of reasonableness" in servicing their constituencies,[55] i.e., processing grievances, but in the exercise of that discretion, a union must act in "good faith, with honesty of purpose, and free from reliance on impermissible consideration."[56] Accordingly, a union

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[47] As to the Respondent's assertion that it was denied "minimum procedural due process," this assertion must fail in view of the above, and because the Respondent was served a copy of the complaint advising it of the "things claimed to constitute an unfair labor practice that the Respondent may be put upon his defense." *American Newspaper Publishers Assn.*, supra. Moreover, as evidenced by the record, the Respondent was fully aware of the unfair labor practices alleged against it, appeared at the hearing apparently fully prepared to defend against these allegations, and at no time during the hearing offered any proof that would establish that it had been denied its due-process rights.

[48] The purpose of and policy behind Sec. 8(b)(1)(A), as set forth in Sec. 10(b) of the Act, is "to protect the rights of individual employees in their relations with labor organizations."

[49] Sec. 9(a) of the Act provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

See *Emporium Capwell Co. v. NLRB*, 420 U.S. 50, 61–70 (1975); *NLRB v. Tanner Motor Livery*, 419 F.2d 216, 218–221 (9th Cir. 1969).

[50] *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944); *NLRB v. Postal Workers St. Louis, Missouri Local*, 618 F.2d 1249 (8th Cir. 1980); *Teamsters Local 315 (Rhode & Jamieson)*, 217 NLRB 616 (1975), enfd. 545 F.2d 1173 (9th Cir. 1976).

[51] Also see *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *H. H. Robertson Co.*, 263 NLRB 1344 (1982).

[52] In its landmark decision in *Miranda Fuel Co.*, 140 NLRB 181 (1962), the Board held at 185:

> Viewing these mentioned obligations of a statutory representative in the context of the "right" guaranteed employees by Section 7 of the Act "to bargain collectively through representatives of their own choosing" we are of the opinion that section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.

Although *Miranda* was reversed in 326 F.2d 172 (2d Cir. 1973), the Second Circuit rejecting the Board's premises that a violation of the duty of fair representation constituted an unfair labor practice, the United States Supreme Court approved the doctrine in *Vaca v. Sipes*, supra. See *U.S. Postal Service*, 240 NLRB 1198 (1979), enfd. in pertinent part 618 F.2d 1249 (8th Cir. 1980); *Laborers Local 300 (Memorial Park)*, 235 NLRB 334 (1978).

[53] *Vaca v. Sipes*, supra at 177–178, 181–183; *Kling v. NLRB*, 503 F.2d 1044 (9th Cir. 1975); *Griffin v. Auto Workers*, 469 F.2d 181 (4th Cir. 1972).

[54] *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

[55] *Hines v. Anchor Motor Freight*, supra; *Ryan v. New York Newspaper Printing Pressmen's Local 2 (N.Y. Times Co.)*, 590 F.2d 451 (2d Cir. 1979); *Carpenters Local 415 (Cincinnati Fixtures)*, 226 NLRB 1032 (1976).

[56] *P.P.G. Industries*, 229 NLRB 713 (1977).

does not violate the duty of fair representation where it refuses to process a grievance pursuant to a reasonable interpretation of the collective-bargaining agreement[57] and/or a good-faith evaluation regarding the merits of the complaint.[58] However, the Supreme Court in *Vaca v. Sipes* explicitly held that a union will breach its duty of fair representation when it has "arbitrarily ignored a meritorious grievance or processed it in a perfunctory fashion."[59]

Once a union undertakes to present an employee's grievance, the obligation to represent him fully and fairly includes the duty to act as an advocate for the grievant.[60] Moreover, as the Board stated in *Teamsters Local 355 (Monarch Foods)*, 229 NLRB 1319, 1321 (1977), enfd. 597 F.2d 388 (4th Cir. 1979),

> However, the issue here is not whether the Respondent discharged its obligations with maximum skill and adeptness, but whether, in undertaking its efforts, it dealt fairly. The duty of fair representation does not require that every possible option be exercised or that a grievant's case be advocated in a perfect manner.

Thus a union is not liable under the duty of fair representation for mere negligence, poor judgment, ineptitude, forgetfulness, or inadvertence.[61]

The Board as well as a majority of the courts have held that a union can violate its duty of fair representation absent any evidence of bad faith if it is shown that the union acted in a perfunctory or arbitrary manner.[62] As the United States Court of Appeals for the Fourth Circuit explained in *Griffin v. Auto Workers*, 469 F.2d 181, 183 (1972):

> Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation. A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority.

But, as the Board stated in *Teamsters Local 692 (Great Western)*, 209 NLRB 446, 448 (1974):

> . . . it is clear that negligent action or nonaction of a union by itself will not be considered to be arbitrary, irrelevant, invidious, or unfair so as to constitute a breach of the duty of fair representation violative of the Act. *Something more is required.* [Emphasis added.]

And, in *Miller v. Gateway Transportation Co.*, 616 F.2d 272 (7th Cir. 1980), the Seventh Circuit Court, citing *Griffin* stated:

> We note also that the duty of fair representation is of special importance when a grievance for wrongful discharge is involved. As the Fourth Circuit said, "A union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge—the industrial equivalent of capital punishment." *Griffin v. Auto Workers*, 469 F.2d 191 (4th Cir. 1970).

The complaint alleges that the Respondent represented Juan Dominguez, Julio Delgado, and Rogelio Rodriguez in a grossly negligent manner at their arbitration by, inter alia, engaging in the following conduct:

> (a) failing to give proper notice of said arbitration to employee Delgado so that he could participate in his defense;
>
> (b) proceeding with the arbitration on behalf of Delgado and failing to respond to the Arbitrator's inquiry as to whether or not he should rule upon Delgado's discharge notwithstanding Respondent's knowledge that Delgado had not received notice of the arbitration;
>
> (c) Failing to conduct a complete investigation and to conduct a complete defense with respect to all of the Employer's stated bases for the discharge of the three named employees;
>
> (d) failing to provide an interpreter and/or to translate for the named discharged employees, who did not speak English or understand English; and
>
> (e) failing to present as witnesses any of the discharged employees to testify as to the circumstances which resulted in their discharges, notwithstanding that they were the only witnesses competent to testify to said events and circumstances.

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[57] *Steelworkers Local 7748 (Eaton Corp.)*, 246 NLRB 12 (1979); *P.P.G. Industries*, supra; *Carpenters Local 415 (Cincinnati Fixtures)*, supra.

[58] *Communication Workers Local 3217 (Southern Bell)*, 243 NLRB 85 (1979).

[59] *Hines v. Anchor Motor Freight*, supra; *Steelworkers Local 15167 (Memphis Stairs)*, 258 NLRB 484 (1981), enf. denied 692 F.2d 1052 (7th Cir. 1982). Cf. *Service Employees Local 579 (Beverly Manor)*, 229 NLRB 692 (1977), in which the Board found that the union's grievance investigation was perfunctory and arbitrary, and *San Francisco Web Pressmen Local (San Francisco Newspaper)*, 249 NLRB 88 (1980), in which the Board held that the investigation was reasonable.

[60] *Hotel & Restaurant Employees Local 64 (HLJ Management)*, 278 NRLB 773 fn. 3 (1986); *Teamsters Local 705 (Associated Transport)*, 209 NLRB 292 (1974).

[61] *Plumbers Local 195 (Stone & Webster)*, 240 NLRB 504 (1979); *Laborers (Manganaro Masonry)*, 230 NLRB 640 (1977); *King Soopers, Inc.*, 222 NLRB 1011 (1976); *San Francisco Web Pressmen Local 4 (San Francisco Newspaper)*, supra; *Teamsters Local 692 (Great Western)*, 209 NLRB 446 (1974); *Operating Engineers Local 18 (Ohio Pipe)*, 144 NLRB 1365 (1963). In *Service Employees Local 579 (Beverly Manor)*, supra, the Board found a violation of the union's duty of fair representation when the union failed to conduct any investigation of the asserted reason for a discharge.

[62] See *Service Employees Local 579 (Beverly Manor)*, supra; *P.P.G. Industries*, supra; *P & L Cedar Products*, 224 NLRB 244 (1976); *Newport News Shipbuilding & Dry Dock Co.*, 236 NLRB 1470 (1978); *Teamsters Local 315 (Rhodes & Jamieson)*, 217 NLRB 616 (1975); *Steelworkers (Inter-Royal Corp)*., 223 NLRB 1184 (1976); *Figueroa de Arroyoyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir. 1970), cert. denied 400 U.S. 877 (1970); *Holodnak v. Avco Corp.*, 514 F.2d 285 (2d Cir. 1975), cert. denied 423 U.S. 892 (1975); *Ryan v. New York Newspaper Printing*, 590 F.2d 451 (2d Cir. 1979); *Griffin v. Auto Workers*, 469 F.2d 181 (4th Cir. 1972); *Milstead v. Teamsters Local 957*, 580 F.2d 232 (6th Cir. 1978); *Ruzika v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975), cert. denied 104 S.Ct. 424 (1976); *Miller v. Gateway Transportation Co.*, 616 F.2d 272 (7th Cir. 1980); *Kesner v. NLRB*, 532 F.2d 272 (7th Cir. 1976), cert. denied 429 U.S. 983 (1976).

The General Counsel alleges in her brief that:

> [I]n the instant case, not only did Respondent fail to conduct any investigation, but also failed to act as advocate for the three employees once it was at the arbitration. . . . In the instant case Respondent either conducted no investigation, or if it did conduct one it only got the employer's version.[63]
>
> Therefore, the only meeting which the three employees had with the Respondent which appeared to have the look of an investigation was the one which took place on May 19 when the three employees met with Torres at his office. . . . In view of the fact that Respondent chose to completely ignore the version of the facts which was presented by the three employees, and to accept the uncorroborated version of the Employer, although there were questions of credibility, the May 19 meeting was tantamount to no investigation at all.

I do not agree.

The credited evidence shows that on 13 May 1986 after Dominguez, Delgado, and Rodriguez returned late from lunch, Marshak asked Zapata and DeSilva to find out the reason for their late return. On questioning these employees it was disclosed that they had returned late because of a flat tire experienced while driving to a restaurant to buy lunch. It should be remembered that DeSilva is the Union's shop steward and presumably at the shop to protect the interests and rights of union member employees under the collective-bargaining agreement, and I find nothing in the record to counter this. Torres and DeSilva met with Marshak on 13 May 1986, after DeSilva had apprised him of the Employer's intent to discharge the three employees, and they sought to change the Employer's mind about firing them.[64] Moreover, DeSilva had previously attempted to save their jobs on 13 May 1986 when he reported to Marshak what the employees had told him and Zapata was the reason for their late return, and DeSilva asked Marshak not to fire them.[65] On 19 May 1986, Dominguez, Delgado, and Rodriguez met with Torres at the Union's office and repeated their account of what had occurred the previous week leading up to their discharges.

Soon thereafter, Torres contacted the Union's attorney, Chetrick, and explained the circumstances of the discharges of Dominguez, Delgado, and Rodriguez. Chetrick then contacted DeSilva and got his account of what happened. Next Chetrick met with Torres at Chetrick's office to review the discharges in the context of the collective-bargaining agreement and to decide what the Union's course of action would be. In view of the admittedly poor lateness and absenteeism records of these three employees and mentioned in the Employer's discharge letter, Chetrick suggested that the Union's strategy at the arbitration be to oppose any attempt by the Employer to rely on their poor attendance records as justification for its discharge of the three employees as being immaterial, on the grounds that the Respondent's failure to grieve their prior incidents of lateness and/or absences, in effect, amounted to a "satisfactory adjustment" thereof within the meaning of the grievances and arbitration clause of the collective-bargaining agreement between the Employer and the Union. Therefore the Union would maintain at the arbitration hearing that the only issue presented therein for resolution was whether the incidents involving overtime work on 12 May 1986, and the employees late return from lunch on 13 May 1986, warranted and merited the extreme discipline of discharge.[66]

Additionally, credited evidence shows that just prior to the opening of the arbitration hearing on 10 September 1986, Chetrick met with Dominguez and then Rodriguez that morning and, with Torres interpreting, obtained their account of what had occurred the week of 12 May 1986 leading up to their being fired on 16 May 1986. He also asked them about their attendance records. Thus, except for Delgado, whose rendition of what had occurred could reasonably be presumed to be the same as that given by Dominguez and Rodriguez, and who did not appear at the hearing, the Union had obtained the stories of all the persons who were involved in or privy to the events leading to the firing of the three employees and who could be considered as potential witnesses at the arbitration hearing in the Union's behalf.

Under the circumstances present here, I cannot find that the Union failed to conduct "any investigation . . . or if it did conduct one it only got the employer's version." Given DeSilva's account of what he observed and heard of the conversation between Marshak, Zapata, Dominguez, Delgado, and Rodriguez on 13 May 1986 before the employees left for lunch, and his account of what transpired after the employees returned late from lunch,[67] and having heard Torres and DeSilva repeat

[63] The General Counsel questions the validity of the testimony of Torres and DeSilva that they met with the three employees on Friday, 13 May 1986, and advised them that they might be fired and also "got their version of what happened on May 13," as unsupported by the facts since DeSilva later that day, after giving them their discharge letters, told them to take the letters to the Union and speak to Torres. However, it is not implausible that DeSilva, even after he and Torres met with the employees earlier that day, would tell them to take the letters to Torres in order to have the Union process their grievances to arbitration, as Torres in DeSilva's presence had advised Marshak and the employees that the Union intended to do.

[64] In *Communications Workers Local 3217 (Southern Bell)*, 243 NLRB 85 (1979), the Board noted that the union had sought to have the discipline imposed on the employee (suspension) lifted or reduced and considered this as part of the evidence that the union's efforts on behalf of the employee "rose above a perfunctory and arbitrary treatment of the employee's matter." Also see *Teamsters Local 355 (Monarch Foods)*, supra.

[65] Ibid.

[66] Under the circumstances present in this case, I do not find Chetrick's strategy as to how he would proceed at the arbitration to be so arbitrary or unreasonable as to constitute gross negligence.

[67] As indicated earlier, DeSilva was the Union's shop steward and presumably "on the Union's side" in the arbitration proceeding. Moreover, the General Counsel offered no supportable evidence, nor do I find any preponderance of evidence showing that the Union was antagonistic towards these employees prior to and at the arbitration hearing, or that it was motivated by the employees' exercise of any protected concerted activity, or that there was any personal hostility on the part of union officials towards them. See *Auto Workers Local 417 (Falcon Industries)*, 245 NLRB 527 (1979); *Buffalo Newspaper Guild Local 26 (Buffalo Courier)*, 220 NLRB 79 (1975); *Electronic Workers Local 483 (Automotive Plating Corp.)*, 170 NLRB 1234 (1968).

what these employees had told them had happened regarding their discharges, the Union and Chetrick could reasonably conclude as to what had actually occurred, notwithstanding any discrepancies in the employees' account thereof or any change in their stories subsequently. I do find that the General Counsel has failed to sustain its burden of showing that the Respondent's investigation of the three grievants' matter in this case was perfunctory or careless.[68]

With regard to the allegation in the complaint that the Respondent failed to present as witnesses any of the discharged employees to testify as to the circumstances that resulted in their discharges "notwithstanding that they were the only witnesses competent to testify to said events and circumstances," I do not agree that this constituted "gross negligence" or "arbitrariness." As stated by the Board in *Teamsters Local 542 IBT (Golden Hill Hospital)*, 223 NLRB 533 (1976):

> In presenting the case to the arbitrator, the attorney supplied by the Union at all times represents the union as well as the grievants. It is for the attorney to determine what evidence is to be presented in support of the claim that the employer has violated the contract. A grievant has no special right to dictate what arguments are to be made or what testimony is to be sought.

The arbitration was conducted in a "very informal" manner as acknowledged by Knowlton, the arbitrator.[69] Marshak and the Respondent's attorney presented the Employer's side of what occurred in the form of unsworn statements as testimony. Although Chetrick did ask questions of Marshak regarding his assertions, there was not the give and take of direct and cross-examination under oath. The Union presented its version of what happened similarly, with Chetrick making its main presentation in the form of a comprehensive statement in defense of the grievants. Thereafter, although not too clear in the instant record, the Respondent's attorney asked questions of both Torres and DeSilva. This was in truth and fact a "very informal" arbitration hearing.

Moreover, although Dominguez and Rodriguez were presumably the most knowledgeable witnesses to the events that transpired, having been participants therein, DeSilva also had first-hand knowledge of what had happened and, additionally, Torres possessed material and relevant information as to what had transpired by virtue of his investigation of the grievances of these employees. Importantly, because DeSilva's account of what he heard and observed was significantly contrary in part to the grievants' story of what occurred on 12 and 13 May 1986, Chetrick's decision not to call Dominguez and Rodriguez as witnesses at the arbitration does not appear to be so "arbitrary" and grossly negligent as to constitute a perfunctory treatment of the conduct of their grievance. I do not find this to constitute a violation of the Respondent's duty of fair representation and therefore violative of the Act.[70]

The complaint also alleges that the Respondent failed "to provide an interpreter and/or to translate for the named discharged employees, who did not speak English or understand English." The question of an interpreter was raised by the arbitrator at the hearing. However, I believe that this was brought up in the context of the need for an interpreter in the event Dominguez or Rodriguez were to be called as witnesses or to give statements. Chetrick told Knowlton that Torres was bilingual and could act as an interpreter if need be. Chetrick's decision not to have them make statements negated this. As to Torres' failing to advise Dominguez and Rodriguez concerning what was being said, because the hearing was being conducted in English, there is some testimony in the record that Torres did on occasion "lean over" and speak to Dominguez in Spanish. However, Torres' testimony concerning this was inconsistent and unclear,[71] and I believe actually that he said little to them by way of translating what was being said in English at the arbitration.[72] My own observation of Dominguez and Rodriguez during the instant hearing was that they do understand some English, enough to be generally aware of what goes on around them, but insufficient

[68] *San Francisco Web Pressmen Local 4 (San Francisco Newspaper)*, supra; *Plumbers Local 195 (Stone & Webster)*, 240 NLRB 504 (1979). Contrast, *Service Employees Local 579 (Beverly Manor)*, supra, cited in the General Counsel's brief.

The General Counsel in her brief also points to the fact that the Respondent did not request and inspect the timecards and/or work history of all the Employer's employees or to compare the three discharged employees' lateness records with those of other employees whose latenesses were equal to or greater in number, as evidence of the Respondent's "arbitrary" and grossly negligent handling and processing of the grievances of the three discharged employees. Again I do not agree. While it might be anticipated that the Employer would submit the attendance records of Dominguez, Delgado, and Rodriguez at the arbitration hearing to bolster its justification for discharging these employees, and it may be argued that in the interest of thorough preparation for the arbitration hearing the better course of action might have been to counter this with the similarly poor or worse attendance records of other employees especially in the refinishing department, this might well constitute hindsight. Chetrick's strategy and presentation of the grievants' case at the arbitration was based on a reasonable determination that they had been discharged mainly because of what occurred on 12 and 13 May 1986, the failure of Dominguez and Rodriguez to work overtime that Monday, and all three employees late return from lunch on Tuesday. His apparently spirited attempts to preclude the Employer from offering evidence at that hearing of their attendance records, as being irrelevant and immaterial, was consistent therewith. While another lawyer might have proceeded somewhat differently in the arbitration matter, this does not mean that Chetrick's handling of it, as he did, constituted gross negligence, or was "arbitrary" in nature.

[69] Without intending any criticism, the arbitrator is the person charged with the proper course and conduct of an arbitration hearing, *procedurally*.

[70] Chetrick also offered as explanation, for not calling Dominguez and Rodriguez as witnesses or to have them make statements at the arbitration hearing, that this would have opened "a Pandora's box" of testimony involving their latenesses and/or absences that he did not want to happen and that would be contrary to his "trial plan" therein. That someone else would have proceeded differently in the presentation of a grievant's case is no reason for finding that an attorney's own handling thereof was "arbitrary" or "perfunctory."

[71] In his sworn statement given to a Board agent, Torres denied that Dominguez had asked him to translate what was occurring at the arbitration hearing, although he did testify herein that both Dominguez and Rodriguez had done so. I did not believe Torres in this instance.

[72] However, a detailed interpretation of what was going on during the course of the actual proceedings, while Torres Dominguez and Rodriguez were in the hearing room, might well have caused some disruption of the hearing, annoyance to the other parties there, or possibly conflict with Torres' absorption and attention regarding what was going on. In truth this is conjecture on my part as an aside only.

to provide comprehension of the technicalities and nuances present in an administrative proceeding or were they to be required to testify therein. This is not to say that perhaps Torres should have attempted to translate in brief in general terms what was being said and/or occurring at the time. Be that as it may, I do not find this omission on the part of the Union to rise to the level of "grossly negligent" behavior or to constitute such unreasonable or arbitrary conduct as to be violative of the Respondent's duty of fair representation.

From all the foregoing, I find and conclude that the General Counsel has failed to meet her burden of establishing that the Respondent breached its duty of fair representation regarding Juan Dominguez and Rogelio Rodriguez by its "arbitrary" and/or perfunctory processing of their grievances. I therefore recommend that the 8(b)(1)(A) allegations in the complaint regarding them be dismissed.[73]

The complaint alleges, in addition to the Respondent's failure to conduct a complete investigation and a complete defense, etc., regarding Dominguez, Delgado, and Rodriguez, as hereinbefore discussed, that the Respondent also breached its duty of fair representation by failing to give proper notice of the arbitration hearing to Delgado, by proceeding with the arbitration on his behalf although he was not present at the hearing, and by failing to respond to the arbitrator's inquiry whether Delgado should be included in any award notwithstanding that it knew that Delgado had not received notice of the arbitration date and place of hearing.

The record evidence shows that the Respondent sent Delgado written notice of the date, time, and place of the arbitration hearing but it was returned to the Union with the notation that Delgado was "Not Known" at the address indicated on the envelope enclosing the letter. The Respondent had addressed this letter to the address that Delgado had given it for receipt of mail, but had failed to include his apartment number.[74] Moreover, the Respondent attempted to contact him by telephone several times at his sister's apartment, because Delgado has no phone of his own, but to no avail because no one answered the telephone. Thus the Respondent did make reasonable efforts to contact Delgado to apprise him of the arbitration hearing.[75]

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The more troublesome fact, however, is the failure of the Respondent, through its attorney, Chetrick, or representative, Torres, to apprise the arbitrator that Delgado had not received notice of the arbitration hearing, accounting for his failure to appear at the hearing. Torres was aware of the returned undelivered notice letter and the unanswered telephone calls and Chetrick testified that it was on 10 September 1986, the day of the hearing, that he first learned that Delgado had not received notice of the arbitration. Instead, Chetrick told Arbitrator Knowlton that Delgado was not present, that he did not know where he was, and that he agreed to proceed with the arbitration hearing without his presence because Delgado's story was "exactly the same" as the other grievants, Dominguez and Rodriguez, who were there. Although Knowlton testified that the Union had informed him that all three grievants had been given notice of the hearing, his recollection of what occurred at the arbitration seemed at times unclear and he admittedly did not recall fully regarding what had transpired therein. However, Chetrick did indicate to Knowlton that the Union would seek to contact Delgado and find out if "[Delgado] wants to be a party to this arbitration and be bound."[76]

Additionally bothersome is the Respondent's failure to advise the arbitrator that Delgado had been absent from work on Monday, 12 May 1986, when Dominguez and Rodriguez were asked by the Employer to work overtime. In view of Knowlton's testimony that his award might have been different if he heard testimony "contrary to what's in this [dismissal] letter," this piece of information might well have had a mitigating effect on the arbitrator's decision regarding Delgado.[77]

As set forth earlier, a union breaches its statutory duty of fair representation when its conduct toward a member of the collective-bargaining unit is arbitrary, discriminatory, or in bad faith.[78] There seems to be no contention in this case nor does the evidence support a finding that the Respondent acted in bad faith or out of hostility towards Delgado, or as found before, towards Dominguez and Rodriguez. However, the Respondent's duty of fair representation also encompasses an obligation to deal fairly with employees in taking certain actions or refraining therefrom.[79] Therefore, the key question in this instance is whether the Respondent has engaged in "arbitrary conduct" regarding Delgado. As both the courts and the Board have held, for union action or nonaction to be considered arbitrary and, therefore, a breach of the duty of fair representation in violation of Section

[73] *San Francisco Web Pressmen Local 4 (San Francisco Newspaper)*, supra; *Plumbers Local 195 (Stone & Webster)*, supra; *Teamsters Local 355 (Monarch Foods)*, supra; *Teamsters Local 542 (Golden Hill Hospital)*, supra. Contrast, *Service Employees Local 579 (Beverly Manor)*, supra; *P & L Cedar Products*, supra. Moreover, the General Counsel's additional reliance on *Teamsters Local 705 (Associated Transport)*, 209 NLRB 292 (1974), in support of her contentions appears misplaced. The Board in *Associated Transport* found that a union violated its duty of fair representation because its representative openly stated at the hearing that he believed that the grievance had no merit. I do not find analogous to this statement, under the circumstances present in this case, and as alleged by the General Counsel, that by failing to conduct any investigation, by failing to call the grievants as witnesses, and by failing to provide "any translator for them at the arbitration," the Respondent, "in effect, told the arbitrator that the grievance of these three employees had no merit."

[74] There is no evidence in the record to explain why a letter correctly addressed to someone was undeliverable because the apartment number was not included therein. Many explanations suggest themselves but none are supported herein.

[75] Although it was the obligation of the Union to advise Delgado of the arbitration, I have wondered why Dominguez and/or Rodriguez did not contact Delgado about the hearing, especially in view of the admitted fact that all three were close friends and Dominguez called Rodriguez on the morning of the arbitration to make sure he was going to be present. This suggests the possibility that they too would have trouble contacting him as the Union had experienced. Be that as it may, the responsibility of advising the grievants of the date, time, and place of the arbitraton hearing remained with the Respondent.

[76] I am aware that under these circumstances Chetrick's remarks could be construed as being somewhat misleading to the arbitrator at the time.

[77] This would appear to be more than mere conjecture because the arbitrator's award upheld the validity of Delgado's discharge on the merits.

[78] *Teamsters Local 355 (Monarch Foods)*, supra; *Carpenters Local 1104 (Law Co.)*, 215 NLRB 537 (1974).

[79] *Teamsters Local 355 (Monarch Foods)*, supra.

8(b)(1)(A) of the Act, "something more than mere negligence is required."[80] "Mere negligence" standing alone, does not constitute arbitrary conduct.[81] And as previously set forth, the issue is not whether the Respondent discharged its obligations with maximum skill and adeptness; but whether in undertaking its efforts, it dealt fairly. The duty of fair representation does not require that every possible option be exercised or that a grievant's case be advocated in a perfect manner.[82]

Therefore, whether I consider that the Respondent handled Delgado's grievance at the arbitration hearing in an inept manner, or used poor judgment therein, or was negligent, or exhibited a "lack of sensitivity" in its handling of the matter, I do not believe that its conduct was so "arbitrary" or egregious as to warrant a finding that the Union failed in its duty to fairly represent Delgado, nor has the General Counsel sustained its burden of proving so.[83] Moreover, a review of the entire record fails to disclose circumstances that constitute the "something more than mere negligence" necessary to convert the negligent act or omission on the Respondent's part into a violation of the Act.

As the Board stated in *Office Employees Local 2*, 268 NLRB 1353 (1984):

> Exactly when conduct constitutes "something more than mere negligence" is not susceptible to precise definition. This is so because, as noted above, the totality of circumstances in each case must be examined and evaluated.

The Board in *Office Employees Local 2* then reviewed various cases where the requisite "something more" or "arbitrariness" was present. In each of these cases the Board found the "something more" in a union's hostility toward the grieving employee,[84] or a willful deception of the employee,[85] or a conflict between a union official and the employee,[86] or a union attempted to cause an employee to forfeit his senority rights on a groundless basis and in contravention of the collective-bargaining agreement.[87]

In this context and with the facts present in this case, I fail to find the circumstances that would constitute the "something more than mere negligence" necessary to convert the Respondent's acts or omissions into a violation of Section 8(b)(1)(A) of the Act.[88] Accordingly, I recommend the dismissal of the 8(b)(1)(A) allegations in the complaint regarding Julio Delgado.

Based on all the foregoing, I recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent, Amalgamated Industrial Union, Local 76B and its Divisions, Local 92—Local 76 (Local 76B Division) of the United Furniture Workers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Office Furniture Service, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondent has not violated the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[89]

ORDER

The complaint is dismissed in its entirety.

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[80] *Teamsters Local 692 (Great Western)*, supra.

[81] Ibid.

[82] *Teamsters Local 355 (Monarch Foods)*, supra.

[83] Id. at fn. 73.

[84] *Pacific Coast Utilities Service*, 238 NLRB 599 (1978).

[85] *Auto Workers Local 417 (Falcon Industries)*, 245 NLRB 527 (1979). Also see *Groves-Granite*, 229 NLRB 56 (1977), in which the union disparaged the employee, harbored personal hostility, and willfully deceived the employees. Also see *Teamsters Local 814 (Beth Israel Medical)*, 281 NLRB 1130 (1986).

[86] *Electrical Workers Local 485 (Automotive Plating)*, 170 NLRB 1234 (1968).

[87] *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963).

[88] *Office Employees Local 2*, supra.

[89] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

M-B Company, Inc. of Wisconsin *and* Dennis L. Strouf. Case 30–CA–9447

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On February 9, 1988, Administrative Law Judge George F. McInerny issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel also excepts to the judge's failure to mention in his decision the conversations that Richard Strouf, the Union's shop chairman and father of alleged discriminatee Dennis Strouf, testified he had with Brunner and Gebhart. Even assuming, arguendo, that based on those discussions or any other evidence, the General Counsel has made a prima facie showing that Dennis Strouf's layoff violated the Act, we agree with the judge that the Respondent has demonstrated that Dennis Strouf would have been laid off for lawful reasons even in the absence of this father's protected union activity.

In adopting the judge's conclusion that Dennis Strouf was not laid off due to his father's union activity, we find it unnecessary to rely on the judge's generalized comment that Dennis Strouf "was not a good or diligent employee," and rely instead on leadman Bruckner's credited testimony concerning specific problems with Dennis Strouf's performance and on the fact that a decrease in the Respondent's workload required the elimination of one employee's job.

We correct the following inadvertent errors in the judge's decision: In sec. III,B, he stated that Dennis Strouf was laid off on November 7, rather than November 6, 1986; in sec. III,C, he referred to Jerome Brocker as "Bruckner"; in sec. III,D, he referred to Mittag as a probationary employee in October "1976" rather than 1986, and stated that Cosgrove, in his speech to employees, referred to an Air Force contract rather than a contract for truck stripers; and in sec. III,E, he referred to drill press leadman Weber as "Meyer."

[2] In agreeing with the judge's determination that the failure of the Respondent to call Gebhart and Weber as witnesses does not give rise to an adverse inference, we note that the Respondent presented other witnesses, such as Bruckner and Brunner, who testified from personal knowledge as to Dennis Strouf's performance and the circumstances of his layoff, the matters about which Gebhart and Weber apparently also had knowledge. Even assuming, arguendo, that Weber would have testified that Dennis Strouf performed satisfactorily during his 1-1/2 week assignment in the drill press room, we agree with the judge's conclusion that Dennis Strouf was not laid off because of his father's union activity. Moreover, no adverse inference should be drawn from Gebhart's failure to testify about his discussion with Mittag concerning Mittag's status in the event of a strike, since Gebhart's statements were not alleged to be unlawful in the complaint or at the hearing. Further, at the time of the hearing, neither Gebhart nor Weber was alleged to be a supervisor, and the complaint was not amended then to include such allegations.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed in its entirety.

In adopting the judge's refusal to find that the Respondent's president, Cosgrove, violated Sec. 8(a)(1) of the Act through his reference to transferring a particular contract to another location if the employees went on strike, we note that the record indicates that, in the context in which it was made, the statement would not reasonably have been understood as a threat of reprisal but rather as a claim that the Respondent would have been able to continue operations during a strike.

Rocky Coe, Esq., for the General Counsel.
Douglas A. Cairns, Esq.[1] and *John C. Patzke Esq. (Brigden & Petajan, S.C.)*, of Milwaukee, Wisconsin, and *Ronald P. Dales, Esq.*, of Sheboygan, Wisconsin, for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE F. MCINERNY, Administrative Law Judge. Based on a charge filed on January 12, 1987, by Dennis L. Strouf, an individual (the Charging Party), the Regional Director for Region 30 of the National Labor Relations Board (the Board) issued a complaint on February 20, 1987, alleging that M-B Company, Inc. of Wisconsin (the Company or Respondent) violated the National Labor Relations Act (the Act) in discharging Dennis L. Strouf on or about November 7, 1986, and subsequently failing and refusing to reinstate him. The Respondent filed a timely answer in which it denied the commission of any unfair labor practices.

Pursuant to a notice contained in the complaint, a hearing was held before me at Manitowoc, Wisconsin, on June 24–25, 1987, at which all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, to make and argue motions, and to argue orally. After the conclusion of the hearing the Respondent and the General Counsel filed briefs, which have been carefully considered.[2] Based on the entire record, including my observations of the witnesses, and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, M-B Company, Inc. of Wisconsin, is a Wisconsin corporation with plants located in Chilton

[1] Mr. Cairns died on December 11, 1987, having completed the trial, the brief, and further motions in this matter.

[2] On December 7, 1987, counsel for the Respondent filed a response to motion to amend the complaint contained in the General Counsel's brief, together with motions to strike portions of the General Counsel's brief and to correct the transcript. The General Counsel filed an opposition to this document, objecting to Respondent's motion to strike portions of the General Counsel's brief and to Respondent's opposition to the General Counsel's motion to amend. Because there was no opposition to Respondent's motion to correct the transcript that motion is allowed. For reasons which will appear below, I deny the General Counsel's motion to amend the complaint, and Respondent's motion to strike portions of the General Counsel's brief.

and New Holstein, Wisconsin, where it is engaged in the manufacture, refinishing, and repair of sweepers and road-marking machinery.[3] During the calendar year ending December 31, 1986, the Respondent sold and shipped from its Wisconsin facilities goods and products valued at over $50,000 directly to points outside the State of Wisconsin. The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that District 150, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Company's facility involved in this case is the plant at New Holstein, Wisconsin, where it manufactures, repairs, and rebuilds commercial sweepers. The sweepers are either self-propelled or are towed by other vehicles, and are used to clean roads, sidewalks, or airport runways. At New Holstein there are approximately 30 hourly rated employees represented by District 150 of the International Association of Machinists and Aerospace Workers, AFL–CIO, in a unit that also includes another 50 employees at the Chilton facility, about 6 miles from New Holstein.

The Union has represented these employees since the 1940s. So far as can be determined from the record in this case, relations had been ongoing and cordial during this period. In the fall of 1986, union and company representatives met to negotiate a new collective-bargaining agreement to succeed a contract expiring at the end of October. The Company was represented by Attorneys Ronald P. Dales and Thomas E. Brunner, vice president and general manager, respectively, of the sweeper division at New Holstein. The Union was represented by Business Representative Jerome Brocker, accompanied by an employee committee including Shop Chairman Richard Strouf, a master assembler at New Holstein, and the father of the Charging Party, and Michael J. Gudex, a committeeman, who is a leadman at the Chilton plant and also the maternal uncle of Dennis Strouf.

In September 1985, the Company had bid on and been awarded a contract to rebuild and recondition airport sweepers for the United States Air Force. After some preliminary work to establish the Company's reliability and its ability to perform the work required under this contract, the Air Force delivered some 30 sweepers to the Company at New Holstein by late August 1986. These were stored in the Company's yard to be disassembled and cleaned so they could be brought into the plant to be rebuilt before the winter.

[3] The Company also operates a shoe manufacturing facility at Sheboygan, Wisconsin, which is not involved in this case.

B. *The Hiring and Layoff of Dennis Strouf*[4]

Dennis Strouf graduated from high school in the spring of 1986.[5] At about that time he mentioned to his father, Richard, that he would like to go to work for the M-B Company. Dennis went to the Company and took a series of tests administered to applicants for permanent jobs. He did not do very well on the tests in early August and had an interview with General Manager Brunner. The latter told him that based on his test scores and lack of experience he would not be considered for permanent employment.

After this, the Company received the 30 Air Force sweepers and had to consider how they were going to get them cleaned up before the snow came to New Holstein. About the same time, Richard Strouf approached Brunner and appealed to him to give Dennis a job. In view of the need to get the sweeper job done, Brunner agreed to hire Dennis on a temporary basis.[6]

Dennis Strouf reported for work on September 6. He was joined by another temporary employee, David Kirsch, and by several employees from the Chilton plant. Dennis worked for about 2 months at cleaning parts on sweepers, operating a forklift under leadmen Stanley Bruckner, and, for a time, operating a drill press in the machine shop under the direction of Jim Weber. On Thursday, November 7, Dennis had a conversation with Brunner who informed him that he was being laid off because of a lack of work. The layoff was effective immediately, and Dennis left the plant.

C. *The Contract Negotiations*

As had been noted, the testimony in this case indicates that the Company and the Union had an ongoing relationship going back to the 1940s. The contract between the parties effective during early 1986 was due to expire on October 31. About 3 weeks before this expiration date the parties commenced negotiations for a new agreement. As indicated, the company committee consisted of Attorneys Dales and Brunner, and for the Union, Jerome Bruckner, Gudex, and Richard Strouf. Bruckner acted as chief spokesman on the union side, but the other two committee people also joined in the discussions. There were extended discussions on economics, including a wage package, and on the Company's profit-sharing plan. There were differences in the testimony of Brunner and, Richard Strouf about the emotional level of these discussions. Brunner recalled the parties as being "emotional" or "animated," but could not recall what Strouf and Gudex described as shouting and table-pounding. I cannot say that the characterizations by any of these witnesses rose to the vituperative or frenzied level of many such situations I have heard about and some in which I have actively participated. The union representatives were disappointed, even angry, at what they described as

[4] There are no substantial issues of fact on the chronology of Dennis Strouf's relations with the Company. This statement of facts is taken from the testimony of Dennis and Richard Strouf and Thomas Brunner.

[5] All subsequent dates are in 1986 unless otherwise noted.

[6] Art. II, sec. 4 and art. IV, sec. 4 of the parties' November 1, 1986 contract provides for the hiring, lay off, transfer, or discharge of temporary employees.

no progress on economic issues. Richard Strouf, particularly, was concerned with possible duplicity in the Company's reservation, or accrual, of moneys from the profit-sharing plan to cover anticipated expenses. But there were no threats, no wild scenes, and no walkouts connected with any of these meetings.

After several meetings, a mediator was called in and, eventually, a last offer was made by the Company. The proposal was taken back by the union bargaining committee to the membership and was there rejected. However, because of an unusual union rule[7] a strike vote failed, and, in that circumstance, the contract "won by default,"[8] and was executed by the parties.

D. *Cosgrove's Speech and Alleged Threats to Employees*

Terrence J. Cosgrove is the president and sole owner of the Company. On the day after the contract was accepted by the Union (despite its being unsatisfactory) Cosgrove testified that he heard talk from company employees that "the Company won again." Cosgrove became angry at this talk because, in his words, he had been trying for 3 years to get people "focused to the marketplace and literally knocking the hell out of our competitors." In order perhaps to refocus the people who were saying that the Company had won in the negotiations he summoned all the employees to a meeting at the Chilton plant.

There does not seem to be any substantive disagreement on what Cosgrove said. He was angry, as he admitted, and he was talking to the employees against the advice of Dales, his attorney. He used no text nor had he made notes on what he was going to say. Cosgrove himself had no real idea what he said,[9] but he did not disagree with testimony on the talk by Brunner or Micheal Gudex. Richard Strouf substantially agreed with this testimony, adding his recollection that Cosgrove said something about moving operations if the employees had gone out on strike. Cosgrove recalled that he said that if they had had a strike he would have taken the Air Force contract and moved it somewhere else.[10]

In another matter, Steven Mittag, who was a probationary employee in October 1976, testified that at the end of October he was asked by Wally Gebhardt, manager of production inventory control, if he would cross the picket line if there was a strike vote. Mittag asked what would happen if he did not and according to Mittag, Gebhardt replied that because he was not protected by the Union, if he refused to cross the picket line for 3 working days, he would be terminated by the Company. Gebhardt did not testify but Tom Brunner, who was present at the conversation between Gebhardt and Mittag, testified that Mittag had asked about crossing a picket line and Gebhardt told him that if he did not cross the line, his absences could be considered to be unexcused absences. There was no evidence that unexcused absences by probationary employees constituted a cause for discipline or discharge.

E. *Summary and Conclusions*

1. The discharge of Dennis Strouf

Based on the entire record in this case, I conclude that the General Counsel has failed to establish that the Company objected to or resented the Union, or that Brunner or any other company official resented the conduct of Richard Strouf during the 1986 negotiations.

This Company, according to Richard Strouf's own testimony, had had continuous relations with the Union since the 1940s. Michael Gudex and Jerome Brocker stated that the Union had filed no grievances during at least the 3 years before this hearing. Taking Richard Strouf's and Michael Gudex's testimony at its face value, it does not appear that Richard's conduct at the bargaining table, or the Company's response, gave rise to any indication that the Company resented that conduct. Indeed, it would be strange if a series of meetings on a collective-bargaining agreement did not produce some shouting, tablepounding, or other manifestations of impatience. Rarely do such displays leave any lasting effects. The evidence in this case does not point to a different conclusion.

The question of Richard Strouf's urging rejection by the membership of the proposed agreement is not, in my opinion, significant. Nor was this action by Richard connected by the General Counsel to Cosgrove's speech to the employees.

There is no indication here, as alleged by the General Counsel, of falsification of Dennis Strouf's employment records by leadman Stanley Bruckner. Bruckner impressed me as a cautious but candid witness. I credit his evaluations of Dennis Strouf as an employee and I believe that his judgment in determining whether to retain Dennis or David Kirsch was an honest judgment based on his view of the best interests of the Company.

I do not agree with the General Counsel that I should take the absence of the drill press leadman, Meyer, and production inventory control manager, Gebhardt, as establishing the General Counsel's position on Dennis Strouf's discharge, or the Company's motivations in effecting Dennis' layoff. There is no indication that either Meyer or Gebhardt would not have responded to the General Counsel's subpoenas or testified as he now asserts they would have.

From these findings it is clear that the General Counsel has not established a prima facie case that Dennis Strouf was laid off (or discharged) because of the Company's animus toward the Union or toward his father. Further, it is also clear that Dennis was not a good or a diligent employee and that his selection of layoff was based on a proper comparison between himself and

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[7] Either under its constitution or bylaws, the record is not clear.

[8] These were Brunner's words. The use of the word "won" became significant later.

[9] Cosgrove was angry, but there is no indication that his talk was rambling or incoherent. Despite his anger and the absence of text or notes, he obviously had thought about what he was going to say.

[10] In his brief, counsel for the General Counsel moved to amend the complaint to allege this remark as a violation of Sec. 8(a)(1). For the reasons given below, I deny the motion to amend the complaint.

David Kirsch.[11] See, e.g., *Wright Line*, 251 NLRB 1083 (1980).

2. The Mittag situation

I think Mittag was an honest witness, but bearing in mind that he had worked only a few days before the strike threat arose, I feel that he was apprehensive and perhaps not exactly sure what was being said to him when he asked about crossing a picket line. I credit Brunner's version of what Gebhardt said to Mittag. In that statement I find no threat, but merely a recitation of a company policy which was not further explained in the record.

3. Cosgrove's speech

I cannot read into Crosgrove's speech either a threat to close the plant, or any other coercive statement. What he said, and there is no serious disagreement on that, was that he might have moved some work if there had been a strike. I find no threat or violation of law in that speech, and I find no connection between the speech and layoff of Dennis Strouf. The General Counsel's motion to amend the complaint to allege this speech as containing a violation of Section 8(a)(1) is denied.

CONCLUSIONS OF LAW

1. The Company, M-B Company, Inc. of Wisconsin, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, District 150, International Association of Machinists and Aerospace Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company has not committed any unfair labor practices under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed.

[11] I do not credit Dennis' denials of derelictions alleged by leadman Stanley Bruckner. I found Bruckner to be a forthright and credible witness, and I found Dennis to be indifferent as well as forgetful. This demeanor indicated to me that he expected to be believed no matter what he said.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Theatre Holdings, Inc. d/b/a Harvard Square Theatre *and* United Electrical, Radio and Machine Workers of America, Local 262 (UE). Case 1–CA–24437

July 29, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On October 20, 1987, Administrative Law Judge Thomas A. Ricci issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision and in opposition to the General Counsel's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Respondent also filed a motion to disallow the General Counsel's brief in support of exceptions. In view of our dismissal of the complaint, we find it unnecessary to pass on the Respondent's motion.

[2] The judge states that Applicant Joel Cohn indicated on his application that he wanted employment as a fill-in temporary employee. In fact, the portion of Cohn's application that requested the hours he was available was left blank by Cohn. This misstatement by the judge does not alter our decision in this case. Additionally, although the judge failed to specifically analyze the alleged violation of Sec. 8(a)(2) of the Act, our review of the documents and record disclose insufficient facts to support finding an 8(a)(2) violation.

In this regard, we note that the General Counsel contended that the Respondent recognized IATSE Local 182 at a time when Local 182 did not represent an uncoerced majority of employees. This contention was premised on the General Counsel's argument that Local 182's majority showing was tainted by the Respondent's alleged unlawful hiring practices. Because we find no violation of Sec. 8(a)(3) in the Respondent's hiring practices and because Local 182 presented evidence that it represented a majority of the employees in the unit, it was not unlawful for the Respondent to recognize and thereafter enter into a collective-bargaining agreement with Local 182. The General Counsel also argues that the Respondent's extension of recognition was made before Local 182 had obtained cards from a majority of the employees. However, the record reflects that recognition was granted on November 16 after at least four of the seven employees in the unit had signed authorization cards. Thus, the General Counsel has failed to present evidence indicative of unlawful employer assistance.

Gary Cooper, Esq., for the General Counsel.
Jerome H. Somers and *Susan C. Nicklaus, Esqs. (Goodwin, Procter & Hoar)*, of Boston, Massachussetts, for the Respondent.
Harry Authelet, of Boston, Massachussetts, for the Charging Party.

DECISION

Statement of the Case

THOMAS A. RICCI, Administrative Law Judge. A hearing in this proceeding was held at Boston, Massachusetts, on 7 and 8 July 1987, on a complaint issued aganist Theatre Holdings, Inc. d/b/a Harvard Square Theatre (the Respondent). The complaint issued on 7 May 1987 on a charge filed on 23 December 1986 by United Electrical, Radio and Machine Workers of America, Local 262 (the UE or the Charging Party). The sole issues to be decided are whether the Respondent refused to hire two applicants for employment because of their membership in the Charging Party Union, and thereby violated Section 8(a)(3) of the statute. Briefs were filed by the General Counsel and the Respondent.

On the entire record and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is engaged in the operation of moving picture theatres. Annually in the course of its business operations the Respondent derives gross revenues in excess of $500,000. It also purchases and receives at its Boston facilities products, goods, and materials valued in excess of $5000 directly from points outside the Commonwealth of Massachusetts. I find that the Respondent is an employer within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that United Electrical, Radio and Machine Workers of America, Local 262, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent, which operates under the trade name U.S.A. Theatres, owns a large number of moving picture houses, about 100, in a number of New England States. Its employees are classified as ticket sellers, ushers, projectionists, assistant managers, etc. In some of its theatres there is no union representing its employees. In some of them there is, with International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (IATSE), representing the projectionists. In one of its theatres the Charging Party represents the projectionists.

During November 1986 the Respondent purchased a moving picture house in Cambridge, Massachusetts, called the Harvard Square Theatre, from a company called Harvard Square. The deal was completed on 14 November and the Respondent took over and started operating the theatre with its own employees that day. The selling company had used the usual categories of employees, including projectionists. In the summer of 1986 its projectionists joined the UE and filed a petition for an election with the National Labor Relations Board on July 11. An election was held on 22 September, with seven projectionists on the eligibility list. All seven of

them voted in favor of the UE. By 13 November, the last day it operated the theatre, the seller discharged every one of its employees.

In anticipation of its starting takeover, the Respondent publicized its need for new employees. It placed ads in the local newspaper and posted notices inviting applications in the theatre itself. In response it received 16 written applications for the positions of projectionists. By 14 November it hired seven of these applicants. Four of them signed cards in favor of IATSE and, after the usual meetings with that Union, the Respondent entered into a regular collective-bargaining agreement later in November.

One of the nine applicants for the jobs of projectionists that Respondent did not hire was Jessica Schroeder, a young lady who had worked for some time for the predecessor company as a cashier and usher. Another was Joel Cohn, who had not worked for the predecessor for several years, and who, at the time of his application in November 1986 was working as a full-time head projectionist at a theatre totally unrelated to these parties. His application asked for employment with the Respondent as a fill-in temporary employee. The complaint alleges that the reason the Respondent did not hire Schroeder or Cohn was because they were members of the UE and that, therefore, the refusal to select them among the many was a violation of Section 8(a)(3) of the Act. The record in its entirety falls far short of proving a prima facie case in support of that allegation. Rather, it shows beyond a shadow of doubt that the Respondent had the most objective reason possible for selecting the projectionists it did hire while ignoring these two and a number of other applicants. I shall therefore dismiss the complaint. *Wright Line*, 251 NLRB 1083 (1980).

The selection among the 16 applicants was made by Charles Goldwater, a vice president of the Respondent, and by Daniel Greismer, vice president and general manager of the Company's New England theatres. They very clearly denied the allegation that union affiliation of any of the applicants had anything to do with their decision who to hire. Rather, both said they choose on the basis of the applicant's experience as a projectionist and availability. The record, consisting of unrequestioned documentary proof, supports the assertion beyond question.

In looking over the various applicants for projectionists, the company representatives checked the work experience listed by the applicants. They spoke to their managers in their other theatres where some of the men had worked. They spoke to Hal Wagner, an officer of IATSE, for his opinion about qualifications and experience of some of the applicants. With some of the applicants having been employed by the selling company, Goldwater and Greisner also consulted with Graham, the manager of the theatre before the takeover, and with Mariello, the owner of the selling company, to learn their opinion about the relative qualifications of the employees in the past. The principal point argued in support of the complaint is that the new owners asked Wagner's opinion about which applicants would be better projectionists. I see nothing wrong in Goldwater or Greismer seeking that man's expert opinion in the circumstances of this case. Wagner had been doing business with the Respondent for a long time in many of its other theatres. He certainly was in a position to give a reliable opinion. There is nothing in any of the Respondent's contracts, which IATSE had at its other theatres, that conditions hiring on referral by that Union. Indeed, the Respondent relied as much on Mariello's recommendation as it did on Wagner's.

A most significant aspect of this case is that there is no evidence at all indicating animosity against the UE by the Respondent's representatives. There is not even a single allegation, in the classic sense, of any violation of Section 8(a)(1) of the Act. The Respondent hired a number of projectionists, all of long experience, who had worked for the predecessor, known adherents of the UE. It also hired projectionists, again, with long experience, who were well spoken of by the IATSE agent. Does it follow from this last fact alone that the Respondent violated the statute, and that IATSE also committed an unfair labor practice?[1] The Supreme Court long ago disagreed with a Board holding that direct referral by a union of a man for hiring, absent affirmative evidence of intent to favor prounion men against nonunion people, constituted an unfair practice. *Teamsters Local 357*, 365 U.S. 667 (1961). If outright referral, absent proof of illegal motivation, is not an unfair labor practice, surely mere recommendation about a man's relative skill can hardly prove a violation of the statute.

The notices inviting applications were posted inside the theatre before the takeover. If the new company was determined to establish IASTE as the bargaining agent in the place of the UE, why would it have solicited applications form the old employees? In the election that had taken place on 22 September all seven of the eligible projectionists had voted in favor of the UE. The new owners knew that. With no evidence to support the assertion the General Counsel suggests that the Respondent deliberately posted a notice inside the theatre to create a false impression that it was indifferent to union or nonunion membership by the applicants. It is an argument that has no foundation in fact.

But more important is that despite its knowledge that all the old projectionists had favored the Union in the Board election, the Respondent hired three of them—William Templemen, Bill Litchman, and Jim Hill. Before deciding on anyone the Respondent's agents asked Mariello for a list of its projectionists, with his opinion regarding their relative skills and experience. Mariello did that, with a comment, in his own handwriting, on their comparative skills. He wrote the word "excellent" next to only three of the names, the very three that the Respondent then hired. About another he wrote "Do not recommend" and another he wrote "Fair." Two others—Hatfield and Kelly—he labeled as "Very Good." But those two did not apply for the new jobs. What better proof than this that the Respondent, as its agents insisted at the hearing, was concerned above all with skills and experience?

[1] The complaint, as issued, also contained allegations of wrongdoing by IASTE. All those allegations were removed from the complaint by the General Counsel at the start of the hearing.

The Respondent hired four others besides the three listed above. All four of these had written in their application that they were members of IASTE. Two of them had 2 years. The selection of these last four projectionists fits squarely into the Respondent's position that all it sought was experienced people.

Gohn was an experienced man, but all he wanted here was a part-time job, offering to "fill-in," as he said, when needed. More important, there is no evidence at all that the Respondent's agents knew of his UE activities in the past. There was no mention of it in his written application. The only thing in this entire record that the General Counsel now says proves the Company's knowledge of this man's prounion interests is a conversation Cohn had with Greisner on the telephone a week after the full complement had been hired. Cohn called to ask if there was still any hope of his obtaining extra work. In the talking, Cohn, as he testified, said "I want you to know that I understand that there's a question of who will represent the projectionists at the theatre, and that I was willing to work no matter who represented or even if they were not represented." Greisner's response to this was, "I'm glad you told me that." Does this conversation prove that, a week earlier, when Cohn was passed over, the Respondent knew of his UE penchant? Does it prove anti-UE machinations by the Respondent? Not at all.

We come to Schroeder, who, at that time, was working as a cashier and usher for the predecessor company and who applied with the Respondent for a job as projectionist. This whole case really centers on the fact that in making their selection the new managers simply ignored her application. Schroeder aspired to become a projectionist. During the summer of 1986 she trained at that work and on 25 August passed a test and became a licensed projectionist. She testified that from September to October 1986 she continued to work for the former company as a cashier and usher. Regarding actual work it did not change thereafter. From the transcript:

> Q. (By the General Counsel). After you received your training as a projectionist, was there any change in the nature of your job at the theatre?
>
> A. Not really, not—basically. I continue to usher. I tried to—Bill Templeman and I tried to get shifts for me that were open. There were shifts that needed to be taken up at the time. That people were working just sort to get us through, until I was ready to work them. So at that time we were trying to make it possible for me to work projecting, and management had some kind of problem with that.

Schroder also testified that during the last month or so before the takeover she was a part-timer, working only about 20 hours per week. She said that part of that limited time she was actually used as a projectionist. This, apparently, based on her own testimony, is the limit of her experience as a projectionist. She also said that for such limited projectionist work she was paid at the rate of $6.25 per hour instead of her regular pay of $3.35 per hour as an usher. The payslips that were offered into evidence for her last 2 weeks—from 1 to 13 November—show a pay rate of $6.25 per hour, but they do not clearly prove her assertion. In explaining the slips she also said that the figure $6.25 could reflect certain overtime work performed during that period. Thus it appears, taking the lady's testimony at its best, that her total experience as a projectionist amounted to no more than 10 or 20 hours at the most.

No one on behalf of the Respondent ever spoke to Schroeder about her application. All she said, in support of the complaint, is that one day she telephoned Greismer, of the Respondent, and asked why she had not been hired. The owner said, as she testified, "that they were looking for more experienced projectionists." It thus appears that, entirely apart from the total absence of direct evidence of illegal motivation in the Respondent's failure to select Schroeder, there was the most convincing proof of a rational and purely objective basis for not hiring her. For the Company to have selected an applicant with virtually no experience at all, and ignoring the many others with years of experience, would have been absolutely silly.

In conclusion, the record in its entirety shows without doubt that the General Counsel was aware of this total lack of evidence to show personal dislike of Schroeder as an employee. Harvard Square Company, the seller, discharged all of its employees shortly after all seven of its projectionists voted in favor of the UE. There is no allegation that its action constituted an unfair labor practice. It is also conceded that the purchaser had a right to hire any employee of its choice to work in the theatre. Restated: The Respondent was not an alter ego of the earlier company. It did not hire a majority of the seller's employees in the unit in which the UE had won a majority in the Board election. It therefore was not a successor, in terms of Board law. In the face of this reality, the complaint nevertheless alleges that the Respondent was legally obligated to bargain with the UE regarding its newly hired employees. It also alleges precisely that later, when it contracted with IATSE and altered some of the conditions of employment in the theatre, the Respondent violated Section 8(a)(5) of the Act because it bypassed the UE.

This is the same as saying: This Respondent did not hire a majority of its predecessor's employees, but treated as though it in fact had done so. It would demean this decision to burden it with a serious response to such an argument. What the General Counsel is really asserting is that the Respondent knew that had it hired four instead of three of the predecessor projectionists, it would have found itself in the position of a successor, according to Board law, and therefore, obligated to bargain with the UE. From this it follows, according to the General Counsel, that the reason the Respondent did not hire Schroeder was to avoid exactly such legal consequence. It is a kind of reasoning that does not merit comment.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

It is recommended that the complaint be dismissed in its entirety.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

General Chemical Corporation *and* International Chemical Workers Union, Local 25. Case 32–CA–8404

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On November 4, 1987, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, General Chemical Corporation, Pittsburg, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Ariel Sotolongo, Esq., for the General Counsel.
John D. McLachlan and *Ned Fine, Esqs. (Fisher & Phillips)*, of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial in Oakland, California, on June 22 through 25, and July 1, 1987. On November 26, 1986, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing based on unfair labor practice charges filed by International Chemical Workers Union, Local 25 (the Union) on September 23, 1986. Thereafter the Union filed amended charges on October 10, 1986, and February 20, 1987, and the Regional Director issued amended complaints on February 2 and April 17, 1987. The complaint alleges that General Chemical Corporation (Respondent) violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act).

The parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Posttrial briefs were filed on behalf of the General Counsel and the Respondent. Based on the entire record, on the briefs filed by counsel, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a Delaware corporation with a facility in Pittsburg, California, where it is engaged in the nonretail manufacture and processing of chemicals. During the 12-month period preceding issuance of the complaint, Respondent purchased and received goods, materials, and supplies valued in excess of $50,000 directly from suppliers located outside the State of California.

The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, the answer admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

As discussed above, Respondent is engaged in the manufacture and processing of chemicals. Respondent's production and maintenance employees have been represented by the Union for many years. In April 1986, Respondent acquired the Pittsburg, California facility from Allied Chemical Corporation. Following its acquisition of the plant, Respondent recognized the Union as the exclusive bargaining agent of the employees and began negotiations for a new collective-bargaining agreement in May 1986. Negotiations between Respondent and the Union became deadlocked by late July, and on August 18 Respondent made its final offer to the Union. Thereafter, on August 22 Respondent unilaterally implemented its final offer.

On September 4, at approximately 2 p.m., the Union went on strike. The strike lasted until Friday, September 19, at approximately 5:30 p.m., when the Union informed Respondent that it accepted Respondent's final offer and that the employees would unconditionally return to work on Monday, September 22.

The employees returned to work at approximately 7 a.m. on September 22. On this date Respondent informed the Union that employees Larry Barela, Dan Ramirez, Bill Scheffler, J. T. Stone, and Diane "Cookie" Strock were terminated for conduct they allegedly engaged in during the strike. The Union promptly filed grievances on behalf of the discharged employees. Respondent later informed the Union that employees Joe Leonguerrero and Ron Smith would be suspended for 3 days without pay for walking off their jobs on September 4 without first following Respondent's CP department relief procedures. The Union filed grievances on behalf of Leonguerrero and Smith. Respondent has agreed to arbitrate the grievances concerning the suspension of Smith and Leonguerrero but has refused to arbitrate the grievances concerning the discharges of Barela, Ramirez, Scheffler, Stone, and Strock.

The General Counsel and the Union contend that Respondent unlawfully terminated Barela, Ramirez, Scheffler, Stone, and Strock for their conduct in viola-

tion of Section 8(a)(3) and (1) and unlawfully suspended Leonguerrero and Smith for their strike activities. Respondent, on the other hand, contends that the five employees engaged in strike-related misconduct and therefore lost the protection of the Act. With respect to the suspension of Leonguerrero and Smith, Respondent contends that the two employees were suspended for violating a safety rule, which rule Respondent contends need not be subservient to the employees' right to strike. Further litigated at the trial was the issue of whether Respondent violated Section 8(a)(5) and (1) by refusing to arbitrate the discharges of the five employees.

B. *The Facts*

1. The suspensions of Leonguerrero and Smith

As stated earlier, on August 22, Respondent unilaterally implemented its final contract proposal. At the time of the implementation of Respondent's final proposal, the Company was expecting and was prepared for a strike. Supervisors were in the plant around the clock and additional supervisors had been brought in from Respondent's other facilities.

However, the strike which began on September 4 was not expected by management. The strike was signaled by the Union's president activating the emergency alarm which caused employees and supervisors to proceed to the water tower near the front gate of the plant in accordance with the emergency procedures in effect for the plant. Neither hourly employees nor salaried employees had any advance knowledge of the commencement of the strike.

Respondent manufactures a wide variety of chemicals, which include electronic, sulfuric, nitric and acetic acids, ammonium hydroxide, and other products. Hydrochloric acid is used in the process. Different blends (150 to 160) of products are manufactured in the CP department of the plant alone. A great number of the chemicals produced in this plant are considered extremely hazardous and could constitute a hazard not only to employees but also to individuals living in the vicinity of the plant.

Because of the dangers involved, Respondent has maintained rules that operators in the control room may not leave their jobs unattended. Both operators involved here, Leonguerrero and Ron Smith, admitted that it was a longstanding rule that an operator had to be properly relieved before leaving his or her work station. The purpose of the rule is for the operator to inform his or her relief operator of the status of the chemical process.

Leonguerrero testified that he had not yet been briefed so that the prior shift operator rather than himself had left without proper relief. Smith testified that the union president directed him not to notify his supervisor before leaving the plant. Respondent contends that these employees could have avoided discipline if they had only notified the supervisor, James Craig, that they were leaving the plant on strike. Craig could have been contacted by pager. It would have taken no more than 5 to 15 minutes for the employees to contact Craig. The operators could have also avoided discipline by shutting down their equipment. Three other control room operators participated in the strike but were not disciplined. These operators shut down their equipment or notified their supervisor.

Respondent's supervisors, Craig and Costello, were in the CP control room within minutes of the strike starting, and they proceeded to assume control of the operations immediately. Craig and Costello were required to spend several hours inspecting the CP room for leakage or damage. However, there was no damage to equipment or to the product as a result of the strike.

The Union filed timely grievances concerning the suspensions of Leonguerrero and Smith. At the time of the instant hearing, the grievances were set for arbitration. However, the only issue before the arbitrator was whether the employees had engaged in the conduct for which they were disciplined. The issue presented here, whether Respondent's discipline of the two employees infringes on their Section 7 rights, is not before the arbitrator. For this reason, Respondent abandoned at the trial its contention that the allegations concerning the suspension of Leonguerrero and Smith should be deferred to arbitration.

2. Larry Barela's discharge

As stated above, the strike which began on September 4 took Respondent by surprise. The strike became violent almost immediately after its commencement. Within the hour, supervisors' cars leaving the plant were hit by stones. Mass pickets blocked the road leading to the plant from the main access road. A truck occupied by two supervisors was struck by a baseball bat wielded by a striking employee.[1] Supervisors and nonstriking employees received numerous threats to their own safety as well as to the safety of their families. During the first day of the strike, numerous vehicles belonging to supervisors were damaged. The violence on the first day of the strike resulted in strong police presence for the remainder of the strike.

On September 5, a temporary restraining order was issued in the Superior Court of Contra Costa County and on September 19, 1986, a preliminary injunction issued against the Union prohibiting the strikers from damaging the property of the company or its employees, customers, and vendors, and limiting the number of picketers to two on each side of the entrance to the plant.

Respondent discharged Larry Barela because of four incidents which will be discussed in chronological order. On September 5, John McLachlan, Respondent's attorney, left the plant between 6 and 7 p.m. McLachlan testified that his car was stopped by 10 to 15 picketers. While McLachlan was stopped, he was approached by an individual wearing a black T-shirt with an arm in a sling, who bent down near the left rear tire. McLachlan heard the sound of air rushing out of his tire shortly afterward. The individual then walked around McLachlan's car and bent down next to the front right tire, and McLachlan again heard air coming out of that tire. McLachlan got a good look at the individual involved.

Although McLachlan did not know Barela at the time of the incident, he described the individual involved to a

[1] The termination of that employee is not at issue in this case.

company supervisor and was told that the person was probably Barela. McLachlan gave a report to the Contra Costa Sheriff's Department which described the person as having a ponytail and a mustache. Barela had short hair and a full beard. McLachlan did correctly describe Barela's dark features. McLachlan later gave the police a second report. This report described Barela as having long hair, a full beard, a "Fu-Manchu" type mustache, and dark skin. McLachlan testified at the hearing that the individual involved in the tire-slashing incident was in fact Barela.

Barela testified that he did not slash the tires of McLachlan's vehicle or any other vehicle. He stated that he had never seen McLachlan before the hearing. He further denied ever having a knife or other sharp object during the strike or that he wore his arm in a sling.

I find McLachlan to be a much more credible witness than Barela and I credit his testimony. Despite the discrepancies in McLachlan's description of the suspect in the two police reports, I am still convinced that Barela is the individual he observed at the tire-slashing incident. Barela, on the other hand, was not a credible witness and, as will be seen below, attempted to deny all wrongdoing.

On September 8, McLachlan drove a car through the picket line with two passengers, Bob Brevard, the Respondent's director of manufacturing, and William Thomas, Respondent's vice president. A white pickup truck with Washington state license plates[2] drove in front of McLachlan's car. According to Brevard, the white pickup truck was going extremely slow and would not let his vehicle pass. On several occasions the white truck pulled onto the shoulder of the road and accelerated rapidly throwing gravel at McLachlan's vehicle. After 1 to 2 miles, the driver of the white truck threw a smoking object (later identified as a cherry bomb) out of his window. After Brevard's vehicle passed over the object, Brevard heard a small explosion underneath a car which was traveling behind McLachlan's car on the road. After McLachlan passed the truck, Brevard observed Barela in the driver's seat. McLachlan corroborated Brevard's testimony.

Barela testified that he drove a white pickup truck with Washington license plates. However, he denied driving the vehicle in front of the car driven by McLachlan and in the manner described above. Barela denied driving slowly, denied driving on the shoulder to throw gravel, and denied throwing any cherry bombs. Barela attempted to explain the exploding noise by saying that the truck had engine difficulties and would "cut out" as well as backfire. Further, Barela testified that the white truck was often used by others during the strike to pick up supplies.

I credit the testimony of Brevard and McLachlan over that of Barela. Brevard and McLachlan testified in a straightforward manner. Barela, on the other hand, was not credible and often relied on the eccentricities of his stepfather's truck to explain his alleged misconduct.

[2] Such a truck is owned by Barela's stepfather and was used by Barela and others during the strike.

Tom Ornellas, a contract truckdriver, testified that on September 8, while he was stopped on the picket line, he was threatened by Barela. According to Ornellas, Barela said he was going to "get" Ornellas and beat the hell out of him. Ornellas testified that Barela said "We are going to beat the hell out of you " and that Barela and Diane Cookie" Strock were" leading the band" in making various threats against him.

Barela denied threatening Ornellas in any way and denied saying anything to Ornellas. In an affidavit given shortly after these events, Ornellas alleged he was threatened by Strock but made no mention of any threats by Barela. Further, Ornellas' testimony is contradicted by Glenda Butler and Strock. Based on Ornellas' affidavit and the testimony of Butler and Strock, I do not credit Ornellas' testimony that he was threatened by Barela on September 8 or 9. However, I do credit Ornellas' testimony regarding an incident that occurred on September 9 involving Barela's driving.

Ornellas testified that on September 9, after he left Respondent's plant, he noticed five vehicles, including a white pickup truck, behind him. When Ornellas pulled onto the shoulder of the road, the five vehicles would do the same thing. Ornellas was supposed to stop and exchange vehicles with one of his employees but instead drove down the highway toward Martinez, California. As Ornellas drove up the ramp to the highway, he noticed that only the white pickup truck was still behind him, now at a very close distance. The white truck passed Ornellas' truck and cut him off several times.

Ornellas exited the highway and drove toward a highway patrol station. The white pickup truck backed up and took the same exit as Ornellas. Ornellas observed the white truck with its hood up at a location across from the highway police station. Ornellas identified Barela as the driver of the truck.

Barela admitted driving the truck on the date in question, but attempted to blame these events on mechanical difficulties. According to Barela, the truck started having mechanical difficulties and started to backfire, which caused Barela to pull to the side of the road. While he was at the side of the road, he observed Ornellas get out of his truck and exchange vehicles with his driver. The truck resumed its course and passed Barela. Barela's truck restarted and Barela continued in the same direction as the truck. Barela passed the truck but once again began experiencing mechanical difficulties. Barela pulled to the shoulder of the road. Barela then noticed Ornellas following him in a car. Barela exited the highway to see if the car would follow. According to Barela, the car followed him and then proceeded to the highway police station. Ornellas spoke to a highway patrol officer and then the officer approached Barela.

Before the hearing, Barela gave an affidavit denying that this incident occurred at all. Months later, Barela gave a second affidavit attempting to explain away the incident. I find Barela's testimony to be inherently incredible. His truck has mechanical difficulties whenever Barela needs an excuse for his conduct. I find his explanation too convenient and far less plausible than Ornellas' testimony.

3. The discharge of Dan Ramirez

On September 4 after the strike was initiated by the activation of the emergency alarm, Neftali Nevarez, supervisor in the CP department, observed Dan Ramirez throw his hardhat and safety glasses into a dumpster. Nevarez testified that he followed Ramirez to the changing room. When Nevarez arrived at the door of the changing room, he saw a large number of employees and realized for the first time that a strike was in progress. As Nevarez was walking away, Ramirez was close to him and called him "wet back," "fuck head," and "son of a bitch." According to Nevarez, Ramirez said, "Why don't you say something so I can kick your ass" and then bumped Nevarez with his shoulder. Nevarez walked away from Ramirez but Ramirez continued calling him names.

Ramirez testified that as he was walking out of the changing room to leave the plant, Nevarez put his hand on Ramirez' shoulder and told him to go back to work. Ramirez said, "We are on strike, Nef, let me through." Nevarez held his hand against Ramirez' chest and insisted that he go back to work. Ramirez told Nevarez to let him through, to "get the fuck out of my face." Nevarez continued to follow Ramirez and Ramirez repeated, "Get the hell out of my face." Ramirez denied threatening Nevarez in any way. Nevarez appeared to be an honest and forthright witness and I credit his testimony over that of Ramirez.

Jeffrey Hushion, a lab technician, testified that on September 4 he attempted to enter the plant. While Hushion was stopped at the picket line, he was confronted by a "mob" of pickets. During the time that Hushion was stopped, Ramirez told him that if he went into the plant, when Ramirez came back to work, he would find Hushion and "cut off his balls." Ramirez produced a utility knife with an exposed blade and threatened to damage Hushion's car. Shortly thereafter, Hushion stepped out of his vehicle and spoke to Leonguerrero. Leonguerrero asked Hushion not to enter the plant that day but rather to go home and return at another time. Hushion returned to his vehicle and went home. Hushion further testified that on September 9 when he was crossing the picket line, Ramirez said, "Jeff, you got no balls. Your balls are mine."

Ramirez testified that he was one of the many pickets who approached Hushion's vehicle. According to Ramirez, he told Hushion that the employees were on strike and that Hushion should "get the fuck out of here." According to Ramirez, Hushion was nervous and upset, and got out of the car to speak to Leonguerrero. Ramirez denied brandishing a knife on the picket line.

The General Counsel presented witnesses Joe Leonguerrero, Bob Lujan, Glenda Butler, and Charles Battle in an attempt to rebut Hushion's testimony. However, none of these witnesses recalled hearing what Ramirez actually said nor could they deny that he pulled a knife. To the extent that Battle testified that Ramirez did not threaten Hushion or brandish a knife, his testimony is discredited. All these witnesses confirmed that a mob surrounded Hushion's car and that Hushion was intimidated.

Hushion's testimony is credited over that of Ramirez. Hushion's testimony is more reliable than the other witnesses who were in the area but did not actually see or hear Ramirez. I find that Ramirez engaged in the misconduct attributed to him by Hushion.

4. The discharge of Bill Scheffler

Phil Ulichney, Respondent's plant manager at the time of the strike, testified that on September 4, he was coming back into the plant when he was stopped by Barela and Ramirez. According to Ulichney, while Ramirez was making some remarks to him, he heard something hit the car and he looked in his rearview mirror. Ulichney saw Scheffler walking away from the car. Ulichney later inspected the car and noticed a dent about 3 inches in length near the tail-light. Ulichney admitted that he did not see Scheffler strike the car nor did he see Scheffler with any object in his hand that might have struck the car. Ulichney admitted there were at least a dozen employees within a few feet of his car, but he only recalled Scheffler as being on the passenger side of the vehicle.

Scheffler testified that he was on the passenger side several feet away from the vehicle while Ramirez was talking to Ulichney but that nothing happened to Ulichney's vehicle while he was there. Scheffler denied striking Ulichney's vehicle. I find insufficient evidence to establish that Scheffler struck Ulichney's vehicle.

James Foster, supervisor, testified that on September 4 around 7:30 p.m. he was stopped on his way back into the plant. Foster testified that Scheffler kicked the door of Foster's vehicle and had to be restrained from kicking the vehicle again by an unidentified picketer.

James Craig, supervisor, testified that he was leaving the plant with Joe Marquez, a production supervisor, when he observed the picketers at Foster's vehicle. Craig testified that Scheffler threatened to go to Craig's home to "fuck" Craig's wife and also "kick [Craig's] ass."

Craig testified that on his way back into the plant a couple of hours later, his left rear door window was broken. According to him, he saw Scheffler running along with the vehicle and heard him say that he was going to go home and "fuck" Craig's wife. Craig's testimony was contradicted by Marquez, who testified that Scheffler was first seen on the right side of the vehicle, after the window was broken and after the vehicle had sped away. Thus, according to Marquez, Scheffler did not run alongside the vehicle nor could he have broken the window.

Scheffler testified that he did not say anything to Craig when Craig left the plant. When Craig returned to the plant, Scheffler said to Craig, "Why don't you go home and fuck your wife instead of crossing the picket line." Scheffler denied threatening Craig in any manner.

Scheffler denied kicking Foster's vehicle. Glenda Butler testified that Scheffler did not kick Foster's vehicle and that she was in a position to see Scheffler had he kicked the vehicle. Diane Strock was present at the time but did not recall seeing Scheffler.

Robin Saunders, a service accounting clerk, testified that as she was leaving Respondent's plant on September

19, she stopped her car before she could turn into the oncoming traffic. According to Saunders, Scheffler's vehicle "bumped" the back of her car and continued to push her car into the ongoing traffic. While Scheffler was driving in this manner, Art Aria, another striker, shouted "thanks Robin, thanks Robin."

Scheffler testified that he and Aria were driving home that evening and that he saw Saunders. Scheffler denied bumping Saunders' vehicle or attempting to push her into traffic. Aria, no longer employed by Respondent, did not testify. I find Saunders to be a credible witness and credit her testimony over Scheffler's denial.

5. The discharge of J. T. Stone

Brevard testified that on September 8[3] he was leaving the plant with McLachlan (who was driving) and another passenger, Bill Thomas, when they were stopped on the picket line. According to Brevard, Stone, who was speaking in a loud voice, said that Respondent had taken the food out of his family's mouth, and got very "belligerent." Stone then allegedly said, "You sorry fat son of a bitch, we know where you live and we're going to get your ass." Brevard finally testified that Stone had to be escorted away from the picket line by two picketers.

McLachlan corroborated Brevard's version of these events to some extent. McLachlan did not recall Stone's exact words but recalled his emotional and loud tone of voice. McLachlan recalled Stone saying something like "I'm going to get you." Thomas, the other passenger, did not testify.

Stone admitted calling Brevard a liar, a crook, and a thief but denied threatening Brevard or saying he was going to "get him." Stone testified that he said Brevard was taking the food out of his family's mouth and that he opened his wallet to illustrate the point. O'Farrell testified that Stone was emotional and loud and that he talked with his hands but that Stone did not threaten Brevard. Further, O'Farrell denied having escorted Stone away. O'Farrell testified that he simply put his hand on Stone's shoulders and told Stone that "it wasn't worth getting that upset." John Moore, another picketer, corroborated Stone's and O'Farrell's testimony that although Stone was loud and emotional, he never made any threats against Brevard or said that he was going to get him.

Based on the testimony of O'Farrell and Moore, I find that Stone did not threaten Brevard. Rather, I find that Stone, speaking in a loud voice and gesturing, called Brevard names and accused him of taking food from his family. However, I credit Stone's denial that he ever threatened to get Brevard. Although McLachlan did corroborate Brevard's testimony regarding Stone's tone of voice, I was not convinced that McLachlan had any independent recollection of Stone's words. In my view, McLachlan did not want to contradict Brevard. In any event, I find the testimony of O'Farrell and Moore to be reliable and I therefore credit Stone's account of this incident.

Gary Christiansen, a driver for an independent courier service, testified that on September 15 he was stopped on the picket line. While stopped, Christiansen was approached by a large black man (later identified as Stone). According to Christiansen, he asked Stone how the strike was going. Stone then asked Christiansen if he could carve his initials on the truck. Stone then asked if Christiansen's boss would mind "if the truck got all fucked up" and then struck the truck with his fist. Thereafter, Stone walked in front of the truck and then to the right rear side of the truck. Christiansen could not see Stone but he heard a "thud" coming from the rear right side of the truck. Christiansen checked the vehicle after leaving the plant and found a hole on the right rear. According to Christiansen, there was no sheriff present on the picket line during this incident. Christiansen did not impress me as a credible witness. He could not or would not recall what took place before Stone's remarks and alleged hitting of the truck.

Stone testified that he approached Christiansen on the picket line and that the driver asked him the reason for the strike. Stone then gave Christiansen a flyer explaining the Union's reasons for the strike. Christiansen asked if there had been any violence on the picket line, and Stone replied that he had heard that there had been violence early on in the strike but there had been none that day and that the sheriff was present. Christiansen then asked Stone what would happen if he ran through the picket line (with his truck). Stone said that if anyone tried that, he would leave his initials on the truck and asked Christiansen what his boss would say if he returned with a truck "all fucked up." Christiansen said he did not care about the truck, only himself. Stone denied walking to the passenger side of the vehicle and denied doing any damage to the truck. Stone heard the impact on the rear passenger side of the vehicle but was on the opposite side of the truck at the time.

Mike Christopher, another picketer, corroborated Stone's testimony. Christopher testified that he and a sheriff were standing right behind Stone. Christiansen asked Stone why the employees were striking and what Stone would do if Christiansen attempted to run the picket line. According to Christopher, Stone said he would leave his initials on the truck only after Christiansen asked what Stone would do if Christiansen did not wait at the picket line but attempted to drive through.[4] Christopher testified that he and Stone were on the opposite side of the truck when it was struck and that Stone did not hit the truck with his fist or anything else.

I did not find Christiansen to be a credible witness. Rather, I find Stone's version of these events to be more logical. Further, Stone's testimony was corroborated by Christopher, whom I find to be a credible witness. I, therefore, credit Stone's testimony over that of Christiansen.

[3] Stone testified that this incident took place on September 11. Because there is no dispute that Stone had a conversation with Brevard, the date is irrelevant.

[4] At that point in the strike, the sheriff made each vehicle await 5 minutes of picketing and then required the pickets to allow the vehicle to pass.

6. The discharge of Diane "Cookie" Strock

Ornellas testified that he was stopped on the picket line on September 8 by approximately 15 pickets. According to Ornellas, while on the picket line, Strock said that the picketers were "going to get you Ornellas and beat the shit out of you." Strock said that she knew where Ornellas lived and that he could not hide from the picketers. Strock further said the picketers would put a bomb in Ornellas' house. She also threatened to run a forklift through the front end of his truck and that Ornellas' truck would never be loaded again. After crossing the picket line and loading his truck, Ornellas was again stopped on his way out of the plant. According to Ornellas, Strock and Barela "who were leading the band" said to him that Ornellas should not bring his truck back or else he would have to buy a new one. Ornellas was friendly with Strock before the strike and she was apparently the only one in the mob he could identify. It is my impression that Ornellas attributed many of the remarks made by the mob to Strock, the one person who stood out in his mind.

Ornellas further testified that on the next day, September 9, Strock again threatened him. According to Ornellas, Strock said the other picketers would drag Ornellas out of the truck and hold him while Strock "beat the shit out of him." Strock said "she would cut off his dick and stick it in his mouth so that he would know what a cocksucker felt like." Once again Strock told Ornellas not to bring his truck back or else it would be damaged.

After crossing the picket line, Ornellas went to load his truck in the plant. According to Ornellas, Strock was standing 100 to 120 yards away and yelling "yeah you motherfucker, you better not bring that truck out, you better have your safety belt on. . . . I'm going to drag your ass out of there." He further testified that she raised her arm and pointed an object at him, but that he could not make out the object because she was so far away.

Strock, on the other hand, testified that on September 8 she merely shouted "Tommy O is a scab."[5] According to Strock, on September 9, she was one of several picketers when Ornellas stopped. Strock asked Ornellas to turn around because the employees, including Strock, had always treated him well and had loaded his truck first. She asked Ornellas "to be a man" and said that if "Fatty" Dullums, the person who loaded trucks during the strike, loaded Ornellas' truck, he would probably drive a forklift right through the truck. Strock admitted calling Ornellas a "stupid fucker" and a "scab." She further admitted telling Ornellas that after the strike she would no longer do him favors and would load him last rather than first. Strock denied threatening Ornellas.

After Ornellas crossed the picket line, Strock, accompanied by Glenda Butler and Julie Damron, walked down to the plant in an attempt to find out who was loading the truck. However, Strock was about 200 yards away from Ornellas and not in the location claimed by Ornellas. According to Ornellas, she looked through binoculars but was unable to distinguish any of the persons at the loading dock. She denied making any remarks to Ornellas at that time and testified that she was too far away to even attempt to speak to him. Finally, Strock denied saying anything to Ornellas on his way out of the plant that day. She recalled that others called him "scab" and "shrimp."

Glenda Butler corroborated Strock's testimony that Strock asked Ornellas not to cross the picket line because the employees had done him favors in the past. According to Butler, Strock told Ornellas that Dullums might drive the forklift through Ornellas' truck because Dullums could not drive a forklift. Strock told Ornellas that he was not a man and that "he had no balls." Butler accompanied Strock to the place where she attempted to watch the loading dock. According to Butler, Strock made no remarks from that point and that Ornellas was too far away for any comments to have been made.

Julie Damron further denied that Strock threatened Ornellas. According to Damron, Strock told Ornellas that employees had done favors for him in the past but would not do so after the strike. Damron admitted that some of the male picketers said to Strock "Do you want us to hold him down for you" and that Strock replied, "No, he's just a pussy. If I wanted to I could kick his ass." Damron further admitted that the picketers heckled and insulted Ornellas. Strock called Ornellas names and told him that Dullums would probably drive a forklift through Ornellas' truck. Further, Damron corroborated the testimony of Butler and Strock that Strock did not yell to Ornellas when Ornellas was at the loading dock.

I credit the testimony of Damron and Butler that Strock did not make the remarks attributed to her by Ornellas. Rather, I find Ornellas attributed remarks made by other picketers to Strock. I credit Strock's versions of these events. I further credit Damron's testimony that Strock told the male picketers that if she wanted to, "she could kick his [Ornellas'] ass."

I cannot credit Ornellas' testimony regarding the incident at the loading dock. The credible testimony establishes that Strock simply was not at the location or locations that Ornellas attempted to place her. Further, Strock was too far away to yell to Ornellas. Although Strock had binoculars with her, I find nothing threatening in such conduct.

C. *The Refusal to Process and Arbitrate the Grievances Concerning the Discharges*

Following the discharges of Barela, Ramirez, Scheffler, Stone, and Strock, the Union filed grievances contesting all five terminations. It is undisputed that Respondent refused to arbitrate the grievances. Respondent takes the position that the employees were discharged before there was a contract containing an arbitration provision. Further, Respondent argues that even if it was obligated to arbitrate the grievances, its refusals to arbitrate would constitute a contract violation but not a violation of the Act.

Although the contract was not executed by the Union until January 8, 1987, the Union and Respondent have agreed that the effective date of the contract is September 22, 1986. The contract by its terms was effective as

[5] Ornellas first testified that these events took place on September 8 and 9. However, during cross-examination, he stated that these events all took place on a single day.

of September 22. Although the Union attempted, before January 1987, to make the contract retroactive to September 19 (to cover these grievances with more certainty), the Union agreed to and signed the agreement retroactive to September 22. Respondent contends the discharges took place on September 19 rather than September 22.

On September 19, when the Union agreed to accept Respondent's proposed contract and return to work on September 22, Respondent indicated that certain employees would not be reinstated due to strike misconduct. However, it was not until September 22 that Respondent revealed the names of the employees who were not eligible for reinstatement. The Union and the General Counsel contend that the discharges of the five employees took place on September 22 and are, therefore, covered by the grievance and arbitration provisions of the current collective-bargaining agreement.

Respondent accepted and processed all other grievances filed by the Union after September 22, including the grievances concerning the suspensions of Leonguerrero and Smith. Respondent accepted and processed grievances filed after September 22, even prior to the execution of the contract by the Union.

D. *Discussion and Conclusions*

1. The discharges

At the end of an economic strike, an employer, unless justified by legitimate and substantial business reasons, must reinstate striking employees, lest their discharges penalize the employees for exercising their right to strike under Sections 7 and 13 of the Act. *Associated Grocers of New England v. NLRB*, 563 F.2d 1333 (1st Cir. 1977); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378–379 (1967). A showing that a striking employee has engaged in serious picket line misconduct justifies a refusal to reinstate after the strike is over. *Clear Pine Mouldings*, 268 NLRB 1044 (1984).

The general rule regarding strike misconduct is that an employer must demonstrate an honest belief that an employee has engaged in strike misconduct. Once an employer establishes this belief, the burden shifts to the General Counsel to prove that the employee was not engaged in the alleged strike misconduct or that the misconduct was not sufficiently serious to place the employee beyond the protection of the Act. *Rubin Bros. Footwear*, 99 NLRB 610 (1952); *General Telephone Co.*, 251 NLRB 737 (1980); *Axelson, Inc.*, 285 NLRB 862 (1987).

In *Clear Pine Mouldings*, supra, the Board adopted the following objective test for determining whether verbal threats by strikers directed at fellow employees justify an employer's refusal to reinstate:

> Whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. [268 NLRB at 1046.]

The Board went on to hold that it would "fashion remedies and policies which will discourage unfair labor practices and the resort to violence and unlawful coercion by employers and employees alike." In case of picket line and strike misconduct, the Board will deny "reinstatement and backpay to employees who exceed the bounds of peaceful and reasoned conduct." Id. at 1047.

In the instant case, Respondent has established an honest belief that each employee has engaged in strike misconduct. The question presented is whether each employee, based on all the credited evidence, has engaged in misconduct sufficient to place the employee beyond the protection of the Act.

Applying the above standards to the instant case, the conduct of striker Larry Barela in slashing tires on McLachlan's vehicle, driving in such a manner as to throw gravel at Brevard's vehicle, throwing a smoking object toward Brevard's vehicle, following Ornellas' truck, driving in a reckless manner, and attempting to cut off Ornellas' vehicle constitutes serious strike misconduct warranting Respondent's refusal to reinstate Barela at the conclusion of the strike.

Barela's conduct is inherently coercive and intimidating regarding the exercise of employees' Section 7 rights to refrain from striking or other protected activities. Barela's misconduct was not directed at nonstriking employees of Respondent but at an attorney, a supervisor, and an independent contractor. However, the same objective standard applies to the assessment of strikers' verbal and nonverbal conduct directed against persons who do not enjoy the protection of Section 7 of the Act. *Clear Pine Mouldings*, supra, 268 NLRB at 1046 fn. 14; *PBA Inc.*, 270 NLRB 998 (1984).

The credited testimony establishes that striker Dan Ramirez called Supervisor Neftali Nevarez various obscene names. Further, Ramirez challenged Nevarez to say something so that Ramirez could "kick his ass." Finally, Ramirez bumped Nevarez in an attempt to punch the supervisor into a fight. Nevarez walked away and Ramirez once again called him names.

With respect to the September 4 incident involving Jeff Hushion, I found that Ramirez threatened Hushion while a mob surrounded Hushion's car. Further, I find that Ramirez produced a knife during the incident. Accordingly, I find that Ramirez has engaged in misconduct exceeding the bounds of peaceful and reasoned conduct. I shall, therefore, recommend that the allegations of the complaint regarding his discharge be dismissed.

The conduct of striker Bill Scheffler in using his vehicle to push the vehicle of nonstriking employee Robin Saunders into ongoing traffic was a reckless act, intended to cause and causing fear in Saunders. Such conduct is inherently coercive and intimidating with respect to the exercise of employees' Section 7 rights to refrain from engaging in the strike or other protected activities. I find this conduct sufficient to warrant denial of reinstatement and backpay. I, therefore, find it irrelevant that the General Counsel established that Scheffler did not damage the automobiles of Ulichney and Craig.

The credited testimony establishes that Stone called Brevard a thief, liar, and crook. Further, Stone took out his wallet to demonstrate that Brevard had taken money from his family. Stone waved his hands and was very

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emotional. However, I find that Stone did not threaten Brevard.

Based on the credible evidence, I do not find that Stone's conduct reasonably tended to coerce or intimidate employees in the exercise of Section 7 rights. Although Stone may have insulted Brevard and subjected him to name calling, which Brevard need not suffer in the absence of a strike, Stone's conduct did not rise to the level of serious strike misconduct. No threats were uttered and no threatening gestures were made. The emotional tone of voice and nonthreatening gestures do not amount to force or coercion.

With respect to the incident involving Christiansen, the courier driver, I find that Stone did not threaten Christiansen. Christiansen challenged Stone by asking what would happen if he, Christiansen, ran the picket line. In answer to that question, Stone's spontaneous comments that he would leave his initials on the truck, do not appear coercive or intimidating. I do not find Stone's comments about damage to Christiansen's truck coercive in the context of Christiansen's question about what would happen if he drove through the picket line. The credited evidence establishes that Stone was not responsible for the damage to Christiansen's truck.

The comments to Christiansen, when placed in context, do not amount to threats or intimidation. Christiansen, in effect, threatened to drive through the picket line. The spontaneous response that Stone would carve his initials in the truck or that the truck would be damaged do not coerce employees in the exercise of Section 7 rights. Such remarks only threaten employees who endanger peaceful pickets. I find that Stone did not engage in misconduct sufficiently serious to deny him reinstatement after the strike. I therefore find that Respondent's discharge of Stone violated Section 8(a)(3) and (1) of the Act.

As mentioned earlier, Diane Strock called Ornellas, an independent contractor, names such as scab and shrimp. Further, in concert with other picketers, Strock said that she needed no help in beating up Ornellas and that she could easily do so if she wished. I further found that Strock did not threaten Ornellas as alleged nor did she follow him in a threatening manner. It is my belief that Ornellas heard threatening remarks and insults directed at him. However, it is unjust to hold Strock accountable for such remarks simply because she was the only person Ornellas could identify. The question presented is whether Strock's conduct, in the context of the unruly picketers, is sufficient to warrant the denial of reinstatement. In my view her conduct, while insulting and abusive, did not amount to restraint or coercion. It is well settled that the use of epithets, vulgar words, or profanity does not deprive a striker of the protection of the Act. *NLRB v. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977); *Linn v. Plant Guards*, 383 U.S. 53, 60–61 (1966). Accordingly, I find that Strock did not engage in misconduct sufficient to warrant the denial of reinstatement and that, therefore, Respondent violated Section 8(a)(3) and (1) of the Act by discharging her.

2. The suspensions of Leonguerrero and Smith

As the General Counsel correctly argues, it is well settled that the act of going on strike is protected concerted activity, regardless of the lack of prior notice to the employer, or the impact it may have on the employer's production, or the severe inconvenience that it may likely cause. *Johnny Johnson Tire Co.*, 271 NLRB 293, 295 (1984); *Go-Lightly Footwear*, 251 NLRB 42 (1980); *Polytech, Inc.*, 195 NLRB 695, 696 (1972). The Board has held that the effect of such a work stoppage of production is incidental and does not preclude protection of the Act so long as the employees involved take reasonable precaution to avoid imminent danger to the employer's physical plant which foreseeably would result from a work stoppage. See *Marshall Car Wheel & Foundry Co.*, 107 NLRB 314 (1953).

However, in *Terry Poultry Co.*, 109 NLRB 1097 (1954), the Board held that a work stoppage was unprotected because it violated a longstanding rule of the employer requiring employees to tell their foremen or fellow employees if they are leaving the production line. The Board found the rule to be a reasonable one consistent with the right of an employer to enforce reasonable rules governing the conduct of its employees on company time even though such rules may limit the statutory right of employees to engage in union or concerted activities.

I find Respondent's conduct to be consistent with the principles of the cases cited by the General Counsel and the *Terry Poultry* case. Respondent, using dangerous chemicals in its CP department, had a longstanding, well-publicized rule requiring operators to be properly relieved before leaving the plant. The purpose of Respondent's rule is to ensure safety to the equipment, the plant, and the general public.

The burden imposed on employees to meet the requirement of the rule was minimal. The employees could have avoided discipline by notifying their supervisor of the status of the chemical process or by shutting down their equipment. Communication to their supervisors would have taken no longer than 15 minutes.

The employees did not take the reasonable precautions mentioned in the *Johnnie Johnson* and *Marshall Car Wheel* cases. Although no actual damage took place, that is not the test. There was a reasonably foreseeable possibility of danger—the purpose of the rule. When balanced against the significant danger involved, even accounting for the low probability of danger (known to the employees but not the supervisors), the restrictions placed on the employees' right to engage in union activities appear minimal. In this case, the danger was eminent (significant) rather than imminent (impending). However, Respondent's rule was designed for safety purposes and did not require anything more than the reasonable precautions mentioned in the cases cited by the General Counsel.

Further, in this case, there is no evidence that Respondent was motivated by any purpose other than enforcement of its longstanding safety rule. Other strikers avoided discipline by compliance with the rule. Moreover, the penalty invoked, a suspension, was not discriminatory and, therefore, should not restrain or coerce

employees in the exercise of Section 7 rights. Respondent clearly indicated that the discipline was imposed for violation of the safety rule and for no other reason. Finally, Respondent has agreed to arbitrate these suspensions under the collective-bargaining agreement.

3. The refusal to arbitrate

As mentioned earlier, the General Counsel contends that Respondent's refusal to arbitrate the grievances over the five discharges constitutes a violation of Section 8(a)(5) of the Act. Respondent, on the other hand, contends that the discharges took place before the effective date of the contract and, therefore, was not subject to the grievance and arbitration procedures of the contract. Secondly, Respondent contends, assuming the discharges are grievable, that the refusal to arbitrate a specific grievance or type of grievance is not a unilateral change in violation of Section 8(a)(5) and (1) of the Act.

The Board has long held that Congress specifically rejected a proposal that every breach of a labor contract gives rise to an unfair labor practice. See, e.g., *Packinghouse Workers (Wilson & Co.)*, 89 NLRB 310, 317 (1950). Further, it is well settled that the refusal to arbitrate a single grievance, even if the refusal is a contract breach, is not in itself an unfair labor practice. *Mid-American Milling Co.*, 282 NLRB 926 (1987). This precedent was recently reaffirmed in *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987), and *Dallas Morning News*, 285 NLRB 53 (1987).

Although a breach of a labor contract is not ipso facto an unfair labor practice, it does not follow that when an employer unilaterally effects a change which has a continuing impact on a basic term or condition of employment, it must be ruled out as an unfair labor practice simply because it happens also to be a breach of contract. *C & S Industries*, 158 NLRB 454, 458 (1966). See also *B. N. Beard Co*, 231 NLRB 191 (1977). Where a breach of contract substantially infringes on the statutory right of a bargaining representative or amounts to a substantial renunciation of the principles of collective bargaining, the Board has found a violation of the Act. See, e.g., *Sea Bay Manor Home*, 253 NLRB 739, 740–741 (1980); *Papercraft Corp.*, 212 NLRB 240 (1974).

In the instant case, Respondent has not refused to take all, or even most, grievances to arbitration. Cf. *Paramount Potato Chip Co.*, 252 NLRB 794 (1980). Rather, Respondent has accepted grievances and agreed to arbitration except on a very narrow and specific grievance matter. See *Whiting Roll Up Door Mfg. Corp.*, 257 NLRB 734 (1981); and *Bacardi Corp.*, 286 NLRB 422 (1987). Respondent has refused to arbitrate the discharges because they occurred before the effective date of the contract and its grievance-arbitration provisions. Thus, assuming Respondent is incorrect whether the contract covers the discharge disputes, Respondent has not repudiated or abrogated the grievance-arbitration procedures. Hence, the record establishes at most a breach of contract, but does not establish that Respondent committed an unfair labor practice.[6] Accordingly, I shall recommend dismissal of this allegation of the complaint.

CONCLUSIONS OF LAW

1. Respondent General Chemical Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging employees Diane Strock and J. T. Stone, Respondent violated Section 8(a)(3) and (1) of the Act.

4. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. By discharging employees Larry Barela, Bill Scheffler, and Dan Ramirez, Respondent did not violate the Act.

6. By suspending employees Ron Smith and Joe Leonguerrero, Respondent did not violate the Act.

7. Except as specifically found above, Respondent did not violate the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Having found that Respondent unlawfully discharged its employees J. T. Stone and Diane Strock, I shall order Respondent to offer Stone and Strock immediate and full reinstatement to their former positions of employment or, if those positions are no longer available, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make Stone and Strock whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them, with interest to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[7]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

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[6] See also *Malrite of Wisconsin*, 198 NLRB 241 (1974), enfd. in relevant part 494 F.2d 1136 (D.C. Cir. 1974), which held that an employer's refusal to comply with an arbitration award was not an unfair labor practice. Enforcement of the arbitration award was held to be better left to the usual court processes.

[7] Under *New Horizons*, interest is computed at the "short-term" Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. §§ 6621. Interest on amounts accrued before January 1, 1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, General Chemical Corporation, Pittsburg, California, its officer, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging the protected concerted activities of its employees by discharging employees for having engaged in lawful strike activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Diane Strock and J. T. Stone immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Post at its facility in Pittsburg, California copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER RECOMMENDED that the complaint allegations not specifically found here be dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POST BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage the protected concerted activities of our employees by discharging employees for having engaged in lawful strike activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Diane Strock and J. T. Stone immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharges of Strock and Stone, and WE WILL notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel action against them.

GENERAL CHEMICAL CORPORATION

American Broadcasting Company; Brighton Productions, Inc.; CBS Inc.; Century Towers Productions, Inc.; Columbia Pictures Industries, Inc.; Walt Disney Pictures; T.A.T. Communications Company d/b/a Embassy Television; Embassy Productions, Inc.; The Leonard Goldberg Company; Hanna-Barbera Productions, Inc.; Lorimar Productions, Inc.; Metromedia Producers Corporation; MGM/UA Entertainment Company; MTM Enterprises, Inc.; National Broadcasting Company, Inc.; NBC Productions, Inc.; Orion Pictures Distribution Corporation; Orion Television; Orion Television T.V. Productions, Inc.; Paramount Pictures Corporation; Aaron Spelling Productions, Inc.; Tandem Communications, Inc.; Twentieth Century Fox Film Corporation; Universal City Studios, Inc.; Viacom Productios, Inc.; Warner Bros., Inc.; Alliance of Motion Picture and Television Producers *and* Writers Guild of America, West, Inc. Case 31–CA–15121

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On June 30, 1986, Administrative Law Judge Earldean V.S. Robbins issued the attached decision. The Respondents filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondents violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with the following requested information:

> 1. The number of writers age 40 and over;
>
> 2. The number of writers with physical handicap [sic]; and
>
> 3. For each category of writers (i.e., Caucasian, ethnic minority group, male, female, over 40, or physically handicapped) employed during the fourth quarter of 1984 and the first, second and third quarters of 1985 under the 1981 basic agreement in television, an indication of job classification (i.e., freelance story assignment, freelance first draft assignment, staff writer, staff story editor, or staff writer/producer.)

The Respondents contended, inter alia, that the General Counsel should be estopped from relitigating the issues raised by the complaint as they had been resolved in a prior arbitration proceeding concerning an earlier request for information by the Union. The Union contended that, in addition to sex and ethnicity data, it is statutorily entitled to information regarding age and physical handicap status, and job classifications of unit employees. The judge found that the arbitrator's decision had preclusive effect only to the extent set forth in the Board's deferral to arbitration policy. She then rejected deferral because she found that the issues before the Board were not the issues before the arbitrator as required by the Board's standards for deferral set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). We disagree.

The facts are more fully set forth in the judge's decision. Briefly stated they demonstrate that the Respondents and the Union have been parties to a collective-bargaining agreement at all material times.[1] The 1981 collective-bargaining agreement between the Respondents and the Union contained a grievance-arbitration procedure that culminated in final and binding arbitration. The agreement also contained a "Non-Discrimination" provision, article 38, which provides in relevant part:

> ARTICLE 38–NON-DISCRIMINATION
>
> A. *Policy*
>
> 1. . . . there shall be no discrimination due to sex, age, race, religion, sexual preference, color, national origin, or physical handicap.
>
> . . . .
>
> C. *Human Resources Coordinating Committee*
>
> The Companies and the Guild shall establish a Human Resources Coordinating Committee which shall meet upon request of either party. . . . The purpose of this Committee is as follows:
>
> 1. to establish the Data Submission Program and to analyze and review employment data submitted thereunder . . . .
>
> . . . .
>
> 4. to explore and consider additional programs the primary purpose of which would be to enhance and expand employment in writing capacities for members of minority groups in the motion picture and television industry.

[1] The Respondents and the Union were parties to a collective-bargaining agreement that was effective from March 17, 1981 to February 18, 1985. Thereafter, the parties negotiated a successor agreement. Although at the time of the hearing the parties' 1985 drafting committee had not completed its task, the judge found that during the 1985 negotiations there were no significant changes made in art. 38, discussed below.

D. *Data Submission Program*

1. The Company shall submit to the Guild within 30 days after receipt of a written request by the Guild (but not more frequently than once a calendar quarter) a report of the sex and ethnicity of writers employed by Company under this Agreement during the preceding calendar quarter.

Commencing with the fourth quarter of 1982 and continuing through 1983 and the first three quarters of 1984, the Union asked the Respondents for information regarding the sex and ethnicity of writers they employed, as well as additional information on employment patterns, i.e., a breakdown of the sex and ethnicity data by job classifications. Only one of the Respondents complied with these requests.

Further, during the first 3 months of 1983, the Human Resources Coordinating Committee (HRCC) established by article 38 of the contract met on a number of occasions to negotiate concerning the data submission program referred to in that article. During the HRCC meetings, the Union initially demanded that the Respondents provide it with information on physical handicap and age, in addition to sex and ethnicity. The Union also sought information about the nature of the unit employees' employment, a description of the project (title and production number), and the specific job assignment (e.g., story, first or second draft, staff writer, story editor, writer/producer) of the unit employees by sex, ethnic group, age, and handicap status.

The Respondents' representatives objected to furnishing any data other than sex and ethnicity, and in February 1983 the Union dropped its demand that the data submission program include age and handicap information. The record shows that the HRCC negotiations broke down in March 1983 because the parties disagreed on whether the information supplied—beyond sex and ethnicity data—would be treated as confidential within the HRCC.

Faced with the Respondents' continued refusal to comply with its requests for sex and ethnicity information, the Union filed a grievance and ultimately in 1984 the parties participated in an arbitration proceeding with respect to the Respondents' obligation to furnish the Union with such information under article 38 of the contract.[2]

The Respondents contended in that proceeding that they had no contractual obligation to furnish the requested data because the data submission program had never been established in accordance with article 38. The arbitrator's decision noted that the controversy stemmed from the apparent conflicting requirements of article 38.C.1 and article 38.D.1 of the 1981 collective-bargaining agreement. The arbitrator then determined, after reviewing the parties' bargaining history with respect to article 38 and the article 38 language itself, that the Respondents were obligated under article 38.D.1 of the contract to submit the sex and ethnicity data requested by the Union. In so concluding, the arbitrator found that the establishment of the data submission program was self-executing and, therefore, the Respondents' obligation to furnish sex and ethnicity data required by article 38.D.1 was not contingent on the HRCC's establishment of a data submission program. He further concluded, however, that this determination did not render the "to establish" language of article 38.C.1 meaningless. Rather, he concluded that

> Article 38.C.1 contemplates a Data Submission Program that includes sex and ethnicity data at the minimum, but that may also be expanded to include other data, as determined by the Coordinating Committee. In this sense, Article 38.D.1 parallels the authority of the Coordinating Committee set forth in Article 38.C.4 namely to explore and consider additional programs. . . .

The arbitrator held, however, that the Respondents' failure to submit the requested information, including sex and ethnicity data, was not "unjustified" within the meaning of the liquidated damages provision of the collective-bargaining agreement, since the Union's request extended far beyond sex and ethnicity data to include a breakdown by job classification. Thus, the arbitrator emphasized that, absent a data submission program negotiated through the HRCC, the Respondents were not obligated to provide any information beyond the sex and ethnicity of unit employees. He added, however, that the Union did not waive its right to the sex and ethnicity data by requesting the additional information on employment patterns.

The alleged unfair labor practice here involves the Respondents' refusal to comply with the Union's requests subsequent to the arbitration award for information pertaining to the age, physical handicaps, and job classifications of unit employees for the fourth quarter of 1984 and the first

[2] On October 20, 1983, the Union filed an unfair labor practice charge in Case 31-CA-13606 alleging, inter alia, that the Respondents failed to provide the Union with necessary and relevant information for it to enforce and administer art. 38 of the contract. Thereafter, the Respondents and the Union agreed to arbitrate the dispute and the Regional Director deferred the charge pursuant to the Board's arbitration deferral policy in *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). Subsequent to the arbitrator's award, the Regional Director dismissed the charge because "the issues alleged were resolved in the Arbitral forum."

three quarters of 1985, a time period not covered by the arbitration award. As such, the information requests at issue here, as the requests considered by the arbitrator, seek data beyond the sex and ethnicity of unit employees.

It is well settled that an employer has an obligation to supply requested information that is reasonable and necessary to the exclusive bargaining representative's responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). A union, however, may contractually relinquish a statutory bargaining right if the relinquishment is expressed in clear and unmistakable terms. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Clinchfield Coal Co.*, 275 NLRB 1384 (1985); *Timken Roller Bearing Co.*, 138 NLRB 15, 16 (1962). In *United Technologies Corp.*, 274 NLRB 504 at 507 (1985), the Board noted with approval the following language of the court in *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982), enfg. 259 NLRB 225 (1981):

> [N]ational labor policy disfavors waivers of statutory rights by a union and thus a union's intention to waive a right must be clear before a claim of waiver can succeed. Waivers can occur in any of three ways: by express provision in the collective-bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two. The language of a collective bargaining agreement will effectuate a waiver only if it is "clear and unmistakable" in waiving the statutory right. [Citation omitted.]

With these principles in mind, we have examined article 38 of the collective-bargaining agreement and the parties' bargaining history regarding article 38. In agreement with the findings and the rationale of the arbitrator, we conclude that the parties contractually agreed that sex and ethnicity data was the minimum information that the Respondents must supply to the Union under article 38. We also find that the parties agreed that the minimum information that the Respondents must supply to the Union under article 38 could be expanded to include additional data as determined by the HRCC. As mentioned above, however, the record shows that the parties agreed during HRCC negotiations that the Respondents would not be required to submit age and handicap data. On the basis of the foregoing, we conclude that article 38 constitutes a waiver of whatever statutory right the Union might otherwise have to the information involved here. We find that the Union assigned to the HRCC whatever right it may have to article 38 information in addition to sex and ethnicity data in exchange for the Respondents' commitment to resolve the Union's further entitlement to article 38 information through the HRCC. Although that forum may not have produced the desired results from the Union's point of view, the failure to produce these results does not allow the Union to obtain through the Act data that it had bargained over and otherwise contractually provided for in its collective-bargaining agreement.[3] *Hearst Corp.*, 113 NLRB 1067 (1955).

In *Olin*, the Board reaffirmed its commitment to the standards set forth in *Spielberg*, which held that the Board would defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. In addition, the Board in *Olin* also clarified the *Raytheon Co.*[4] requirement that the arbitrator must have considered the unfair labor practice issue for deferral to be appropriate. Under the standard set forth in *Olin*, an arbitrator has adequately considered the unfair labor practice issue if the contractual issue is factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.

We find that deferral is appropriate here because the contractual issues involved in the arbitration proceeding are factually parallel to the statutory issue and the arbitrator adequately considered the alleged unfair labor practice at issue here. In this regard, the resolution of both the contractual issue and the unfair labor practice allegation is contingent on the factual finding of whether the Respondents were obligated to furnish the Union with information in addition to sex and ethnicity data. Although the issue framed to the arbitrator may have limited the question only to the Union's right to sex and ethnicity data, in resolving that and related damages issues the arbitrator considered the broader issue of the scope of article 38. He thus concluded that the contract "contemplates a Data Submission Program that includes sex and ethnicity *at the minimum*, but that *may also be expanded* to include other data *as determined by the Coordinating Committee* [emphasis added]." Thus, the arbitrator found that under article 38 the Union was entitled to sex and ethnicity data, but that the Union was entitled only to such additional information as the HRCC determined. That finding necessarily involves consideration of the same factual question

[3] We note that there is no contention, and the evidence does not establish, that the failure of the HRCC to meet after March 25, 1983, was due to any bad faith by the Respondents.

[4] 140 NLRB 883 (1963).

presented by the complaint in this case, i.e., the extent of the Respondents' obligation to furnish information in connection with the contractual nondiscrimination provision. Accordingly, we find that the arbitrator addressed the precise issue raised here of whether the Union is entitled to information in addition to sex and ethnicity data.

We also find that the parties presented the arbitrator with the facts relevant to resolve the instant unfair labor practice issue. Thus, a review of the arbitrator's decision shows that he was presented with virtually the same evidence in support of the contractual issues before him as was subsequently presented by the parties to the judge, i.e., the history of the 1981 bargaining with respect to article 38, the parties' negotiations through the HRCC regarding the nature and type of data to be submitted, and the article 38 language itself.[5] The arbitrator was aware that the arbitration proceeding before him arose from a deferred unfair labor practice charge filed by the Union which, like the instant charge, alleged that the Respondents' refusal to furnish article 38-related information was in violation of the Act. Accordingly, as we find that the contractual issues are factually parallel to the statutory issue here and that the parties presented the arbitrator with facts relevant to resolving the issues,[6] we are satisfied that the alleged unfair labor practice raised by the complaint was adequately considered by the arbitrator, and we shall defer to the arbitration award.[7] Accordingly, we find that the Respondents did not violate the Act by failing to furnish the requested information to the Union.[8]

[5] The sole exception appears to be the evidence as to the parties' subsequent 1985 negotiations. As found by the judge, that evidence demonstrates that during the 1985 negotiations there was some discussion within the art. 38 subcommittee whether the HRCC was a viable committee to continue in existence. There were no proposals made to expand the data submission program. Although at the time of the hearing in this case the drafting committee had not completed its task, the judge found that the working draft demonstrated that there were no significant changes made in art. 38.

[6] See *Chevron, USA, Inc.*, 275 NLRB 949 (1985), and *Furr's Inc.*, 264 NLRB 554 (1982), in which the Board found deferral to prior arbitration awards appropriate under *Spielberg*. In those cases, although prior arbitration awards involved employees different from those named in the Board proceedings, the Board found deferral appropriate because the arbitration proceedings involved the same contractual questions and legal issues as presented in the unfair labor practice complaints. Compare *Litton Systems*, 283 NLRB 973 (1987), in which the Board refused to defer to a prior arbitration award because factual developments occurring after the award gave rise to new issues and the charging party union took a position different from that which it had taken in the arbitration proceeding. Unlike in *Litton*, here the Union's information request raises the same issues and contentions as raised in the arbitration proceeding.

[7] There is no contention that the proceedings were not fair and regular, that all parties had not agreed to be bound, or that the arbitrator's award is repugnant to the Act.

[8] We find it unnecessary to reach the Respondents' argument that the parties agreed that the art. 38 information would be correlated by the single job classification of "writer," and not by the breakdown of writing assignments within that classification as called for in the Union's data request.

ORDER

The complaint is dismissed.

CHAIRMAN STEPHENS, dissenting.

I would affirm the judge's finding of a violation in this case because I do not regard the statutory and contractual issues as factually parallel, with the consequence that I find deferral inappropriate. Neither do I find evidence sufficient to establish that the Union clearly and unmistakably waived its statutory right to the information at issue.

Because the collective-bargaining agreement had a nondiscrimination clause prohibiting discrimination on a number of grounds, including sex, ethnicity, age, and physical handicap, the Union had the right, under our Act, to request and obtain information on these work force characteristics.[1] That right is not dependent on any contractual provision guaranteeing the right to such information.[2] Thus, the arbitrator's decision regarding the provision of contractually guaranteed information on sex and ethnicity does not determine any rights the Union enjoyed under the Act to this or any additional information unless it can be said that the arbitrator determined that the Union had contractually waived entitlement to such information.[3] Because it seems clear that the arbitrator was not asked to, and did not, decide whether the Union waived statutory rights in this matter, there is no factually parallel decision, required under *Olin*, to which we can defer in this regard.[4]

With respect to the waiver question now before us, I would have no trouble finding a waiver to information beyond that contemplated in the provisions of the agreement relating to information bearing on the nondiscrimination provision *if* the data submission program had worked as the parties expected. The parties clearly contemplated using the Human Resources Coordinating Committee as the forum for working out the scope and format of submission of data other than sex and ethnicity.

[1] The Respondents do not challenge the judge's finding, with which I agree, that the information requested is relevant to the Union's obligation to monitor compliance with the nondiscrimination clause. However, they do argue, on relevance grounds, that the Union is not entitled to the information in the format requested, i.e., statistically categorized by job classifications. I agree with the judge, for the reason set out by her, that this argument has no merit.

[2] *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

[3] *Globe-Union Inc.*, 233 NLRB 1458, 1460 (1977).

[4] Moreover, even assuming that deferral is appropriate with respect to the Union's request for sex and ethnicity data considered by the arbitrator, in no event is deferral proper with respect to requests for the same or additional information made subsequent to the arbitrator's award, because (1) it is by definition not possible to pass on the propriety of requests made *in futuro*, and (2) the arbitrator did not retain jurisdiction for the purpose of resolving future disputes over requests for information. *Kroger Co.*, 226 NLRB 512, 513 fn. 6 (1976).

Thus, the Union was bound to seek to obtain information on age and physical handicap through that channel, and it waived any statutory right to demand such information directly from the Respondents, at least so long as that committee was functioning for that purpose. The Union and the Respondents *did* seek to resolve their differences through that committee but, owing to a disagreement over confidentiality provisions, that arrangement simply broke down. I do not view the Union's agreement to channel such information requests through that committee as an unequivocal waiver of its statutory right to information relevant to contract monitoring that survives the channel's breakdown. Because the existence of a functioning committee was an express expectation of *both* parties when they negotiated the waiver, the Union is now entitled to rescind the waiver and revert to its statutory right in seeking relevant information.

Neither do I find the Union's act of dropping its demand for information on age and physical handicap, while committee negotiations were still viable, a waiver of its right to that information once it was clear that no agreement was going to be reached. Had the parties reached an agreement on data submission reports that excluded such information, of course, waiver could properly be found.[5]

In sum, I reach the following conclusions: (1) the Union's request for information on writers' sex, ethnicity, age, and physical handicap was a request for information relevant to monitoring the contractual nondiscrimination prohibition; (2) although the arbitrator was aware of the then pending unfair labor practice charges, he did not consider any issue other than the Union's entitlement to information under the contractual provisions; (3) the Union did not waive its statutory right to such information in the event the Human Resources Coordinating Committee was unable to produce an agreement. For these reasons, I would find that the Respondents violated Section 8(a)(5) and (1) of the Act by not supplying the requested information after the committee process broke down.

[5] My colleagues are correct that *Hearst Corp.*, 113 NLRB 1067 (1955), is authority for finding waiver where the abandonment of a demand, after full bargaining, is reflected in a final agreement. Here, to the contrary, no such agreement was ever reached on which the parties could rely for stabilizing the bargaining relationship with respect to rights to information.

Ann Reid Conrin, Esq., for the General Counsel.
Richard Moreno, Esq., of Hollywood, California, for Respondent American Broadcasting Company.
John Turner, Esq., of Sherman Oaks, California, for Respondent Members of the Alliance of Motion Picture and Television Producers.
Sandra Gorham, Esq., of Los Angeles, California, for Respondent CBS, Inc.
Edward Reitkopp, Esq., of Burbank, California, for Respondent NBC Productions, Inc.
Michael R. White, Esq., of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARLDEAN V.S. ROBBINS, Administrative Law Judge. This matter was heard before me in Los Angeles, California, on 29 January 1986. The charge was filed by Writers Guild of America, West, Inc. (the Guild) on 24 June 1985, and copies thereof were served on Respondent's on 26 June 1985. The complaint, which issued on 23 August 1985, alleges that Respondents violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The basic issue is whether Respondents unlawfully refused to provide information requested by the Guild, which information was necessary for and relevant to the Guild's performance of its function as the exclusive collective-bargaining representative of certain of Respondents' employees.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material Respondent American Broadcasting Company (ABC), a New York corporation with an office and place of business in Hollywood, California; Respondent CBS, Inc. (CBS), a New York Corporation with an office and place of business in Los Angeles, California; and Respondent National Broadcasting Company, Inc. (NBC), a Delaware corporation with an office and place of business in Burbank, California; each has been, and is now, engaged in the operation of radio and television broadcasting stations.

At all times material Respondent NBC Productions, Inc. (NBC Productions), a New York corporation with an office and principal place of business located in Burbank, California; Respondent Columbia Pictures Industries, Inc. (Columbia), a Delaware corporation with an office and principal place of business located in Burbank, California; Respondent Paramount Pictures Corporation (Paramount), a Delaware corporation with an office and principal place of business located in Los Angeles, California; Respondent Universal City Studios, Inc. (Universal), a Delaware corporation with an office and principal place of business located in Universal City, California; Walt Disney Pictures (Disney), a California corporation with an office and principal place of business located in Burbank, California; Metromedia Producers Corporation (Metromedia), a California corporation with an office and principal place of business located in Hollywood, California; MGM/UA Entertainment Company (MGM/-UA), a California corporation with an office and principal place of business located in Culver City, California; MTM Enterprises, Inc. (MTM), a California corporation with an office and principal place of business located in

Studio City, California; Orion T.V. Productions, Inc. (Orion T.V.), a New York corporation with an office and principal place of business located in Los Angeles California, Twentieth Century Fox Film Corporation (Fox), a Delaware corporation with an office and principal place of business in Century City, California; and Warner Bros., Inc. (Warner), a California corporation with an office and principal place of business located in Burbank, California; Hanna-Barbera Productions, Inc. (Hanna-Barbera), a Delaware corporation with an office and principal place of business located in Hollywood, California, each has been, and is now, engaged in the operation of a television and/or movie production studio.

At all times material, Brighton Productions, Inc. (Brighton), a California Corporation with an office and principal place of business located in Los Angeles, California, has been, and is now, engaged in the development of theatrical projects for motion picture productions.

At all times material, Century Towers Production, Inc. (Century Towers), with an office and principal place of business located in Los Angeles, California, has been, and is now, engaged in the development and/or production of television motion pictures on video tape.

At all times material, Leonard Goldberg Company (Goldberg), a sole proprietorship with an office and principal place of business located in Los Angeles, California, has been, and is now, engaged in the development of television and/or production of theatrical motion pictures.

At all times material, T.A.T. Communications Company d/b/a Embassy Television (Embassy Television), a joint venture with an office and principal place of business located in Los Angeles, California; Lorimar Productions, Inc. (Lorimar), a California corporation with an office and principal place of business located in Culver City, California; Aaron Spelling Productions, Inc. (Spelling), a California corporation with an office and principal place of business located in Los Angeles, California; Viacom Productions, Inc. (Viacom), a Delaware corporation with an office and principal place of business located in Los Angeles, California, each has been, and is now, in the development and/or production of television motion pictures.

At times material, Tandem Communication, Inc. (Tandem), a California corporation with an office and principal place of business in Los Angeles, California, was engaged in the development and/or production of television motion pictures.

At all times material, Embassy Productions, Inc. (Embassy Productions), a New York corporation with an office and principal place of business located in Los Angeles, California, has been, and is now engaged in the development and/or production of theatrical motion pictures.

At all times material Orion Pictures Distribution Corporation (Orion Pictures), a Delaware corporation with an office and principal place of business located in Los Angeles, California, has been, and is now, engaged in the distribution of theatrical productions.

At all times material Orion Television, Inc. d/b/a Orion Television (Orion Television), a California corporation with an office and principal place of business in Los Angeles, California, has been, and is now, engaged in the development of projects for television productions.

At all times material, each of the above Respondents, in the course and conduct of their business operations, annually derive gross revenues in excess of $500,000 and annually purchase and receive goods and services valued in excess of $50,000 directly from suppliers located outside the State of California.

The Alliance of Motion Picture and Television Producers (AMPTP), is now and has been at all times material an association comprised of various employers with principal offices and places of business in the State of California where they are engaged in the production of motion pictures for television and theatres; and exists for, and does engage in collective bargaining for, and negotiates and executes collective-bargaining agreements on behalf of, its employer-members with organizations, including the Guild. The employer-members of AMPTP, in the course and conduct of their business operations, annually derive gross revenues in excess of $500,000 and annually purchase and receive goods and services valued in excess of $50,000 directly from suppliers located outside the State of California.

The complaint alleges, Respondents admit, and I find that Respondents and the employer-members of AMPTP are now and have been at all times material employers in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondents admit, and I find that the Guild is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The member-companies of the Association of Motion Picture and Television Producers, Inc., the member-companies of AMPTP, and certain other employers, including Respondents MGM/UA, ABC, CBS, NBC, and Disney were parties to a multiemployer collective-bargaining agreement with the Guild covering a unit of writers effective by its terms from 17 March 1981 to 18 February 1985. This agreement (the 1981 agreement) provides, inter alia:

> ARTICLE 38–NON-DISCRIMINATION
>
> A. *Policy*
>
> 1. . . . there shall be no discrimination due to sex, age, race, religion, sexual preference, color, national origin, or physical handicap.
>
> . . . .
>
> C. *Human Resources Coordinating Committee*
>
> The Companies and the Guild shall establish a Human Resources Coordinating Committee which shall meet upon request of either party. . . . The purpose of this Committee is as follows:
>
> 1. to establish the Data Submission Program and to analyze and review employment data submitted thereunder.

. . . .

D. *Data Submission Program*

1. The Company shall submit to WGA within 30 days after receipt of a written request by the Guild (but no more frequently than once a calendar quarter) a report of the sex and ethnicity of writers employed by Company under this Agreement during the preceding calendar quarter.

The agreement contains no specific provisions regarding the submission of data within the article 38A categories. Nor does it specifically resolve what, on the surface, appears to be a conflict between the provision of article 38D, which requires quarterly data submission, on request, of a report of the sex and ethnicity of writers employed by signatory employers and the provision of article 38C, which establishes a human resources coordinating committee whose purpose is to establish a data submission program, and which contains no limitations as to the data to be submitted.

Similarly, evidence as to the negotiations leading to the 1981 agreement does not conclusively resolve this question. The Guild's initial proposal, dated 5 April 1981, provided for no discrimination due to sex, age, race, religion, sexual preference, creed, color, or national origin and required that the employer submit, on request, affirmative action data to the Guild. On 17 February 1981 the employers counterproposed that the employers provide the Guild, on request but not more frequently than once a calendar quarter, a report of the sex, ethnicity, and age of writers covered by the agreement. This proposal further provided for the creation of a nondiscrimination coordinating committee whose purpose would be, inter alia, to ananlyze and review employment data supplied by the Employers. The Employers' 1 April 1981 proposal, as well as the earlier counterproposal, provided that the employers submit a report of the sex and ethnicity of writers employed under the agreement, and further that the data "furnished in accordance with this Article shall be for the purpose of facilitating the meeting which the Guild may request" on 10 days notice "to discuss any matter relating to alleged discrimination, fair employment or the policy expressed [in Article 38]." There was no essential change in the employers' 28 April counterproposal.

The Guild's 10 July counterproposal did not restrict the submission of sex and ethnicity data to the purpose of "facilitating the meeting which the Guild or the employer may request . . . to discuss any matter relating to alleged discrimination, fair employment or the policy expressed [in Article 38]. It did provide for the creation of a human resources coordinating committee, one of whose purposes is "to establish and supervise the data submission program and to analyze and review the employment data submitted thereunder. . . ."

Dean Farris, an employer-member of the negotiating subcommittee on article 38, testified that when the Guild spokesperson presented the proposal for article 38 she expressed concern regarding the employment of minorities as writers in the motion picture and television industry and stated that the proposal was being made in an effort to stimulate employment opportunities for minorities.

Following the presentation of the Employers' counterproposal, and at the request of the Guild, an article 38 subcommittee was established. According to Farris, the emphasis in the subcommittee discussions was on enhancing the employment opportunities for minorities. Jim Tisdale, a Black Guild representative on the subcommittee, was insistent that efforts be focused on minorities, and concern was expressed by the Guild that a broadening of efforts would dilute minority opportunities. Employer-representatives expressed concern as to possible first amendment and reverse discrimination problems. A Guild spokesperson represented that there was a very vocal group of women within the Guild who did not want females incorporated in any affirmative action effort because they felt there was no discrimination being practiced within the industry against women in the writing categories. The Employers urged that failure to incorporate women would cause reverse discrimination problems.

As a result of this discussion, the Employers redrafted their counterproposal[1] to pinpoint, to the extent they felt it was legal, the employment of minorities and, according to Farris, agreement was reached to deal with race and sex only. However, he was unable to relate specifically what was said in this regard. According to him, the only time that an expansion of these two categories was discussed was at one session in which one of the producers said he would personally like to see the physically handicapped included. It was determined, however, that it was not necessary to incorporate the physically handicapped into the contract, as there were no problems with that group that needed to be rectified.

On the last night of the negotiations, according to Farris, the data submission program was one of the two or three open issues. The negotiating committee determined that the form to be utilized for submissions would be developed by the human resources coordinating committee. Farris further testified that during the drafting committee meetings, which commenced immediately following the negotiation, there was no discussion of the type of data to be included under the data submission program, nor was there any agreement to include anything other than sex and ethnicity.[2]

Following the 1981 negotiations, the human resources coordinating committee (HRCC), was established. On 29 December 1982 the Guild sent AMPTP a proposed data reporting form that it wished to discuss at the first meeting of HRCC scheduled for 7 January. This form provided for statistical data as to sex, ethnicity, age, and physical handicap by job classification. On 26 January 1983 AMPTP sent the Guild a proposed data reporting form that it wished to discuss at an HRCC meeting scheduled for 7 February. This form provided for employment data only as to sex and ethnicity.

[1] The Employer's proposal was based on the 1984 Screen Actors Guild contract.

[2] Farris was not a member of the drafting committee, but did attend some of the sessions.

According to Farris, at the 7 February meeting of HRCC, as primary spokesperson for the Employers, he objected to the inclusion of the age and physically handicapped categories on the grounds that they had not been negotiated and specifically had not been included in the requirements for data submission in the agreement. He stated that the breakdowns by job classification went far beyond what the Employers felt was necessary and agreed on. Farris also testified that it is his recollection that the Guild representatives on the committee agreed to his objections to the inclusion of age and physically handicapped, as not having been incorporated into the agreement and further agreed to exclude it from their format; but did not agree to exclude the breakdown by job classification. Jane Ellison, as spokesperson for the Guild, stated they felt the breakdown was necessary in order to identify in what categories writers were being employed. The Guild then proposed a data submission form identical to the one earlier proposed by them, except that it dropped the age and physical handicap categories and agreed to drop one of the job classification categories.[3] With these exceptions, no agreement was never reached as to what should or should not be included on the data submission form.

Commencing with the fourth quarter of 1982 and continuing through the first two or three quarters of 1983, the Guild requested sex and ethnicity data according to a job classification breakdown. With one exception, the Employers did not comply with these requests.

On 20 October 1983, the Guild filed an unfair labor practice charge in Case 31-CA-13606, alleging, inter alia, that Respondents failed and refused to provide the Guild with information relevant and necessary to its ability to enforce and administer article 38 of the parties' collective-bargaining agreement. The parties agreed to arbitrate the underlying dispute in this case and the Regional Director deferred the charge pursuant to the Board's arbitration deferral policy in *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). The Guild continued to request the same information for the remaining quarters of 1983 and for the first three quarters of 1984.

By letter dated 28 December 1984, the Guild requested that Respondents furnish the following information for the third quarter of 1984:

> 1. The number of writers age 40 and over;
> 2. The number of writers with physical handicap; and
> 3. For each category of writers (i.e., Caucasian, ethnic minority group, male, female, over 40, or physically handicapped) employed during the third quarter of 1984 under the 1981 basic agreement in television, an indication of job classification (i.e., freelance story assignment, freelance first draft assignment, staff writer, staff story editor, or staff writer/producer).

During the arbitration, the Guild alleged that Respondents breached the 1981 agreement in that, with one exception, they had submitted no data regarding the sex and ethnicity of writers in their employ despite the requirements of article 38D(1). Relying on article 38C(1), Respondents urged that because that provision requires the HRCC "to establish" the data submission program, their obligation to furnish sex and ethnicity data comes into being only after the committee had established the program; and, since the committee has not yet done so, they neither have, nor have had, any obligation to submit any data. The Guild urged that the data submission program was "established" when the agreement was executed and thus the Companies have been obligated to submit data, pursuant to the limitations of article 38D(2), since that time.

On 9 January 1985 Arbitrator Murray L. Schwartz issued an opinion in which he concluded that, based on the collective-bargaining history and the structure and policy of article 38, the data submission requirement of the contract is self-executing and the Companies are required by its terms to furnish sex and ethnicity data. He further concluded.:

> That determination does not render the "to establish" language of Article 38.C.1 meaningless. Article 38.C.1 contemplates a Data Submission Program that includes sex and ethnicity data at the minimum, but that may also be expanded to include other data, as determined by the [HRCC]. In this sense, Article 38.D.1 parallels the authority of the [HRCC] set forth in Article 38.C.4, namely, to "explore and consider additional programs."

Accordingly, the arbitrator found that Respondents were obligated to furnish sex and ethnicity data to the Guild under article 38D(1).

As to the Guild's request for a determination that it had not waived its statutory and contractual rights to receive such data by requesting a job classification breakdown, the arbitrator concluded that inasmuch as he had held that Respondents are required by article 38D to submit sex and ethnicity reports the Guild's statutory rights were not adversely affected. However, the arbitrator further found that, as the Guild's demand for data extended beyond sex and ethnicity into job classification areas, the refusal of the Respondents to submit sex and ethnicity data in response to the Guild's written request was not "unjustified" under article 38, and that consequently the Guild was not entitled to an award of liquidated damages because of the companies' failure to file reports prior to any that may have been demanded for the third quarter of 1984. Accordingly, the Respondents were ordered to submit a report of the sex and ethnicity of the writers employed by them during the fourth quarter of 1982, 1983, and the first two quarters of 1984 covering all employees employed in any capacity as writers.

[3] The classifications proposed by the Guild were:
1. Freelance
(a) story
(b) first draft
(c) second draft
2. Staff
(a) staff writer
(b) story editor
(c) writer producer
The category the Guild agreed to drop was that of second draft in the freelance category.

However, it was further ordered that the Guild should not recover liquidated damages for the Respondents' failure to submit such reports.

By letter dated 5 February 1985 the Guild requested that the Regional Director investigate that portion of the charge in Case 31–CA–13606, which alleged that Respondents "have failed and refused to provide [the Guild] with information relevant and necessary to [the Guild's] ability to enforce and administer Article 38 of the parties' collective-bargaining agreement in further violation of Section 8(a)(1) and (5) of the Act." In support thereof, the Guild argued that the arbitrator did not consider nor decide whether Respondents breached the contract or violated the Act with respect to their continuing refusal to provide the Guild with information concerning the writers' job classifications. On 9 May 1985 the Regional Director dismissed the charge in Case 31–CA–13606 on the grounds that the issues alleged were resolved in the arbitral forum. The Guild did not appeal this dismissal.

Following negotiations in January and February 1985, an oral agreement, in principle, was reached on a 1985 collective-bargaining agreement, which was ratified by the employees on or about 18 March 1985. According to Farris, there was some discussion within the 1985 article 38 subcommittee whether the HRCC was a viable committee to continue in existence. There were no proposals, as he recalls, to expand the data submission program. At the time of the hearing, the drafting committee had not completed its task. However, the working draft corrobates Farris' testimony that no significant changes were made in article 38.

Guild's 28 December 1984 request for information was repeated on 18 March 1985 for the fourth quarter of 1984; on 25 June 1985 for the first quarter of 1985; on 30 September 1985 for the second quarter of 1985; and on 31 December 1985 for the third quarter of 1985. Certain of the employer-signatories complied with these requests but most of them, including Respondents, did not.

Conclusions

1. The relevance of the requested information

It is well established that an employer is obligated to provide the collective-bargaining representative of its employees, on request, with information that is relevant and necessary for the proper performance of a union's duties as a collective-bargaining representative. This obligation extends not only to information that is useful and relevant for the purpose of contract negotiations, but also to information necessary for the administration of a collective-bargaining agreement. However, before the obligation to produce arises, it must be shown that the requested information is relevant and reasonably necessary for the labor organization's proper performance of its role as a collective-bargaining representative. Relevancy is to be determined by a liberal standard, and it is necessary to establish only the "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1965); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). *Gunn & Briggs, Inc.*, 267 NLRB 944, 947 (1983); *W-L Molding Co.*, 272 NLRB 1240.

Respondents do not dispute the relevance of the sequested information as related to "all writers." However, they do argue that the requested information is not relevant insofar as it requires a breakdown of such information by "job classification." In this regard Respondents contend that there is only one job classification at issue, which classification is accurately set forth in the bargaining unit description in the complaint as covering *all writers* employed to write literary material for Respondents' motion pictures. Thus, Respondents argue, the request is not actually calling for a breakdown of job classifications, but instead it calls for descriptions of the particular writing assignment and the nature of the writers' writing employment. Respondents further argue that this contention is supported by the fact that the annual employment data report required by the Equal Employment Opportunity Commission requests information only as to broad employment categories and does not require a further breakdown of information regarding job assignments within those categories.

I find these arguments unpersuasive. Here, the Guild requested information as to sex, ethnicity, handicapped status, and age of employees 40 and over. It is undisputed that this information was requested in order to monitor and administer the equal opportunity policy set forth in the collective-bargaining agreement. In view of the statutory bargaining representatives' obligation to insure that discriminatory practices are not established or continued, the Board has found that information, such as requested here, which relates to alleged discrimination is clearly relevant to a determination of whether discrimination exists. The Board has further concluded that it shall apply the same standard to requests for statistical data relating to employment practices as is applied to requests for wage data; namely, that such information is presumed relevant to the collective-bargaining process and that it shall not require the union initially to show the relevance of the requested information. *Westinghouse Electric Corp.*, 239 NLRB 106, 107–109 (1978), enf. in pertinent part sub nom. *Electrical Workers IUE*, 648 F.2d 18 (D.C. Cir. 1981). I therefore find that the information requested by the Guild is relevant and reasonably necessary for the Guild's performance of its role as collective-bargaining representative.

2. The res judicata, collateral estoppel, and deferral to arbitration argument

On October 1983 the Guild filed an unfair labor practice charge in Case 31–CA–13606 alleging, inter alia, that Respondents had failed and refused to provide the Guild with information relevant and necessary to its ability to enforce and administer article 38 of the parties' collective-bargaining agreement. Thereafter, in view of the parties' agreement to arbitrate the underlying dispute, the Regional Director deferred the charge pursuant to the Board's arbitration deferral policy in *Dubo Mfg. Corp.*, supra. Following the issuance of the arbitrator's opinion, and award, the Regional Director dismissed the charge for the stated reason that "the issues alleged were re-

solved in the arbitral forum." The Guild did not appeal this dismissal.

Respondents argue that the doctrines of res judicata and collateral estoppel apply because the relevant factual and legal issues are identical to those raised in the arbitration proceeding and in the charge in Case 31-CA-13606, the dismissal of which was not appealed. Under the res judicata doctrine "[a] valid, final judgment on the merits is a bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand." 1B Moore *Federal Practice* 0.411[2], at 1281 fn. 1 (2d ed. 1982); and "such a judgment precludes the subsequent litigation both of issues actually decided in determining the claim asserted in the first action of issues that could have been raised in the adjudication of that claim." Id. § 0.045[3], at 631-632. The doctrine of collateral estoppel normally will bar the relitigation of an issue or law or fact that was raised, litigated, and actually decided by a judgment in a prior proceeding between the parties, if the determination of that issue was essential to the judgment, regardless of whether the two proceedings are based on the same claim. *NLRB v. United Technologies Corp.*, 706 F.2d 1254 (2d Cir. 1983). Clearly, neither doctrine applies to the administrative dismissal of a charge, and an arbitrator's decision has preclusive effect only to the extent set forth in the Board's deferral to arbitration policy.

Under that policy, the following criteria must be met for the Board to defer to the decision of an arbitrator: (1) the proceeding must be fair and regular; (2) all parties must agree to be bound; and (3) the decision must not be repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Further, the arbitrator must have considered the unfair labor practice issue. *Raytheon Co.*, 140 NLRB 883 (1963). The current policy for the application of this latter standard and the burden of proof is set forth in *Olin Corp.*, 268 NLRB 573, 574 (1984). There the Board held:

> We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard with to the inquiry in to the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.
>
> Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.

Here, there is no contention or evidence that the arbitral proceedings were not fair and regular or that all parties did not agree to be bound. However, the evidence does not support Respondents' position that the issues before the arbitrator were the same as the issues here. Thus, according to the arbitrator's opinion, the dispute that gave rise to the arbitration related to the Employers; failure to submit requested sex and ethnicity data and the Employers' position that they were obligated to furnish sex and ethnicity data only after the HRCC established a data submission program; and since HRCC had not done so, they had no obligation to submit any data. Therefore, the basic issue before the arbitrator was whether, despite the provision of article 38(C)(1) that the HRCC establish the data submission program, the Employers were required by article 38(D)(1) to furnish sex and ethnicity data without regard to whether HRCC established a data submission program.

The arbitrator concluded that article 38 contemplated a data submission program that included sex and ethnicity data at the minimum, but that could be expanded to include other data as determined by the HRCC. Accordingly, he concluded that the data submission requirement of article 38(D)(1) relating to sex and ethnicity was self-executing and the Employers were required by its terms to furnish such data. Further, upon the Guild's request for a determination that it had not waived its statutory and contractual rights to receive such data by requesting a job classification breakdown, the arbitrator concluded that inasmuch as he had held that Respondents are required by article 38(D) to submit sex and ethnicity reports, the Guild's statutory rights were not adversely affected. However, he also found that since the Guild's demand for data extended beyond sex and ethnicity into job classification areas, the refusal of Respondents to submit such data was not "unjustified" under article 38 and, consequently, the Guild was not entitled to an award of liquidated damages. Thus, the arbitrator's findining was limited to a determination of whether Respondents' refusal to comply with the Guild's request for sex and ethnicity data by job classification was "unjustified" under article 38(G)(1), thereby making the employers obligated to pay the liquidated damages provided for therein. Thus, the arbitrator never reached the general question of whether the Employers could be required to furnish information according to a job classification breakdown.

Here, the issue is whether Respondents were obligated to furnish the requested data relating to discrimination, other than sex and ethnicity, prohibited by article 38; and were obligated to furnish such information, as well as that related to sex ethnicity, according to the job classification breakdowns requested by the Guild. Neither of these issues was before the arbitrator. Further, their resolution requires considerations in addition to those relevant to the issues before the arbitrator.

Accordingly, under the Board's deferral to arbitration policy, it is appropriate for me to make a determination

in this matter. However, the record shows that the arbitrator interpreted certain provisions of article 38 of the collective-bargaining agreement underlying both the issue here and that in the arbitration proceeding. I, therefore, further find it appropriate, in the circumstances, to defer to the arbitrator's interpretation of these provisions. Thus my decision here will be based, in part, on the arbitrator's determination that sex and ethnicity is the minimum, rather than the exclusive, data required under article 38 to be submitted to the Guild by the employers.

3. Respondent's obligation to furnish the requested data

Respondents contend that by the provisions of article 38 the Guild waived any statutory rights it may have had with respect to the age and handicapped data requested by the Guild. The record does not support this contention. It is well established that waiver of a right to information must be "clear and unmistakeable." *Hearst Corp.*, 113 NLRB 1067 (1955). Such a waiver must be in express terms and can never be found by implication. *Skyway Luggage Co.*, 117 NLRB 681 (1957), *W-L Molding Co.*, 272 NLRB 1239 (1984).

Here, the arbitrator concluded that sex and ethnicity data were the minimum data required and that, under article 38, the requirement could be expanded to include other data as determined by the HRCC. Thus, it is apparent that the Guild did not waive its rights to age and physical handicap data, nor to breakdowns by job classifications of data relevant to issues of actual or potential discrimination. Rather, the Guild agreed to further negotiate the specifics of a data submission program within HRCC. That section of article 38(C) constituted a commitment to continue negotiations rather than a waiver of the Guild's right to data except as required by the HRCC is apparent, not only from the failure to include express waiver language in the provision, but also from Farris' testimony as to the conclusion of the 1981 negotiations. According to him, on the last night negotiations the data submission program was one of the two or three open issues. An agreement to conclude the strike was reached, and they simply ran out of time to further refine the data submission program. So it was determined that development of a format for data submission would be turned over to HRCC.

However, even assuming arguendo that by article 38(C) the Guild did limit its right to data other than sex and ethnicity to only such data as required by HRCC, the arbitrator found, and I agree, that it is clear the parties did not contemplate a complete breakdown as occurred within the HRCC. Nevertheless, such a breakdown did occur, resulting in a complete abandonment of the process by 25 March 1983, only 2-1/2 months after the first HRCC meeting that was held on 7 January 1983.[4] In view of this breakdown of the agreed-upon process for determining the extent of the data to be submitted, the Guild may properly insist on its statutory right to information relevant to actual or potential discrimination despite the authority given to the HRCC under article 38. To conclude otherwise would give a recalcitrant employer the power to effectively evade its obligations under the Act.

In view of the above, I find that each of the Respondents violated Section 8(a)(5) and (1) of the Act by its refusal to furnish the Guild with the requested data as to sex, ethnicity, age, and physical handicap status of unit employees by job classification.

CONCLUSIONS OF LAW

1. The Respondents are employers within the meaning of Section 2(2) of the Act, engaged in commerce or a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Guild is a labor organization within the meaning of Section 2(5) of the Act.

3. (a) From 2 March 1981 until 28 February 1985, the following-described employees of Respondents constituted a multiemployer unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> Included: (a) *Theatrical*—all writers employed by the Respondents; and (b) *Television*—all writers engaged by Respondents as employees for the purpose of preparing literary material for the entertainment portion of motion pictures produced primarily for exhibition over television.
>
> Excluded: Producers, directors, story supervisors, composers, lyricists, non-professional writers, story analysts, employees employed in non-writing capacities, guards and supervisors as defined in the Act.

(b) From 2 March 1985 to date, the following described employees of each Respondent (other than AMPTP) have constituted individual units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: (a) *Theatrical*—all writers employed by Respondent in the motion picture industry; and (b) *Television*—all writers engaged by Respondent as employees for the purpose of preparing literary material for the entertainment portion of motion pictures produced primarily for exhibition over television.
>
> Excluded: Producers, directors, story supervisors, composers, lyricists, non-professional writers, story analysts, employees employed in non-writing capacities, guards and supervisors as defined in the Act.

4. (a) From 2 March 1981 until 28 February 1985, the Guild was the designated exclusive bargaining representative of the employees in the multiemployer unit described above in paragraph 3(a) and during that period of time was recognized as such representative by Respondents.

[4] The arbitrator concluded the breakdown was occasioned by the Employers' insistence that data submitted other than as to sex and ethnicity be treated as confidential and that all data submitted be "prospective" only. The Guild refused to accede on either issue.

(b) Since on or about 2 March 1985 the Guild has been, and is now, the designated exclusive collective-bargaining representative of the employees in each unit described above in paragraph 3(b) and since that date has been recognized as such representative by each Respondent.

5. Respondents have engaged, and are engaging, in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Guild with the following requested information relevant to actual or potential discrimination in the units described above:

1. The number of writers age 40 or over;

2. The number of writers who are physically handicapped;

3. For each category of writer (i.e., Caucasian, ethnic minority group, male, female, over 40, or physically handicapped) employed during the fourth quarter of 1984 and the first, and second, and third quarters of 1985 under the Guild's basic agreement in television, an indication of job classification (i.e., Freelance story assignment, freelance first draft assignment, staff writer, staff story editor, or staff writer/producer).

6. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that Respondents cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents have violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish certain information requested by the Guild commencing on or about 28 December 1984, I shall recommend that each of the Respondents be ordered to furnish the Guild with the following information:

1. The number of writers age 40 or over;

2. The number of writers who are physically handicapped;

3. For each category of writer (i.e., Caucasian, ethnic minority group, male, female, over 40 or physically handicapped) employed during the 4th quarter of 1984 and the first, second, and third quarters of 1985 under the Guild's basic agreement in television, an indication of job classification (i.e., Freelance story assignment, freelance first draft assignment, staff writer, staff story editor, or staff writer/producer).

[Recommended Order omitted from publication.]

Triality Inc. d/b/a United Iron Works[1] *and* Rodney Gene Watson, Petitioner and Shopmen's Local 509 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO. Case 21–UD–269

July 29, 1988

DECISION AND ORDER DISMISSING PETITION

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

Pursuant to a Stipulation for Certification Upon Consent UD Election, an election by secret ballot was conducted on January 6, 1984. The tally of ballots established that a majority of the eligible voters were in favor of withdrawing the authority of the Union to require, under its collective-bargaining agreement with the Employer, that membership in the Union be a condition of employment. Thereafter, the Union filed an objection to conduct affecting the election, alleging that the election could not be conducted in a fair and uncoerced atmosphere owing to the activities of the Petitioner, a statutory supervisor, who circulated and campaigned on behalf of the petition.

[1] The name of the Employer appears as amended at the hearing.

Subsequently, Hearing Officer Rowena Hodges issued a report and recommendations, in which she found that the Petitioner was a supervisor within the meaning of Section 2(11) of the Act, and recommended that the petition be dismissed on the ground that as a statutory supervisor, the Petitioner was not eligible to file the petition. The Employer filed exceptions to the hearing officer's report and recommendations,[2] and the Union filed an answering brief.

The Board, by a three-member panel, has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations.

In *Rose Metal Products*, 289 NLRB 1153 (1988), the Board recently held that a statutory supervisor was ineligible to file a deauthorization petition. For the reasons set forth in *Rose Metal Products*, we find that the Petitioner, as a statutory supervisor, was ineligible to file the instant deauthorization petition. Accordingly, we shall dismiss the petition.

ORDER

The petition is dismissed.

[2] The Employer erroneously filed a request for review under Sec. 102.67(c)(1) of the Board's Rules and Regulations rather than filing exceptions under Sec. 102.69 as properly directed in the hearing officer's report. We have treated the request for review as exceptions.

Holly Peterson Co., Inc. *and* United Steelworkers of America, AFL–CIO, CLC. Case 18–CA–10219

July 29, 1988

ORDER DENYING MOTION

BY MEMBERS JOHANSEN, BABSON, CRACRAFT

On November 25, 1987, the Acting Regional Director for Region 18 of the National Labor Relations Board issued a complaint and notice of hearing in the above-entitled proceeding, alleging that the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Subsequently, the Respondent filed an answer, admitting in part and denying in part the allegations of the complaint, stating defenses, and requesting that the complaint be dismissed.

On January 25, 1988, the General Counsel filed with the Board in Washington, D.C., a Motion for Summary Judgment, claiming the only issues raised by the complaint and answer are legal in nature and that there are no issues of disputed fact warranting or requiring a hearing. On February 1, 1988, the Board issued an order transferring the case to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board having considered the matter,

IT IS ORDERED that the General Counsel's Motion for Summary Judgment is denied with leave to renew before an administrative law judge as there are genuine issues of material fact that cannot be resolved without a hearing and the General Counsel is not entitled to judgment as a matter of law.[1]

IT IS FURTHER ORDERED that the above-entitled proceeding is remanded to the Regional Director for Region 18 for further appropriate action.

MEMBER JOHANSEN, dissenting.

Based on documentary evidence submitted in support of the General Counsel's Motion for Summary Judgment and admissions set forth in the Respondent's answer to the complaint, I agree with the General Counsel that the only issues raised in these proceedings are legal in nature. Finding no genuine dispute as to material facts, I must dissent from my colleagues' denial of the Motion for Summary Judgment.

The complaint alleges and the Respondent's answer admits that the Union was certified on December 22, 1986, as the exclusive collective-bargaining representative of the production and maintenance employees at its Albert Lea, Minnesota facility. The Respondent further admits in its answer that it closed its Albert Lea facility on August 13, 1987, without providing the Union with advance notice of the closure. The Respondent acknowledges that by letter dated August 18, 1987,[1] after implementation of the closure decision, it first provided the Union with formal notice of the plant closing. In addition, the record reveals that only then did the Respondent offer to bargain with the Union about the effects of the closure. Finally, the Respondent did not specifically deny in its answer the allegations contained in paragraphs 10, 11, and 12 of the complaint, i.e., that its actions constituted unfair labor practices within the meaning of the Act.

The Respondent raises two defenses to its failure to provide the Union with advance notice of the plant closing. The first defense is that it "extended an open offer to meet with the Union" after actually closing the Albert Lea facility.[2]

It is well settled that an employer is obligated to bargain with its employees' collective-bargaining representative regarding the effects of a decision to close a facility. In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981), the Supreme Court emphasized that bargaining over the effects of a decision to close must be conducted "in a meaningful manner and at a meaningful time." An important element in evaluating whether mean-

[1] Our dissenting colleague would grant the General Counsel's Motion for Summary Judgment. Contrary to our colleague, we cannot say, as a matter of law, that the defense raised by the Respondent could never amount to emergency circumstances relieving the Respondent of its obligation to notify and bargain with the Union before the closing. We emphasize that we are not deciding the merits of the Respondent's defense. When, as our colleague points out, the Board has never addressed this precise question, we believe it is inappropriate to do so without benefit of a full evidentiary hearing.

Our colleague argues that aside from a general assertion in its answer the Respondent has not come forward with one shred of evidence to substantiate its claim. However, in light of our finding that the General Counsel is not entitled to judgment as a matter of law, it is well established that the Respondent is not obligated to come forward with evidence and a simple denial of unlawful conduct is sufficient to warrant a hearing. See, e.g., *Florida Steel Corp.*, 222 NLRB 586 (1976).

Our colleague states that the Respondent did not specifically deny the allegations in pars. 10 and 11 of the complaint that allege the specific violations of Sec. 8(a)(5) and (1), and that therefore they shall be deemed admitted true pursuant to Sec. 102.20 of the Board's Rules and Regulations. However, Sec. 102.20 provides that "any allegation in the complaint not specifically denied or *explained* in an answer filed . . . shall be deemed to be admitted to be true and shall be so found by the Board." (Emphasis added.) We believe Respondent's answer satisfies the rule.

[1] The record reveals that the correct date of the letter was August 17, 1987.

[2] The quoted language appears in par. 4 of the Respondent's answer to the complaint.

ingful bargaining has occurred is whether the union was provided with clear and timely notice of a plant closing.[3] In *Metropolitan Teletronics Corp.*, 279 NLRB 957, 960–961 (1986), enfd. without opinion 819 F.2d 1130 (2d Cir. 1987), the Board reaffirmed the principle that notice to a union of a facility's closure after it has occurred is not timely and cannot serve as a defense to the obligation to bargain in good faith. The Board recognized that a belated offer to negotiate denies a union of the opportunity to bargain when it retains a measure of bargaining power. Ibid.[4] Thus, I find that the Respondent's postclosure offer to bargain is not legally cognizable as a defense to the complaint allegations.

The Respondent's answer raises as a second defense that the Company was privileged to withhold from the Union advance notice of the plant closing because of "concern that such notice would have led to a slowdown in the production rate and/or sabotage to the equipment or to the products manufactured."[5] As the General Counsel acknowledges, the rule regarding timely notice is not a per se rule—an employer can avoid 8(a)(5) liability by demonstrating that "emergency circumstances" justified late notice to the union.[6] While the Board has recognized as "emergencies" such occurrences as discontinuance of an ongoing line of credit,[7] lack of funds to continue in operation,[8] and theft of vehicles,[9] it has at no time found that concern for the mere conjectured possibility of employee sabotage of a plant or product amounts to "emergency circumstances." As the General Counsel points out, such speculation could be raised, with equal justification, by most employers deciding to close a facility. Should a vague and unspecified "concern" about employee sabotage or production slowdown be recognized by the Board as a valid defense, the exceptions to the advance notice rule would provide a loophole broad enough effectively to nullify an employer's obligation to engage in effects bargaining. In this case in particular (and I note that the Respondent failed to respond to the Notice to Show Cause), there is not a shred of evidence that would even hint that the Respondent has any basis for its unspecified apprehension or "concern." Even had such evidence been presented, however, the Board did not create (nor do I believe it intended to create) an exception based on "concern" for sabotage and/or production slowdown when it recognized that occasional exceptional circumstances may justify circumvention of the advance-notice requirement. Thus, I find, again, that the Respondent has failed to raise a legally cognizable defense to the complaint allegations.

Accordingly, as I find that the pleadings in this case fail to raise a disputed issue of fact which would warrant litigation, that the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by these proceedings, that the Respondent has failed to deny specifically that its actions constitute unfair labor practices,[10] and that the Respondent's affirmative defenses are legally insufficient as justification for the Respondent's conduct, I would grant the General Counsel's Motion for Summary Judgment. That is the appropriate action when a respondent fails to raise a legally cognizable defense.[11] Finally, I would enter an appropriate remedial order.[12]

[3] *Penntech Papers v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983), enfg. 263 NLRB 264 (1982), cert. denied 464 U.S. 892 (1983); *P. J. Hamill Transfer Co.*, 277 NLRB 462 (1985).

[4] See also *Thompson Transport Co.*, 184 NLRB 38 (1970).

[5] The quoted language appears in par. 4 of the Respondent's answer.

[6] *Metropolitan Teletronics*, supra.

[7] *Raskin Packing Co.*, 246 NLRB 78 (1979).

[8] *M & M Transportation Co.*, 239 NLRB 73, 75 (1978).

[9] *National Terminal Baking Corp.*, 190 NLRB 465 (1971).

[10] Sec. 102.20 of the Board's Rules and Regulations, provides that "any allegation in the complaint not specifically denied or explained . . . shall be deemed to be admitted to be true . . . ." In light of my finding that the Respondent has failed to raise a legally cognizable defense to the complaint allegations, I cannot agree with my colleagues that the Respondent's answer "explains" the complaint allegations as required by Sec. 102.20 of the Board's Rules and Regulations.

Further, contrary to my colleagues, I find that *Florida Steel Corp.*, 222 NLRB 586 (1976), does not require that this case be remanded for a hearing. In *Florida Steel*, a distinguishable case, General Counsel filed a Motion for Summary Judgment contending that through its answer the respondent admitted facts sufficient for a Board determination finding the alleged violations of the Act. Through an amended answer, the respondent sought to withdraw its admission of the alleged unlawful conduct and entered instead a denial of such conduct. The Board denied the General Counsel's motion to strike the amended answer and found instead that respondent's denial of the commission of the alleged unlawful acts raised questions of fact and law requiring resolution through a hearing.

The critical difference between *Florida Steel* and this case is that we have here the Respondent's admission of all facts material to a resolution of the unfair labor practice issues, a failure by the Respondent to deny that its actions constitute unfair labor practices, and the assertion of defenses that are not legally cognizable. Thus, the factors which resulted in a remand for a hearing in *Florida Steel* are not present here.

[11] See, e.g., *Auburn Die Co.*, 282 NLRB 1044(1987) (Motion for Summary Judgment granted because employer admitted factual allegations of complaint except for a contention that its actions resulted from economic circumstances, which is not a cognizable defense in a refusal to bargain case); *General Split Corp.*, 284 NLRB 418 (1987) (Motion for Summary Judgment granted where employer's claim that it was financially unable to make contractually required severance pay disbursements was found not to constitute an adequate defense to a complaint's allegation that the employer unlawfully failed to abide by the provisions of a collective-bargaining agreement).

[12] I agree with the General Counsel that the appropriate remedy in this case would be a *Transmarine* remedy. See *Transmarine Navigation Corp.*, 170 NLRB 389 (1968); *Metropolitan Teletronics*, supra; *P. J. Hamill*, supra.

RDR Industries, Inc. *and* International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 157. Case 3–CA–13541

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On May 26, 1987, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

The Respondent and the Union began negotiations for a new contract on October 14, 1986.[3] As of September, 7 of the 15 unit employees were union members on dues checkoff. Prior to the November 12 negotiating session the Respondent's counsel, Murray Kirshtein, informed the Union's business representative, Lawrence Manca, that because of promotions and resignations there were only 2 union members remaining in the now 10-person unit that were on dues checkoff.

At the November 12 session Manca, Kirshtein, and the Respondent's president, John Rushton, were present. Kirshtein and Rushton both testified that Kirshtein asked Manca, "Can you represent to me that you represent the majority of the unit?" Kirshtein testified that Manca replied, "I cannot represent to you that I do."

The Respondent contended that, based on Manca's statement, it had a reasonably grounded doubt as to the Union's majority status and that it therefore lawfully withdrew recognition from the Union. Manca denied that he made the statement attributed to him.

We agree with the judge that Manca's ambiguous response to Kirshtein's question, even if made as Kirshtein testified, was insufficient to rebut the Union's presumption of continuing majority status. Therefore, it is unneccessary to remand the case to the judge to resolve the credibility conflict.

If, in fact, Manca made such a statement, he could have meant only that he did not know that a majority of the unit were members of the Union or that a majority would agree to the contract terms he was negotiating. Futhermore, the statement is not couched in affirmative terms—that Manca did not represent a majority—but merely in terms of declining to make an express statement that he did. His alleged statement is in marked contrast to the statements in *Upper Mississippi Towing Corp.*, 246 NLRB 262 (1979), relied on by our dissenting colleague. There, the majority relied on, among a number of factors rebutting the union's presumption of continuing majority status, three unambiguous statements. Those statements were found to "clearly state NMU's estimate that it lacked employee support" and that the NMU would "never be able to win the election." Manca's single ambiguous statement here simply does not rise to the level of the union representatives' "admissions" in *Upper Mississippi*.[4]

In short, we agree with the judge that Respondent was not justified in withdrawing recognition from the Union here. Accordingly, we shall adopt his recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, RDR Industries, Inc., Mohawk, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER CRACRAFT, dissenting in part.

Contrary to my colleagues, I would not adopt the judge's decision.[1] I would remand this case to the judge for resolution of the credibility conflict between the Respondent's witnesses (Attorney Kirshtein and President Rushton) and Union Business Representative Manca whether Manca was asked whether he could represent that the Union

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We affirm the judge's quashing of the subpoena for the testimony of Federal Mediator Robert Clintshaw. The Respondent seeks Clintshaw's testimony to corroborate the testimony of its witnesses that they asked Union Negotiator Manca if he could "represent that he represented a majority" of the unit and that he answered that he could not. Clintshaw was not present when the question was allegedly asked and answered. At most he could testify that Kirshtein told him over the phone that the question was asked and answered. Thus, we find that Clintshaw's testimony would not be sufficiently probative to corroborate the Respondent's witnesses and that the judge did not abuse his discretion in excluding this testimony.

[3] All dates are in 1986.

[4] See *United Supermarkets*, 214 NLRB 958 (1974), in which a Board majority found that an unclear statement was not an admission by the union that it did not have majority status. That case bares a closer resemblance to the situation here.

[1] I do, however, agree with the majority's quashing of the subpoena for the testimony of Federal Mediator Robert Clintshaw for the reasons stated.

represented a majority of the unit employees and whether Manca replied that he could not so represent.

The complaint alleges only an unlawful withdrawal of recognition. There is no evidence that the Respondent sought to undermine the Union or that it committed any other unfair labor practices. The Respondent bargained in good faith with the Union to reach a successor agreement until the alleged question was asked and the alleged reply was given, whereupon the Respondent withdrew recognition. In the context of a sharp decline in the percentage of unit employees on dues checkoff, record evidence, if credited, reveals that the Respondent merely asked the Union to confirm that it remained the employees' 9(a) representative and that the Union admitted in its answer that it lacked majority support.[2] Under these circumstances, I would find that Manca's statement, if credited, would provide the Respondent with an objectively based, good-faith doubt of the Union's continuing majority status. *Upper Mississippi Towing Corp.*, 246 NLRB 262 (1979). Therefore, I would remand the case to the judge for this vital credibility resolution.

[2] If the Union had merely relied on its presumption of majority support in responding to the Respondent's inquiry, I would have no problem affirming the judge. However, when, as here, it is alleged that the business representative and chief negotiator for the Union admitted that he could not represent that the Union had majority support, I believe a credibility resolution must be made.

Robert A. Ellison, Esq., for the General Counsel.
Murray J. S. Kirshtein, Esq., of Utica, New York, for the Respondent.

DECISION AND ORDER

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Utica, New York, on 9 February 1987.[1] On a charge filed on 24 November 1986,[2] a complaint was issued on 16 December, alleging that RDR Industries, Inc. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The complaint alleged that Respondent withdrew its recognition of International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 157 (the Union) as the exclusive collective-bargaining representative of its production and maintenance employees. In addition, the complaint alleged that Respondent failed to furnish the Union with information requested by it and increased the hourly wage rates of unit employees without prior notice to the Union. Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with an office and place of business in Mohawk, New York, is engaged in the fabrication of sheet metal and related products. It annually sells and ships from its New York facility goods valued in excess of $50,000 to consumers located outside the State of New York. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and I so find. In addition, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

On 1 July 1980 the Union was certified as the exclusive collective-bargaining representative of Respondent's production and maintenance employees. The parties subsequently entered into a 3-year collective-bargaining agreement. In 1983, pursuant to a decertification petition, an election was conducted that resulted in the Union's recertification. At the time approximately 15 to 17 employees were in the unit. The parties then entered into a 3-year collective-bargaining agreement extending from 10 November 1983 to 10 November 1986.

On 22 and 26 August 1986 the parties notified each other, in writing, of their intent to enter into negotiations for a successor agreement. In early September, Union Business Representative Lawrence Manca orally requested that Respondent President John Rushton provide a listing of the hourly earnings of the unit employees. On 19 September Rushton provided the requested information, which disclosed that wage increases were given to some unit employees beyond that provided by the contract.

2. Negotiations

On 14, 21, and 23 October the parties met to negotiate a successor contract, with Manca and Steward Dennis Quatrino, representing the Union, and Rushton and Respondent's counsel, Murray Kirshtein, representing Respondent. Manca and Kirshtein were the chief spokesmen. During these discussions the parties reached a number of tentative agreements, including an agreement to increase wages.[3]

[1] The record was closed on 27 March 1987.
[2] All dates refer to 1986 unless otherwise specified.

[3] According to Manca, on 28 October the parties agreed to extend the 10 November expiration date of the then-existing agreement. Kirshtein denied that the contract extension was agreed to. Art. 30 of the agreement provides that any changes or modifications to the agreement must be in writing and Manca conceded that there was nothing in writing ex-

Continued

As of September, 7 of the 15 unit employees were union members whose dues were deducted from their earnings by Respondent. On 26 August Rushton posted an announcement that three foreman positions would be filled, advising those interested to apply by 29 August. Four employees, including Scott Fullington, all of whom were union members on dues checkoff, applied. During the last week of September, Fullington quit his employment with Respondent. On 7 November Leland Smith notified Respondent and the Union, in writing, that he was terminating his union membership as of 10 November.[4]

The parties resumed negotiations on 10 November, with Manca and Kirshtein present. Certain items were agreed on, subject to approval by Rushton and Quatrino. Manca and Kirshtein agreed to continue negotiations the following morning. The parties met again on 11 November, at which time various contract items were discussed. The Smith resignation letter was shown to Manca, who was then informed that the three foreman positions were being filled immediately. Those selected were the individuals who had signed the 26 August posting. Kirshtein then asked Manca whether all the members in the bargaining unit would vote on the agreement. Manca replied that only union members would vote. Kirshtein said he would be more "comfortable if everybody in the bargaining unit could vote on the agreement." Manca replied that he had no objection to meeting with everyone in the unit to inform them of the negotiations but that he could only permit union members to vote on the agreement. Manca and Kirshtein then agreed to speak with Robert Klimshaw, a mediator with the Federal Mediation and Conciliation Service, as to the legality of having the entire bargaining unit vote on the agreement. In addition, Manca said that he would discuss the question with the Union's legal department.

3. Withdrawal of recognition

Kirshtein testified that he told Manca that he and Rushton were concerned because less than a majority of the unit employees were on checkoff. According to Kirshtein he then asked Manca, "Can you represent to me that you represent the majority of the unit?" Kirshtein testified that Manca replied, "I cannot represent to you that I do." Kirshtein further testified that he told Manca:

> If you can't provide for a majority of the employees affected ratifying whatever agreement we come to, and we're very close, and you can't represent to me you represent a majority of the people, you give me a problem. I can't negotiate with you.

Manca denied that he was asked whether the Union represented a majority of the employees. Kirshtein and Manca then spoke by telephone to Clintshaw, who suggested that the Union obtain a legal opinion regarding nonmember participation in the ratification process.[5]

On 12 November Manca was informed by the Union's attorney that only members could participate in the ratification. Manca so informed Kirshtein who replied that Respondent would not negotiate further with the Union. Rushton acknowledged that Respondent would have continued to negotiate with the Union had the Union allowed the entire unit to ratify the agreement. Also on 12 November Manca made a written request for an updated list of employees' earnings. Respondent never answered the request. On 13 November Kirshtein and Rushton met with the unit employees and informed them that Respondent was implementing the wage increase that it had tentatively agreed to with the Union. This action was taken without prior notice to the Union. Respondent has refused to negotiate with the Union after 12 November.

B. *Discussion*

In *Robertshaw Controls Co.*, 263 NLRB 958, 959 (1982), the Board stated:

> We have consistently held that a union enjoys a presumption of continuing majority status. In order to rebut that presumption, an employer must either show that the union in fact no longer retains majority support, or that its refusal to bargain was based on a reasonably grounded doubt as to the union's majority status. As to a reasonably grounded doubt, the doubt must be based on objective considerations.

When Respondent's representatives realized that less than a majority of the unit employees were on checkoff, they requested that all the unit employees ratify the agreement. The union representative refused to accede to this request and stated that only union members would be eligible to vote on the agreement.[6] Kirshtein testified that he then asked Manca whether Manca could affirm that the Union represented the majority of the unit, to which Manca replied that he could not so affirm. Manca denied that such a question was asked or that such an answer was given. It is not necessary for me to resolve the credibility issue, for even were I to credit Kirshtein's version of the events, Respondent has not sustained its burden of showing that the Union no longer retained majority support or that its refusal to bargain was based on a reasonably grounded doubt as to the Union's majority status.

Even crediting Kirshtein's version, the question and answer are ambiguous. Kirshtein conceded that he advised Manca that, "You may have other people who are

tending the agreement. I find, therefore, that the agreement was not extended.

[4] Under the maintenance-of-membership clause of the 1983 contract, employees had the right to resign from union membership between 1 and 10 November.

[5] Respondent served a subpoena on Clintshaw to testify concerning the telephone conversation. The General Counsel moved to revoke the subpoena, arguing that Federal mediators should not be required to testify at Board proceedings. The petition to revoke the subpoena was granted. *NLRB v. Lemon Tree*, 618 F.2d 51, 54 (9th Cir. 1980); *Tomlinson of High Point, Inc.*, 74 NLRB 681, 685 (1947).

[6] The ratification process is an internal union matter and a union's determination to limit participation to its members is a matter within its discretion. See *Darlington Veneer Co.*, 113 NLRB 1101, 1117 (1955), enfd. 236 F.2d 85 (4th Cir. 1956).

union members who are not part of the checkoff." Thus, even if the question were asked as Kirshtein testified, it could have meant whether Manca could represent that a majority of the unit were union members. Indeed, it is unlikely that an experienced union agent like Manca would have told an employer with whom he was negotiating that the Union did not speak on behalf of the majority. This is so, especially here, where there was no underlying factual basis to make such a statement adverse to the Union's interest. Similarly, in *United Supermarkets*, 214 NLRB 958, 964 (1974), the union representative admitted that "he did not believe he had a majority." The Board, however, in observing that the number of dues-checkoff authorizations is immaterial to the issue of majority status, held that respondent did not establish that the union lost its majority status or that respondent had a reasonable basis for so believing. The Board pointed out that "the crucial question is whether a majority of employees have expressed dissatisfaction with the Union as their collective-bargaining representative, and there is no evidence showing such majority dissatisfaction" (id. at 958).

In *Robertshaw Controls Co.*, supra, the Board found that the factors on which respondent based its refusal to bargain were insufficient to support a reasonable doubt as to the Union's continuing majority status. The Board stated (at 959):

> With regard to union membership, we have held that a showing that less than a majority of the employees in the unit are members of the union is not the equivalent of showing that the union lacked majority support, because no one can know with certainty how many employees who favor union representation do not become or remain members of the union.

As appears from his closing statement, Kirshtein understood that the fact that less than a majority of the unit employees were on checkoff was not sufficient to create a good-faith doubt of majority status, where Respondent was unaware of substantial dissatisfaction among the employees. Manca's ambiguous response, even if credited, that he did not represent a "majority," was insufficient to rebut the Union's presumption of continuing majority status.

I therefore conclude that Respondent was not justified in withdrawing recognition from the Union. I further conclude that Respondent violated the Act by failing to furnish the Union with the information it requested on 12 November[7] and by increasing the employees' wage rates on 13 November without prior notice to the Union.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By withdrawing recognition of the Union as the exclusive collective-bargaining representative of its production and maintenance employees, by failing to furnish the Union with the information it requested, and by increasing the employees' wage rates without prior notice to the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take further action necessary to effectuate the policies of the Act. Inasmuch as I have found that Respondent unlawfully refused to bargain collectively with the Union, I shall recommend that Respondent be ordered to bargain with the Union as the representative of its production and maintenance employees.

The General Counsel has requested that the order include a visitatorial clause authorizing the Board to engage in discovery under the Federal Rules of Civil Procedure for the purpose of securing compliance with the Board's Order. However, the General Counsel has not shown any special circumstances necessitating a departure from the standard remedy in similar cases. Accordingly, I will not include that requested remedy in this Order. See *Northwind Maintenance Co.*, 281 NLRB 317 (1986); *O. L. Willis, Inc.*, 278 NLRB 203 (1986).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondents, RDR Industries, Inc., Mohawk, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to meet and bargain collectively with International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 157 as the exclusive representative of the employees in the following appropriate unit:

> All production and maintenance employees employed by Respondent at its Mohawk facility, excluding office clerical employees, watchmen, guards and supervisors as defined in the Act.

(b) Refusing to furnish necessary and relevant information requested by the Union.

(c) Unilaterally changing wage rates or other terms and conditions of employment of unit employees, without prior notice to or bargaining with the Union.

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[7] See *B. F. Diamond Construction Co.*, 163 NLRB 161, 175–76 (1967), enfd. 410 F.2d 462 (5th Cir. 1969), cert. denied 396 U.S. 835 (1969).

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive representative of the above unit of employees and, on request, embody in a signed agreement any understanding reached.

(b) Furnish necessary and relevant information requested by the Union in a timely manner.

(c) Post at facility in Mohawk, New York, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYESS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 157 as the exclusive representative of the employees in the following appropriate unit:

> All production and maintenance employees employed by Respondent at its Mohawk facility, excluding office clerical employees, watchmen, guards and supervisors as defined in the Act.

WE WILL NOT refuse to provide necessary and relevant information requested by the Union in a timely manner.

WE WILL NOT unilaterally change wages and other terms and conditions of employment without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the employees in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with the Union as the exclusive representative of the employees in the above-mentioned unit and WE WILL, on request, embody in a signed agreement any understanding reached.

WE WILL furnish necessary and relevant information requested by the Union in a timely fashion.

RDR INDUSTRIES, INC.

Clark & Wilkins Industries, Inc. *and* **Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO.** Cases 2–CA–21012 and 2–RC–19908

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On March 31, 1986, Administrative Law Judge Winifred D. Morio issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Charging Party Petitioner filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt her recommended Order as modified.[3]

We agree with the judge that the General Counsel has sustained her burden under *Wright Line*[4] of a prima facie showing that union activity was a motivating factor for the discharges of employees Phillip Greene and Cessil Chinfloo and that the Respondent has failed to demonstrate that these employees would have been discharged even in the absence of their union activity. As found by the judge, the discharges were precipitated by a locker room agreement among employees, including Greene and Chinfloo, on January 30, 1985, to attend a union meeting, and their attendance at that meeting where they signed authorization cards.

Regarding the prima facie case, we find that the General Counsel has established the Respondent's knowledge of employees' union activity by evidence that Brown, a supervisor who spent a considerable amount of time with the small complement of unit employees both on and off the job, was aware of the campaign, and we agree with the judge that Brown's knowledge is imputed to the Respondent's steel superintendent, Wardrop. We find support for the finding of knowledge not only in inferences drawn by the judge from the size of the unit and Brown's close relationship with employees and from Brown's incredible denials in seeking to distance himself from his subordinates' union activity, but also in direct evidence of Brown's knowledge contained in Greene's uncontroverted testimony concerning his confrontation with Brown on the construction site the morning before Greene's discharge.[5]

Greene testified that he had become upset after Brown approached the worksite where Greene, Chinfloo, and another employee were erecting fences and doors and criticized the quality of their work. Greene told Brown that he was "tired of being used" and that he would take "steps . . . to change that." Brown replied, in obvious references to the union meeting and solicitation of authorization cards that had taken place the previous evening, that "any steps or anything you guys are going to do, do not include me." This testimony contributes to establishing not only the Respondent's general knowledge of union activity within the unit but specific knowledge of the participation of the employees to whom Brown's remark was directed, which included Greene and presumably Chinfloo.

The Respondent's asserted justification for Greene's discharge was trumped up from events occurring the very morning after his activity in support of the Union—events which even his supervisor made clear he considered trivial, and

[1] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent contends that the judge erred in finding Uriel Brown, on whose testimony the judge relies in finding that the Respondent had knowledge of union activity, to be a statutory supervisor because the complaint did not specifically allege that Brown was a supervisor and was not amended to so allege at hearing. The Respondent further contends that, in making her determination as to Brown's supervisory status, the judge failed to consider the parties' stipulation to Brown's voting eligibility in the representation proceeding. We find no merit to these exceptions. First, we find, based on a careful reading of the record, that the issue of Brown's supervisory status was fully and fairly litigated at the hearing. Second, the Board has held that failure to request review of a Regional Director's approval of a stipulation for a consent election has preclusive effect only to *related* subsequent unfair labor practice proceedings (i.e., 8(a)(5) refusal-to-bargain cases), and that subsequent unfair labor practice proceedings involving Sec. 8(a)(1) and (3) such as the instant proceeding are not related unfair labor practice proceedings. *Farm Fans, Inc.*, 174 NLRB 723, 724 (1969); see also *Clothing Workers*, 365 F.2d 898, 902–905 (D.C. Cir. 1966); *Reeves Bros.*, 277 NLRB 1568, 1573 (1986). We find that the judge properly resolved Brown's supervisory status in this proceeding and we affirm her findings in that regard.

[3] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 789 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[5] Member Babson, in concluding that the Respondent had knowledge of the employees' union activity, finds it unnecessary to rely on the small size of the unit.

which the judge found to be pretextual. Chinfloo's discharge occurred only hours after the Respondent was confronted by the Union with a demand for recognition. The fact that these employees' support for the Union was pivotal in this small unit—their discharges enabling the Respondent to frustrate the Union's efforts to achieve recognition—renders even their modest activities significant.[6] Further, having discredited Wardrop's confused and self-contradicting testimony and thus finding that his asserted reasons for the discharges were false, the judge properly inferred that the real reason was an unlawful one.[7] Accordingly, because the Respondent has not shown that it would have discharged the employees even in the absence of union activity, we affirm the judge's finding that it violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders the Respondent, Clark & Wilkins Industries, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c) and reletter paragraph 2(c) and subsequent paragraphs.

"(c) Expunge from their files any references to the discharges of Phillip Greene and Cessil Chinfloo and notify them in writing that this has been done and that the discharges will not be used against them in any way."

[6] See *Advance Development Corp.*, 275 NLRB 186, 191, 195 (1985).

[7] See *E. Mishan & Sons, Inc.*, 242 NLRB 1344, 1345 (1979); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Richard L. DeSteno, Esq., for the General Counsel.
Martin Gringer, Esq. (Marshall M. Miller Associates, Inc.), of Hewlett, New York, for the Respondent.
Susan Martin, Esq. (Sipser, Weinstock, Harper & Dorn), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WINIFRED D. MORIO, Administrative Law Judge. This case, heard on 15, 24, 25, and 31 October 1985 at New York, New York, was based on a complaint issued by the Regional Director for Region 2, on 3 July 1985. The complaint alleges, in substance, that Clark & Wilkins Industries, Inc. (Respondent/Company) discharged its employees, Phillip Greene and Cessil Chinfloo, because of their activities on behalf of Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO (Union). The Respondent filed an answer in which it denied that it had committed the alleged unfair labor practices.

All parties were afforded the opportunity to present witnesses, to cross-examine witnesses, and to file briefs. Briefs were filed by all parties.

On the entire record, including my observation of the demeanor of the witnesses and on consideration of briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, in the Respondent, a New York corporation, with a facility located in the City and State of New York, was engaged in providing general contracting services in the construction industry. Annually, the Respondent, in the course and conduct of its business operations, purchases and receives goods and materials valued at in excess of $50,000 directly from firms located outside of the State of New York. The parties admit, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties also admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE REPRESENTATION PETITION

On 7 February 1985, the Union filed a representation petition, in Case 2-RC-19908, seeking to represent all production and maintenance employees of Respondent. At a conference held on 25 February 1985, issues were raised concerning the status of four employees, Phillip Greene, Cessil Chinfloo, Leslie Earlington, and Carrol Dyall. It was the position of the Union that these four employees had been temporarily laid off and, therefore, they were eligible to vote. The Respondent contended that the four employees had been discharged for cause. A hearing was commenced on 25 February 1985 regarding the status of these individuals, but it was terminated when the parties entered into a Stipulation for Certification upon Consent Election. The parties agreed that Greene and Chinfloo would vote subject to challenge because the Union continued to maintain that the two employees were laid off, while Respondent maintained that they had been discharged.[1] An election was held on 20 march 1985, which resulted in six votes for the Union and six votes against the Union. The challenged ballots of Greene and Chinfloo, therefore, were determinative of the election. The Regional Director, on 9 April 1985, issued a notice of hearing to determine the status of these two individuals. The hearing, initially scheduled for 19 April 1985, was postponed to 29 April 1985. On 22 April 1985, the unfair labor practice charge in the instant case was filed and, as noted, on 3 July 1985 the complaint in this case issued. Subsequently, on 9 July 1985 an order consolidating the hearing on the challenged ballots with the hearing in the unfair labor practice case was issued by the Regional Director.

[1] The Union, apparently, did not pursue its position about the status of Earlington and Dyall and they did not vote in the election.

III. RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

During the hearing, Respondent's counsel filed a motion to dismiss the complaint. It was counsel's position that the Union, by proceeding with the election on the basis that Greene and Chinfloo were eligible to vote because they had been temporarily laid off, waived the right to claim, subsequent to the election, that the two employees had been discharged for discriminatory reasons. Counsel argued that the instant case is similar to the situation that existed in *Irving Air Chute*, 149 NLRB 627 (1964), where the Board held that when a union loses an election it may seek a bargaining order pursuant to Section 8(a)(5) of the Act where it had failed to file timely objections to the conduct of the election. Counsel contends that it would be a logical extension of *Irving Air Chute* to hold that where a union proceeds to an election and fails to allege, in a timely manner, that certain individuals are eligible to vote as a result of unlawful discharges, it waives its right to subsequently assert the illegality of such discharges. The motion to dismiss was denied. However, counsel requested that he be permitted to amend his answer to include the grounds for his motion to dismiss as an affirmative defense. This motion was granted.

IV. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Background*

Phillip Greene commenced his employment with Respondent in June 1983. According to Walter Wardrop, the Respondent's steel superintendent, he discharged Greene in March 1984 because he, together with another employee, drank while on the job and both individuals failed to perform the work assigned to them. Greene claimed that he was laid off and not discharged in March 1984 because of a slowdown in work. Greene did admit, however, that some weeks before he was laid off, both he and another employee were reprimanded by Wardrop because they had failed to perform assigned work, and Wardrop told both employees that he did not want them drinking on the job. Although Greene claimed that it was the other employee who was drinking, it does not appear that he told this to Wardrop at the time he was reprimanded. Greene testified that he was unable to perform the assigned work because he did not know how to drive the truck to the jobsites, it was driven usually by the other employee. However, Greene did not explain why he had failed to call Wardrop to explain what had happened.

Uriel Brown, employed by Respondent as a leadman, testified that he had been friendly with Greene. He claimed that Greene told him, that sometime in 1984, he went drinking with another employee and they failed to perform the work assigned to them and Wardrop was angry with them. About this time, Greene also told Brown that he had been fired. Although counsel for the General Counsel claimed that Brown, originally, testified that Greene told him he was fired for drinking and, subsequently, testified that he "guessed" Greene was fired for drinking, a careful examination of the record establishes that Brown, in both instances, testified that Greene told him he had been drinking and that he was fired and Brown "guessed" that Greene was fired for drinking on the job.

Greene admitted that between the time he was laid off in March and June 1984 he knew that Wardrop was hiring employees but did not recall him; however, he could not remember if he complained to Wardrop about this failure to recall him. Greene testified that in June 1984 he approached Wardrop and asked to be rehired, and he was rehired at that time. According to Uriel Brown and Wardrop, Wardrop rehired Greene only after Brown interceded with Wardrop, told him that Greene needed a job and asked him to hire Greene, which Wardrop did in June 1984.

B. *Greene's Alleged Organizing Efforts*

Antonio Schifano, the Union's business representative, testified that he was first approached by some of Respondent's employees at the union hall in December 1984 and they spoke to him about their interest in the Union. It is unclear whether Greene was one of the employees in the group at this first meeting, but Schifano did testify that he knew Greene[2] because Greene had assisted him with his organizing efforts at another company.[3] Schifano claimed that sometime in December 1984, whether it was at this meeting or another is unclear, he gave 12 authorization cards to Greene to distribute to the other employees. According to Schifano, these were the only authorization cards that he gave to Greene. Schifano also testified that during the following weeks he met with Greene once a week, on a Wednesday, to discuss the progress of his organizing efforts.

Greene's recollection of his first meeting with Schifano about organizing Respondent's employees differs from Schifano's recollection. Greene recalled that in early January 1985 he went alone to the union hall, between 5:30 and 6 p.m., and he spoke to Schifano about organizing the employees. Schifano told him to talk to the "other guys" to see if they were interested and to try to have them sign authorization cards. Schifano gave him two authorization cards to show "as specimens to the other guys." In response to a question about whether these two cards were signed, Greene responded that they were signed in January 1985. Greene testified that within a day or two after he spoke with Schifano he discussed the benefits of joining the Union with three employees at the 125th Street subway station and he gave one of the authorization cards to one of the employees and he kept the other as a sample to show to the other employees. It appears that the employee who Greene claimed he gave the card to was Carroll Dyall. Greene, initially, testified that the employee who took the card at the station did

[2] Schifano testified that he had known Greene for some time. However, it appears that Schifano first met Greene a few months earlier when he was organizing B.R.B. Iron Works.

[3] Greene had worked for B.R.B. Iron Works and while there he had signed an authorization card for the Union. He was discharged by that company on 7 May 1984. In Case 29-CA-11244 Administrative Law Judge Howard Edelman found Greene's discharge and the discharges of two other employees, Earl Mills and Carrol Dyall, to be violative of the Act.

not return it to him until the last week in January. However, in subsequent testimony Greene stated that the employee who took the card at the subway station returned it to him "the second Wednesday in January." In the affidavit secured from Greene during the investigation of the case, Greene stated, "the first card was signed on or about January 28, 1985."[4] In fact, the evidence in the record establishes that authorization cards were signed by Leslie Earlington and Carrol Dyall on 28 December 1984 and 20 January 1985.[5] Greene claimed that he secured additional authorization cards from Schifano about 17 January and that he distributed about 12 of these cards to employees during January at various locations, and the evening of 30 January, during a union meeting at the union hall, he secured an additional 5 cards, which he distributed to employees at the meeting. At one point, Greene testified that he secured seven signed authorization cards, but he did not state where or when he secured these cards. At another point, Greene testified that with the exception of the one card that he gave to the employee at the subway station, all authorization cards, including his cards, were signed at the union meeting on 30 January 1985. Greene claimed that he did not sign an authorization card until the union meeting because he believed that the card he had signed previously while employed at B.R.B. Iron Works was sufficient. According to Greene, Schifano did not ask him to sign a new authorization card or explain to him why it was necessary to sign a new card at any time before the union meeting on 30 January 1985. Greene's recollection about when, where, or the number of employees he spoke to about the Union also varied constantly throughout his testimony. At one point, Greene testified that he spoke to 9 employees and at another point he testified that he spoke to 12 out of 15 employees.

According to Greene, a day or two before 30 January 1985, Schifano told him that he wanted to hold a union meeting at the union hall and he requested Greene to ask the other employers to be present. Greene testified that he spoke to other employees about the meeting, either by telephone or in the locker room, and he asked them to attend the meeting, which was scheduled for 5:30 p.m. Although the employees usually left work about 4:30 p.m., Greene testified that on 30 January 1985 the employees left the locker room about 5:10 p.m. and as they left they observed Wardrop and Colon, another supervisor, standing at the door. Greene admitted that it was not unusual for employees to leave in a group, nor was it unusual for supervisors to be standing at the entrance, which was also the exit, to shop. Schifano, Greene, and Chinfloo testified that the meeting was held on 30 January as planned and it was attended by 8 of the approximately 15 employees in the unit. Greene admitted that Brown was not present at the meeting, and there is no evidence that any supervisor was present. Schifano, Greene, and Chinfloo testified that during the meeting there was general discussion about the benefits the Union could secure and about the possibility of an election. However, their recollection about other events that took place at the meeting differed. As noted, at one point Greene claimed that he had secured seven signed authorization cards, but, subsequently, he claimed that he had received only one signed authorization card before the union meeting and the other eight or nine cards, including his card and that of Chinfloo, were signed by the employees during the meeting. Schifano claimed that Greene had returned some signed authorization cards to him before the meeting, he could not recall how many, and that other cards were signed by the employees during the meeting. Chinfloo testified that Greene gave him an authorization card in early January 1985, he took the card and told Greene he would think about it. Thereafter, on 30 January, but before the meeting, he signed the card and he handed it to Greene during the meeting. In the affidavit secured from Chinfloo during the investigation of the case, he stated that he signed the authorization card when Greene gave it to him and he returned it to Greene at the jobsite.

C. *The Status of Brown*

Greene testified the he became angry when Brown interfered with the work his group was doing on 31 January 1985 because he did not consider that Brown was his supervisor. It was Greene's position that his status was the same as Brown's status and, therefore, Brown had no right to tell him what to do. The record reveals that Greene applied for a position as a welder; however, he testified that he considered himself to be a welder-mechanic. When questioned whether he had been told by Respondent's representatives that that was his classification, Greene admitted that he had not been told this and that it was his opinion that that was his classification. It is undisputed that Brown, who had more seniority than Greene, was a mechanic who was paid, at the time of the events in this case, at the rate of $11.50 an hour, while Greene was paid at the rate of $8.50 and hour. Moreover, it was evident that Brown could read blueprints and that Greene, when tested during the hearing, could not do so, although he testified that he was capable of reading such prints. Wardrop and Brown both testified that Brown became a leadman about mid-1984 and in that position, he received instructions from Wardrop about the work to be performed and he transmitted these instructions to the men on the job. Wardrop testified that at the time of these events he had two leadmen, Brown and Earl Mills[6] and one person, Tom Wardrop, in training to be a leadman. According to Wardrop, leadmen do not work alone, they work with other employees and they decide when other employees are to work at the site and the work they are to perform. A leadman also has the authority to change the work employees are doing when the considers it necessary to do so and he does this without prior consultation with Wardrop, who normally rotates from job to job each day. Leadmen do

[4] Greene testified that he made a mistake in the affidavit when he said the card was returned on 28 January 1985.

[5] Greene claimed that Dyall's card was the first one signed, in fact Earlington's card was the first one signed. Earlington's card, apparently, was submitted to the Board in connection with the representation petition because it bears the Board's stamp. Dyall's card was not submitted.

[6] Mills had been the employee responsible for the Union's organizing efforts at B.R.B. Iron Works.

not have the authority to hire or fire employees, but they are responsible to report to Wardrop when they consider that an employee's work is unsatisfactory. It is also the leadman's responsibilty to decide when a job is completed and to advise Wardrop of this fact. Finally, Chinfloo, who was hired after Greene, was paid at the same rate as Greene and he testified that when he worked with Greene he considered that he was an equal partner with Greene but, when he worked with Brown he worked as a helper.

D. *Brown's Knowledge About the Union*

Brown, initially, testified that he first became aware of the existence of the Union on the day before the election, which was held on 20 March 1985, when Schifano, the Union's representative, asked him to sign an authorization card, which he refused to do.[7] Later, Brown testified that 2 days before the election he saw the Board's election notices and it was then that he became aware of the Union. The record reveals that Brown was friendly with Greene and the other employees, he drank with them, had their telephone numbers and they had his, and he performed the same work they did and he used the same locker room. Further, it should be noted, regarding Brown's claim of a lack of knowledge, that the Union filed its representation petition on 7 February 1985, Respondent agreed to an election on 25 February 1985, and Roth and Wardrop distributed literature to employees in the weeks before the election in which they urged the employees to reject the Union.

E. *The Discharge of Greene*

On 31 January 1985, two groups of employees were assigned to erect railings and gates at 97th Street off Central Park. Greene, Chinfloo, and a new employee, Kevin Brennan, worked at one end of the project, while Uriel Brown and Tom Wardrop[8] worked at the other end of the project. It was Greene's position that Wardrop had assigned him to head one section of the project and had given him a sketch that detailed the work to be done, and that Wardrop had assigned Brown to head the other section and had given him a sketch to outline the work to be done by his group. Approximately several hours after the job started, Wardrop returned to the jobsite and, according to Greene and Chinfloo, he examined the work they were doing, expressed satisfaction with the job, and then left to speak with Brown. A few minutes after Wardrop left the jobsite, Brown walked over to where Greene and Chinfloo were working and he began to criticize their work and told them they were too slow. Greene testified that he was angry because his group had progressed on their section further than Brown's group and he told Brown to get off his job. Green claimed that he told Brown that he was tired of being used and that steps were being taken to change that. Brown responded that Greene was not to include him in any changes, he was not interested. Greene claimed that he had asked on prior occasion to sign an authorization card and Brown had refused. Brown denied that Greene had asked him to sign a card. Although Chinfloo testified that Brown criticized the work that they were doing, he did not testify that Greene told Brown that he was tired of being used, nor did he testify that Brown told Greene not to include him in any changes.

According to Wardrop, on 31 January 1985 he helped the men to unload the truck and then he left the site. He returned to the job between 1 and 2 p.m. and he observed that the section where Greene, Chinfloo, and Brennan were working was set up wrong, the job was being done incorrectly, and it was unsafe. He did not speak to Greene or Chinfloo but he did speak to Brown who was the leadman. He did not consider Greene a leadman. He told Brown the job was being done incorrectly and he instructed Brown to check the work. Brown told him he would take care of the problem and Wardrop left the jobsite. The affidavit secured from Wardrop contradicts this testimony. According to the affidavit, Brown informed Wardrop that he gave Greene an assignment and it was taking Greene too long to do it. Brown also told him that when he tried to correct Greene, Greene screamed at him.

Brown testified that on 31 January 1985 Wardrop gave him instructions and the documents for the job at 97th Street. According to Brown, he was the leadman on the job and he assigned Greene, Chinfloo, and Brennan, all of whom were helpers, to erect one section that he referred to as section C, the most difficult section to erect. He worked with Tom Wardrop to erect the other section. Initially, Brown testified that about 3:30 p.m. he went over to where Greene, Chinfloo, and Brennan were working in order "to give them a hand" and he noticed that they were not doing the work properly, they were attempted to assemble three pieces of the railing at once, when they first should have anchored one piece of the railing to the wall. When he attempted to give instructions about how the work should be done, Greene appeared to resent it and contradicted him. On cross-examination, Brown stated that he did not make a thorough check on the progress of the work being done by Greene's group, but he did make a quick check and the work seemed to be progressing at a normal rate. About 1 p.m., Wardrop returned to the jobsite, he checked the work done by Greene's group, and he returned and told Brown that the work was not being done properly, it was not safe, and he told Brown to check the job. Brown claimed that he had not noticed how Greene and the others were doing the work until Wardrop spoke to him. He then checked and saw that they had done one section correctly, but the section they were then working on was not being done properly, and he told this to the employees. He then instructed the employees about how the work should be done, and Chinfloo and Brennan followed his instruction but although Greene did not argue with him, he refused to change the way he was doing the work.

It is undisputed that later that day in the locker room, about 4:30 p.m., Greene and Brown had a confrontation

[7] Schifano claimed that it was in the week before 6 February 1985 that he asked Brown to sign an authorization card after Greene identified Brown for him.

[8] Tom Wardrop is the son of Walter Wardrop.

about Brown's efforts to correct Greene's work. According to Greene, he told Brown to quit "messing around" with his job, voices were raised, and he might have said in more explicit language that Brown should not interfere with his work. Greene claimed that Wardrop came to the door of the locker room, asked what was going on, and when Brown replied that they were having a discussion, Wardrop left the room. Brown testified that when he went to the locker room later that day Greene confronted him and told him that he did not want Brown to interfere with his work again. Brown replied that he was trying to get the job done, and he told Greene that he thought the matter was finished. At this point, Wardrop passed by and he asked Brown what was the problem and he told Wardrop what had happened and that he thought the matter was closed but Greene confronted him about it in the locker room. According to Brown, when he spoke to Wardrop, Greene was still in the locker room. Brown testified that he did not ask Wardrop to do anything about the matter, it had not been his intention to tell Wardrop about the incident, that he had done so only because Wardrop questioned him as he left the locker room.

Wardrop's testimony differs from Brown's testimony. According to Wardrop, he heard yelling and screaming in the locker room, he opened the door and saw Greene, Brown, and other employees, and he asked what was the matter. Brown responded that he had an argument but he did not say with whom he had the argument. Wardrop left the room. Later, Brown came to him and told him that he had attempted to assist Greene and others at the jobsite and Greene had yelled at him and told him to leave his work alone. Brown told Wardrop that when he tried to explain to Greene that what he was doing was wrong, Greene continued to scream at him. Wardrop said that Brown did not ask him to do anything, but he did say that he did not want that to happen again. Initially, Wardrop claimed that he went immediately to look for Greene to fire him for insubordination but at that point Greene had left work.

According to Greene, on 1 February 1985 when he arrived at work at 7:30 a.m. Wardrop called him to his office and told him that he was laying him off for a few weeks but that a "big job" was coming up and he would then be called back to work. Greene claimed that he asked Wardrop if he was dissatisfied with his work and Wardrop responded that he was not, that Greene should file for unemployment benefits because he was being laid off.[9] Greene admitted that he did not question Wardrop about why Brennan and other employees with less seniority were being retained when he was being laid off. Greene testified that he spoke with Wardrop a week later about when he would be called back but Wardrop said that he was not ready to call him at that time.

Wardrop testified that on 1 February 1985 as soon as Greene arrived at work he told him that he was discharged for insubordination. He also told Greene, "You've been screwing up long enough and this is the final thing. I just can't take insubordination on the job anymore. You're fired." Although, as noted, Wardrop claimed, initially, that he had decided to fire Greene as soon as he heard Brown's story, on cross-examination, Wardrop testified that he did not make an immediate decision to discharge Greene when Brown reported the incident to him. Rather, he thought about the matter overnight and then he decided to discharge Greene, which he did the following morning. When counsel for the General Counsel asked Wardrop why he looked for Greene after his conversation with Brown, he stated that he looked for Greene, "Probably to raise hell with him." Further probing by counsel produced these responses by Wardrop.

> Q. Were you prepared to fire him at that point?
>
> A. Yes I was.
>
> Q. So, actually,—was that right after you spoke with Brown?
>
> A. I guess you can say that.
>
> Q. So you made the decision right at the end of the conversation with Brown . . . then didn't you fire Mr. Greene?
>
> A. Was I going to fire him at that time?
>
> Q. Did you make the decision to fire Mr. Greene right at the end of your conversation with Mr. Brown?
>
> A. No, I didn't.
>
> Q. So when you went to see Mr. Greene, were you or were you not prepared to fire him when you went to look for him?
>
> A. I was prepared to fire him but I didn't say I was going to fire him. But after I thought about it, I know that this had to be done.
>
> Q. Okay, you say you were prepared. In other words, you didn't have a clear intention of going out to look for him to fire him, right?
>
> A. At that—say that again Sir.
>
> Q. You did not go to look for Greene with the clear intention that you were going to fire him when you found him.
>
> A. Not really.

According to Wardrop's affidavit, after he spoke with Brown he went out to fire Greene but Greene had left the building. When this statement in the affidavit was called to his attention, Wardrop changed his prior testimony again and testified that when he went to look for Greene it was his intention to discharge him. Wardrop admitted that he did not ask Greene for his version of the events on 30 January 1985.

Although Brown had not requested Wardrop to discharge Greene, Wardrop testified that he decided to discharge him because he considered insubordination to be a very serious matter. Wardrop claimed that it was necessary for the employees to work together and to obey the instructions of the leadman because the type of work they performed could be dangerous.

F. *The Discharge of Chinfloo*

Chinfloo began his employment with Respondent in September 1984. Chinfloo claimed that he applied for a position as a welder but when Wardrop hired him he did not tell him "definitely" what the job was for which he

[9] Greene did collect unemployment benefits.

was hired. He denied, specifically, that Wardrop told him that he was hired as a helper or driver. Subsequently, he admitted that during the initial interview Wardrop asked to see his driver's license and told him that he would both drive a truck and go out on jobs. Chinfloo claimed that he told Wardrop that he was from the West Indies and was not familiar with the city but Wardrop assured him that it would not be a problem, he would be accompanied by other employees who would know the location of the jobsites.

During the period between September 1984 and February 1985, Chinfloo claimed that he drove the truck to jobsites on only 10 occasions and the remainder of the time he worked at the jobsites, frequently with Greene. Chinfloo testified that about January 1985, Greene spoke to him about the benefits of the Union and he gave him an authorization card to sign. As noted above, Chinfloo's recollection about when he signed the card varied at different points in this testimony but he did state that he did not believe that any representative of Respondent was aware that he had signed an authorization card. Both in the affidavit he gave the Board and in his initial testimony, Chinfloo claimed that it was on 7 February 1985 that he had a conversation with Wardrop, during which Wardrop told him that he had been instructed by "Jack"[10] to lay off a man and he, therefore, had to lay off Chinfloo. Chinfloo claimed that he recalled that the conversation occurred on 7 February because he wrote down the date. During this conversation, Wardrop told him that he would be laid off for only a few weeks, that he was a good man and he would be the first one to be recalled when Wardrop "gets this thing straightened out." Chinfloo testified that he did not ask what things Wardrop referred to and he did not ask why he was being laid off when he had more seniority than Brennan. Chinfloo told Wardrop that he was moving and he gave Wardrop his new address and Wardrop then told him that he would let him know, definitely, by noon, whether he was laid off. Later that day, a foreman told Chinfloo that Wardrop said that Chinfloo should leave by 3 p.m. When Chinfloo asked whether that meant he was laid off, the foreman replied that it did. Chinfloo denied that Wardrop had told him at any time that he would be discharged if he did not become familiar with the city streets.

On cross-examination, Chinfloo admitted the conversation with Wardrop about his layoff could have occurred on 6 February 1985. Chinfloo's payroll records establish that he worked 8 hours on both 4 and 5 February and for half a day on 6 February 1985 and that, thereafter, he did not work for the Respondent. Chinfloo also recalled, on cross-examination, that sometime in early February 1985 he was told by Wardrop to pick up debris at some location on Riverside Drive, but he could not remember where he was to make the pickup and he could not describe how to get to the location. According to Chinfloo, Kevin Brennan was present when Wardrop asked him to pick up the debris but Brennan also did not know how to get to the jobsite and, thereafter, they followed Wardrop to the site, made the pickup, and returned, without Wardrop's assistance, to the shop.

Wardrop testified that he hired Chinfloo as a driver-helper and he told him his classification when he hired him. Chinfloo said he was not familiar with the city but Wardrop told him he would learn. Thereafter, Chinfloo worked both in the field and the shop but, according to Wardrop, he was not a good worker, "he was slow and sloppy." After Chinfloo had been on the job for several months, Wardrop told him, a few days before 6 February 1985, to go to a site on 70th Street and West End Avenue to pick up some debris. Chinfloo said that he did not know how to get there, and Wardrop claimed that he then described, in detail, the route Chinfloo was to follow but Chinfloo did not appear to be able to follow Wardrop's instructions. Wardrop claimed that he then drew a map detailing the route for Chinfloo to follow but Chinfloo could not follow these directions. At this point, Wardrop decided he had no choice but to drive to the site and have Chinfloo follow him with the truck. Wardrop testified that this was the first time he realized that Chinfloo had not learned his way around the city and he decided that it was useless to keep Chinfloo, who had been hired primarily to drive, if he could not follow directions. Therefore, on 6 February he called Chinfloo to his office about 12:30 or 1 p.m. and he told him that he was discharging him because his work performance was not satisfactory.[11] Wardrop claimed that he had planned to talk to Chinfloo before 6 February 1985 but he became involved with another job and was unable to do so until that time.

G. *The Schifano Meeting*

There is no dispute that Schifano came to the premises of the Respondent, met with Roth, the Company's president, and requested Roth to recognize the Union as the representative of his employees. However, there is a disagreement about the date when this meeting occurred. The counsel for the General Counsel contends that the meeting occurred on 6 February 1985 and the meeting was a significant factor in the discharge of Chinfloo, which occurred on that date, although as noted, Chinfloo initially claimed that he was laid off on 7 February 1985. Respondent's counsel claims that the meeting occurred on 7 February 1985, after Chinfloo had been discharged.

According to Schifano, he went to the Respondent's premises on 6 February 1985 at 7:45 a.m., with two other union representatives to seek recognition. When he arrived at the premises, the employees told him which person was Wardrop, he then spoke to Wardrop and told him that he was seeking recognition as the representative of Respondent's employees. Wardrop told him that he could not help him, he would have to speak with Roth, the Respondent's president. Schifano left but he claimed that he returned about 10 a.m. on that same day and he met with Roth, told him that the employees had signed authorization cards for the Union, and he asked Roth to enter into negotiations. Roth asked who had signed

[10] Jack Roth, Respondent's president.

[11] Chinfloo collected unemployment insurance benefits.

cards, and Schifano agreed to show him the signed authorization cards provided that Roth would agree to recognize the Union. Ruth responded that he would go out of business but Schifano testified that he persuaded Roth to meet with him the following day at a nearby restaurant, the Fox & Hound, to discuss the matter. Schifano claimed that he was certain that this meeting with Roth took place on 6 February and not on 7 February 1985 because an entry in his calendar listed an appointment for 7 February at the Fox & Hound Restaurant. However, when asked where that restaurant was located Schifano was unable to respond and there does not appear to be a listing in the telephone directory for such a restaurant in the nearby boroughs. Moreover, an examination of Schifano's calendar reveals that words were erased in the space where the name Fox & Hound appears.

According to Schifano, later in the day on 6 February 1985 he received a call from Roth's office and he was told that the scheduled meeting for the following day was canceled and Schifano was told that he should contact Roth's attorneys. Schifano then called his office and advised them that they should file a representation petition.

In support of its position that Schifano met with Roth on 6 February, the Union called Harper, its counsel as a witness. Harper had no direct knowledge regarding Schifano's meeting with Roth. However, she did testify about an entry in her work diary concerning Respondent. According to that entry, Harper met with Don Bell, a union representative, at 10 a.m. on 7 February to discuss the filing of a representation petition for Respondent's employees. Harper could not state the precise time when that meeting was arranged but she believed that it had to be sometime before 10 a.m. on 7 February 1985, and she based this belief on her normal practice when she arranged meetings with clients. Harper testified that when a client sought an appointment she entered a notation in her diary for that future appointment, she would not make such an entry at the time she actually met with the client. Further, it was her practice to arrive at her office between 10:05 and 10:10 a.m. Harper admitted that her secretary does make entries in her diary, at times, before she arrives at work, but the entry respecting her meeting with Bell was in her handwriting. It was Harper's recollection, that the representation petition was prepared when Bell was present and that he hand delivered it to the Board. An examination of the petition, establishes that it was filed on 7 February 1985 at 2:05 p.m. and it shows that the space is blank with respect to when the request for recognition was made.

Roth did not testify, but Wardrop testified that it was on 7 February 1985 when Schifano came to the Respondent's premises, introduced himself, and asked to speak to the "boss" but he did not tell Wardrop why he wanted to see the "boss." Wardrop told Schifano that Roth, the president, would be in about 9 a.m. and Schifano left but returned about 9:30 a.m. and he met with Roth. Wardrop claimed that he was present for part of the meeting and he heard Schifano tell Roth that he had organized the employees and that he wanted to sit down to talk with Roth.

Discussion

It is the position of counsel for the General Counsel that Greene initiated the organizing activities on behalf of the Union, that in the plant and at jobsites, he urged employees to join the Union and to sign authorization cards for it, that Respondent became aware of the activities either through Brown or under the theory of the small plant doctrine and that Respondent discharged Greene because of these activities. Counsel concedes that Chinfloo's union activities were limited to signing a union authorization card and attending a union meeting but counsel contends, nevertheless, that Respondent discharged Chinfloo either because it perceived him as being "guilty" by virtue of his association with Greene, or in an effort to reduce the number of employees who supported the Union or to camouflage Greene's discharge. In any event, he argues, Chinfloo's union activity was the motivating factor in Respondent's decision to discharge Chinfloo. In the alternative, counsel argues that if the administrative law judge finds that these employees were not discharged, but were laid off, then their union activity was the reason for Respondent's failure to recall them. The counsel for the Union agrees with the arguments of the counsel for the General Counsel. In addition, she contends that if the discharges or layoffs are not found to be discriminatorily motivated, then the record supports a finding that the employees were temporarily laid off, had a reasonable expectancy of recall and, therefore, were entitled to vote and their ballots should be opened and counted. The Respondent has reiterated its argument that the Union failed to raise the issue of discriminatory discharges before the election and, therefore, it has waived its right to raise that issue in this proceeding. Counsel for Respondent also claims that the General Counsel has failed to establish any knowledge by Respondent's representatives of union activity by employees. Finally, he argues that these employees were not laid off, they were discharged for cause.

All counsel agree that the case presents credibility issues, but each contends that the witnesses who testified in support of their position were completely trustworthy and it was the witnesses for the other side who slanted the truth. Unfortunately, the resolution of the credibility issue in this case is not that simple. My observation of the demeanor of all the witnesses and my examination of the record convinces me that witnesses for both sides tended to tell only part of the truth. Accordingly, in resolving the credibility issues, I have accepted some portions of the testimony of the witnesses for both sides and have rejected other portions of their testimony. The court and the Board have stated that "a trier of the facts is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness say." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950); *PBA Inc.*, 270 NLRB 998 (1984); *L. D. Brinkman Southeast*, 261 NLRB 204 (1982).

The first issue to consider is whether Greene was the employee who was responsible, initially, for the Union's presence at Respondent's premises. According to Greene, he was the employee who approached Schifano

about organizing Respondent's employees and he, thereafter, urged employees to join the Union and to sign union authorization cards. More specifically, Greene testified that in early January 1985 he went, alone and without an appointment, to the union office where he spoke to Schifano about organizing the employees and Schifano gave him two authorization cards as "specimens" to show to the other employees. Schifano, who was called to testify on Greene's behalf, did not support this version of the alleged meeting. According to Schifano, in late December 1984 he first heard about Respondent because it was "brought to his attention by some—some of the employees working there." Schifano further testified that at some point in December 1984 he met with Greene, whether it was at the meeting with other employees or at another one is unclear, and he gave him 12 authorization cards to distribute to other employees. It is difficult to understand how the participants to this meeting could differ on such crucial points as to when the meeting occurred, who first informed Schifano about Respondent and the number of authorization cards given by Schifano to Greene. It is evident that the differences arose because Greene and Schifano testified about a meeting that had not occurred between them.

However, Schifano did meet to discuss organizing activities with an employee of Respondent in December 1984. The record reveals that on 28 December 1984 Leslie Earlington, then a Respondent employee, signed the first authorization card for the Union and he signed his card more than a month before Greene signed his authorization card. Generally speaking, the employee who contacts the Union signs either the first or one of the first authorization cards.[12] Greene recognized this fact and he knew that his failure to sign an authorization card until late January undercut his contention that he was the instigator of the organizing efforts on behalf of the Union. He, therefore, offered an explanation for his failure to sign the card before 30 January 1985. That explanation is not plausible. Greene claimed that he did not sign the authorization card at an earlier date because he believed that the authorization card that he had signed for the Union while employed at B.R.B. Iron Works was sufficient. It is unbelievable that Schifano, an experienced organizer, would have failed to inform Greene of the need to sign a new card, particularly if Schifano met with Greene as frequently as he claimed he did throughout January 1985.

There was further contradictory testimony given by Schifano and Greene, which casts doubt on Greene's assertion that he was the main employee organizer for the Union. Schifano claimed that he gave authorization cards to Greene on only one occasion. However, Greene testified that he received authorization cards from Schifano on two occasions, the first time was in early January, the second time was about the mid January 1985. According to Schifano, he received several signed authorization cards from Greene before 20 January 1985. Greene's testimony on this issue varied at different points. Although Greene testified, at one point, that he secured seven signed authorization cards, apparently before 30 January 1985, he did not state that he gave these cards to Schifano. Subsequently, he testified that he secured only one signed authorization card before 30 January 1985, the other cards, including his card and that of Chinfloo, were signed at the union meeting held at the end of January. Greene's testimony and the statements he made in his affidavit about when he secured the one signed authorization card also were not the same. He testified that he secured the card on the second Wednesday in Januray 1985, however, his affidavit stated that he secured the card on 28 January 1985. In fact, the card that Greene claimed he secured was signed on 20 January 1985. Greene's testimony concerning the number of employees he spoke to about the Union also varied depending on when he testified about the matter.

I do not credit Greene's assertion that he was the prime mover in the organizing efforts for the Union, and I base this conclusion not only on my observation of Greene's demeanor, but on the internal contradictions in his testimony and on the contradictions between his testimony and that of Schifano. In determining that Greene's testimony was not trustworthy regarding his contention that he instigated the union activity, I have also considered his testimony concerning his prior separation from Respondent in June 1984. Greene claimed that he was laid off and not fired for drinking. However, an examination of Greene's entire testimony and that of Brown on this issue establishes that Greene, in fact, was fired in June 1984 for drinking on the job.

The record establishes that the Union's efforts to organize Respondent's employees began at least as early as 28 December 1984, as evidenced by the fact that Earlington signed an authorization card for the Union on that day. The record establishes that these organizing efforts continued in January 1985 and that on 20 January 1985 Carrol Dyall also signed an authorization card for the Union.[13] Although I do not find that Greene was as actively involved in these organizing efforts as he claimed, I do find that both Greene and Chinfloo were part of the group who met in the locker room to attend the union meeting on 30 January 1985 during which they both signed authorization cards for the Union, which cards were submitted to the Board in support of the representation petition.[14] It is Respondent's position that it was unaware of any union activity by Greene, Chinfloo, or any of its employees prior to 7 February 1985 and that, therefore, it could not have discharged either Greene or Chinfloo because of such activity. I do not credit that contention.

Wardrop testified that Brown was a leadman and in that capacity, at the time of the events in this case, he had certain responsibilities over the actions of the other employees when Wardrop was not at the jobsite, which occurred frequently because Wardrop rotated one job to another. According to Wardrop, leadmen had the authority to assign men on the job, to determine the work the men were to do, to rotate them if he determined that

[12] As noted, Earlington was discharged in January 1985.

[13] Dyall also was discharged in January 1985.

[14] In view of my finding concerning Greene's role in the organizing efforts, I do not credit Chinfloo's testimony that Greene gave him an authorization card at a jobsite sometime in January 1985.

it was necessary and to perform these functions without prior consultation with Wardrop. Leadmen also had the responsibility to decide lunch and breaks periods, to decide when a job was finished, and to tell the men when they could return to the shop. Although leadmen did not have the authority to hire, fire, or reprimand an employee, it was their responsibility to inform Wardrop about any dissatisfaction they had with an employee and about any problem that arose on the job. Greene's claim that he had the same status as Brown is not supported by the evidence in this record. The record reveals that Brown was paid at the rate of $11.50 an hour, while Greene was paid at the rate of $8.50 an hour, the same amount paid to Chinfloo, who was a new employee. Brown had greater seniority than Greene and unlike Greene he had the ability to read blueprints, which would be necessary in order to direct the work of the other employees. Significantly, Chinfloo testified that when he worked with Greene he considered that they worked on an equal basis but when he worked with Brown, he worked as a helper to Brown. Based on this record, I find that Brown responsibly directed other employees and that he was a supervisor within the meaning of Section 2(11) of the Act. *Dale Service Corp.*, 269 NLRB 924 (1984); *Serendippity-Un-Ltd. & Tigerrr*, 263 NLRB 768, 771 (1982).

In efforts to establish Brown's knowledge of union activities, Greene claimed that in January 1985 he asked Brown to sign an authorization card. Because of my findings concerning Greene's role in the union organizing efforts, I do not credit that claim. Schifano testified that he solicited Brown to sign an authorization card in the week before 6 February 1985. Brown admitted that Schifano asked him to sign an authorization card, but he testified that the incident occurred a day or two before the election that was held on 19 March 1985. This disparity in the dates concerning this incident illustrates my prior statement that in the instant case witnesses for both sides tailored their testimony to suit the positions they held. Thus, Schifano claimed the incident occurred the week before 6 February 1985 in order to establish Respondent's knowledge of the union activities by employess before the layoff or discharge of Greene and Chinfloo. Brown testified that it occurred later to support his position that he had no knowledge of union activities until well after the discharges. Respondent has advanced many theories to support its position that the incident could not have occurred as early as Schifano claimed, and the counsel for the General Counsel has argued that it could not have occurred as late as Brown claimed. The fact is that the evidence in the record is insufficient to establish the exact date when the incident did occur. However, I am not convinced that it occurred as early as Schifano claimed or as late as Brown stated. Although the date of this particular incident is uncertain, I find, for other reasons, that Brown did have knowledge of the union activities of the employees before 1 February 1985.

Brown, initially, testified that he first became aware of the existence of the Union on 19 March 1985. He then testified that he became aware of the Union about a day or two before the election when he saw the Board's election notices in the plant. That testimony must be evaluated in light of the circumstances, which existed at that time in the plant. The shop where Brown and the other employees worked was a small one, there were 15 employees in the unit and Brown worked closely with these employees, often performing the same work they did. He shared a locker room with these employees, and he was on a friendly basis with them both during and after work hours. He exchanged telephone numbers with several of the employees and he frequently had drinks with them at a local restaurant. Despite his friendship with these employees, and his presence with them on the job and in the locker room, it was Brown's position that he had no knowledge about the Union until late March. If that testimony is credited, it means that Brown did not know that a representation petition had been filed in early February 1985 or that Respondent had agreed in late February 1985 that an election would be held. Further, it means that Brown continued to be unaware of any union activity even when that activity was well known to Wardrop, who was Brown's immediate supervisor, and to Roth, the Respondent's president, both of whom were writing letters to employees, in the weeks before the election urging them to vote against union representation. I do not credit Brown's testimony that he had not gained knowledge about the union activities of the employees in the circumstances that existed at the plant. In fact, Brown's efforts to distance himself from any knowledge of the employees union activities raises the inference, which I make, that Brown, due to his relationship with other employees and the size of the plant 1 February 1985. The Board has held that knowledge of union activities of employees need not always be established by direct evidence, reliance may be placed on circumstantial evidence and knowledge may be inferred from the record as a whole. *Park General Clinic*, 218 NLRB 540, 544 (1975); *Thunderbird Motel*, 180 NLRB 656, 658 (1978). Although there is no direct evidence that Brown transmitted this information to Wardrop, the Board has held that a supervisor's knowledge of the union activities of the employees can be imputed to his supervisor. *Herb Kohn Electric Co.*, 272 NLRB 815, 819 (1984); *Hawthorne Mazda*, 251 NLRB 313, 316 (1980).

On the evening of 30 January 1985, after discussing the matter in the locker room, a group of employees, including Greene and Chinfloo, left work to attend a union meeting. Insofar as this record discloses, this was the first time this had happened. Greene claimed that as the men left work they were observed by Wardrop and Colon, another supervisor, but Greene admitted that this was not unusual. On the following day, an incident occurred that involved Greene and Brown. Wardrop claimed that the incident was of such a serious nature that it required him to discharge Greene. There is no dispute that Greene's work was criticized by Brown on 31 January 1985. However, I am not convinced that the criticism was justified or that Wardrop, under other circumstances would have viewed the events that followed thereafter as grounds to discharge Greene. Rather, I believe that Wardrop used the incident to discharge Greene because of his support for the Union.

An examination of the testimony given by Brown and Wardrop about the entire incident discloses significant differences in their versions of the events. According to Greene and Chinfloo, Wardrop came to the jobsite about 12:30 or 1 p.m. on 30 January 1985, expressed satisfaction with the work the men were doing, spoke to Brown, and left the site. Brown then came to where Greene and Chinfloo were working, and told the men to "push" the job. Statements made by Wardrop in his affidavit tend to support, at least in part, Greene's version of what happened. According to those statements, it was Brown who came to Wardrop to complain about the slow progress of the work being performed by Greene and Chinfloo. The testimony given by Wardrop, however, was completely different from the statements contained in his affidavit. According to Wardrop's testimony, he observed the work being done by Greene and his group, he considered that the work was being performed in a dangerous manner, and he instructed Brown to correct the way work was being done, after Brown completed his own work. If, in fact, the work was being done in a dangerous manner, it is surprising that Wardrop did not speak directly to Greene or at least that he did not direct Brown to speak immediately to Greene about the problem. According to Wardrop, he not only did not speak to Greene but he left the jobsite when he knew a dangerous condition existed that had not been corrected. Brown gave two versions concerning this incident. According to Brown's testimony on direct examination, about 3:30 p.m., which was almost the end of the workday, he observed that Greene's group was not performing the work correctly, he told this to the group and he instructed them about the way the work should be done. However, on cross-examination, Brown changed both the time the incident occurred and the individual who first observed the manner in which the work was being performed. Thus, he testified that the incident occurred at 12:30 or 1 p.m. and that it was Wardrop who first noticed that the work was being performed in an incorrect manner. These numerous contradictions by Respondent's witnesses about the event raises suspicions about whether there was, in fact, any real reason to criticize the work being performed by Greene's group. Admittedly, Greene did not consider that there was, and he expressed his irritation to Brown about what he considered to be unjustified criticism. Wardrop claimed that it was Greene's conduct in expressing this irritation that he considered so serious that it warranted Greene's discharged. I do not credit that assertion.

It was evident that Brown, who had the disagreement with Greene, considered the entire incident a trivial one. In fact, according to Brown, he had not intended to discuss the matter with Wardrop and did so only because he met Wardrop as he left the locker room and Wardrop questioned him about what had happened. Brown did tell Wardrop that Greene appeared to resent his criticism, but Brown did not ask Wardrop either to speak to Greene or to reprimand him. Wardrop did not agree with Brown's version of this incident. Wardrop, apparently to support his position of the seriousness of the incident, claimed that it was Brown who came to his office to complain about Greene's conduct. Although Wardrop admitted that Brown did not ask him to reprimand Greene, Wardrop claimed that he decided he had to do something about Greene's conduct. Brown testified that Greene was still in the locker room when he left the room and saw Wardrop. Wardrop claimed that after he spoke to Brown he looked for Greene, but Greene had left the building. Wardrop's testimony about what he intended to do about Greene's conduct and when he made that decision changed so frequently that it was difficult to follow it. Wardrop claimed that he looked for Greene immediately after he spoke to Brown because he wanted to "raise hell with him." However, later, he testified that he looked for Greene immediately after Brown spoke to him in order to discharge him. He then testified that he thought about it overnight and it was then that he decided to discharge Greene. Subsequently, he changed that testimony again and stated that he made an immediate decision to discharge Greene because of his insubordination. It is impossible to believe that Wardrop would be uncertain as to whether his decision was "to raise hell with Greene" or to discharge him. There is a significant difference between those two options. It is also unlikely that Wardrop would be confused about whether he made the decision after he spoke to Brown or at some point during the night when he thought about the matter. This confused and contradictory testimony establishes that Wardrop did not testify truthfully when he said that he told Greene he was discharged for insubordination.[15] It also establishes that he was not truthful when he claimed that it was Greene's insubordination that caused his discharge. The courts and the Board have held that if the stated motive for a discharge is false, then a judge may infer that there is another motive, an illegal one the employer desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Professional Air Traffic Controllers Organization*, 261 NLRB 922, 932 (1982); *Kenco Plastics Co.*, 260 NLRB 1420, 1421 (1982).

Based on the evidence in this case I find, under the standard set forth in *Wright Line*, 251 NLRB 1083 (1980), that the General Counsel has established that Greene's support for the Union was a motivating factor in his discharge and Respondent has failed to demonstrate that it would have taken the same action against him absent his union activities. Thus, I find that Respondent's employees commenced their activities on behalf of the Union in December 1984, that Brown, a supervisor who spent a considerable amount of time with the small complement of employees, including Greene, both during and after work hours, became aware of these activities, that Respondent expressed its opposition to these union activities of its employees,[16] that Greene at-

[15] In fact, Wardrop's lack of certainty about when the decision was made to discharge Greene, tends to support Greene's assertion that he was never told that he was discharged. Greene's testimony about this issue also is supported by the fact that he collected unemployment insurance because he claimed he was laid off. There is no evidence that Respondent filed an objection to the receipt of these benefits.

[16] Although I find that Roth expressed his opposition to the Union, both in letters he sent to employees and in his statement to Schifano that he would go out of business, it should be noted that direct evidence of union animus is not required to establish that a layoff or discharge was unlawful. *Westinghouse Electric Corp.*, 235 NLRB 356, 358 (1978).

tended the meeting in the locker room where the employees agreed to go to the union meeting, that he attended the union meeting, and signed a union authorization card on 30 January 1985, that immediately thereafter he was discharged, and that absent his union activities Respondent would have not have discharged Greene for the trivial incident that occurred on 31 January 1985. Accordingly, I find that Greene was discharged in violation of Section 8(a)(1) and (3) of the Act. *Allied Lettercraft Co.*, 272 NLRB 612 (1984); *Abbey Island Park Manor*, 267 NLRB 163 (1983).

Schifano and Wardrop both agree that Schifano came to Respondent's premises in early February 1985, spoke to Roth, and demanded that he recognize the Union as the representative of his employees. However, they disagree about when the event occurred, about whether Chinfloo was discharged before or after this meeting, and about whether the meeting caused Chinfloo's discharge and/or layoff. Chinfloo had no knowledge about when a union representative came to Respondent's premises but he testified that he heard it was 7 February 1985, and Chinfloo then proceeded to tailor his testimony to suit those hearsay statements. Thus, he testified, originally, that it was 7 February 1985 when Wardrop told him he was laid off. Wardrop claimed that it was 6 February 1985 when he told Chinfloo that he was discharged and in support of this position he offered Chinfloo's timecard, which establishes the last time Chinfloo worked for Respondent was noon on 6 February 1985. Chinfloo, after much probing, finally agreed 6 February was the last day that he worked for Respondent. It was Wardrop's position that Schifano did not come to Respondent's premises until 7 February 1985 and, therefore, Chinfloo's discharge could not have been related to Schifano's visit. I do not credit Wardrop's testimony concerning the date of Schifano's visit to the plant.

Schifano testified that he spoke to Roth about 10 a.m. on 6 February 1985, told him he represented a majority of employees and demanded recognition. Schifano also testified that Roth, initially, stated that he would go out of business, but he then agreed to a meeting to discuss the matter the following day. Later that day, Roth's office called to cancel the meeting and, therefore, Schifano, on 6 February 1985, contacted his office and told them to file a representation petition with the Board. Although I find that Schifano embellished his testimony to establish that it was 6 February 1985 when he met with Roth, I credit the essential parts of his testimony for the following reasons. First, Roth, the president of the Company, was not called to testify and he did not refute Schifano's testimony about this meeting. It is well established that an adverse inference can be drawn when a witness within the control of a Respondent fails to testify. *Laredo Coca Cola Bottling v. NLRB*, 613 F.2d 1338 (5th Cir. 1980). Moreover, I observed Wardrop who did testify about the incident and I was not convinced that his testimony was truthful. Finally, I credit the testimony of the Union's counsel, which tends to support Schifano's testimony that he met with Roth on 6 February 1985, and I base my credibility resolution on my observation of counsel and on the notations contained in her work diary. Harper credibly testified that it was her practice to arrange appointments before they occurred, that her diary disclosed that she had scheduled an appointment for 10 a.m. on 7 February 1985, concerning Respondent's employees, with a representative of the Union, that she usually did not arrive at her office until 10 a.m. and that the notation about this appointment was in her handwriting. The implication of that testimony is that Harper scheduled an appointment with a union representative to discuss the situation at Respondent's premises sometime before 7 February 1985. Further, Harper credibly testified that the subject matter of her conversation with the union representative was the Union's request that a representation petition be filed for Respondent's employees. Harper's testimony supports Schifano's statements that it was 6 February 1985 when Roth called to cancel a scheduled meeting and that it was that day when he called his office and told them that a representation petition had to be filed. Accordingly, I find that it was the morning of 6 February 1985 when Schifano demanded that Respondent recognize the Union as the collective-bargaining representative of its employees and that it was within a few hours thereafter that Chinfloo was discharged.

As noted above, immediately after the employees, including Greene and Chinfloo agreed in the locker room to attend a union meeting, attended that meeting and signed authorization cards for the Union, Wardrop seized on an incumbent to discharge Greene because he supported the Union. The same pattern was followed concerning Chinfloo. Chinfloo was discharged, within hours after Schifano came to the plant, allegedly for an incident that occurred in early February 1985. I do not credit Wardrop's explanation that he did not discharge Chinfloo at the time of the incident because he was busy with other projects. It is obvious that if Wardrop considered Chinfloo's inability to locate a particular jobsite to be serious he would have discharged him at the time the incident occurred. That Wardrop did not consider the matter important is evident from the fact that he did not reprimand Chinfloo at the time the incident occurred or mention it to Chinfloo. Wardrop knew from the beginning of Chinfloo's employment that his knowledge of the city was limited but Chinfloo was able to cope with the problem, for many months, apparently to Wardrop's satisfaction. It is unlikely in these circumstances that Wardrop would have discharged Chinfloo because of his failure on one occasion to locate a particular site. As in the case of Greene, Wardrop seized on a situation to discharge Chinfloo, which absent Chinfloo's support for the Union he would not have done. In these circumstances, I find that Respondent violated Section 8(a)(1) and (3) when it discharged Chinfloo. *Taylor Hospital*, 272 NLRB 697, 702 (1984).

Although, as I have observed, I have not credited all the testimony given by Greene and Chinfloo, I do credit their testimony that Wardrop told them they were laid off and did not tell them they were discharged. I base this conclusion on the contradictory testimony given by Wardrop regarding this issue and that both Greene and Chinfloo collected unemployment benefits without objection by Respondent. It is unlikely that Respondent would

have permitted these employees to receive such benefits if they had been discharged for cause. However, although I find that Wardrop told Greene and Chinfloo that they were laid off and would be recalled, I have concluded that Wardrop, in fact, discriminatorily discharged the two employees.[17]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging Phillip Greene and Cessil Chinfloo.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist from engaging in such unfair labor practices and take certain affirmative action set forth below. Respondent shall offer to Phillip Greene and Cessil Chinfloo, immediate and full reinstatement to their former positions without prejudice to their seniority or other rights or privileges. In addition, Respondent shall make Greene and Chinfloo whole for any loss of earnings or other benefits they may have suffered by reasons of the discrimination practiced against them. All backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Additionally, I shall require that Respondent remove from its records any reference to the unlawful discharges of Greene and Chinfloo. Respondent shall also be required to provide written notice of such expunctions and to inform them that Respondent's unlawful conduct will not be used as a basis for further personnel actions concerning them. *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Clark & Wilkins Industries, Inc, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging and subsequently refusing to reinstate its employees because of their activities on behalf of or their support for Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage concerted activities for the purpose of collective bargaining or other mutal aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Phillip Greene and Cessil Chinfloo full and immediate reinstatement to their former or substantially equivalent positions of employment, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make whole Greene and Chinfloo for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in New York, New York, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Regional Director for Region 2 shall, within 10 days from the date of this decision, open and count the ballots cast by Phillip Greene and Cessil Chinfloo in Case 2–RC–19908 and prepare and serve on the parties a revised tally of ballots. If the revised tally reveals that the Union has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. However, if the revised tally shows that the Union has not received a majority of the valid ballots cast the Regional Director

[17] Respondent has not cited any support for its position that the Union waived its right to argue the issue of discriminatory discharges because it failed to raise that issue prior to the election. I do not find any validity to that argument. Moreover, any ambiguity that exists with respect to the status of these employees is the result of the Wardrop's verbal statements to the employees and his actual intent with respect to that status.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

shall set aside the election results and forward the case to the Board for further consideration.[20]

[20] *Gerber Co.*, 270 NLRB 1235, 1236 (1984).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had on opportunity to give evidence it has been found that we violated the National Labor Relations Act and we have been ordered to post this notice.

WE WILL NOT discharge and thereafter refuse to reinstate our employees because of their activities on behalf of, or their support for the Shipmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO or any other labor organizational.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer to Phillip Greene and Cessil Chinfloo full and immediate reinstatement to their former or substantially equivalent positions of employment, without prejudice to their seniority or to other rights and privileges previously enjoyed.

WE WILL make whole Phillip Greene and Cessil Chinfloo for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of this decision. Further, WE WILL remove from our records any reference to the discharges of the above-named employees and notify them in writing that this has been done and that evidence of these discharges will not be used for future personnel actions against them.

CLARK & WILKINS INDUSTRIES, INC.

United States Postal Service *and* Charles B. Richardson. Case 17–CA–12451(P)

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On February 19, 1986, Administrative Law Judge Stephen M. Charno issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified, to modify the remedy,[2] and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reassign and promote Charles Richardson, and violated Section 8(a)(1) by threatening to harass, retaliate against, and prevent Richardson's advancement because he had filed grievances or otherwise engaged in protected concerted activity. In its answer and at the hearing, the Respondent denied that it had violated the Act as alleged and argued that the dispute here was cognizable under the grievance-arbitration provisions of a collective-bargaining agreement between the Respondent and the American Postal Workers Union, which represents Richardson. Accordingly, relying on the Board's decision in *United Technologies Corp.*, 268 NLRB 557 (1984), and *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Respondent urged that the matter be deferred.

At the hearing, the judge refused to defer this dispute to the grievance procedure.[3] In refusing to defer at the hearing, the judge stated that it was not "altogether" clear that the issues which would be presented in the grievance procedure were sufficiently similar to those presented to the Board such that the standards set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), could be applied.[4] Indicating that, if the General Counsel's prima facie case were believed, there was a violation of the Act here, the judge contrasted this with the Union's purported doubt as to whether a contract violation existed. The judge also noted that the Charging Party in this case was Richardson, not the Union. He found that when Richardson sought to use the grievance procedure, the use of that process was denied him by the Union. Thus, the judge concluded that it would be inappropriate to deny Richardson the protection of the Act's processes based on the actions of the Union, which did not appear to be motivated by a desire to avoid deferral to arbitration by the Board.

We agree with the judge that deferral in this case is inappropriate, but in doing so we rely on the fact that this grievance-arbitration procedure has been totally ineffective in curbing the Respondent's proclivity to retaliate against the Charging Party for filing grievances.

The record shows that Charging Party Richardson has filed numerous grievances since 1981. Richardson has also filed several EEO complaints against the Respondent, including one that alleged the Respondent had taken reprisals against him for filing complaints and grievances. The grievances and EEO complaints consistently were resolved in Richardson's favor.

In this proceeding the Respondent, through Postmaster Clarence Bounds (Richardson's supervisor), is alleged to have refused to reassign and promote Richardson, and to have threatened and harassed him because of his grievance-filing. The record contains evidence that Bounds told Richardson he would not be reassigned because he had filed complaints and grievances, that he could file a grievance if he did not like the work assignments, and that Bounds would "get back" at Richardson if he continued to file grievances.

We find that the record evidence establishes that the Respondent has engaged in a series of reprisals against Richardson for his grievance-filing activity. This pattern of hostile conduct is fundamentally at odds with the Act and the policy behind deferral.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreement with the judge, we find that the instant charge involving the 8(a)(3) allegation was timely filed in accordance with Sec. 10(b) of the Act. In this respect, we note that the action by the Respondent which gives rise to the alleged 8(a)(3) violation did not occur until September 26, 1984, when the Respondent, by letter, notified Charging Party Richardson that another employee had been awarded the desired transfer. Inasmuch as the instant charge was filed on January 9, 1985, the event of September 26, 1984, is clearly encompassed within the statutory 6-month period for the filing of charges under Sec. 10(b) of the Act.

[2] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[3] In his decision, the judge reaffirmed that refusal without elaboration.

[4] *Spielberg* deals with the issue of whether the Board will defer to an arbitration decision. The Respondent was not relying on *Spielberg* in seeking initial deferral to the arbitration procedure.

The facts of the case at bar show a continuation of the earlier coercive conduct, and the Respondent's recent statements reveal an intent to retaliate against Richardson in the future. In these circumstances, the grievance-arbitration machinery we are being asked to defer to has become meaningless in the extended campaign of reprisals against Richardson. Accordingly, we will not require Richardson to perform what has clearly become a futile act. The Respondent's own words have established the futility of future grievance-filing by Richardson.

Having concluded that deferral is inappropriate here, we have considered the merits of the alleged unfair labor practices. For the reasons set forth by the judge, we adopt his conclusions that the Respondent has violated Section 8(a)(3) and (1) as alleged in the complaint.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United States Postal Service, Joplin, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to reassign or promote you because you file a grievance or otherwise engage in protected concerted activity.

WE WILL NOT threaten to harass, retaliate against you, or prevent your advancement because you file a grievance or otherwise engage in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Charles B. Richardson a full-time regular carrier position at the Galena Post Office.

WE WILL make Charles B. Richardson whole, with interest, for any loss of pay resulting from our unlawful refusals to reassign and to promote him.

UNITED STATES POSTAL SERVICE

Julie K. Hughes, Esq., for the General Counsel.
Lynn D. Poole, Esq., of Washington, D.C., for the Respondent.
Mike Gunter, of Carbondale, Illinois, for the Charging Party.

DECISION

STEVEN M. CHARNO, Administrative Law Judge. In response to a charge filed on 9 January 1985, a complaint was issued on 1 April 1985 alleging that the United States Postal Service (Respondent) had violated Section 8(a)(1) and (3) of the National Labor Relations Act by refusing to reassign and promote Charles B. Richardson and by threatening and harassing him because he had engaged in protected concerted activity. Respondent's answer denied the commission of any unfair labor practice.

A hearing was held before me in Joplin, Missouri, on 29 May 1985 and 10–12 July 1985. At the hearing, the complaint was amended over Respondent's objection to allege an additional violation of Section 8(a)(1). On 23 August 1985, Respondent sought permission to file an interlocutory appeal on the issue of whether the Board should defer to arbitration concerning the matters involved in this case. The Board denied permission to appeal on 5 November 1985, without prejudice to the renewal of Respondent's request for deferral on exception. Briefs were thereafter filed by the General Counsel and Respondent under extended due date of 17 December 1985.

On the entire record and after due consideration, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent provides postal services for the United States of America and operates various facilities throughout the country in the performance of that function, including the facility involved in this proceeding at Galena, Kansas. It is admitted, and I find, that the Board has jurisdiction over Respondent and the subject matter of this proceeding by virtue of section 1209 of the Postal Reorganization Act of 1970.

American Postal Workers Union is admitted to be, and I find is, a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

At the Galena facility, clerical employees are represented by the Union and mail carriers on city routes are represented by the National Association of Letter Carriers (Association). At all times relevant, Respondent, the Union, and the Association were parties to a collective-bargaining agreement covering the represented employees. That agreement provides that work in the clerical craft and work in the carrier craft shall not normally be combined in a single job position. When Respondent wishes to fill a full-time position, the collective-bargain-

ing agreement establishes that the most senior part-time employee in the same craft as the vacancy shall, under most circumstances, receive the job. When there are no eligible employees within the same craft, Respondent is free to select an outside applicant or choose an employee from another craft who has requested reassignment. Under the grievance procedure established by the collective-bargaining agreement, grievances arising at the Galena facility are to be heard at the first level by the local postmaster and at the second level by Respondent's management in Wichita, Kansas.

Charles B. Richardson was hired by Respondent on 9 April 1977 as a part-time clerk at its Joplin facility. In the fall of 1979, Richardson wished to transfer to Respondent's Galena facility and contacted that facility's postmaster, Clarence Bounds. In November 1979, Bounds offered Richardson a position as a part-time clerk-carrier[1] and indicated that Richardson could become a full-time carrier within 3 to 4 years. This offer did not constitute an absolute promise of advancement, but impliedly required that Richardson maintain a satisfactory level of performance. Richardson accepted the offer and transferred to Galena, effective 1 December 1979.

Respondent's Galena facility is relatively small. At the time of the hearing, the work force consisted of two full-time rural carriers, two full-time city route carriers, one part-time carrier, and two part-time clerks. Bounds was the sole supervisor.

B. *The Alleged Discrimination*

In February 1983,[2] Richardson was assigned to work holidays and days off for Lester Clarkson, a full-time city route carrier. It is unclear from the record whether there was any other employee who was eligible and willing to accept such an assignment at that time. Between February and the beginning of July 1983, no customer complaints were recorded concerning Richardson's performance as a carrier.

On 11 July 1983, Bounds began to document a series of customer complaints against Richardson. Although all of Respondent's employees are authorized to take complaints from customers, 18 of the 19 complaints recorded against Richardson were documented by Bounds. The remaining complaint was documented by Timothy Weston, and it is uncertain whether Bounds encouraged other employees to solicit complaints concerning Richardson.[3] Twelve of the complaints documented by Bounds concerned reported misdeliveries of mail by Richardson although Bounds admittedly did not consider identical reports of carrier Weston's misdeliveries to be complaints. Indeed, there is no evidence that any other carrier ever had a customer complaint documented against him for misdelivering mail, even though all the city route carriers who testified had made misdeliveries. The record is devoid of credible evidence of the number and nature of complaints received by Respondent concerning carriers of experience similar to that of Richardson during a comparable time period.[4]

On 24 February 1984,[5] Bounds disciplined Richardson for misdelivery of mail and discourtesy by giving him a letter of warning. On 8 March, Richardson filed a grievance concerning the letter and, at the second stage of the grievance procedure, the warning was reduced by Bounds' superiors to a job discussion, a nondisciplinary action. Later in March, Bounds denied Richardson a pay increase, and Richardson filed a grievance concerning that decision on 28 March. On 29 March,[6] Bounds relieved Richardson of all carrier duties, purportedly because of customer complaints and a failure to work efficiently. On 16 April, the grievance concerning the pay increase was decided in Richardson's favor by Bounds' superiors at the second level of the grievance procedure.

During the summer, Respondent created a part-time carrier position in anticipation of Clarkson's impending retirement. On 26 June, Weston requested reassignment to the carrier craft, and Richardson made a similar request on 6 July. In early July, Bounds took the unprecedented step[7] of asking carriers Clarkson and Teddy Watkins to recommend an employee to fill the upcoming carrier vacancy. When Bounds made the request, he was aware that the two carriers did not get along with Richardson and expected that they would recommend Weston. As Bounds planned, Clarkson and Watkins wrote a letter suggesting Weston for the vacancy, even though the latter had never worked as a carrier.[8]

On 11 July, Bounds told Richardson that Weston, rather than Richardson, would be reassigned as a carrier because of the complaints and grievances[9] filed by Rich-

[1] Richardson and his wife so testified. Bounds denied offering Richardson a position so denominated and advanced arguments in support of the denial. I do not credit Bounds in light of official documents that he prepared on 13 October 1981 and 8 November 1983 which describe Richardson's position as "clerk-carrier." Although determination of the correct title for Richardson's position is not necessary to the resolution of any issue in this case, Bounds' testimony on this question showed a lack of candor and reflected adversely on his credibility.

[2] The beginning date of Richardson's service as a carrier is taken from an employment history prepared by Bounds.

[3] When asked whether he encouraged Clarkson to solicit customer complaints about Richardson, Bounds refused to respond directly. His evasiveness, together with his evident nervousness during this line of questioning, reflect adversely on Bounds' credibility.

[4] Bounds testified that an average carrier would receive three to four complaints during a similar period, but no documentary evidence was offered on this question. In light of Bounds' disparate treatment of Richardson and Weston with regard to misdelivered mail, his demonstrated antipathy toward Richardson and his overall demeanor while testifying, I find his unsupported testimony on this point to be suppositious and do not credit it.

[5] All dates refer to 1984, unless otherwise specified.

[6] This date is taken from contemporaneous records prepared by Bounds.

[7] Watkins testified that this was the only such request he had received in over 25 years as a carrier.

[8] Clarkson and Watkins, who are the sole members and, consequently, the officers of Local 793 of the Association, wrote the letter on the Association's stationery. I do not accept Respondent's contention on brief that the letter constituted the Association's official position.

[9] At the time of this conversation, Richardson had filed grievances and/or EEO complaints concerning at least seven matters. In the spring of 1981, Richardson filed a grievance over Bound's insistence that Richardson work as a supervisor. This was resolved when a union steward pointed out that the collective-bargaining agreement prevented a postmaster from requiring an employee to work as a supervisor. On 23 April 1981, Richardson filed an EEO complaint over Bounds' accusation that

Continued

ardson and because of the Clarkson/Watkins letter.[10] Following this conversation, Richardson called the union business agent to discuss the possibility of filing a grievance. The agent advised Richardson to wait until a final decision was made concerning the position.

On 19 September, Bounds wrote a letter to higher management in Wichita recommending Weston for the carrier vacancy. Attached to the letter were employment histories that Bounds had prepared for both applicants. Weston's history mentioned his general work habits and concluded by referring to his tenure as a mail carrier, which had not begun until 13 September. No mention was made of the fact that Weston had not filed any grievances or complaints. The employment history Bounds prepared for Richardson mentioned the latter's tendency to file grievances and EEO complaints, discoursed on Richardson's "attitude," referred to the "customer complaints" documented by Bounds and concluded that Bounds would consider a future reassignment request from Richardson if the latter were "on a course which is for the team and not for one individual." Bounds' recommendation that Weston receive the carrier position was routinely approved by Respondent's management.

During a September 29 conversation overheard by carrier Earl Williams, Richardson asked Bounds about the vacancy, and Bounds stated that Richardson would not receive the reassignment because he had filed grievances and EEO complaints.[11] Bounds then suggested that Richardson file another complaint if he was dissatisfied.

Shortly thereafter, Richardson called the Union and asked that a grievance be filed concerning the reassignment. A union business agent told Richardson that the reassignment constituted a lateral move and was not, therefore, governed by or grievable under the collective-bargaining agreement. The agent then suggested that Richardson file an EEO complaint. Richardson did so, and that complaint was pending at the time of the hearing in this proceeding.

Weston became a part-time carrier on October 13.

On 21 November, Richardson asked Bounds for additional hours. Bounds refused and told Richardson that he could file a grievance or seek other employment if he did not like the decision.[12] On 23 November, Bounds scheduled carrier Weston to work as a clerk when Richardson was available for work. When confronted, Bounds again told Richardson that he could file a grievance or find another job if he did not like the decision.[13] Richardson's subsequent grievance over the cross-craft assignment was decided in his favor by Bounds' superiors.[14]

On 27 November, Richardson called one of Respondent's management officials in Wichita and provided him with citations to portions of the collective-bargaining agreement that Richardson thought had been violated by the reassignment. By letter of 29 November, Respondent informed Richardson that the agreement did not apply to the reassignment.

In January 1985, Weston, who was the senior part-time carrier, was promoted to fill a full-time carrier vacancy.

On 21 January 1985, Bounds altered the number of hours on Richardson's timecard by 1 hour because a power outage had stopped the timeclock. When Richardson protested this action, Bounds suggested that Richardson file another grievance. Bounds added that Richardson could continue to file grievances but that Bounds would continue to get back at Richardson for doing so.[15]

C. *Discussion*

Two prefatory issues require resolution. The first concerns Respondent's repeated request that the Board defer to the grievance procedure established by the collective-bargaining agreement between Respondent and the Union. Based on the foregoing findings and for the reasons I gave at the hearing, I reaffirm my ruling denying Respondent's request for deferral.

The second preliminary matter concerns Respondent's contention that the 11 July 1984 conversation falls outside of the 6-month statute of limitations mandated by Section 10(b) of the Act. The running of the statutory period is halted by the service of a charge, and service occurs on the date the charge is mailed. See *Laborers*

Richardson had $42 belonging to Bounds. The record does not indicate any resolution of the matter, but no reference to disciplinary action appears in Richardson's personnel folder. On 21 September 1981, Richardson filed a grievance concerning a warning issued to him by Bounds. At the second level of the grievance procedure, the matter was resolved in Richardson's favor by Bounds' superiors. On 13 October 1981, Richardson filed a grievance and an EEO complaint concerning Bounds' imposition of a 14-day suspension. Richardson was awarded 40 hours' pay as a result of the EEO complaint and an additional 40 hours' pay by Bounds' superiors at the second level of the grievance procedure. On 6 July 1982, Richardson filed an EEO complaint against Bounds for reprisals over past complaints and grievances. This was settled with both parties agreeing to strive to resolve their differences. The other grievances filed by Richardson prior to the July 11 conversation are outlined in the text. The content and resolution of Richardson's grievances and EEO complaints are significant only to the extent that they provide a motivation for Bounds' actions regarding Richardson.

[10] Richardson so testified. Although Bounds admitted the conversation, he denied referring to Richardson's grievances and complaints. Because of Bounds' overindulged penchant for mendacity while testifying and based on his demeanor on the stand and in the hearing room, I do not credit his denial. Indeed, the fact that Bounds mentioned grievances and complaints during this conversation is consonant with his undisputed reference to them in an employment history he prepared concerning Richardson only 2 months later.

[11] Richardson and Williams so testified. Bounds again admitted the conversation but denied making any reference to grievances and complaints. At the time Williams took the stand, he was in Respondent's employ and therefore testifying against his personal interest. See *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961). Unlike Respondent, I do not find it improbable that Williams would remember only the most startling portion of an overheard conversation that did not directly concern him and that had taken place more than 9 months before. Given Bounds' consistently demonstrated lack of candor in this proceeding, I do not credit his denial.

[12] This finding is based on the mutually corroborative testimony of Bounds and Richardson.

[13] Richardson so testified. Bounds stated that he did not recall the conversation in detail but admitted telling Richardson that "he could file a grievance" or "maybe he should seek other employment."

[14] Bounds' assertion under oath that he made the assignment because he was unaware of a recent change in the contract is of a piece with the remainder of his testimony. The record is clear that no such change had been made in the collective-bargaining agreement since at least 1981.

[15] This finding is based on Richardson's testimony. I do not credit Bounds' denial for the reasons set forth in prior credibility resolutions.

Local 264, 216 NLRB 40, 43 (1975), enfd. 529 F.2d 778 (8th Cir. 1976). Because the charge in this case was mailed on 9 January 1985, the events of 11 July 1984 are clearly within the statutory period. Respondent also appears to contend that, because Bounds threatened Richardson with loss of future preferment during a conversation that took place no later than 26 March 1984,[16] the statutory period relating to Respondent's refusal to reassign and promote Richardson should begin to run on that date. Because Richardson's application for reassignment was not denied until 26 September 1984, no final adverse employment action concerning him took place or could have taken place in March 1984. Accordingly, the statutory period did not begin to run in March. See *Postal Service Marina Center*, 271 NLRB 397, 400 (1984).

The central issue in this case is whether Bounds' decision not to reassign Richardson violated the Act. It is clear from the record that Respondent's decisions concerning a reassignment between crafts are discretionary and may, therefore, be made for any lawful reason or for no reason at all. Respondent cannot, however, make such a decision for a discriminatory reason. That is, Respondent cannot lawfully deny Richardson a reassignment because he exercised his right under the collective-bargaining agreement to file grievances.

Respondent contends that Bounds made the reassignment decision based on the superiority of Weston's performance, the customer complaints against Richardson, and the Clarkson/Watkins' letter recommending Weston. The significance of the superiority of Weston's performance as a carrier is rendered suspect by the fact that Bounds made his decision no later than 11 July—over 2 months before Weston began carrying mail. Similarly, the timing, manner of collection, and disparate nature of the complaints documented by Bounds against Richardson rob them of any probative value. Even if it were concluded that Bounds had not been "papering a case" against Richardson, the absence of any probative evidence concerning the number and nature of complaints received about other carriers makes it impossible to evaluate the significance of the complaints relating to Richardson. Finally, the carrier letter was not solicited by Bounds as an evaluative aid but as additional justification for a previously made decision. Accordingly, I conclude that the justifications advanced by Respondent were wholly pretextual. The real reason for refusing to reassign Richardson was the one repeatedly iterated by Bounds: Richardson filed too many grievances, almost all of which resulted in Bounds' decisions being reversed by his superiors.

Respondent also contends that the denial of Richardson's reassignment request cannot be discriminatory, even if Bounds was unlawfully motivated, because officials in Wichita made the final decision. In *Frank Paxton Lumber Co.*, 235 NLRB 582, 583 (1978), the Board rejected this argument and held that a line supervisor's discriminatory recommendation bound the management official who made the final adverse action decision. In any event, it is clear that Respondent's managers relied on and routinely approved Bounds' decision. For the foregoing reasons, I find that Respondent's refusals to reassign and, consequently, to promote Richardson violate Section 8(a)(3) of the Act.

Resolution of the remaining issues raised by the complaint turns on the findings set out above. The record establishes that on 11 July and 29 September 1984 Bounds told Richardson that the latter would not be reassigned because he had filed complaints and grievances. On 23 and 25 November 1984, Bounds implied that he would continue to make decisions adversely affecting Richardson because of the complaints and grievances filed by the latter. Finally, on 21 January 1985, Bounds stated that he would "get back" at Richardson if the latter continued to file grievances. All of these statements by Bounds constitute threats designed to discourage protected concerted activity and are therefore violative of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer over whom the Board has jurisdiction by virtue of section 1209 of the Postal Reorganization Act of 1970.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By threatening to harass, retaliate against, and prevent the advancement of Charles B. Richardson because he filed grievances, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.
4. By refusing to reassign and promote Charles B. Richardson because he filed grievances, Respondent has engaged and is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Because Respondent engaged in unfair labor practices, it shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. Such affirmative action shall include an offer to Charles B. Richardson of a full-time regular carrier position at the Galena facility, displacing if necessary any employee assigned to such a position since 31 December 1984. See *Marlan Lewis, Inc.*, 270 NLRB 432, 434 (1984). Richardson shall be made whole for any loss he may have suffered as a result of Respondent's discriminatory refusals to reassign him on 13 October 1984 and to promote him in January 1985. Backpay will be calculated in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (150), to which interest shall be added in the manner provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).[17]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

[16] That threat was not alleged to be violative of the Act.

[17] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, United States Postal Service, Galena, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reassign or promote its employees because they file grievances or otherwise engage in protected concerted activity.

(b) Threatening to harass, retaliate against, or prevent the advancement of its employees because they file grievances or otherwise engage in protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to engage or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Charles B. Richardson a full-time regular carrier position at its Galena facility.

(b) Make Charles B. Richardson whole for any loss of earnings he may have suffered as a result of Respondent's discrimination against him in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Galena, Kansas facility copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Meekins, Inc. *and* Southern California District Council of Laborers, AFL–CIO. Case 21–CA–23645

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On October 15, 1985, Administrative Law Judge Richard D. Taplitz issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

It is undisputed that the Respondent entered into its relationship with the Union pursuant to Section 8(f) of the Act. In *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), the Board overruled *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973), abandoned the conversion doctrine,[2] and modified unit scope rules in 8(f) cases. As more fully set forth in *Deklewa*, supra at 1377, the Board decided to apply the following principles in 8(f) cases.

> (1) [A] collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

Deklewa further held that "[i]n light of the legislative history and the traditional prevailing practice in the construction industry," in which the Respondent is engaged, "we will require the party asserting the existence of a 9(a) relationship to prove it,"[3] through either (1) a Board-conducted representation election or (2) a union's express demand for, and an employer's voluntary grant of, recognition, based on a showing of support for the union among a majority of the employees in an appropriate unit.[4]

Under *Deklewa*, we find that the General Counsel, while asserting that the Respondent is bound to recognize the Union under Section 9(a), has failed to establish that the relationship between the Respondent and the Union is anything other than an 8(f) relationship. There is no substantiated claim, nor any evidence, that a Board election was held or that there was a demand for and voluntary grant of recognition to the Union at any time premised on a showing of support for the Union among a majority of the Respondent's employees.[5]

Further applying *Deklewa* to the instant case, we reverse the judge and conclude that the Respondent violated Section 8(a)(5) and (1) of the Act. The contractual history shows that on November 1, 1983, the Respondent entered into a short-form agreement with the Union, which bound it to a master agreement between various employer associations and the Southern California District Council of Laborers, AFL–CIO. The contract was effective until June 15, 1986. By letter dated June 26, 1984, written in response to a June 4, 1984 letter of complaint from the Union, the Respondent repudiated article V, paragraph C, of the master agreement.[6] By letter dated December 20, 1984, the Respondent repudiated the entire agreement. The complaint alleges that by the above conduct the

[1] We note that the Respondent did not except to the judge's decision not to reach the defenses raised by the Respondent to the judge. Accordingly, these defenses are not before us and we do not pass on them. Nonetheless, we note that were we to consider these defenses, we would find them to be without merit. Specifically, regarding the defense raised under Sec. 10(b), we note that even assuming that the repudiation of the collective-bargaining agreement took place, as argued by the Respondent, on November 1, 1983, the date of the execution of the contract, there is insufficient evidence of clear notice to the Union of this repudiation prior to the Respondent's June 26, 1984 and December 20, 1984 letters to the Union. See, e.g., *L. C. Cassidy & Sons, Inc.*, 185 NLRB 920, 926 (1970).

[2] Under the conversion doctrine, a collective-bargaining relationship/agreement permitted under Sec. 8(f) could convert into one cognizable under Sec. 9(a) on the basis of a showing that during a relevant period the union enjoyed the support of a majority of the employer's employees in an appropriate unit.

[3] *Deklewa*, 282 NLRB at 1385 fn. 41.

[4] Ibid.

[5] The General Counsel excepts to the judge's finding that the General Counsel has not established by a preponderance of the credible evidence that the Union represented a majority of the employees in the bargaining unit at any relevant time. We find it unnecessary to pass on the judge's finding in this regard because such finding is predicated on precedent overruled by *Deklewa*.

[6] Art. V, par. C states:

> The Contractor shall not perform any work with employees at the site of the construction, alteration, painting or repair of a building, structure, or other work which comes within the recognized jurisdiction of the Carpenters, Cement Masons, Operating Engineers, or Teamsters, unless the contractor is signed to an appropriate current labor agreement with the appropriate craft.

Respondent has violated Section 8(a)(5) and (1) of the Act.

Under the first *Deklewa* principle, the collective-bargaining agreement is enforceable under Section 8(a)(5) of the Act. However, under the fourth principle, the Union enjoyed no presumption of majority status following the contract's expiration date of June 15, 1986, and thus at that point the Respondent was free to repudiate the 8(f) bargaining relationship. Therefore, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating the 1983–1986 contract with the Union during the contract term and shall limit the make-whole remedy accordingly.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action necessary to effectuate the policies of the Act. We shall order the Respondent to make its employees whole, as prescribed in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), for any losses they may have suffered as a result of the Respondent's failure to adhere to the contract from 6 months before the December 17, 1984 charge to the expiration of the agreement on June 15, 1986, with interest as computed in *New Horizons for the Retarded*.[7]

ORDER

The National Labor Relations Board orders that the Respondent, Meekins, Inc., Riverside, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition during the term of a collective-bargaining agreement from Southern California District Council of Laborers, AFL–CIO, as the exclusive collective-bargaining representative of the Respondent's employees covered by the agreement.

(b) Repudiating its 1983–1986 collective-bargaining agreement with the Union until the June 15, 1986 expiration date.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the above-described employees for any losses they may have suffered as a result of the Respondent's failure to adhere to the contract from 6 months before the December 17, 1984 charge until the contract's expiration date on June 15, 1986. The appropriate unit is:

> All job-site construction laborers employed by the Employer, excluding all other employees, clerical employees, guards and supervisors as described in the Act.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Riverside, California office copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the attached notice marked "Appendix" for posting by the Union, if willing, in conspicuous places where notices to employees and members are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[7] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Therefore, any additional amount owed with respect to the health and welfare fund, pension fund, vacation fund, training and retraining fund, construction industry advancement fund shall be determined in accordance with the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

Our make-whole remedy includes the requirement that the Respondent remit to the Union all dues and fees that it should have deducted from employees' wages remitted pursuant to the terms of the collective-bargaining agreement.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT during the term of a collective-bargaining agreement repudiate that agreement and withdraw recognition from Southern California District Council of Laborers, AFL–CIO as the exclusive collective-bargaining representative of our employees covered by the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make our employees whole for any losses they may have suffered as a result of our failure to adhere to the 1983–1986 contract with the Union until it expired on June 15, 1986.

MEEKINS, INC.

Lana Hill Parke, Esq., for the General Counsel.
Wilson Clark, Esq. (Clark & Tonigal), of Marina del Rey, California, for the Company.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge. This case was tried in Riverside, California, on June 5, 1985. The charge was filed on December 17, 1984, by Southern California District Council of Laborers, AFL–CIO (the District Council or the Union). The complaint, which issued on January 31, 1985, alleges that Meekins, Inc. (Respondent or the Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act.

Issue

The Company entered into a construction industry contract with the Union at a time when the Union did not represent the majority of the Company's employees. The contract was lawful under Section 8(f) of the Act but was unenforceable at that time. The key issue is whether the Union subsequently obtained majority status so that the contract became enforceable and the Company's renunciation of that contract constituted a violation of Section 8(a)(5) and (1) of the Act. The Company has raised a number of defenses unrelated to the majority status question that need be resolved only if it is found that the Union did obtain majority status.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Company.

On the entire record,[1] and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a California corporation with an office and place of business at 6293 Redley Road, Riverside, California, is a general contractor in the construction industry in the counties of Los Angeles, Orange, Riverside, and San Bernardino, California. During the year immediately preceeding issuance of the complaint, the Company performed services valued in excess of $50,000 for customers located in California, each of which, in turn, during the same period of time, purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of California. The complaint alleges, the answer admits, and I find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges that the Union is a labor organization within the meaning of Section 2(5) of the Act. The Company in its amended answer denies that allegation. The Union is a District Council that, under the authority of its International, and on behalf of itself and its affiliated locals, negotiates and services various collective-bargaining agreements with employers. A number of laborers locals in Southern California are affiliated with the District Council. Among them are Locals 300, 652, and 1184. Although the affiliated locals do negotiate some manufacturing agreements, the District Council is responsible for all construction industry agreements. Each affiliated local selects delegates to the District Council based on a vote of the membership. The number of delegates depend on the size of the membership of each affiliate. Section 2(5) of the Act defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wage, rates of pay, hours of employment, or conditions of work." Employees who are members of the affiliated locals participate in the District Council through the delegates that they elect to that Council. The District Council exists in whole or in part to negotiate contracts with employers on behalf of the affiliated locals. The District Council meets all the requirements of the definition of a labor organization. See *Plumbers Local 388 (Featherly Construction)*, 252 NLRB 452, 453–435 (1980), enfd. 703 F.2d 565 (6th Cir. 1982). In *Southern California District Council of Laborers (Hahn, Inc.)*, 194 NLRB 471 (1971),[2] the Board held the very District Council involved in the instant case to be a labor organization within the meaning of

[1] The Company's unopposed motion to correct the transcript of the record is granted.

[2] The basic decision in that case was reported at 180 NLRB 364 (1969), enf. denied on other grounds 443 F.2d 220 (9th Cir. 1971).

Section 2(5) of the Act. I find that the District Council is a labor organization within the meaning of that section.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Company is a general contractor in the construction industry. Most of the Company's work involves the digging of trenches and laying of pipe. Company employees use hand equipment such as shovels and picks to dig trenches and then lay the pipe in the trenches. That work is generally considered to be within the jurisdiction of the Laborers Union. Company employees also operate backhoes, loaders, cranes, and other heavy eqipment in the performance of their work. That work is generally considered to be within the jurisdiction of the Operating Engineers Union. In addition, employees drive water trucks over which the Teamsters generally have jurisdiction.

The issues in this case all concern a bargaining unit of construction laborers. Though the parties are in disagreement with regard to which employees should be included in a laborers bargaining agreement, they agree and I find that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All job-site construction laborers employed by the Employer, excluding all other employees, clerical employees, guards and supervisors as defined in the Act.

At one time, the Company had collective-bargaining agreements with both the District Council (Laborers) and with Local 12 of the Operating Engineers. Those contracts expired sometime in 1983 after the Company gave timely notification of its intention to terminate them.

Sometime after the Company gave its timely notice of intention to terminate the contracts, Charles Meekins, a 25-percent owner and vice president of the Company, met with Kenny Bell, a representative of Laborers Local 1184, and Bob Dye, and representative of Local 12, Operating Engineers. The union representatives asked Meekins to sign a contract and Meekins replied that he would not do so and that the Company was involved in litigation with Local 12.

During the last week of October 1983, Kenny Bell, the Laborers representative, came to Charles Meekins' office without a representative from the Operating Engineers. Bell asked Meekins to sign a laborers agreement. Charles Meekins, who had recent problems with the Operating Engineers but no such problems with the Laborers, agreed to sign. Bell left a "Laborers' Short-Form Agreement For The Construction Industry" with Meekins. On November 1, 1983, Charles Meekins signed it and delivered it to the District Council. The agreement bound the Company to the 1983–1986 Southern California Master Labor Agreement (MLA) between various employer associations and the District Council. The termination date of the MLA is June 15, 1986.

The Master Labor Agreement to which the Company bound itself contained a new provision that had not appeared in prior contracts. At the time he signed the short-form agreement, Charles Meekins was unaware of that provision. It was article V,C, which read:

> The Contractor shall not perform any work with employees at the site of the construction, alteration, painting, or repair of the building, structure, or other work which comes within the recognized jurisdiction of the Carpenters, Cement Masons, Operating Engineers, or Teamsters, unless the Contractor is signed to an appropriate current labor agreement with the appropriate craft.

Charles Meekins credibly testified that if he had known of that provision he would not have signed the short-form agreement.

After signing the agreement, the Company abided by some of the terms of the contract and disregarded others.

The first complaint that the Company received from the District Council concerning an alleged failure to abide by the terms of the contract was in a letter dated June 4, 1984, from Alexander Civitan, an attorney for the District Council. Though Civitan was the attorney for the Laborers (District Council) and the Company was bound by an agreement with the Laborers, the letter referred to article V, paragraph C of the Master Labor Agreement and asserted that the Company had violated that clause by performing work within the jurisdiction of the Operating Engineers when the Company was not signatory to an agreement with the Operating Engineers.

By letter dated June 26, 1984, Wilson Clark, an attorney for the Company, responded to the District Council's claim that the Company had violated the Master Labor Agreement. The letter stated:

> . . . we hereby repudiate the pre-hire provisions contained in Article V, paragraph C of the Southern California Master Labor Agreement, pursuant to 29 U.S.C. 158(f) and established NLRB and Supreme Court authority.

On December 20, 1984, Clark, on behalf of the Company, once again wrote to the District Council. In that letter, the Company stated that it "repudiated ab initio" the Master Labor Agreement and the short-form agreement, and that the Company had ceased making contributions to the various construction laborers trusts for Southern California.

The General Counsel concedes, and I find, that at the time the Company bound itself to the short-form agreement and the Master Labor Agreement, a majority of the Company's employees had not designated the District Council as their exclusive bargaining representative.

The Company does not obtain its employees through union hiring halls. Though there is some employee turnover, the employee complement is basically a stable one. Employees are assigned from job to job. They are not hired for a particular job and then terminated at the completion of that job.

B. *The Enforceability of Construction Industry Contracts*

1. The underlying law

As a general rule, it is unlawful for an employer to enter into a collective-bargaining contract with the union when the union does not represent a majority of that employer's employees.[3] However, a special exception exists for employers in the construction industry. With exceptions not relevant here, Section 8(f) of the Act provides that it is not an unfair labor practice for a construction industry employer to enter a collective-bargaining agreement with a construction industry union even though "the majority status of such labor organization has not been established under the provisions of Section 9 of this Act prior to the making of such agreement." In a nonconstruction industry contract situation, a presumption arises from the mere existence of a lawful contract that the union represents a majority of the employees throughout the life of the contract.[4] However, there is no such presumption arising from the existence of a construction industry contract where the union did not represent a majority of the employees at the time that the contract was executed. In such circumstances, though the contract is not unlawful, it is unenforceable until such time as the union obtains majority status. If such majority status is obtained, the contract becomes enforceable and an employer's renunciation of the contract constitutes a refusal to bargain in violation of Section 8(a)(5) of the Act. No such violation exists unless the union has obtained majority status, even where the employer unilaterally repudiates the agreement during its term.[5] The outstanding Board law in this regard was approved by the United States Supreme Court in *NLRB v. Iron Workers Local 103 (Higdon Contracting Co.)*, 434 U.S. 335 (1978), in which the Court held:

> Section 8(f) is an exception to this rule [that contracting with a minority union violates the Act]. The execution of an agreement with a majority union, an act normally an unfair practice by both employer and union, is legitimated by Section 8(f) when the employer is in the construction industry. The exception is nevertheless of limited scope, for the usual rule protecting the union from inquiry into its majority status during the terms of a collective-bargaining contract does not apply to prehire agreements. A proviso to the section declares that a Section 8(f) contract, which would be invalid absent the section, "shall not be a bar to a petition filed, pursuant to section 9(c) or 9(e)." The employer and its employees—and the union itself for that matter—may call for a bargaining representative election at any time.
>
> The proviso exposing unions with prehire agreements to inquiry into their majority standing by elections under Section 9(c) led the Board to its decision in *R. J. Smith*: An employer does not commit an unfair practice under Section 8(a)(5) when he refuses to honor the contract and bargain with the union and the union fails to establish in the unfair labor practice proceeding that it has ever had majority support. As viewed by the Board, a "prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship." *Ruttmann Construction Co.*, 191 NLRB 701, 702 (1971). The employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites. In *NLRB v. Irvin*, 475 F.2d 1265 (C.A. 3, 1973), for example, the prehire contract was deemed binding on those projects at which the union had secured a majority but not with respect to those projects not yet begun before the union had terminated the contract.

The requirement that the General Counsel establish the Union's majority status on a jobsite-to-jobsite basis is appropriate where an employer hires different crews for each jobsite. That is not the situation in the instant case. Respondent does not use the Union's hiring hall and does not hire employees for a particular job and then discharge them at the end of the job. Respondent's employees are shifted from one job to the next. Although there is some turnover among Respondent's employees, there is basically a permanent and stable work force.[6] In *Precision Striping*, 245 NLRB 169 (1979),[7] the Board held that where a union, which was originally recognized under Section 8(f) of the Act, later achieves majority status among employees who make up the permanent, stable work force, the contract becomes fully binding and the union enjoys an irrebuttable presumption of majority status for the duration of the agreement.

In the instant case, Respondent and the District Council signed an 8(f) construction industry contract at a time when the Union did not represent the majority of Respondent's employees. Respondent's employees are hired for indefinite terms rather than on a jobsite-by-jobsite basis. There is a permanent, stable work force within the meaning of *Precision Striping*, supra. As no presumption of majority status can arise from the existence of the construction industry agreement, the General Counsel has the burden of establishing that the Union achieved majority status during the term of the contract. In the absence of such proof of majority, there can be no finding that Respondent refused to bargin in violation of Section 8(a)(5) of the Act even though the Respondent did renounce the contract.

As is set forth in more detail below, in order to establish the Union's majority status, the General Counsel must prove each of the following: (1) Chris Meekins performs so much operating engineers' work that his community of interest is not aligned with the laborers and he is excluded from the Laborers unit. (If Chris Meekins is included in the laborers unit, then the District Council

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[3] *Ladies Garment Workers (Bernhard-Altman) v. NLRB*, 366 U.S. 731 (1961).

[4] *Sahara-Tahoe Hotel*, 229 NLRB 1094 (1977), enfd. 581 F.2d 767 (9th Cir. 1978).

[5] *R. J. Smith Construction Co.*, 191 NLRB 6932 (1971), enf. denied 480 F.2d 1186 (D.C. Cir. 1973).

[6] *Construction Erectors*, 265 NLRB 786, 788 (1982).

[7] See also *Hageman Underground Construction*, 253 NLRB 60 (1980).

could not have obtained majority status.) (2) Dale Meekins, Dean Meekins, Larry V. Meekins, Mike Meekins, and Woodrow J. Meekins should be excluded from the laborers unit because they are the sons of fathers who own 25 percent of the corporation and are corporate officers. (If the sons are included in the laborers unit, the District Council could not have obtained majority status.) (3) The District Council obtained majority status among the employees in the bargaining unit as distinguished from the employees who physically worked during the week that majority status was claimed. (4) It was sufficient for the Union to have majority status in 6 weeks out of a total of 56 weeks.

2. The failure to establish that the Union represented a majority of Respondent's employees in the bargaining unit as distinguished from employees who physically worked during particular weeks

At the times relevant herein, four employees in the bargaining unit have authorized locals of the District Council to represent them.[8]

By stipulation of the parties, Joint Exhibit 1(G) was received in evidence. The stipulation identified that exhibit as follows: "Exhibit (G)–Three-page chart showing the names of certain employees employed by Meekins, Inc., for the week of October 29, 1983 [the week in which the short-form agreement was signed] through November 17, 1984 [the Company repudiated the MLA by letter dated December 20, 1984]. Each week of employment for each individual is indicated by an 'X' in the appropriate line and column." The chart lists 18 names. They are Don Bennett Jr., E. Bowe, L. Frias, R. Hinojosa, T. Hinojosa, Chris Meekins, Dale Meekins, Dean Meekins, Gary Meekins, Larry Meekins Jr. (also referred to as Larry V. Meekins), Mike Meekins, Woodrow J. Meekins, M. McIver, Rick Rose, Gerrardo Serrano, Gerald Taja, Jeff Taranto, and Kirby Tonissen. The General Counsel concedes that all of those employees are properly included in the bargaining unit except for Chris, Dale, Dean, Larry V., and Mike and Woodrow J. Meekins. Though there is a serious question concerning the eligibility of those six employees, for the purpose of this section of the decision, I will assume that the General Counsel is correct in contending that all six are properly excluded. That leaves 12 employees in the bargaining unit during various parts of the 56 weeks covered by Joint Exhibit 1(G).

Joint Exhibit 1(G), together with the evidence regarding union affiliation, establishes that in 6 weeks out of the 56 weeks listed on the exhibit, a majority of the employees who worked were affiliated with the District Council. The record shows the following:

Employee	*Union Affiliation*
E. Bowe	Laborers Local 1184
L. Frias	Laborers Local 652
R. Hinojosa	None
T. Hinojosa	Laborers Local 300
Gary Meekins	None
R. Rose	None
Gerado Serrano	Laborers Local 652
Week of June 23, 1984	
E. Bowe	Laborers Local 1184
L. Frias	Laborers Local 652
R. Hinojosa	None
T. Hinojosa	Laborers Local 300
R. Rose	None
Week of August 25, 1984	
E. Bowe	Laborers Local 652
Week of September 1, 1984	
L. Fraios	Laborers Local 652
Week of September 15, 1984	
R. Hinojosa	None
Week of November 17, 1984	
T. Hinojosa	Laborers Local 300
Gary Meekins	None

There is some ambiguity with respect to what Joint Exhibit 1(G) means. The stipulation refers to an "X" mark for each "week of employment." In introducing the exhibit, the General Counsel referred to it as showing employment times of employees. An examination of the exhibit itself leads to the conclusion that it shows the weeks in which employees actually worked. It does not appear to indicate employees who were in the bargaining unit but for one reason or another did not actually work that week. Employees who were on vacation, on temporary leave, and on sick leave, as well as employees who were laid off but had a reasonable expectation of recall would all be employees in the bargaining unit whether they worked in a particular week or not.[9] They would have to be counted in determining whether the Union had majority status. However, it does not appear that any such employees are included on Joint Exhibit 1(G). Many of the employees listed are shown as not having worked for certain weeks within the 56-week period. One employee, Gary Meekins, apparently worked 54 out of those 56 weeks. The only weeks in which there is no "X" on the chart for him are December 17, 1983, and June 23, 1984. Other employees had more missing weeks, but the exhibit shows that they worked both before and after those weeks. I am unable to infer from anything in the record that Gary Meekins or those other employees were terminated or otherwise lost their status as bargaining unit employees during those weeks that they were not actually on the job. If any inference is warranted, it would be that such employees remained in the bargaining unit. In any event, the General Counsel has the burden of proof in this regard and she has not established that they lost their status as bargaining unit employees.

There are 6 weeks in which the General Counsel claims that the Union has majority status. The first was June 9, 1984. Employees Jeff Taranto and Kirby Tonissen did not work that week or the week before. However, of the preceding 31 weeks, Tonissen worked every

[8] These were Edwin Bowe, Louis Frias, Gerardo Serrano, and T. Hinojosa.

[9] See *D & B Masonry*, 275 NLRB 1403 (1985).

week and Taranto worked 28 weeks. Neither worked in the month of June but both resumed work on July 7. Taranto continued to work through the week of August 18 and Tonissen through the week of July 28, 1984. There is no explanation in the record of why Taranto and Tonissen were absent from work for the month of June. However, the General Counsel has not established that they ceased to be employees within the bargaining unit. If either or both of them are counted as employees in the bargaining unit, then the Union would not have majority status during the week of June 9, 1984.

The second week in which majority is claimed is June 23, 1984. That was 1 of the 2 weeks during the 56-week period that Gary Meekins did not work. In the absence of further evidence, the assumption is clearly warranted that Gary Meekins was an employee in the bargaining unit during the entire 56-week period. In addition, that was one of the June 1984 weeks in which Jeff Taranto and Kirby Tonissen did not work. As indicated above, they also should be included in the bargaining unit for those weeks even though they did not work. If any or all of those three employees were included in the bargaining unit, the Union would not have had a majority for that week.

The third week was August 25, 1984. That week employee Rick Rose did not work. He had worked the previous 16 weeks and he worked again the week of September 8, 1984. He did not work from then through the week of November 17, 1984, which was the last week listed on Joint Exhibit 1(G). The 2-week gap in his employment for August 25 and September 1 are not explained in the record. He worked both before and after those weeks and the inference is warranted that he was still an employee in the bargaining unit during that 2 weeks' absence. With the inclusion of Rose in the bargaining unit, the Union did not have a majority during that week. The next week was September 1, 1984. That was the second week that Rick Rose did not work, but for the reasons stated above, the General Counsel has not established that he had been terminated or otherwise removed as an employees in the bargaining unit.

The next week was September 15, 1984. Rick Rose had worked the previous week but did not work any of the following 10 weeks that are listed on Joint Exhibit 1(G). That 2-1/2 month absence is unexplained and there is no indication whether he came back to work after November 17, 1984. A similar situation exists with regard to Jeff Taranto and Kirby Tonissen, who were out for even longer periods. In addition, M. McIver worked on September 22, 1984, and for the 7 following weeks. There is no indication of when McIver was actually hired and became an employee in the bargaining unit. If any of those employees are counted as bargaining unit employees, the Union did not have a majority on September 15.

The last week is November 17, 1984. McIver had worked the 8 weeks preceding November 17, 1984, which was the last day shown on Joint Exhibit 1(G). There is no indication whether McIver was out for just that 1 week or for a longer period. The General Counsel has not established that McIver lost his status as an employee in the bargaining unit during that week.

In short, I find that the General Counsel has not established by a preponderance of the credible evidence that the Union represented a majority of the employees in the bargaining unit at any relevant time. It follows that the Company did not refuse to bargain in violation of Section 8(a)(5) of the Act when it renounced the collective-bargaining agreement.

3. The contention that if a majority was obtained at any time during the life of the contract, the contract became enforceable

Even if we were to assume that the General Counsel was correct in urging that Chris Meekins and the five sons of the corporate shareholders should be excluded from the bargaining unit, and were further to assume that the Union has majority status on 6 out of 56 weeks listed on Joint Exhibit 1(G), the complaint would still have to be dismissed.

The General Counsel's contention that a contract becomes enforceable if the Union obtains majority status at any time during the term of the contract is supported by some Board law. In *Hageman Underground Construction*, 253 NLRB 60, 62 (1980), the Board said that if a union achieves majority status "at any time" during the term of a contract, the union is entitled to an irrebutable presumption of majority status for the duration of the agreement. However, in *Construction Erectors*, 265 NLRB 786, 787 (1982), the Board elaborated on its concept of a "permanent and stable" work force, saying:

> At the outset, we believe it is important to emphasize that the determination of whether a work force is "permanent and stable" is more than a mechanical exercise in tabulating the makeup, longevity, and fluctuation of a group of employees. For in making the determination, the Board ultimately is deciding whether the work force is of such a nature that a showing of majority support made at a particular point in time reasonably can be said to have significance at a subsequent time.

That logic applies both to the determination of whether there was a "permanent and stable" work force and to whether the Union obtained majority status in such a work force. Looking at the record as a whole, I am unable to find that the atypical weeks in which the Union may have had majority status could be reasonably said "to have significance at a subsequent time." There is not even a contention that a majority of the employees were union supporters in 50 out of the 56 weeks listed on the exhibit. The typical rather than the atypical situation should be controlling. It follows that the 8(f) construction industry contract remained unenforceable and that the Company did not violate Section 8(a)(5) of the Act by renouncing it.

As indicated above, the General Counsel contends that Chris Meekins, as well as the five sons of owners and officers of the corporation, should be excluded from the bargaining unit. For the sake of argument, I have assumed in section B,2 and 3 above, that such exclusions were justified. In fact, there is substantial question whether any of those persons should be excluded. How-

ever, such unit eligibility questions need not be resolved in this case. Even if those issues are decided in a way that is most favorable for the General Counsel, the General Counsel still has not established a violation of Section 8(a)(5) of the Act. In a like vein, there is no need to consider a number of defenses raised by Respondent that do not pertain to the majority status issue. Though those defenses, as well as the unit eligibility issues, may be of considerable academic interest, their resolution is not necessary to the disposition of this case and they therefore will not be considered.

CONCLUSION OF LAW

The General Counsel has not established by a preponderance of the credible evidence that the Company violated the Act as alleged in the complaint.

[Recommended Order omitted from publication.]

American Pacific Concrete Pipe Company, Inc. *and* General Truck Drivers, Warehousemen and Helpers Union Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen And Helpers of America, AFL–CIO.[1] Case 31–CA–10098(E)

July 29, 1988

SECOND SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On February 11, 1987, Administrative Law Judge Clifford H. Anderson issued the attached second supplemental decision. The Applicant filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions and an answering brief to the Applicant's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

On August 23, 1984, the National Labor Relations Board issued a Supplemental Decision and Order[2] in this proceeding denying the Applicant's application for an award under the Equal Access to Justice Act (EAJA) on grounds that the Applicant's net worth exceeded $5 million. The Applicant filed a petition for review with the United States Court of Appeals for the Ninth Circuit, which on April 25, 1986, reversed the Board's finding that the Applicant was disqualified from an EAJA award on the basis of its net worth, and remanded the case for further proceedings on the Applicant's claim.[3] The Board accepted the court's remand and, after considering position statements from the Applicant and the General Counsel, on October 7, 1986, remanded the case to the administrative law judge for a second supplemental decision consistent with the court's remand.

1. In the attached decision, the judge found that the General Counsel was substantially justified in including discriminatee Milton Womack in a backpay specification and pursuing his claim until she moved to withdraw his claim from the proceedings on the second day of the backpay hearing. The judge concluded that the General Counsel possessed conflicting evidence concerning whether Womack was unable to work because of disability during the backpay period and therefore was justified in refusing to resolve the evidence administratively. He therefore recommended that the Applicant's application for fees be denied. Contrary to the judge, we agree with the Applicant that the General Counsel's failure to investigate the disability issue was unreasonable, and resulted in her taking a position that was not substantially justified.

The relevant facts are undisputed. Following a Board and court adjudication[4] that the Applicant, inter alia, unlawfully refused to recall Womack in April 1980, the parties could not agree on a backpay figure and a backpay specification issued September 23, 1983, covering the period from January 28, 1981 to September 30, 1982. Womack worked for the Applicant as a truckdriver until March 1979, when he was injured. He was physically unable to work until January 1981.

In 1983 Womack informed the General Counsel that in January 1981 his physician, Dr. Freedle, signed a release stating Womack was fit to work, after which Womack sought truckdriving jobs but found none. According to Womack, the release Freedle signed was destroyed in a garage fire. Womack later returned to Dr. Freedle's office and obtained another written release, dated June 28, 1983, which stated Womack was fit to work beginning January 28, 1981.[5] Womack gave this release to the General Counsel. By September 2, 1983, however, the Applicant had informed the General Counsel that Womack had been disabled during the entire backpay period, and on September 15, 1983, the Applicant provided a letter renewing this argument and enclosing a February 25, 1982 report from Dr. Freedle to the Applicant's insurance company stating Womack had been unable to work at any time since the 1979 accident and was completely disabled.[6] The Applicant further asserted that Womack had been receiving disability payments from its insurer during the backpay period.

The General Counsel concedes that if Womack was unable to work, he is not entitled to any backpay. Nonetheless, the General Counsel made no effort to contact Dr. Freedle in order to resolve the conflicting evidence in her possession. The September 23, 1983 backpay specification named Womack as a claimant entitled to $43,186.79, ex-

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] 271 NLRB 1171.

[3] 788 F.2d 586.

[4] 262 NLRB 1223 (1982), enfd. 709 F.2d 1514 (9th Cir. 1983).

[5] Although the release bore Dr. Freedle's name on his office letterhead, the judge found that it was apparently signed by someone else because the initials "ss" had been parenthetically inserted under his signature.

[6] This report was also on Dr. Freedle's letterhead and the initials "ss" appeared under his signature.

luding interest; and the General Counsel contin-ed to press Womack's claim until January 31, 984, when at the hearing she withdrew his name rom the specification without giving a reason.

The judge regarded the conflicting reports from Dr. Freedle as disputed evidence concerning vhether Womack was disabled. The judge held the lisability issue was an affirmative defense and herefore the General Counsel was under no obli-ation to investigate the disability issue further.

Although the evidence in the General Counsel's ossession was indeed "conflicting," it did not re-uire a credibility determination by a judge be-ause the inconsistent medical reports came from he same physician—Dr. Freedle. The judge found, nd we agree, that the conflict could have been re-olved if the General Counsel had contacted the loctor and ascertained, if possible, whether Womack was disabled during the backpay period. After the General Counsel learned that Dr. Freedle ad issued reports directly at variance with one an-ther and critical to the resolution of Womack's ackpay issue, she was not substantially justified in efusing to make a simple inquiry to the one wit-ess whose account could have resolved the con-flict. We conclude that the General Counsel must at least assess the information she obtains during the investigation and address patent inconsistencies susceptible to conclusive resolution. In the context presented here, this obligation would have been minimal. Consequently, we find no merit in the General Counsel's position that she was justified in prosecuting the backpay issue because the Appli-cant has the burden of adducing evidence to dis-prove backpay liability.[7]

The judge, in the event the Board disagreed with the finding that the General Counsel was substan-tially justified in the Womack matter, made condi-tional findings concerning the fees and expenses to which the Applicant is entitled. We agree with the judge's denial of the Applicant's expenses incurred before September 23, 1983, when the backpay spec-ification issued, and denial of compensation for the Applicant's costs incurred in an unsuccessful U.S. district court suit in October 1983 to compel pre-hearing discovery. We also agree with the judge that the attorney's fees shall be limited to $75 an hour. The Applicant's original Application sought $8845 in fees and $538.59 in expenses; it subse-quently amended the Application for an additional $1682.85 in fees and expenses. The judge noted, and we agree, that liquidation of the award would not require a remand because the General Counsel did not challenge the Applicant's fees and expenses but for the $75 ceiling on attorney fees, the discov-ery lawsuit, and expenses incurred before the back-pay specification issued.[8]

We have taken the total claimed fees and ex-penses and reduced them in accord with the above limitations. Where it is unclear whether the Appli-cant incurred costs relating to Womack's backpay specification or the discovery suit, we have drawn reasonable inferences based on the Applicant's entry descriptions and the time period in which the fee or expenditure occurred. We will award attor-neys fees of $3086.25, based on the $75-per-hour rate, and expenses of $1456.47, for a total of $4542.72. In addition, the Applicant requests its costs involved in appealing the judge's decision. We award those expenses as well on the submission of an adequately documented request.[9]

ORDER

The National Labor Relations Board orders that the Applicant, American Pacific Concrete Pipe Company, Inc., Los Angeles, California, be award-ed the sum of $4542.72, pursuant to its application for an award under the Equal Access to Justice Act, plus additional fees and expenses incurred in connection with its appeal of the judge's decision.

APPENDIX

Date—Service—Time

4/22/84
Call from Liz Cox re labor matter—.1

4/27/84
Call to Al Bea, discussion re Teamsters prob-lem—.2

6/3/84
Long telephone call(s) to Lloyd and Ownbey re letter of 5/26/83 of Regional Director; steps to implement Order; letters to Regional Direc-tor and call to Al Bea re hiring procedures—.8

10/6/83
Review of filed examiners' report call to Miss Young—.6

10/6/83
Various calls to Ms. Young, Rachel NLRB re the possibility of settlement: calls to Russer & Al Bea—.4

10/06/83

[7] In view of our adopting the judge's finding that the General Counsel could have resolved Womack's backpay issue merely by consulting Dr. Freedle, we find it unnecessary to pass on the judge's discussion of burden of proof in backpay specifications, or his reliance on *Phil Schmidt & Son*, 276 NLRB 1157 (1985), enf. denied 810 F.2d 638 (7th Cir. 1987).

[8] See attached appendix, which identifies all fees and costs awarded.

[9] The Applicant has requested a remand to the judge for this purpose. We provisionally deny the request, but if the parties are unable to agree within a reasonable period of time concerning the amount of fees and expenses incurred in the instant appeal, the Applicant should submit to the judge a revised application for costs consistent with this Order.

Travel time and various appearances in connection with Teamster matters—2.5
11/14/83
Review correspondence from field examiner Middleton and NLRB factual info re back-pay computation; memorandum to Mr. Bea—.5
11/15/83
Review NLRB procedures for subpoena of witnesses at hearing; memorandum to Mr. Bea re NLRB procedures—.1
11/16/83
Conference(s) with Mr. Bea re subpoenas and subpoena duces tecum for back-pay hearing; prepare application to Regional Director re discriminates; research re federal counterpart to state custodian of records deposition; memorandum to Mr. Bea re federal procedure—1.1
11/16/83
Go over factual information from NLRB as each Teamster; memos to Al Bea in each re further investigation; call Appling—1.1
11/16/83
Conference(s) with Mr. RWR re subpoenas re custodians; claimants amt. call to Appling—.1
11/17/83
Conference with CB re 12/13 Hearing—.2
11/17/83
Research with RWR re subpoena duces tecum—.2
11/17/83
Conference(s) with Mr. Bea re subpoenas for hearing; telephone call(s) to NLRB re subpoena procedures; prepare application for record custodians subpoena duces tecum—.6
11/18/83
Conference with Carlos Bea re various claims—.2
11/21/83
Call to Al Bea re Teamsters problem.2
11/21/83
Call(s) from Rachel Young re subpoena procedures for custodians of records; instructions re subpoena applications—.2
11/22/83
Final P&O of application for hearing subpoenas; letter(s) to Regional Director re application and issuance—.2
11/26/83
Conference(s) with Mr. Bea hearing re subpoenas; telephone call(s) to NLRB Staff Counsel re NLRB procedure to authenticate records; call(s) to office of Administrative Law Judge, S.F. re NLRB procedure; call(s) to Rachel Young, NLRB Staff Counsel, LA re NLRB procedures—.6
11/28/83
Telephone call(s) with Rachel re issuance of subpoenas and presence at hearing of record custodians; letter(s) to Young re telephone call(s); conference(s) with Mr. Bea re issuance and service of subpoenas—.3
11/29/83
Calls to Al, Mussor & Rachel Young—.8
11/28/83
Prepare attachments to subpoenas re documents and records; prepare declaration re authenticity of records; prepare supplementalapplication for subpoena duces tecum; letter(s) to Regional Director re subpoena duces tecum; telephone call(s) to Rachel Young re agreement of custodians nonappearance at hearing; research re fees tendered to custodians—.6
11/30/83
Review letter(s) from Rachel Young re record custodians; telephone call(s) to Young re subpoenas; telephone call(s) to Regional Director's office re subpoenas; letter(s) to Regional Director re subpoena delay & hearing continuance; prepare cover letter(s) for delivery with subpoenas; organize attachments to subpoenas—.6
11/30/83
Call to Al Bea re Boothly backup check; Womack ditto—.2
12/1/83
Preparation of NLRB subpoenas for service; instruct re completion of subpoenas; letter(s) to process service re service instructions; telephone call(s) to process service re instructions; review completed subpoenas—1.4
12/3/83
Prepare declaration of bank operations officer re time necessary to produce subpoena document(s)—.2
12/6/83
Telephone call(s) to Regional Director Gonbeaux re issuance of subpoena duces tecum; telephone call(s) to Rachel Young re issuance of subpoena duces tecum out of SF; telephone call(s) to Walter Kentz, NLRB, SF Regional Counsel re issuance of subpoena duces tecum out of SF; letter(s) to Kintz re request for issuance; instruct re letter(s) delivery and subpoena duces tecum pick-up; telephone call(s) with custodian of records for Dr. Freedle re Womack's records; telephone call(s) from custodian of records for Transamerica Real Estate re preparation and delivery of Craig's records—.6
12/8/83
Telephone call(s) Rachel Young re continuance of hearing; telephone call(s) from record custodian, Transamerica Real Estate re Craig

records; instruct re Federal Express Service of additional subpoenas for records of Craig and Boothby, letter(s) to posi-serve re subpoena service; conference(s) with Mr. Bea subpoenas and hearing continuance—.6

12/9/83

Call re imputations on the back pay specification—.1

12/9/83

Preparation Womack cross-examination and calls from Musser and instructions to Mr. Richardson re research "deferral" question 1:00–6:00—5.0

12/9/83

Work on preparation of material recieved re subpoenas; telephone call(s) from attorney(s) for Household finance re subpoena; instruct re follow-up to subpoenas served on records custodians—.1

12/11/83

Prepare returned subpoenas for filing with NLRB; complete motion to continue hearing; complete organization of subpoenaed records for use at hearing—.1

12/12/83

Proofread and correct motion to continue hearing and supporting declarations; telephone call(s) with attorney(s) for Anaheim Citrus re declaration showing time needed to produce records; prepare files re returned subpoenas, NLRB rules etc. for use at hearing—1.0

12/13/83

Telephone conference(s) with Mr. Bea re continuance of backpay hearing, calendar new hearing date—.3

12/13/83

Telephone conference(s) with Mr. Bea re continuance of backpay hearing, calendar new hearing date—.3

12/14/83

Conference(s) with Mr. Richardson re discovery and dictate memo on way home in plane—.3

12/15/83

Telephone call(s) to posi-serve re service on Roland and return of proofs of service for subpoenas—.3

12/17/83

Work w/ secretary to get insurance co. records w/o subpoenas (12/16) secretarial time included—.5

12/27/83

Instruct re preparation and service of subpoenas re Womack's disability claims; review subpoenas prepared for service—.5

12/28/83

Telephone call(s) from custodian of records, Occidental Insurance re Womack records—.2

12/28/83

Review Womack's disability claims for Occidental Insurance policy number; telephone call(s) to record custodian for Occidental re policy number; follow-up letter(s) to custodian; instruct re preparation and service of Roland subpoenas; follow-up letter(s) to Tel-Tech re bank account addresses and numbers—1.0

12/29/83

Telephone call(s) to Rachel Young, left message to call back; review correspondence from Security Bank re Boothby records; letter(s) to Security re Boothby records; telephone call(s) from Rachel young re stipulation for admissability of custodian declarations; confirming letter(s) to Young re stipulation & Womack's social security records—.4

12/30/83

Telephone call(s) to Tel-Tech investigations re bank account search, left message to call back; review records from Pierce National Insurance re Womack; telephone call(s) to Pierce National, left message to call back; telephone call(s) from Tel-Tech re bank account search—1.8

1/2/84

Womack: work on Pierce, Directors Insurance, bank meeting—.3

1/4/84

Telephone call(s) from social security SF branch director re Womack's disability records; telephone call(s) to Rachel Young re Womack authorization, left message to call back; letter(s) to Young re authorization—1.3

1/5/84

Telephone call(s) from Rachel Young re Womack's social security records—.3

1/06/84

Call from Porky Armenta; and to Neal Carter; various calls to do work that should have been done 11/16 (memo)—1.0

1/6/84

Telephone call(s) to Manhattan Life, N.Y. re Womack records—.3

1/9/84

Work on declarations of the custodian of records—.3

1/9/84

Telephone call(s) to Manhattan Ins. re Womack records; follow-up letter to Manhattan—.4

1/11/84

Call(s) with Rachel Young re meeting to review records delivered to NLRB; conference(s) with Mr. Bea re meeting with

Young; review subpoena file re records delivered to NLRB—.4
1/12/84
Review transcript of 12-13-83 hearing re legal issues which require research—.2
1/13/84
Review correspondence from Rachel young re Foundational Objections Agreement; telephone call(s) to Young re agreement; conference(s) with Mr. Bea re agreement—.5
1/16/84
Womack; declaration to Safeway Stores re 8/82 application by Womack—.3
1/16/84
Telephone call(s) to bank custodians re records of Craig, Boothby and Womack; conference(s) with Mr. Bea re bank records—.2
1/18/84
Womack check decision—.2
1/18/84
Conference(s) with Mr. Bea re Womack's workers' comp award and Craigs financial statements—.4
1/19/84
Conference(s) with Mr. Bea re trial brief and issues re burden of proof—.2

Date—Description of Charges—Amount
10/19/83
Telephone time and charges—$ 6.99
10/19/83
Photocopies—7.67
10/29/83
Robert W. Richardson out of pocket expenses: parking, mileage, tolls, etc.—.30
10/30/83
Robert W. Richardson out of pocket expenses: parking, mileage, tolls, etc.—35
10/31/83
Robert W. Richardson out of pocket expenses: parking, mileage, tolls, etc.—38
11/1/83
Robert W. Richardson out of pocket expenses: parking, mileage, tolls, etc.—.43
11/02/83
Robert W. Richardson out of pocket expenses: parking, mileage, tolls, etc.—.30
11/11/83
Richard Idell Airfare to Los Angeles reim-bursement-hearing of 10/11/83—30.00
11/11/83
Robert W. Richardson out of pocket expenses: parking, mileage, tolls, etc.—.38
11/11/83
Telephone time and charges—9.63
11/16/83
Photocopies—2.10
12/5/83
Special T Messenger Service—.88
12/5/83
Federal Express—12.50
12/6/83
Los Angeles Superior Court filing fee—23.00
12/7/83
Sonic Air Courier—20.00
12/10/83
Investigative Consultants-Corporate Report—7.50
12/12/83
Carlos Bea air fare to Los Angeles for trial—35.75
12/14/83
Telephone time and charges—10.32
12/14/83
Photocopies—8.13
12/14/83
Telephone time and charges—10.31
12/14/83
Photocopies—8.12
12/14/83
Federal Express—3.12
12/23/83
Federal Express Air Freight—44.75
12/23/83
Federal Express—12.50
12/29/83
Federal Express—3.20
12/29/83
Security Pacific National Bank—9.20
1/6/84
Federal Express—4.00
1/6/84
Federal Express—3.02
1/6/83
Transamerica Occidental Life Insurance—12.85
1/6/83
Special T Messenger Service—42.63
1/12/83
Federal Express—75.85
1/12/83
Federal Express—15.63
1/12/83
Federal Express—.33

Neal Carter and Associates

Performed services rendered:	
Investigation: (29-1/2 hrs. @ $25 per. hr.	$737.50
Mileage:	122.80
Telephone: (Local & Dist)	190.05
Steno & Miscellaneous	47.50

Total:	$1097.85
Labor Relations Specialists	
Performed services rendered:	$75.00
Lloyd C. Ownby Jr.	
Performed services rendered: 4-1/4 hrs. @ $75 per. hr.	$318.75

Rachael Young, Esq., for the General Counsel.
Carlos Bea and *Robert Richardson, Esqs. (Bea & Schatz)*, of San Francisco, California, for the Applicant.

SECOND SUPPLEMENTAL DECISION

Equal Access to Justice Act

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. This second supplmental decision follows an Order of the United States Court of Appeals for the Ninth Circuit remanding the instant matter for further proceedings to determine the Applicant's entitlement to an award of attorneys' fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), as amended by Pub. L. 99-80, 99 Stat. 183 (1985) (EAJA). More particularly the case arose as follows.

On 23 July 1982, the Board issued a Decision and Order[1] finding American Pacific Concrete Pipe Company, Inc. (the Applicant) had committed certain unfair labor practices among which were the discharges of certain individuals including Milton L. Womack. The Applicant was ordered to make these individuals whole. The United States Circuit Court of Appeals for the Ninth Circuit enforced that decision on 28 April 1983.[2] Thereafter the parties were unable to reach agreement regarding the backpay due certain individuals including Womack. As a consequence, on 23 September 1983, the Regional Director for Region 31 issued a backpay specification and notice of hearing alleging Womack and others were entitled to backpay for certain periods. The backpay period alleged for Womack spanned the period 28 January 1981 to 30 September 1982. The amount sought, excluding interest, was $43,186.79. On 31 January 1984, during the hearing on the backpay specification, counsel for the General Counsel moved to delete from the backpay specification all reference to Womack thus abandoning all claims made on his behalf. This motion was approved by me without opposition on that date.[3]

On 1 March 1984 the Applicant filed with the Board an application for an award of fees and other expenses pursuant to the EAJA with respect to the Womack litigation. The Board on 9 March 1984 issued an Order referring the application to me for appropriate action. On 29 March 1984 the General Counsel filed a motion to dismiss the application and, on 2 April 1984, the Applicant filed an amendment to its application alleging additional expenses. On 27 April 1984, I issued a supplemental decision dismissing the Applicant's application based on a determination that under the Board's Rules and Regulations the Applicant was not eligible for an award. On 23 August 1984 the Board affirmed this finding and denied the Applicant's application.[4] On review of the Board's Supplemental Decision and Order, the United States Court of Appeals for the Ninth Circuit reversed the Board's finding and remanded the matter to the Board on 25 April 1986.[5]

Thereafter the Board solicited statements of position from the parties. The Applicant submitted a statement of position dated 27 August 1986 and the General Counsel submitted a statement of position on 3 September 1986. On 16 September 1986 the Applicant submitted a response to the General Counsel's statement of position. On 7 October 1986 the Board by supplemental order remanding proceedings to the administrative law judge remanded the matter to me for further proceedings as necessary to determine the Applicant's entitlement for an award for attorneys' fees and expenses under the EAJA in light of the court's decision.

On 20 October 1986 I issued an order denying the General Counsel's 29 March 1984 motion to dismiss and setting the time for filing of the General Counsel's answer to the application and for the receipt of any response by the Applicant. On 24 November 1986, the General Counsel filed its answer to the application for award under EAJA and memorandum in support and, on 9 December 1986, the Applicant filed a response.

Based on all the above and the record of the backpay hearing, I make the following

FINDINGS AND CONCLUSIONS

I. ISSUES NOT NOW IN DISPUTE

As a result of the pleadings, the court of appeal's decision in this matter and the parties' statements to the Board, the following findings and conclusions are not disputed and are found to be true.

A. *The Applicant Meets the Board's Standard for Eligibility to Apply for an EAJA Award*

The United States Court of Appeals for the Ninth Circuit decided, supra, that the Applicant met the net worth requirements of the EAJA and is an eligible applicant. Therefore, I find that the applicant is eligible pursuant to Section 102.143(c)(5) of the Board's Rules and Regulations[6] to seek such an award.

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[1] *American Pacific Concrete Pipe Co.*, 262 NLRB 1223 (1982).

[2] 709 F.2d 1514 mem. (9th Cir. 1983).

[3] My supplemental decision concerning the amended backpay specification with Womack's claim's deleted issued on 22 February 1985 and is now before the Board on exceptions by the General Counsel and the Applicant.

[4] 271 NLRB 1171 (1984).

[5] *American Pacific Concrete Pipe Co. v. NLRB*, 788 F.2d 586 (9th Cir. 1986).

[6] Sec. 102.143(c)(5) defines applicants eligible to receive awards as "any other partnership, corporation, association, public or private organizaiton with a net worth of not more than $5,000,000 and not more than 500 employees." This $5 million limit was raised in the 1985 amendments to the EAJA (Pub. L. 99-80, 99 Stat. 183 (1985)), to $7 million. The court's decision in this matter, however, determined that the original amount was appropriate for testing eligibility in the instant case.

B. *A Backpay Proceeding Is an Adversary Adjudication Within the Meaning of the EAJA*

The EAJA provides for fees incurred during an adversary adjudication. The Board's Rules and Regulations, Section 102.143(a) defines the term "adversary adjudication" as including backpay proceedings. Accordingly, the applicant is eligible to seek appropriate fees and expenses incurred during the litigation of the backpay proceeding.

C. *The Applicant's Application Was Timely Filed*

Although there was some initial dispute concerning the dates on which certain events occurred, it is clear and I find: (1) that the General Counsel withdrew the Womack allegation from the backpay specification on 31 January 1984, and (2) the Applicant filed the instant application with the Board on 1 March 1984. The Board's standard for filing an application is set forth in Section 102.148 of the Board's Rules and Regulations and requires a filing within 30 days of the operative event ending the proceeding. The General Counsel does not dispute, and I find, that Respondent's application was timely filed.

D. *The Applicant Was a Prevailing Party in Connection with a Discrete Portion of the Backpay Proceeding*

As a result of the General Counsel's motion to withdraw the Womack allegation from the backpay specification and my approval of that motion, there was no formal finding that the General Counsel's claims as to Womack were without merit. There can be no doubt, however, that, on the withdrawal of the allegation, the Applicant was in the identical situation as if it had prevailed on this issue after full litigation. Where a government agency withdraws or changes its position after initiating an action, it is clear the applicant must be viewed as if it had prevailed in the litigation. The Board so holds. *Shrewsbury Motors*, 281 NLRB 486 (1986). There is no dispute that the Womack allegations constitute a discrete portion of the backpay proceeding as required in the Board's Rules and Regulations Section 102.143(b). Accordingly, and without dispute by the General Counsel, I find that the Applicant was a prevailing party with respect to the Womack allegations.

II. DISPUTED ISSUES

The issues in dispute at this stage of the proceeding may be divided into three categories. First, the General Counsel makes various threshold attacks on the sufficiency of the application and its supporting documentation, which were opposed by the Applicant. Second, the parties strongly differ over the question of whether the General Counsel was "substantially justified" in including Womack in the backpay specification. Finally, assuming the substantial justification issue is decided in favor of the Applicant, the parties dispute what portions of the Applicant's claim should be included in an award. It is appropriate to consider these issues separately.

A. *The General Counsel's Threshold Arguments*

1. The deferral issue

The General Counsel argues that resolution of the instant matter should be deferred until the remaining portions of the backpay specification now before the Board are covered by a "final Order of the Board." A similar motion from the General Counsel was denied with Board approval in the initial decision in this matter.[7] The General Counsel made a similar motion to the Board in its statement of position on remand after which the Board remanded the matter for further proceedings without comment. Under all the circumstances, I can see no reason why the circumstances supporting the earlier refusal to defer this case have changed. Accordingly, I deny the General Counsel's motion to defer this case.

2. The General Counsel's allegation that the Applicant failed to properly serve all parties

The Board's Rules and Regulations, Section 102.148(a) states in part:

> The application shall be served on the Regional Director and all parties to the adversary adjudication in the same manner as other pleadings in that proceeding. . . .

The General Counsel correctly asserts that there is no evidence that the application or the amended application was served by the Applicant on the Charging Party in the original unfair labor practice case or its attorney. The Applicant made the following statement in its response to the General Counsel's statement of position to the Board:

> The Charging Party "Union and its attorney" may have been parties to the charge (backpay specification) but when Mr. Womack dismissed voluntarily on January 31, 1984 with the *placet* of the General Counsel, and of the Administrative Law Judge, and the only matter remaining before the ALJ was the application for fees (*not* directed against the charging Union) your applicant's counsel is at a loss to determine why the Charging Union or its attorney are still "parties" through the "adversary adjudication."

The Applicant renewed its argument that such service was unnecessary in its response to the answer.

It is clear that the General Counsel is correct that the Rules and Regulations require service on all parties to the adversary proceeding. The clarity of the rule binds me irrespective of the Applicant's questioning of the underlying rationale of the rule. It is a separate matter, however, to determine the consequences of the lack of service at this stage of the proceeding after substantial litigation both before the Board and the court. Given the current status of the case, I find that the earlier service omissions are not fatal to the Applicant's claim and,

[7] 271 NLRB 1171 (1984).

therefore, the General Counsel's motion to dismiss the application based on failure of service is denied.[8]

3. The General Counsel's attack on the Applicant's documentation

The General Counsel attacks the specificity of the Applicant's documentation of its fees and expenses. The Applicant notes the General Counsel's attack is essentially de minimis. I do not find that the Applicant's documentation of fees and expenses is so inadequate as to require either a dismissal of the application or an order under Rule 102.147(h) of the Board's Rules and Regulations for other substantiation.

B. *Was the General Counsel "Substantially Justified" in Including Womack in the Backpay Specification and not Withdrawing the Womack Allegation Until Midhearing on 31 January 1984*

In order to consider whether the General Counsel was "substantially justified" in including Womack in the backpay specification and in not withdrawing the claim until 31 January 1984, it is necessary to consider: (1) the Board's procedures and substantive law concerning backpay specifications, (2) the actual actions and knowledge of the General Counsel during the backpay litigation in the instant matter, and (3) the decisional law applying the EAJA to Board procedures.

1. Backpay specifications generally

The Board litigates unfair labor practices in a two-step procedure. Generally, allegations of wrongdoing are litigated in an initial or unfair labor practice stage. Thereafter, if a respondent has been found to have committed unfair labor practices and has been ordered to remedy those unfair labor practices by the Board and/or a United States court of appeals and, if a dispute arises over whether compliance with that order has been achieved, the Board utilizes a second-step or compliance stage. Where, in an initial unfair labor practice proceeding, a respondent has been found to have wrongfully discharged an individual and has been ordered to reinstate that individual and to make him or her whole for losses suffered and, if a dispute arises concerning the amount of money necessary to make such an individual whole, the compliance stage is initiated through the use of a backpay specification. A backpay specification normally alleges the period of time an individual was deprived of employment, the gross amount of wages and other benefits that individual would have accrued had his or her employment not been terminated, and admits interim earnings or other events relevant to the individual, which would reduce the amount claimed. There is a substantial body of law dealing with backpay specifications and the burdens of proof assigned to respondent and the General Counsel. Generally, the burden of proof lies with the General Counsel in establishing elements of gross backpay and, equally generally, the burden of proof falls to a respondent to show that there should be deductions from gross backpay.[9]

2. The Womack allegations[10]

The General Counsel's backpay specification alleged Womack as a discriminatee named in the unfair labor practice case and entitled to backpay for the period 28 January 1981 to 30 September 1982. No interim earnings were admitted in the backpay specification and at no time during the backpay period was Womack conceded by the General Counsel to have been out of the job market or unable to work. The Applicant's answer to the backpay specification denied generally all allegations of the backpay specification pertaining to Womack but specifically alleged that Womack's "physical and mental condition" made it impossible for him to work during the backpay period.

In October 1983, before the hearing on the backpay specification was held, the Applicant sought from the Regional Director subpoenas to conduct prehearing depositions of Womack and others to obtain evidence in support of its affirmative defenses. The Regional Director denied the subpoena application and the Applicant sued the Regional Director in United States District Court for the Central District of California (Case 83-6481 (EMT) PX) seeking an order compelling discovery or an order restraining the Board from proceeding with the backpay hearing until discovery could be accomplished. This suit was not successful and, after a postponement, the Board's backpay specification hearing opened on 13 December 1983 without the Applicant having obtained pretrial discovery.

On the opening day of trial on 13 December 1983 testimony was heard from the General Counsel's compliance officer concerning how the backpay specification was prepared. The Applicant moved for and was granted a postponement of the hearing until 31 January 1984 to obtain subpoenaed evidence and prepare its defenses. On the second day of trial, 31 January 1984, the Applicant sought an additional postponement in order to obtain documents relevant to the Womack matter. This postponement was rendered unnecessary when the General Counsel withdrew the Womack allegations in midtrial that day.

Evaluating the substantive merits on the basis of the record before me, I make the following conclusions. The General Counsel's evidence concerning the gross backpay formula regarding Womack and the calculation of his gross backpay was never under substantial attack[11]

[8] I also note that the Charging Party in the unfair labor practice case did not make an appearance through counsel or otherwise in the backpay specification litigation. Thus a question exists whether the Charging Party was in fact a "party" to the backpay specification within the meaning of the rule.

[9] *Big Three Industrial Gas*, 263 NLRB 1189 (1982).

[10] The Womack allegations were withdrawn without an evidentiary record on the merits or a statement by the parties of the reasons for the withdrawal of the allegations from the backpay litigation. The following recital of the motivations and actions taken in the backpay litigation are based on the statements of the parties contained in the filings in the EAJA portion of the case.

[11] The Applicant in its various statements of position never challenged the gross backpay allegations. Indeed, its general denials in its answer may have been inadequate as a matter of law to put the allegations into contest.

and was sufficient to carry the General Counsel's burden of proof. With respect to the Applicant's affirmative defense of Womack's disability, I find there was never a difference of legal interpretation rather there was one solely of fact. If Womack had been disabled and unable to work, all parties agreed he would take nothing under the specification. The Applicant's position at all relevant times was that Womack was disabled during the entire backpay period. The General Counsel apparently believed until the specification was withdrawn that there was insufficient evidence to accept the Applicant's arguments until the matter had been fully litigated. On 31 January 1984 the General Counsel determined it was appropriate to withdraw the Womack allegations in the face of this defense.

3. The General Counsel's knowledge of the Applicant's disability defense

The substantial justification, if any, of the General Counsel's proceeding in the face of the Applicant's disability defense is the heart of the instant case. It is appropriate to consider what the Government knew and when it knew it.[12]

a. *Womack's report to the General Counsel*

Initially the General Counsel obtained backpay information from the discriminatees including Womack. This information was obtained on an ongoing basis throughout the unfair labor practice litigation. Womack told the General Counsel he had been employed as a truckdriver by the Applicant until March 1979 when he was injured on the job. Womack reported that his doctor, Dr. Freedle, told him he could not go "back to driving a truck at this time." Womack drew workman's compensation for a year, after that he received a payment from the Applicant's insurance carrier. Womack reported that some 18 months after his injury he began receiving temporary social security payments. Womack recalled being told the payments were temporary and recalled applying for temporary disability. His papers however had been destroyed in a February 1981 garage fire.

Womack told the General Counsel's agents that in January 1981, Dr. Freedle told him to "look for something to do" and that the doctor was considering releasing him. Dr. Freedle did not tell Womack what work to seek and did not tell him he could not return to truckdriving work. Dr. Freedle released Womack to work a week later, signing a slip so indicating. Womack claimed this release was later destroyed in the fire in his garage. He immediately began looking for truckdriving employment and continued his search through 1981 continuing in 1982 with two interruptions of a "couple of months" each. Womack did not find employment.

Womack reported that in June 1983 the Applicant offered him reinstatement and also sought health information. Womack called Dr. Freedle's office and asked for a copy of his 1981 release. He was told it would take a few days. A few days later Womack went to the doctor's office and was given a release dated 28 June 1983 signed by Dr. Freedle that declared Womack able to return to work as of 28 January 1981.[13] This release was given to the General Counsel. Womack further told the General Counsel's agents that after his 1981 release he believed he could return to driving and that Dr. Freedle told him nothing to the contrary.

b. *The General Counsel's prebackpay specification exchange of information with the Applicant*

It is clear that by 2 September 1983, Counsel for the Applicant Carlos Bea, had informed the Board's Regional compliance agent, James Middleton, of the Applicant's disability defense concerning Womack. Middleton by letter dated that day informed Bea that, if the Applicant supplied "conclusive evidence" that Womack or others were ineligible for backpay, the backpay specification concerning them would be amended.

On 15 September 1983 Bea wrote Middleton arguing that Womack had been unemployable throughout the backpay period and attaching as evidence a report by Dr. Freedle dated 25 February 1982 to the Applicant's insurance carrier.[14] This report indicates Dr. Freedle examined Womack both before and on 28 January and that at all times since his accident Womack had not been physically able to work.

c. *Postbackpay specification developments*

The Regional Director issued the backpay specification on 23 September 1983 including the Womack allegations. There is no evidence that the General Counsel's agents received additional information on the Womack claim until the opening day of trial on 13 December 1983. On that date, in support of the Applicant's motion for a postponement of the trial of Womack's claims, counsel for the Applicant asserted that, pursuant to subpoena, the Applicant had received records that indicated that Womack, in addition to receiving disability payments from the Applicant's insurance carrier, had filed disability claims with four other insurance carriers. Further counsel for the Applicant represented that the records indicated that Womack had applied to social security for some type of disability and had obtained a doctor's certificate in support thereof.

No evidence was taken on the Womack disability defense that day and the trial was adjourned until 31 January 1984. There is no evidence that the General Counsel sought or obtained additional information on the issue or changed its position until the second day of trial.

On 31 January 1984 at the opening of the hearing the Applicant sought a further postponement in order to obtain Womack's social security file, which counsel for

[12] While there was initial dispute regarding certain facts, the General Counsel's answer and the Applicant's response are not at essential difference concerning the relevant facts. While the Applicant points out the General Counsel did not obtain Womacks' affidavit which it submitted with its answer until the instant Application had been filed, the Applicant did not otherwise contest the factual assertions contained therein.

[13] The release was on a medical office letterhead and was apparently signed by another on behalf of Dr. Freedle as the parenthetical initials "(ss)" appeared under the signature.

[14] This report, like the release described supra, was on medical letterhead and bore the same handwritten signature followed by the same parenthetical "(ss)."

the Applicant indicated he believed would show that Womack had sought and obtained social security disability benefits whose benefits would have been predicated on a finding that Womack was unable to work at any gainful employment. Evidence was taken only on portions of the backpay specification independent of Womack and, following an afternoon recess, the General Counsel withdrew all claims regarding to Womack.

4. The contention of the parties

The General Counsel's position on its substantial justification for including Womack in the backpay specification is stated in its memorandum in support of answer to application for award of attorneys' fees and expenses. The General Counsel initially asserts:

> In backpay proceedings it is well settled that the General Counsel has the burden of proving gross backpay and that the Respondent has the burden of establishing facts which would negate the existence of backpay liability or which would mitigate that liability. *M Restaurants, Inc. d/b/a The Mandarin*, 238 NLRB 1575 (1978); *Big 3 Industrial Gas & Equipment Co.*, 263 NLRB 1189 (1982).
>
> In the instant matter Mr. Womack's eligibility to receive backpay, based upon his fitness to function as a truckdriver, was at issue. Respondent contended that Mr. Womack was totally disabled and therefore ineligible for backpay. Respondent, through Counsel, submitted a medical report from a Dr. Ernest M. Freedle which proported to establish Mr. Womack's total disability [footnote omitted].
>
> However, conflicting evidence was submitted that Mr. Womack had been released by his physican to work, and that Mr. Womack had looked for interim employment [citations to evidence omitted].
>
> Where, as here, there is a genuine issue as to which evidence should be credited, the matter is customarily placed, and herein the General Counsel was substantially justified in initially placing, that issue before the Administrative Law Judge, rather than resolving that issue administratively. For the General Counsel to have done otherwise would have undercut the division of functions between the General Counsel and the Board and would be inconsistent with the fair and just administration of the National Labor Relations Act.
>
> While Respondent may contend that the evidence submitted in regard to Mr. Womack was conclusive, it was in fact one doctor's opinion as to Womack's condition. Therefore, it was not unreasonable for General Counsel to name Womack in the Backpay Specification even considering Respondent's submission and particularly as General Counsel had contrary evidence. While there can be disagreement as weight given the respective submissions, it is just such disagreement which makes appropriate consideration of the evidence by a trier of fact in this case the administrative law judge.
>
> An evaluation of evidence submitted, in this circumstance, is an ongoing process. The fact that at some point, based on such a reevaluation, the General Counsel may alter positions previous taken, does not mean that the position taken was unreasonable. Herein, as there was conflicting evidence, it was not unreasonable for the General Counsel to proceed cautiously as there was a good deal at stake, i.e., the Agency's statutory responsibility to the public in remedying the judged unfair labor practices in Mr. Womack's entitlement to backpay. Further, as the burden of proof regarding litigation of backpay liability is upon Respondent, it was not unreasonable for General Counsel to evaluate its position based upon that premise and to make the initial decision to include Mr. Womack in the backpay proceedings.
>
> While General Counsel did move on January 31, 1984 to withdraw Mr. Womack from the backpay proceedings, underlying this application, General Counsel was substantially justified in naming Mr. Womack and proceeding on that aspect of the case until that time.

The Applicant's reply to the General Counsel's answer contains the Applicant's most refined position regarding the substantial justification issue. Relying on the factual background described, supra, the Applicant asserts that it early provided evidence of Womack's disability in the form of Dr. Freedle's report but that the General Counsel took several unjustifiable positions respecting the evidence. First, the General Counsel refused to make any investigation to determine which of Dr. Freedle's seemingly contradictory documents was correct. Second, the General Counsel declined to allow prehearing depositions by the Applicant that would have allowed the Applicant to depose Dr. Freedle. Third, the General Counsel opposed the Applicant's action in U.S. district court that would have allowed pretrial depositions of Dr. Freedle and others relevant to the Womack claim.

In summary, the Applicant asserts:

> This is not the case of a General Counsel "surprised" at the hearing with a report which shows physical disability by the alleged discriminatee in the period of the claimed backpay specification. This is a case of conscious, determined refusal to investigate proffered evidence, resulting in a "we'll see you in court" attitude which the Courts have denounced as "bad faith."

5. Analysis and conclusions regarding substantial justification

The Applicant's argument in the instant case is implicitly twofold. First is the argument that the General Counsel, on the basis of the evidence before it, was not substantially justified in pursuing the Womack allegations. Second is the argument that, had the General Counsel only investigated the Applicant's defense or acquiesced in the Applicant's attempts to investigate through prehearing depositions, the necessary evidence would have been uncovered, which would have conclusively demonstrated that the Womack claim was without merit. Because the General Counsel wrongfully failed to do either, argues the Applicant, it must be held to have

known what would have been uncovered. Those facts fully support a finding that the General Counsel was not substantially justified in pursuing the Womack allegations. Finally, the Applicant argues that the General Counsel's hindrance of the Applicant's attempts to obtain pretrial discovery also justifies a finding of no substantial justification.

Each argument raises separate issues that are best addressed separately.

a. *Was the General Counsel substantially justified in issuing and maintaining the Womack allegations based on the information actually before it?*

(1) The decisional law with respect to substantial justification in disputed fact situations

The Board had recently reiterated its view of the General Counsel's substantial justification for maintaining actions based on conflicting evidence, which is ultimately resolved against the General Counsel. In *National Fire Protection*, 281 NLRB 624 (1986), the Board found it proper for the General Counsel to maintain an action where credibility conflicts could not be resolved administratively through documentary evidence because Board practice requires that such credibility issues be resolved at a hearing before an administrative law judge.

(2) Findings regarding the General Counsel's substantial justification given the evidence before it

Because the evidence known to the General Counsel varied over time, three separate dates must be considered in evaluating the General Counsel's substantial justification.

(a) *The General Counsel's substantial justification for issuing the backpay specification on 23 September 1983*

On 23 September 1983 the General Counsel had received Dr. Freedle's report[15] which, if credited, clearly indicated Womack was totally disabled at least through the date of the report, 25 February 1982. It also had Womack's assertions that Dr. Freedle had certified his ability to return to work in January 1981 and Womack's statements that he had in fact sought such employment. Womack's assertions were importantly corroborated by Dr. Freedle's signed certification dated 23 June 1983 which asserted on its face that Womack had been eligible to return to work as of 28 January 1981.

Faced with this conflicting documentary evidence the General Counsel issued a backpay specification asserting Womack was eligible for backpay as of 28 January 1981. Given the Board's holding in *National Fire Protection*, supra, it cannot be found that the General Counsel was not substantially justified in placing the disputed evidence, i.e., the conflicting documents attributed to Dr. Freedle and Womack's assertions, before an administrative law judge for resolution. Accordingly, I find that as of 23 September 1983 the General Counsel was substantially justified in issuing the backpay specification with the Womack allegations.

(b) *The General Counsel's substantial justification on and after 13 December 1983*

On 13 December 1983, in open court, counsel for the Applicant asserted it had obtained documentary evidence showing that Womack had made multiple claims for disability. Does this additional information make the General Counsel's continuing prosecution of the Womack claim no longer substantially justified?

Considering the evidence Womack had supplied earlier to the General Counsel, see discussion, supra, that his disability claims were temporary, I do not believe the 13 December assertions of counsel for Applicant rendered the General Counsel's claim unjustifiable given the continuing factual conflicts. Nor do I believe counsel for Applicant considered this evidence conclusive. Immediately after making these assertions at the opening of the trial, Counsel for Applicant pressed his motion for a postponement to allow additional time to subpoena additional evidence. Counsel Bea stated:

> I want to go get the records of those insurance companies to show—to see what declarations [Womack] made to them regarding his physical condition and whether he was able to work as a truckdriver or not. I'm not in a position to do that here at the present time without applying for depositions . . . . But, that is, on Womack's case, I simply am not ready to proceed with him and I need a continuance to take some depositions of those custodians to find out what he said to them about his physical condition. [Tr. 15]

For the same reason that counsel for the Applicant felt he needed time to obtain more evidence, i.e, that the matter was not conclusively resolved by the evidence on hand,[16] I find the General Counsel, too, was entitled to maintain its position unless and until documentary evidence could be obtained that would show that Womack's representations and Dr. Freedle's release were incorrect.[17]

Accordingly, I find that the General Counsel was substantially justified in maintaining the Womack allegations through the conclusion of the day's hearing on 13 December 1983.

[15] This report would have been mailed on Thursday, 15 September 1983 and received on or about Monday, 19 September 1983. Before its receipt the General Counsel had no documentary evidence tending to support the Applicant's defense. Thus, the General Counsel was clearly justified in maintaining its position regarding Womack at least until receipt of the report. However, because I find elsewhere in this decision that prebackpay specification fees and expenses are not recoverable, it is not necessary to consider the General Counsel's justification or lack thereof at any time prior to the issuance of the backpay specification on 23 September 1983.

[16] Mr. Middleton's testimony on 13 December 1983 makes it clear the Applicant had by that time been provided a copy of the Dr. Freedle's 28 June 1983 release.

[17] The apparent belief of counsel for the Applicant that his evidence was not conclusive on the issue is not independently relevant to the issue of the General Counsel's substantial justification. The statements of counsel for the Applicant regarding the inconclusiveness of the evidence on hand made in the presence of counsel for the General Counsel is a factor to be considered in deciding the issue.

(c) *The General Counsel's substantial justification from 13 December 1983 through withdrawal of the allegation on 31 January 1984*

The only new information obtained by the General Counsel after the close of the hearing on 13 December, at least as is evident on this record, was the assertion by counsel for the Applicant on the opening of the second day of hearings on 31 January 1986 that additional time was necessary to obtain Womack's social security file, which counsel for the Applicant hoped would contain claims of permanent disability by Womack.[18]

Given Womack's assertion to the General Counsel that his only claims with social security were for temporary disability, I do not find this information modifies my earlier analysis, nor do I find the General Counsel's change of position on the afternoon of 31 January 1984 when she withdrew the Womack claims undermines these findings. As the General Counsel argues on brief, subsequent reevaluation of an earlier position does not render the earlier position unjustified. Accordingly, I find the General Counsel's maintenance of the Womack assertion substantially justified until its withdrawal.

(b) *Was the General Counsel substantially justified in proceeding to trial without further investigation of the Applicant's defense?*

I have found that the conflicting reports of Dr. Freedle—each apparently in the same handwriting—justified the General Counsel taking the Womack allegation to a hearing. I also accept the Applicant's assertion that, if the General Counsel had contacted Dr. Freedle, the conflict could have been resolved. So, too, I find that if the General Counsel had obtained Womack's complete social security file, the evidentiary conflict would have been resolved.

May the General Counsel rely with impunity on conflicting evidence as justification for maintaining an adversary action when a simple investigation would have resolved the conflicting evidence in favor of the Applicant? Without asserting the proposition more broadly, I believe that where the disputed evidence concerns an affirmative defense in a backpay proceeding in which the burden of proof is on the Applicant, the General Counsel is under no obligation to investigate further. I also believe there is clear Board precedent for such a finding.

A backpay proceeding does not involve findings of wrongdoing. Rather, it liquidates or renders specific an order previously issued and determines compliance with that order. Generally, respondents are obligated as part of the original order to participate in the investigative portion of the compliance stage.[19]

As noted, supra, the burden of proof regarding mitigation of backpay, including issues of disability, is explicitly on respondents. Paragraph 10737.2 of the National Labor Relations Board's Casehandling Manual, Part Three, Compliance Proceedings, makes it clear that with respect to these matters, while the General Counsel may make evidence available to Respondent and admit adverse facts,

> it is not the General Counsel's policy to assume respondent's burden of proof and attempt to establish that there are no facts in mitigation . . . .

The Board has explicitly recognized and approved this practice in an EAJA case, *Phil Smidt & Son*, 276 NLRB 1157 (1985). In that case the Board found the General Counsel substantially justified in issuing and litigating a backpay specification in which the General Counsel did not prevail on the issue of interim earnings—which like disability is an area where respondent bears the burden of proof. The Board approved the following language of the administrative law judge, 276 NLRB at 1158:

> That does not mean that Applicant is entitled to some portion of his fees and expenses [under the Equal Access to Justice Act]. The finding of an unfair labor practice is "presumptive proof that some backpay is owed." *Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 US 972 (1966). The General Counsel bears the burden of proving the applicable backpay period and an appropriate formula for computing backpay. It is the Respondent which bears the burden to prove interim earnings. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963); *DeLorean Cadillac*, 231 NLRB 329 (1977), enfd. in relevant part 614 F.2d 554 (6th Cir. 1980); *NLRB v. Izzi*, 395 F.2d 241, 244 (1st Cir. 1968); *NLRB v. McCann Steel Co.*, 570 F.2d 652, 655 (6th Cir. 1978); *NLRB v. Mercy Peninsula Ambulance Service*, 589 F.2d 1014, 1017 (9th Cir. 1979).
>
> Thus, Applicant's principle contention that [the backpay claimant's] interim earnings were not analyzed with the care and scrutiny that the Applicant applied has no merit. It may have been incumbent upon the General Counsel in a backpay proceeding to go forward with testimony from [backpay claimant] as to her interim earnings, but the ultimate burden of proof on this subject must be on Applicant. *NLRB v. Izzi*, supra. Applicant was not taken advantage of by the institution of the compliance proceeding. Rather, it caused the proceeding to be instituted by its unlawful discharge of [the backpay claimant]. The General Counsel, having determined

[18] The Applicant introduced into evidence on 31 January in support of its motion for further continuance an affidavit of Cocounsel Richardson which contained, inter alia, the following assertion:

> Documents and record (above described) which AMPAC has subpoenaed but which will not be available at the hearing on January 31, 1984, are necessary for the proper presentation of AMPAC's case. AMPAC cannot meet its burden concerning . . . the ability of alleged discriminatee Womack to work nor effectively cross-examine these alleged discriminatees concerning these matters in the absence of these records.

[19] The Board's original Order in the instant case, with court approval, directed the Applicant to:

> Preserve and, on request, make available to the Board or its agent, for examining and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order [262 NLRB 1223, 1238 (1982)].

> that [backpay claimant] was not in Applicant's employ for five quarters, was justified in issuing the backpay specification.

Given all the above, I am satified that in the particular and quite narrow situation presented here, the General Counsel did not act improperly in considering both the evidence submitted by the backpay claimant and the Applicant but not further investigating the disability issue. In these circumstances the General Counsel could properly place the matter before an administrative law judge.

c. Are the refusal of the Regional Director to allow pretrial depositions and/or the General Counsel's opposition to the Applicant's U.S. district court action seeking to compel discovery relevant to the instant case?

I agree with the Applicant's assertion that, had the Regional Director allowed prehearing discovery or had the General Counsel not opposed the Applicant's attempt to compel such discovery in U.S. district court, the Womack allegations would most probably have been resolved in the Applicant's favor before the commencement of trial. I further find these facts irrelevant to the instant proceeding and find that they do not support the Applicant's claim that the General Counsel was not substantially justified regarding the Womack allegations.

I make this finding because no substantial contention is made, nor does the evidence show, any error by the Regional Director or the U.S. district court in refusing to allow pretrial depositions. The National Labor Relations Act and the Board's Rules and Regulations place the issuance of orders requiring pretrial depositions within the discretion of the Regional Director. See, e.g., Board's Rules and Regulations, Section 102.30. Insofar as the record reflects, the sole basis offered by the Applicant for seeking pretrial rather than trial discovery was speed and asserted convenience. These are not grounds sufficient to require depositions as a matter of right.[20]

To penalize the General Counsel—even in an EAJA proceeding—for the failure to allow prehearing depositions, would however indirectly, undermine the current policy of the Agency, buttressed by its Rules and Regulations and case law, of placing such orders entirely within the discretion of the Regional Director. Absent Board direction in such an important area—and the Applicant cites no authority—I will not make such a holding. If limiting such discretion is appropriate it should be done directly not indirectly after the fact in an EAJA action.

Accordingly, I find the denial of pretrial depositions irrelevant to the issue of substantial justification. For the same reason, if the original action of the Regional Director was not inappropriate, it was not inappropriate for the General Counsel to oppose the Federal district court suit attacking the Regional director's exercise of discretion.[21]

[20] All requests for depositions and related postponements made to the trial judge by the Applicant were granted.

[21] The issue of the compensability of time spent in the U.S. district court proceeding is discussed, infra.

d. Summary and conclusions on substantial justification

I have found that, at all relevant times, there was sufficient conflicting evidence on the issue of Womack's disability to substantially justify the General Counsel's maintenance of its allegations regarding Womack. I have further found no obligation on the General Counsel to make further investigation to resolve the conflicting evidence before it regarding Womack's disability. Finally, I have found the Regional Director's denial of pretrial depositions and the General Counsel's opposition to the Applicant's U.S. Federal court lawsuit irrelevant to the issue of the General Counsel's substantial justification in maintaining the Womack action.

C. Conditional Findings on Arguments Concerning the Amount of the Award

Having determined the General Counsel was substantially justified in issuing and maintaining the backpay specification allegation regarding Womack at all relevant times, it is unnecessary to resolve further arguments with respect to the Applicant's claim. Resolution of this matter, however, has been substantially delayed and, in my view, it is incumbent on me to avoid if at all possible a new remand with all the associated delays if reviewing authority should differ about my determination concerning the issue of substantial justification. Accordingly, in the unusual situation where this decision issues on a remand from the court of appeals, I believe it is appropriate to deal with other arguments made by the parties, even if only in a conditional sense, in order to maximize the likelihood of resolving this case without a second remand should reviewing authority differ from my findings above. Accordingly, I make the following conditional findings on the assumption that reviewing authority has found that the General Counsel was not substantially justified in the Womack matter and that an award should issue.

1. The compensability of fees or expenses incurred before issuance of the backpay specification

The backpay specification underlying the instant matter issued on 23 September 1983. I have found that the General Counsel did not have evidence, beyond the Applicant's bare assertion, that Womack had a disability sufficient to deny him all recovery during the backpay period until the receipt of the Applicant's 15 September 1983 letter and attached doctor's report. It may be fairly argued that even if that report was sufficient evidence to charge the General Counsel with the duty to omit Womack from the backpay specification, the General Counsel's duty to act would not have occurred instantly upon the receipt of the letter dated 15 September and that it would be reasonable to assume that the General Counsel, under any interpretation of the facts, would not be charged with having acted without justification until after 23 September 1983, a time sufficient to have received and considered the submitted evidence. Setting aside these questions of fact however and working on the assumption that reviewing authority may entirely

reject this factual analysis, the General Counsel makes an independent argument that as a matter of law no applicant is entitled to fees and expenses incurred prior to the issuance of the formal documents initiating the adversary procedure, in this case the backpay specification.

The Board's Rules and Regulations Section 102.144 states in part:

> An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication . . . .

The General Counsel argues that the cited "in connection with" limitation is grounded in the principle that the EAJA is designed to recompense litigants for defending against discretionary actions by the Government which are not substantially justified. Since both the investigation of an unfair labor practice charge and the compliance investigation following a Board order or Court decree are not discretionary actions by the Agency but are rather required under the Act, the General Counsel argues that the Equal Access to Justice Act does not apply to those nondiscretionary procedures. The General Counsel further notes that the Board's original Order, quoted supra, required Respondent, the Applicant here, to preserve records and cooperate in the compliance investigation necessary to liquidate backpay. Therefore, argues the General Counsel, the Applicant should not be compensated for the investigative or prebackpay specification stage of the procedures under any circumstances.

The Applicant asserts that even before the issuance of the United States Court of Appeals order enforcing the Board's Order, it was clear to the Applicant that the Government was proceeding with the backpay specification and, as a consequence, the Applicant's efforts during the prebackpay specification period were part of its defense of the allegations and thus should be fully compensated.

No party cited Board authority on the question. The Board in *Phil Smidt & Son*, 276 NLRB 1157 (1985), approved the decision of an administrative law judge, including the following footnote (Id. fn. 4 at 1158):

> However, it appears firmly established that, until issuance of a complaint in an unfair labor practice proceeding, no previous incurred expenses may be awarded in the EAJA application. *Carthage & Sheet Metal Heating Co.*, Similarly, until the issuance of a backpay specification, here May 11, 1984, no fees and expenses may be awarded.

In *Evergreen Lumber Co.*, 278 NLRB 656 (1986), the Board approved the decision of an administrative law judge who awarded an applicant only postcomplaint fees specifically denying the compensability of precomplaint fees. See also *DeBolt Transfer*, 271 NLRB 299 (1984). Based on these holdings I find the EAJA and the Board's Rules and Regulations do not allow recompense of fees and expenses incurred before the issuance of the backpay specification even were an award otherwise appropriate in the instant case.

2. The compensability of fees and expenses incurred during the litigation of a collateral action in a United States district court

In October 1983, the Applicant filed suit in the United States District Court for the Central District of California in Case 83-6481 (EMT PX) seeking, inter alia, a temporary restraining order postponing the hearing on the backpay specification until the Applicant could obtain information and records from the backpay claimants and an order directing the Regional Director to order depositions which the Applicant felt was necessary before it could defend itself in the backpay specification hearing.[22] Although the record is not completely clear on the matter, it appears the Applicant's action in Federal district court was totally unsuccessful.

The Applicant seeks fees and expenses in connection with the Federal district court action as part of its general claim.[23] The General Counsel opposes this claim under two theories. First, the General Counsel argues that since the Federal district court action was a judicial proceeding, any application for fees and expenses arising out of that proceeding must be governed by section 504(a)(1) and 2412(b) and (d) of the EAJA and such application must be filed in the appropriate Federal court. The General Counsel cites the Board decision in *Granite State Minerals*, 261 NLRB 619 (1982), in which the Board dismissed an EAJA application seeking fees and expenses incurred in an enforcement proceeding in the court of appeals. As the Applicant points out however that decision was based on the language of sections 504(c)(1) and 2312(d)(3) of the EAJA and dealt expressly with fees and expenses in an enforcement action. The Applicant argues that the Federal district court action was in response to the Regional Director's refusal to issue prehearing subpoenas in the backpay litigation and that, accordingly, the Federal court suit was in connection with the Board's backpay specification.

Second, the General Counsel asserts, correctly, that the Applicant did not prevail in the Federal district court action and, accordingly, even viewing that action as within the Board's jurisdiction under the EAJA, the Applicant did not prevail and therefore is not entitled to compensation. The Applicant did not explicitly address this argument.

These arguments may be separately addressed.

a. *The Board's EAJA jurisdiction over a U.S. district court action*

The Equal Access to Justice Act at section 504(c)(1) requires that awards for fees and expenses involved in court review of the underlying decision of an agency adversary adjudication be made pursuant to section 2412(d)(3) of the EAJA, which provides for court not

[22] The Applicant had earlier filed with the Regional Director a request for issuance of subpoenas, but the Regional Director had denied this motion. See discussion, supra.

[23] Because the Federal district court action also involved other backpay claimants who are not part of the instant application, the Applicant determined a proportionate share of the fees and expenses in the Federal district court action and alloted them to the Womack claim in litigation herein.

agency jurisdiction. That situation and the *Granite State Minerals* circumstances, supra, which rely on this language, are not present here. Here the agency decision, which was challenged was an intermediate procedural action undertaken before the merits of the underlying adversary adjudication were addressed.

Section 2412 of EAJA ,which covers judicial jurisdiction, clearly puts Federal court actions under Federal court jurisdiction unless otherwise specifically provided by statute. I find no suggestion that the language of the EAJA otherwise limits this judicial jurisdiction that I regard as exclusive unless clearly stated otherwise. I therefore conclude that agencies, the Board included, have no jurisdiction to consider applications or portions of applications under EAJA, which seek compensation for U.S. district court litigation.

The General Counsel's cited *Granite State Minerals* case is distinguishable and no other case law or legislative history on the issue was cited by the parties. The advantages of one unified consideration of EAJA claims after a final decision has been reached in a complicated litigation is evident. It is also true that the case law does not tend to support the consideration of costs litigation based on rulings on evidentiary or procedural grounds or on the obtaining of preliminary injunctions where no determination has been made on the ultimate merits of the case. See *Hanrahn v. Hampton*, 446 U.S. 754 (1980); *Smith v. University of North Carolina*, 632 F.2d 316 (4th Cir. 1980); *Grubbs v. Butz*, 548 F.2d 973 (D.C. Cir. 1976). Cases do exist however awarding interim attorney fees. See *Hanrahn v. Hampton*, Ibid.; *Bradley v. Richmond School Board*, 416 U.S. 699 (1974); *Grubbs v. Butz*, Ibid.

At bottom I am persuaded a Federal court action must be considered by the Federal court under the EAJA based on fundamental notions of the separation of powers and the limited expertise of administrative agencies. Where the statute is not crystal clear on the question, I am very reluctant to find agency EAJA jurisdiction over Federal court proceedings. Such a finding would seem to turn the question of expertise on its head. I simply do not think any administrative agency has the skills to evaluate an action in the Federal courts. Further, I do not believe Congress intended to create such a right in administrative agencies under the EAJA.

Accordingly, I find the U.S. district court action involved here outside the jurisdiction of the Board under the EAJA. Therefore, I would exclude all claims for recompense for fees and costs incurred in that litigation.

b. *Assuming the Board has EAJA jurisdiction over the U.S. district court action herein, should fees and costs for that litigation be awarded*[24]

The General Counsel, arguing in the alternative, asserts, if the Board has EAJA jurisdiction over the U.S. district court action, no award should issue because the Applicant did not prevail in that litigation. The Applicant asserts: "[T]he time and effort expended [to] try to show the General Counsel the error of her ways was necessarily incurred as the subsequent development of events has proved."

Viewing the district court litigation as part and parcel of the entire Womack litigation, all of which, under this alternative view, is before the Board in an EAJA action, the fact that the Applicant did not prevail in this preliminary portion of the entire Womack litigation does not in and of itself defeat the Applicant's claim. Litigation in this sense is viewed as a unity. If the Applicant has prevailed in the final result, as here, it is not compensated only for the intermediate rulings favorable to it. Rather, with a single exception, the entire litigation is considered in determining an award.

The single exception is set forth in the first sentence of EAJA Section 504(3):

> The adjudicative officer of the agency may reduce the amount to be awarded or deny an award to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

This language is carried forward essentially unchanged in Section 102.144(b) of the Board's Rules and Regulations.

As noted, supra, I have found the Applicant's U.S. district court action unreasonable. It is clear that it protracted the final resolution of the matter in controversy.[25] This being the case, pursuant to Section 504(3) of the EAJA and Board's Rules and Regulations Section 102.144(b), I would deny the Applicant any recompense for the U.S. district court litigation even were it found such litigation were within the jurisdiction of the Board to evaluate under the EAJA.

3. The $75-per-hour fee limit

As part of the Applicant's application, the Applicant asserted the regular billing rate for counsel to the Applicant exceeded $75 per hour and further asserted "a Petition is made under Section 102.146, 29 C.F.R. Part 102 for adjustment of the $75 limitation to reflect these fees." The General Counsel opposes this request citing several cases by the Board denying such petitions. The General Counsel further notes that Section 102.146 of the Board's Rules and Regulations as well as the EAJA "both contemplate the separate petition to be made to the Board for rule making."

My research having uncovered no case in which the Board has modified the $75-per-hour limitation and, further, not finding it appropriate for an administrative law judge to initially grant such a petition, I find the petition is appropriately placed before the Board. I would, therefore, decline to grant any exception to the $75-per-hour rule.

[24] I am here again attempting to avoid a remand should reviewing authority differ with my previous findings regarding agency EAJA jurisdiction over actions in the U.S. district court.

[25] The Applicant argues that, had it prevailed, the suit would have speeded final resolution of the case. That statement is irrelevant because as a matter of current law the action was without merit and was simply not reasonably likely to succeed as the final result in U.S. district court confirmed. In the event, the backpay specification hearing was postponed due to the Federal court action.

III. SUMMARY AND CONCLUSIONS

I have found the General Counsel's inclusion of the Womack allegations in the backpay specification to have been substantially justified within the meaning of the EAJA and the Board's Rules and Regulations and decisional law. Accordingly, I have denied the Applicant's application in its entirety.

In order to avoid a second remand with its attendant delays in the event reviewing authority should differ from my findings concerning substantial justification, I have taken the admittedly unusual step of making further alternative findings that are designed to obviate a second remand if at all possible. Accordingly, I found that, were the conduct of the General Counsel in including the Womack allegation in the backpay specification without substantial justification, the Applicant's claims would be further limited as follows. First, all claims for time and expenses occurring before the issuance of the backpay specification would be denied. Second, all claims and expenses for the preparation and litigation of the matter in district court, as described more completely supra, would be denied. Third, the $75 per hour limitation would remain in effect and claims for higher hourly rates would be denied. Given those exclusions, assuming again that the General Counsel's inclusion of the Womack allegation in the backpay specification were to be found not substantially justified, I would award fees and expenses with the limitations described above, commencing at the time the General Counsel was found to no longer be substantially justified in maintaining the Womack action.[26]

Recommendation

Having concluded that the Applicant's application is without merit because the General Counsel was substantially justified in including the Womack allegation in its backpay specification and in maintaining that allegation until its withdrawal, I find the Applicant's application for fees should be denied.

Accordingly, based on the above, I issue the following recommended[27]

ORDER

The application of American Pacific Concrete Pipe Company, Inc. for attorneys' fees and expenses under the EAJA is denied.

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[26] I make no arithmetic calculations here for two reasons. First, the amount conditionally awarded depends on the further specification of the date the General Counsel was first without substantial jurisdiction to continue the Womack action. Second, the General Counsel did not challenge the Applicant's assertions of hours worked nor the expenses incurred save as previously discussed; thus liquidation of the award would be essentially automatic given the determination of the dates of the commencement of the General Counsel's insufficient justification and no remand would be necessary to produce a fixed dollar award.

[27] If no exceptions are filed as provided by Sec. 102.154 of the Board's Rules and Regulations, the findings, conclusions and recommended order shall as provided in the Board's Rules and Regulations, be adopted by the Board and all objections to them shall be waived for all purposes.

P. J. Dick Contracting, Inc.[1] ***and*** **International Union of Operating Engineers, Local No. 66, AFL–CIO.** Case 6–RC–9850

July 29, 1988

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On July 16, 1987, a hearing was held before Hearing Officer Mark E. Wirick. Pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, the Regional Director for Region 6 transferred this proceeding to the Board for determination of an appropriate bargaining unit. The Petitioner and the Employer filed briefs.

On the entire record, the Board finds

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Formed in 1979, the Employer is engaged in building construction. It joined the Master Builders Association (MBA), a multiemployer bargaining association, and assigned it bargaining rights. The MBA entered a series of 8(f) prehire agreements with the Petitioner in 11 Pennsylvania counties. The Petitioner seeks an election to establish its status as majority representative under Section 9(a).

The record consists of stipulated evidence. No oral testimony was offered. The only point of contention between the parties is the scope of an appropriate bargaining unit.

I. CONTENTIONS AND STIPULATIONS

A. *The Petitioner*

The Petitioner contends the Employer's operating engineers[2] working within its 33 county International Union's geographic jurisdiction constitute an appropriate unit. According to the Petitioner, the Employer performs the majority of its work in Allegheny County, Pennsylvania. However, because of expanded operations, an operating engineer can reasonably expect employment with the Employer in all 33 counties.

Alternatively, the Petitioner requests a unit composed of the Employer's operating engineers working within the 11 counties of the current MBA agreement. It asserts that the bargaining history of this unit illustrates an established and operational relationship and should be preserved. Additionally, according to the Petitioner, the parties' 8(f) prehire agreement is currently enforceable in all 11 counties of the current MBA jurisdiction. Finding this unit appropriate, contends the Petitioner, merely continues the existing voluntary relationship.

B. *The Employer*

The Employer's primary proposal for an appropriate unit is one limited to the operating engineers employed by it in Allegheny County where it performs the majority of its contracts. The Employer contends that work performed in other counties is sporadic and insignificant. Working on those projects, the Employer insists, does not provide an operating engineer with a reasonable expectation of future employment. The Employer maintains that the scope of an appropriate bargaining unit is controlled by the presence of a core group or common nucleus of employees. Only where this core group is present, argues the Employer, is an election a barometer of future employee choice of bargaining representative, permitting broad geographical units.

The Employer alternatively proposes a unit composed of its operating engineers working within the counties of the current MBA agreement, where it has performed projects since 1985.

C. *Stipulations*

The parties stipulated to the following relevant facts.

1. The operating engineers not employed on a project-by-project basis possess sufficient continuity of interest to merit continued reliance on the results of an election.

2. The Employer's operating engineers are hired exclusively through the Petitioner's referral system.

3. The Employer uses a core group of operating engineers on projects performed in the 11 counties of the current MBA agreement.

4. Because of the Employer's common wages, hours, centralized control of labor relations, and other terms and conditions of employment, voter eligibility is determined by the rule of *Daniel Construction Co.*[3]

[1] Name as amended at the hearing.

[2] For ease of reference, all the Employer's operators of heavy equipment, oilers, mechanics, and mechanic's helpers shall be referred to as "operating engineers."

[3] 133 NLRB 264 (1961). Accordingly, we direct that in addition to those in the unit who were employed during the payroll period immediately preceding the date of the Decision and Direction of Election, all employees in the unit who have been employed for a total of 30 days or more within the period of 12 months, or who have had some employ-

Continued

5. The number of operating engineers varies substantially during each job and no readily available records exist which show the number of employees on each site or the duration of their employment.

II. ANALYSIS

Determination of an appropriate bargaining unit is guided by the objectives of ensuring employee self-organization, promoting freedom of choice in collective bargaining, and advancement of industrial peace and stability. These objectives are realized when the members of an appropriate unit share, inter alia, a community of interest in wages, hours, and other terms and conditions of employment.

Board inquiry pursues not the most appropriate or comprehensive unit but simply *an* appropriate unit.[4] Once this unit is determined, the requirements of the Act are satisfied. The inquiry first considers the petitioning union's proposals.[5] If the union's proposed unit is inappropriate, the employer's proposals are then scrutinized. Factors relevant to appropriateness are the similarity of skills, functions, and working conditions throughout the proposed unit; the central control of labor relations; transfer of employees among the Employer's other construction sites; and the extent of the parties' bargaining history.[6] Units with extensive bargaining history remain intact unless repugnant to Board policy or interfere with rights guaranteed by the Act.[7]

The Petitioner proposes a unit which includes all 33 counties within its geographical jurisdiction. However, the limited evidence introduced by the Petitioner at the hearing provides inadequate support under the above-listed factors for this proposed unit. Without supporting evidence, we cannot find the Petitioner's proposed 33-county unit appropriate.[8]

The Petitioner's alternative unit proposal of the 11 counties of the current MBA agreement is an appropriate unit. It is significant that the parties have bargained in this unit, albeit through a bargaining association, since 1979. The Employer recognized the Petitioner as the 8(f) bargaining representative of its operating engineers and used its hiring halls exclusively.

Reliance on 8(f) bargaining history is supported by our decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988). Although that case concerned an alleged unfair labor practice not present here, the Board enumerated several principles relevant to representation issues, including the statement that:

> [8(f)] agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e) . . . [and] in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement . . . .[9]

We further noted, in *Deklewa* at fn. 42, that existing eligibility and election rules would be applied to the extent feasible. Accordingly, the Board's traditional deference to bargaining history is generally applicable in the construction industry. Indeed, based on the limited evidence presented, it is the determinative factor in finding in this case that the 11-county jurisdiction of the MBA agreement is an appropriate unit.[10]

Finding the 11-county unit of the current MBA agreement an appropriate unit ends the inquiry. We do not reach the Employer's proposals.

III. CONCLUSION

We find the following unit appropriate for the purpose of collective bargaining within the meaning of Section 9(a) of the Act:

> All operators of heavy equipment, oilers, mechanics and mechanics' helpers, employed by the Employer within the 11 Pennsylvania counties of Allegheny, Armstrong, Beaver, Butler, Fayette, Green, Indiana, Lawrence, Mercer, Washington, and Westmoreland, excluding: office clerical employees, guards and supervisors as defined in the Act, and all other employees.

[Direction of Election omitted from publication.]

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ment in that period and who have been employed 45 days or more within the period of 24 months, immediately preceding the eligibility date for the election hereinafter directed shall be eligible to vote. *Daniel Construction Co.*, 133 NLRB at 269.

[4] *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950).

[5] *Marks Oxygen Co.*, 147 NLRB 228 (1964).

[6] *Metropolitan Life Insurance Co.*, 156 NLRB 1408 (1966).

[7] *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965).

[8] We emphasize that we have not found that this proposed unit is necessarily inappropriate. Such a finding is simply not warranted based on the limited record.

[9] 282 NLRB at 1377.

[10] Historically, the Board has not defined the scope of an appropriate bargaining unit in geographic terms. However, as each of the Petitioner's proposed units are so described, we give deference to this terminology.

Facet Enterprises, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Cases 7–CA–22929, 7–CA–23154, and 7–CA–23817

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On February 27, 1987, Administrative Law Judge Harold Bernard Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel and Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[2] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified, to modify the remedy,[4] and to adopt the recommended Order as modified.

1. We agree with the judge that the Respondent's proposal to remove all the electron beam welder work from the bargaining unit constituted an attempt to alter the unit's composition. Like the judge, we do not find that the evidence establishes that the Respondent, through its offer concerning the electron beam welder, was merely attempting to promote the employee in that classification out of the unit into a supervisory position after bargaining in good faith over the transfer of the individual and his work into supervisory status. See, e.g., *Tesoro Petroleum Corp.*, 192 NLRB 354 (1971); *Fry Foods*, 241 NLRB 76 (1979), enfd. 609 F.2d 267 (6th Cir. 1979). Rather, we find, as he did, that the Respondent's bargaining over this matter represented an attempt to remove the electron beam welder classification from the unit under the guise of promoting the incumbent welder to a supervisory position. That it was not a genuine promotion to supervisory status is shown by the evidence that the welder simply continued to perform his same duties after being removed from the unit. Consequently, it is evident that the Respondent was not insisting simply on transferring unit work to supervisors through the device of promoting unit employees to supervisory positions—a mandatory subject of bargaining. *Tesoro Petroleum Corp.*, supra. It was actually trying to alter unit composition by placing an employee classification outside the unit—a permissive subject of bargaining. See *Newport News Shipbuilding v. NLRB*, 602 F.2d 73, 77–78 (4th Cir. 1979) (employer may not insist on altering composition of a unit under guise of a work transfer), cited in *Idaho Statesman*, 281 NLRB 272, 277 (1986), enfd. in relevant part 836 F.2d 1396, 1403–1406 (D.C. Cir. 1988). Accordingly, we agree with the judge's finding that the Respondent unlawfully insisted to impasse on a permissive subject of bargaining.

2. Although we agree with the judge's rejection of the Respondent's defense under *Trident Seafoods Corp.*, 244 NLRB 566 (1979), affd. 642 F.2d 1148 (9th Cir. 1981), and his finding that the notice sent to employees during the first week of February 1984 did not adequately cure the electron beam

[1] The Charging Party filed a motion to strike the Respondent's exceptions and supporting brief, and the General Counsel filed a request for an order directing the Respondent to resubmit its supporting brief. The Respondent filed an opposition. We deny both the Charging Party's motion and the General Counsel's request.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] As discussed in sec. 5 below, we find the unfair labor practice strike conversion date at Madison Heights to be November 6, 1983. We also find the unfair labor practice strike conversion dates at Elmira and Detroit to be the third week of December 1983 and December 24, 1983, respectively. Accordingly, we modify the remedy to reflect those dates instead of the November 3 and December 2 dates found therein.

In making his multiplant unit determination, the judge relied in part on the Union's method of submitting master agreement proposals to a pooling of votes by employees at all three plants. Although we agree with the judge that the parties intended to bargain on the basis of a single multiplant unit, we note that this pooling process indicates only the Union's belief that the three plants constitute one unit and has no bearing on the Respondent's view of the appropriate unit.

We agree with the judge's finding that an impasse had not been reached in local Detroit plant negotiations regarding the Respondent's proposal to reduce the number of shop stewards from six to three. The judge also found that, despite the absence of impasse, the Respondent advised the Union at the strike's conclusion that the number of shop stewards it would recognize in the Detroit plant would be reduced to three. Because the Respondent implemented its proposal before bargaining to impasse and refused to recognize three of the six shop stewards as union representatives, we agree with the judge that the Respondent violated Sec. 8(a)(5).

We find it unnecessary to address the issue of whether the Respondent would have been privileged to implement its proposal had the parties reached a valid impasse. See *Lehigh Portland Cement Co.*, 287 NLRB 978 (1987).

In his discussion of the Respondent's unlawful refusal to provide the Union with information concerning the removal of jobs and machinery from the Detroit plant, the judge stated that the strike at the three plants concluded in February 1985. The judge also stated in the remedy section of his decision that the strike concluded in February 1964. We correct these inadvertent errors as the strike actually ended in February 1984.

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

welder and direct dealing violations, we find it unnecessary to pass on the judge's finding that the notice was untimely sent to the Respondent's employees. Rather, we rely on the judge's finding that the notice was ineffective because shortly thereafter the Respondent engaged in further unlawful conduct.

3. We also find no merit in the Respondent's argument that it did not unlawfully refuse to provide the Union with financial information because it merely claimed competitive disadvantage at the Elmira and Madison Heights facilities. By linking plant survivals to economic recoveries from the Union and announcing the closing of Madison Heights, the Respondent by its words and conduct clearly pleaded an inability to pay existing wages and benefits and was therefore legally obligated to turn over books and records so that the Union could verify that poverty claim.[5]

4. We clarify the judge's finding that the Respondent violated Section 8(a)(5) of the Act by engaging in conduct calculated to split off the Detroit plant from the established multiplant bargaining unit. We observe that the Respondent's proposal for a separate contract covering the Detroit plant was not per se unlawful. Rather, our finding of an 8(a)(5) violation here is based on the Respondent's coercive verbal and written communications to the Detroit employees, which went beyond the boundaries of protected speech as provided in Section 8(c) of the Act. Thus, we agree with the judge that the Respondent sought to create a division between the Detroit employees and the Union by pitting one part of the bargaining unit (the Detroit employees) against another part (the Elmira and Madison Heights employees), thereby undermining the Union's representative status.

We note that our decisions in *United Technologies Corp.*, 274 NLRB 609 (1985), affd. 789 F.2d 121 (2d Cir. 1986) (*United Technologies I*); *United Technologies Corp.*, 274 NLRB 1069 (1985), affd. 789 F.2d 121 (2d Cir. 1986) (*United Technologies II*); and *Putnam Buick*, 280 NLRB 868 (1986), affd. sub nom. *Machinists District 190 v. NLRB*, 827 F.2d 557 (9th Cir. 1987), do not dictate a different result. In *United Technologies I* and *II*, the Board found no 8(a)(5) violations because the employer's public communications to its employees did not urge the employees to abandon their representative in favor of receiving benefits from the employer. Furthermore, the employer genuinely acknowledged the union's rightful role as the employees' bargaining representative. In *Putnam Buick*, the employer's conduct was also found to be protected by Section 8(c) of the Act. The Board, there, however, relied on a union officer's admission that one employer-employee meeting was merely informational in nature and found that at another meeting the employer impliedly suggested that the employees present an offer (already presented to the union) to the union leadership for further consideration. We note that none of these cases involved an employer's attempt to achieve its bargaining objectives by pitting one group of employees against another, which is evident here. We also find that the instant case is distinguishable because the Respondent's communications to the Detroit employees denigrated the Union's concern for its representative duties and, in a coercive manner, suggested that the Detroit employees return to work without involving the Union in the decisional process.

We further note that although the complaint did not specifically allege a direct dealing violation, the complaint does challenge the legality of the Respondent's communications to the Detroit employees on the ground that they constitute conduct designed to split apart the historic multiplant unit in violation of Section 8(a)(5). At the hearing, the Respondent had the opportunity to fully litigate the nature and extent of its communications to the Detroit employees. It is well established that the Board may find a violation, although not specifically alleged in the complaint, if it is related to the allegations in the complaint, the matter was fully and fairly litigated, and the respondent has not been prejudiced. *Baytown Sun*, 255 NLRB 154 fn. 1 (1981). That is the situation here. Accordingly, we conclude that a finding of an 8(a)(5) direct dealing violation is fully warranted. We shall modify paragraph 1(b) of the judge's recommended Order to conform to the violation found.

5. The judge found that the Madison Heights strike was an unfair labor practice strike from its inception on November 3, 1983. We modify the judge's finding to reflect that the Madison Heights strike was an economic strike at its inception which converted to an unfair labor practice strike commencing on November 6, 1983.

On October 11, Madison Heights Local 771 President Thomas Butler handed out a list of unresolved issues between the Respondent and the Union to the Madison Heights membership during the strike vote meeting. The list contained several economic items but did not mention the electron beam welder issue. The Madison Heights member-

[5] We note that *Harvstone Mfg. Corp.*, 272 NLRB 939 (1984), on which the judge relied, was denied enforcement in part by the court of appeals, *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d 570 (7th Cir. 1986), on the ground that a claim of competitive disadvantage, without more, does not amount to a claim of inability to pay. Because, as noted above, the Respondent here indicated that its plants might not survive without concessions from the Union, we need not rely on *Harvstone* in order to find a violation here.

ship voted to strike. The union leadership, however, chose not to proceed with the strike authorization process at that point but continued to negotiate with the Respondent.

On the afternoon of November 2, International Servicing Representative Smith sought final strike approval from the Union's office of the regional director, as it had final discretion on whether to implement the strike. Smith discussed with Assistant Regional Director Preston Harris the Respondent's position on the electron beam welder issue and orally amended the statement of strike issues to include that dispute. There is no evidence that the membership was either apprised of or consented to the oral amendment at that time. Following the discussion, Harris gave Smith final approval to implement the strike.

The strike at the Madison Heights plant began on November 3. On November 6, the Madison Heights membership confirmed by vote their representatives' rejection of the Respondent's final proposal. Prior to voting, and for the first time, the employees were informed of the electron beam welder issue.

We find that the Madison Heights strike was not an unfair labor practice strike at its inception, but was converted to that status on November 6, when the membership was informed of the Respondent's position on the electron beam welder position and voted to confirm their representatives' rejection of the Respondent's final offer and remain on strike. We do not dispute the notion that unit employees may give standing authorization to their bargaining agents to commence a strike in response to what those agents believe is an employer's unfair labor practice. But we find no evidence that such generalized authority was ever given by the rank-and-file employees to the Local's officers, either at the October 11 meeting, when the employees approved the strike authorization, or at any time before. In requesting that strike vote, the only grounds offered by the Local's officials dealt with economic issues.[6]

6. The judge also determined that the Elmira and Detroit plant strikes were converted to unfair labor practice strikes on December 2 when the Respondent sent a letter solely to the Detroit employees urging their return to work. Although we agree with the judge that the strikes were converted to unfair labor practice strikes, we disagree with the judge's selection of the December 2 date.

At the Elmira union membership meeting held in the third week of December, District Representative Jack Manione read to the membership a list of unfair labor practice charges filed December 15. These charges included the Respondent's unlawful attempt to bypass the Union and deal directly with the Detroit employees. After Manione read the charges, approximately 50 to 60 members voiced their opposition to the Respondent's conduct. Elmira Local Vice President Fred McElligott credibly testified that these members expressed the position that "there is no way one plant will go back to work without the other two units."[7] McElligott also testified that on December 21 or 22 the Elmira picketers began carrying signs which read, "Facet Charged with Unfair Labor Charges." These signs were carried until the strike's conclusion on February 17, 1984.

At the Detroit union membership meeting held on December 24, Union Vice President Jim Ellis credibly testified that he informed the membership that the Union had filed unfair labor practice charges in December and Respondent President James Malone had told Ellis over the phone that "he [Malone] had been down on the picket lines talking to the people, asking them were they satisfied . . . would they come back." Staff Representative Wally Waller also credibly testified that Ellis told the Detroit employees the Respondent was "badgering" some picketers into coming back to work and that Ellis asked whether other employees had been approached by the Respondent. Detroit Local President Tony Rahall similarly testified that he was informed by either Ellis or International Representative John Mando that the Detroit meeting was called because "people . . . were complaining about management coming out talking to the people, going in without a contract, and no union." Two picketers, Ilah Drake and Jack Muhaw, both credibly testified that Malone had admitted to them that "he thought he could get into trouble for talking to the people on the picket line, [b]ecause he thought that the [U]nion would think that he was trying to bargain and talk us back to work." Finally, Mando credibly testified that in mid-December he issued instructions to each Local to change some of the picket signs to read "Unfair Labor Practice Charges."

[6] Member Cracraft would find that the Madison Heights strike was an unfair labor practice strike from its inception. In voting to strike on October 11, the Madison Heights membership gave its union representatives the authority to respond to the progress of negotiations in the manner they saw fit. On November 3, Representative Smith decided to call the strike in protest of the Respondent's position on the electron beam welder issue. Thus, in Member Cracraft's view, Smith's decision was well within the broad authority a collective-bargaining agent possesses to act on behalf of employees in a strike situation. See *Woodlawn Hospital*, 274 NLRB 796 (1985), and *Michigan Ladder Co.*, 286 NLRB 21 (1987) (continued and vigorous objections of union negotiators to the unlawful company decision to subcontract unit work warrant the conclusion that the strike was an unfair labor practice strike).

[7] As stated in sec. 4, supra, the Respondent's direct dealing violation includes coercive solicitation of the Detroit employees to return to work.

Based on the record as a whole, we find that the Respondent's unlawful attempt to bypass the Union and deal directly with the Detroit employees in part caused the Elmira and Detroit memberships to resolve to stay out on strike and actually prolonged the strike. *Blu-Fountain Manor*, 270 NLRB 199, 206 fn. 14 (1984), enfd. sub nom. *NLRB v. Jarm Enterprises*, 785 F.2d 195 (7th Cir. 1986). Accordingly, we modify the judge's conversion findings and find that the Elmira and Detroit plant strikes converted to unfair labor practice strikes as of the dates of the membership meetings when the memberships were informed of and objected to the Respondent's unlawful direct dealing. Because the record is unclear concerning the date of the Elmira membership meeting, we leave its determination to the compliance stage of this proceeding.

In light of our modification of the judge's findings, we shall issue Amended Conclusions of Law, a modified Order, and a new notice to employees.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 7.

"7. Due to the Respondent's conduct described above in paragraph 6, the economic strike at the Madison Heights plant underway since November 3, 1983, was prolonged and thereby converted to an unfair labor practice strike commencing on November 6, 1983."

2. Substitute the following for Conclusion of Law 9.

"9. By dealing directly with employees about terms and conditions of employment, the Respondent refused to bargain in good faith with the Union in violation of Section 8(a)(5) of the Act."

3. Substitute the following for Conclusions of Law 11 and 12.

"11. By unilaterally changing employment conditions such as established grievance procedures, paid time for representative matters, seniority recall rights, plant access for employee representatives, and number of shop stewards, and refusing to recognize three of the six shop stewards as union representatives without notifying, consulting, or bargaining with the Union as the exclusive representative of its employees in the appropriate bargaining unit, the Respondent violated Section 8(a)(5) of the Act.

"12. Notwithstanding unconditional request for reinstatements made by the Union on behalf of its striking employees on February 18, 1984, the Respondent has refused to reinstate them to their former or substantially equivalent positions, thereby engaging in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Facet Enterprises, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(b), (c), and (d).

"(b) Refusing to bargain in good faith with the Union by dealing directly with employees about terms and conditions of employment. The bargaining unit is:

> All production and maintenance employees employed by Respondent at its Detroit, Michigan plant (Fuel Devices Division), its Madison Heights, Michigan plant (Filter Products Division) and its Elmira, New York plant (Motor Components Division); but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

"(c) Refusing to bargain in good faith with the Union by unilaterally changing employment conditions such as established grievance procedures, paid time for representative matters, seniority recall rights, plant access for employee representatives, and number of shop stewards, and refusing to recognize three of the six shop stewards as union representatives without notifying, consulting, or bargaining with the Union as the exclusive representative of its employees in the appropriate bargaining unit.

"(d) Refusing on request to reinstate employees engaged in an unfair labor practice strike."

2. Substitute the following for paragraphs 2(a) and (b) and reletter subsequent paragraphs.

"(a) Offer the unfair labor practice strikers immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as modified by the Board's decision regarding the dates the Madison Heights, Detroit, and Elmira strikes became unfair labor practice strikes."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything to interfere with these rights.

WE WILL NOT refuse to bargain in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) by insisting to impasse and thereby preventing an agreement from being reached concerning your terms of employment on our proposal to exclude the electron beam welder position from the bargaining unit.

WE WILL NOT refuse to bargain in good faith with the Union by refusing to furnish the Union with information relevant and necessary to its duty to represent you, such as information on our financial status, on movement of plants and machinery, and picket line misconduct.

WE WILL NOT refuse to bargain in good faith with the Union by dealing directly with employees about terms and conditions of employment.

WE WILL NOT unilaterally alter the employment conditions of employees concerning the established grievance procedures, paid time for representative matters, seniority recall rights, plant access to our premises by your union representatives, and number of shop stewards, and refusing to recognize three of the six shop stewards as union representatives.

WE WILL NOT, in certain circumstances explained in the Board's decision, refuse reinstatement to former Madison Heights, Detroit, and Elmira unfair labor practice strikers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the aforenamed Union as the exclusive representative of our employees in the following appropriate unit:

> All production and maintenance employees employed by us at our Detroit, Michigan plant (Fuel Devices Division), our Madison Heights, Michigan plant (Filter Products Division) and our Elmira, New York plant (Motor Components Division); but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act,

and if an understanding is reached, embody any such understanding in a signed agreement.

WE WILL restore and place in effect retroactive to February 18, 1984, all conditions of employment which we were found herein to have unlawfully changed, including the established grievance procedures, paid time for representative matters, seniority recall rights, and plant access; and WE WILL make whole employees for any losses they may have incurred as a result of our unlawful action in changing such employment conditions. These conditions will remain unchanged until such time as the parties execute a new agreement, or bargain to good-faith impasse.

WE WILL offer the unfair labor practice strikers, except those discharged for cause by us, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make each of them whole for any loss of wages suffered by reason of our unlawful conduct against them as provided in the Board's decision.

WE WILL furnish the Union with information relevant and necessary to its collective-bargaining responsibilities.

FACET ENTERPRISES, INC.

Mark D. Rubin and *A. Bradley Howell, Esqs.*, for the General Counsel.

Steven J. Fishman and *Frank T. Mamat, Esqs.*, for the Respondent.

Betsy A. Engel and *Leonard R. Page, Esqs.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD JR., Administrative Law Judge. Pursuant to second amended consolidated complaint issued on 31 October 1984, I heard this matter on numerous days in 1985 in Detroit, Michigan. The case involves alleged violations of Section 8(a)(1), (3), and (5) of the Act occurring in the context of negotiations for a new collective-bargaining agreement, and including issues

over refusals to provide information, unlawful impasse bargaining about a nonmandatory subject, efforts to split an established multiplant bargaining unit, whether a strike was economic or an unfair labor practice strike, picket line misconduct, refusals to reinstate former strikers, and asserted unilateral action by Respondent.

On the entire record, including credibility determinations based on witnesses' deportment on the witness stand, and briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, as alleged in the complaint and admitted in its answer, is an employer engaged in commerce within the meaning of the Act. The Union (UAW) and its Locals 104, 771, and 604 are labor organizations as defined in the Act.

II. APPROPRIATE UNIT

The complaint alleges that the appropriate unit is:

> All production and maintenance employees employed by Respondent at its Detroit, Michigan plant (Fuel Devices Division), its Madison Heights, Michigan plant (Filter Products Division) and its Elmira, New York plant (Motor Components Division); but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

The record shows that the Union has represented Facet's employees at the three named plants under contracts in force from April 1976 to 30 April 1977, 1977 through 1980, and 1980 through early November 1983. As the long-established and recognized collective-bargaining representative for these employees, the Union has negotiated major terms and conditions of employment covering all the unit employees at the three plants in master agreements over the years. Under the long-established practice negotiated master agreements are submitted to all the employees in the three plants for ratification, the outcome being determined by pooling the votes. Although the parties left some subjects to be resolved in local supplementary agreements tailored to each plant's circumstances, as early as 1976 it was specifically provided in the parties' agreement that such agreements would have to be referred to the National Facet Department of the Union for approval before becoming effective. (G.C. Exh. 42, par. XXIII.)

In all the years the parties lived with multiplant bargaining, Respondent never denied the appropriateness of the master agreement unit, in fact, even during the failed negotiations for a new contract to replace the 1980–1983 agreement, Respondent had occasion in various communications to refer to the "recognized three-plant bargaining unit," declaring that, "At no time did Facet every [sic] try to split up the three-plant bargaining unit." (G.C. Exh. 38 at 1,2.) In addition, by a "Notice" to all employees dated 1 February 1984 Respondent stated that "Facet disavows and repudiates any intention at any time to split the Detroit plant from the historic multiplant bargaining unit (which includes the Detroit, Madison Heights and Elmira [New York] plants)." This communication refers to the "historic multiplant unit" throughout its contents. (G.C. Exh. 25.)

Nevertheless, the Respondent, for the first time, sought to question the appropriateness of the established unit in its answer and on brief in these proceedings, pointing to dissimilar characteristics at the three plants, such as geographical separation and lack of interchange, among other factors, to support its unprecedented contention. Respondent's tardy contention after 7 years of bargaining successive contracts in such unit is not entitled to much weight. *Williams Enterprises*, 212 NLRB 880, 884 (1974); *Harding Glass Industries*, 216 NLRB 331 (1975); *Maphis Chapman Corp.*, 151 NLRB 73, 86 at fn. 34 (1965); and *NLRB v. Midvalley Steel Fabricators*, 621 F.2d 49, 53 at fn. 3 (2d Cir. 1980). In any event, Respondent also referred to the fact that original Board certifications, from 1935 to 1940, fail to support the view that the Board ever certified a multiplant unit as opposed to separate plant units, suggesting the unit was never really an appropriate one from its inception so that the complaint should be dismissed. In effect, Respondent on brief proposes for unit determination purposes, "the Board enter a time capsule and return to when employees were first assigned" at the three plants and reappraise the unit as it would have deemed it appropriate had the matter been before the Board in an initial unit determination many years ago, a superficial proposal indifferent to the parties' admitted collective-bargaining history since then and their current state of affairs, and therefore wholly unwarranted. *Gibbs & Cox, Inc.*, 280 NLRB 953 (1986). The factors extant at the three plants here addressed by Respondent to support its view, as the Board noted in *Gibbs & Cox, Inc.* are

> of lesser cogency where a history of meaningful bargaining has developed. See, e.g., *Standard Brands*, 75 NLRB 394 (1947); *West Virginia Pulp & Paper Co.*, 53 NLRB 814 (1943). In such circumstances, greater latitude should be accorded the *collective* rights of employees to pursue and preserve the pattern of representation of their choosing. Thus, to characterize the unit from the vantage of any period of time but the one presently under consideration is to disturb the reasonable balance the Board seeks to achieve between the aims of assuring freedom of employees' choice and fostering established bargaining relationships. [280 NLRB at 954–955.]

Viewing the unit presently, it is clear that the parties' multiplant unit is appropriate. Thus, it is well established "that parties to a collective-bargaining relationship may by contract, bargaining history, and course of conduct . . . form a multiplant bargaining unit." *Anheuser-Busch, Inc.*, 246 NLRB 29, 31 (1979); *Miles & Sons Trucking*, 269 NLRB 7, 14 (1984); and *White-Westinghouse Corp.*, 229 NLRB 667 (1977), see also *General Electric Co.*, 180 NLRB 1094, 1095 (1970); *Canterbury Gardens*, 238 NLRB 864 (1978); and *General Motors Corp.*, 120 NLRB

1215, 1218 (1958). That they have done so here is readily apparent from the contracts between the parties from 1976 through 1983, the bargaining for major terms and conditions of employment covering employees at the three plants at master agreement negotiations preceding those contracts and the multiplant contract ratification procedures requiring a majority of yes votes among all three-plant bargaining unit members combined. I find that, based on all the foregoing, that the above-described unit of employees for which the Union and its locals have been, and remain, the exclusive bargaining representative, is a unit appropriate for collective bargaining as defined in the Act.

III. AGENCY STATUS OF FACET OFFICIALS

On the basis of admissions in the pleadings and the entire record, I find that James Malone, Paul Dick, Robert Schaeffer, Thomas Robertazzi, Bob White, T. J. Westfall, Frank Vaughn, William Popadynec, Ron Goral, E. J. Mullane, Donald Houser, John Evans, and Robert Childress occupied the positions as described in paragraphs 7(a) and (b) in the complaint and at all times material were supervisors and/or representatives and agents of Respondent within the meaning of the Act.

IV. THE UNFAIR LABOR PRACTICES

A. *The 10(b) Issue*

Respondent moved at hearing and on brief to dismiss complaint paragraph 13 which alleges an unlawful refusal by Respondent to furnish the Union with financial information, contending that this matter was covered by a dismissed charge in Case 7–CA–22929 from which no appeal was ever taken thereby rendering the subject matter time-barred from these proceedings, citing both *Ducane Heating Corp.* and *ITT Lighting Fixtures*.[1] Respondent makes further reference to the view that a separate later charge in Case 7–CA–23154 cannot support the issuance of complaint paragraph 13 either because nowhere on the face of that later charge or in the appeal from a partial dismissal does the matter contained in paragraph 13 appear.

At the outset, it is clear that the cited precedent, dealing with reinstatement or revivals of abandoned charges time-barred by Section 10(b) in the Act, is inapplicable to the instant case, where complaint was authorized on the basis of a then active, timely charge in the later Case 7–CA–23154, rather than the earlier dismissed case, Case 7–CA–23159 (R. Exh. 7). This being true, paragraph 13 is not a reinstated or revived abandoned charge whose subject matter is barred by the cited cases. In this connection, it should be noted further that the dismissed charge, Case 7–CA–22929, was a sharply limited allegation of bad-faith bargaining by, inter alia, Respondent's refusal of the Union's request for financial information early in the parties' handling of this matter without further reference to any factual circumstances, while complaint paragraph 13 based on the later charge identifies numerous dates and places when the allegedly unlawful refusals to provide the requested financial information had continued to occur and the problem had matured. On the face of things, therefore, the dismissed charge and paragraph 13 are clearly not one and the same and there is no evidence to support such view, or the Respondent's "revival" theory based thereon.

Finally, while it is true that the allegations in the timely charge do not specifically address a refusal to provide financial information, this fact is not controlling. The parties continued negotiations after the dismissal in Case 7–CA–22929 and, more significantly, the matter of financial information requests as well as other information requests arose in the dynamics of those ongoing negotiations during which numerous allegations of unlawful conduct by Respondent arose. In fact, specific allegations of unlawful refusals to provide other information concerning striker misconduct and equipment removal had been found meritorious during the continuing investigation.

It should be further noted that this kind of alleged misconduct by Respondent was addressed to the General Counsel's attention in an appeal from the Regional Director's partial dismissal in Case 7–CA–23154 (R. Exh. 7). All the above being true it was well within the reasonable exercise of sound discretion by the General Counsel to evaluate the parties' entire situation at the current stage in their collective-bargaining relationship, rather than being foreclosed from viewing a total picture by a contention based merely on an earlier dismissal of an undeveloped issue or the facial allegations in Case 7–CA–23154 just so long as the General Counsel did not get, "so completely outside of the situation which gave rise to the charge that it may be said to be initiating the proceeding on [her] motion [for] then the complaint [would] fall as not supported by the charge." *NLRB v. Kohler Co.*, 220 F.2d 3, 7 (7th Cir. 1955). For these reasons, including the fact that the allegations in complaint paragraph 13 concerning refusal of requests for financial information, I find, are clearly associated with other alleged unlawful refusals of information requests set forth in the complaint, I conclude that the timely 8(a)(5) charge in Case 7–CA–23154 is sufficient to support the additional incidents of financial information request denials covered by the complaint. Based on the foregoing, Respondent's motion is denied. *Flex Products*, 278 NLRB 417, 418 (1986); *NLRB v. Fant Milling Co.*, 360 U.S. 201 (1959); *NLRB v. Complas Industries*, 714 F.2d 733 (7th Cir. 1983); and *Flex Plastics*, 262 NLRB 651, 652 (1982).

B. *Respondent's Proposal on the Electron Beam Welder Classification*

The complaint alleges that Respondent insisted to impasse on its contract proposal regarding the electron beam welder (EBW), a job classification included in the unit at Respondent's Madison Heights plant, thereby violating Section 8(a)(5) in the Act because the proposal concerned a permissive subject of bargaining, a reduction in the composition and scope of the bargaining unit, as to which, unlike a mandatory subject of bargaining, neither party could condition their agreement for a new contract.

[1] 273 NLRB 1389 (1985), and 267 NLRB 709 (1983).

1. Background

The position has been included in the collective-bargaining unit at the Madison Heights plant since that plant's inception, and has been covered by the collective-bargaining agreements mentioned above. At negotiations beginning on 20 September 1983 for a new agreement at Madison Heights, Respondent proposed to "transfer electron beam welder classification to salaried status" this term being considered by the Union and Respondent to denote outside the bargaining unit. Respondent, at contract negotiations in prior years, had made similar proposals to no avail, meeting consistent union resistance, and little discussion occurred on 20 September. At the next session on 22 September Respondent's minutes show that it sought to place the job classification among those excluded from the bargaining unit as described in the parties' local collective-bargaining agreement, again without success. After the two efforts plainly designed to exclude the job classification en haec verba from the unit failed, Respondent next proposed in later September and October meetings to exclude the incumbent unit employee in that position, Don Doctor, by transferring him to a salaried status—out of the bargaining unit where he could perform other duties, as well as training an upgrader to do the EBW work as a unit employee, and be available for EBW work himself. Respondent's minutes reflect the Union's refusal to "put the EBW on salary"—which is to say exclude the classification from the unit.

The continued negotiations on this subject, as well as Respondent's representative's comments concerning the proposal, evidence the importance attached to it in these negotiations. Thus, in explaining the value to the company in being able to continue EBW operations during a strike because they were profitable, Industrial Relations Director Donald Houser during 13 October negotiations stated the proposal to have EBW incumbent Doctor on salary and out of the unit was a very important strikeable issue for the Company. The Union's opposition to such proposal was equally adamant.

2. Respondent's final offer

On 2 and 3 November the parties continued negotiations but deadlocked on Respondent's "final" offer to the Union, which Industrial Relations Director Houser told the Union contained five "hang tough" issues. Among these five issues covered by Respondent's package, "indivisible" offer was the following proposal concerning EBW:

> Article IX
>
> Add new paragraph as follows:
>
> > the regular work formerly performed by the Electron Beam Welder Operator Set Up and Operate Leader Classification shall, at the discretion of the Company, be performed outside the bargaining unit. The person formerly holding that classification shall be transferred out of the unit.

Larry Smith, an International representative for the Union assigned to service the Madison plant bargaining unit and a member of the negotiating committee, testified without contradiction that he informed Houser the Union could not agree with the EBW proposal—or the other four proposals—and since Houser had informed the Union the five-item proposal was a final (and) package one, the committee could not recommend it to the union membership and, "We were prepared to strike at midnight." Thomas Butler, president of the Madison plant local union, testified that Smith told Houser, "there was no way we could accept the beam welder job going to salary."

Respondent's written final proposal excluded all the EBW work from the unit, at Respondent's *discretion*, and the only incumbent unit employee holding that position, Don Doctor, thus effectively eliminating the EBW job classification, curtailing the established bargaining unit composition, and depriving the affected employees of union representation. One can say the proposal, if implemented, was tantamount to Respondent's withdrawing recognition of the EBW job classification from the Union, subject to Respondent's sole unilateral right or discretion, for there would be nothing of substance or value left to the job classification stripped of an EBW employee or EBW work to be performed. Cf. *San Antonio Portland Cement Co.*, 277 NLRB 309, 313–315 (1985). This being the case, I find that Respondent's offer concerned a permissive subject of bargaining, the elimination from the bargaining unit of the EBW job classification, and consequent reduction in the composition and scope of the established collective-bargaining unit. *Newspaper Production Co.*, 503 F.2d 821, 828 (5th Cir. 1974).

The notion posed by Respondent on brief that an earlier agreed-on "upgrader EBW" position to be in the unit is contrary to any Respondent intention to remove the EBW job classification from the unit via the Respondent's 2 and 3 November EBW proposal is without merit. Respondent's own director of industrial relations, Donald Houser, testified that he posted an upgrader letter—not previously agreed on by the Union as to content—for employee bids "so we'd be ready *if* Doctor (the sole incumbent of the EBW job classification) was promoted and *allowed to perform the work*," the latter reference to the need for agreement by the Union to the two-part earlier proposal by Respondent involving Doctor's transfer out of the unit and an upgrader classification being created, described above. Because the Union never agreed to such proposal, viz, removing Doctor from the unit, and the posting, as admitted by Houser, was conditional on such agreement by the Union to the entire proposal, there simply never was an established upgrader classification position. Further confirming this view is the testimony by Union Representative Butler, the Madison plant local union president. He testified that he recalled as of the date of Respondent's final EBW proposal, set forth above on 2 and 3 November, that the Company had dropped the "upgrader aspect" and was just going to make Doctor salaried, that this was the hang-tough issue—the salaried status (outside the unit) of the EBW classification—and further that the Union had never agreed to the *posting* of an upgrader letter. In this context, references to an alleged assignment—never complet-

ed or carried out at any time relevant—of a future upgrader position and an employee grievance over such selected future candidate has no persuasive force for the simple reason that Respondent's final offer regarding its EBW proposal made no reference whatsoever to the upgrader classification, a matter reasonably viewed as both integral to the EBW classification problem and one which would reasonably have been discussed or offered for formalization in the article 9 proposed addition had Respondent intended to make it a part of the proposal. In fact, as noted, the plain language in the proffered new addition to article 9 puts the performance of *all* regular EBW work outside the unit at the Company's discretion, as well as the unit employee holding the EBW position. The proposal simply renders the upgrader matter a nonissue.

On brief Respondent further urges that case law involving proposals to allow the assignment to work outside the unit by former unit personnel promoted to supervisory positions holds that such proposals are mandatory subjects of bargaining concerning the assignment of work rather than changes in the scope of the unit. The cases cited by Respondent, one involving a subcontracting issue, *Fry Foods, Inc.*, 241 NLRB 76 (1976), and the others involving the employer's right to appoint supervisory personnel are readily distinguishable from the instant case, where the issue from the start in negotiations was the elimination of the EBW job classification from the unit to a "salaried" or excluded status just to protect the Respondent from loss of profits from the EBW operation during a strike. Unlike other cases cited by Respondent, *Tesoro Petroleum*, 192 NLRB 354 (1971), being representative, the Respondent proposal here did *not* involve an employer's right to make nondiscriminatory supervisory promotions of personnel who continued to perform bargaining unit work. There was, here, no probative evidence to support Respondent's alleged "intent" to promote Doctor to supervisor or any evidence he ever became a supervisor at times relevant to appraising the nature of Respondent's final EBW proposal on 2 and 3 November which nowhere makes reference to such promotion, stating only in this respect that "the person formerly holding that classification shall be transferred out of the unit." Moreover, Respondent's proposal specifically called for *all* the EBW classification work being performed *outside the bargaining unit*, so that the result would not be analogous to a situation where the classification continued to exist but some of the work was being performed by supervisors excluded from the unit. Here, both the work and its performance would be outside the unit, so Respondent's proposal, rather than relating to the amount of EBW work which the bargaining unit would perform, sought to remove it entirely from the unit and thereby constituted bargaining over a type of work which historically had defined the bargaining unit with the forseeable result: altering the composition of the bargaining unit.

Analysis

As recently observed with Board affirmance (citing *Newport News Shipbuilding v. NLRB*, 602 F.2d 73, 77–78 (4th Cir. 1979)):

> The Board agrees that, unless transfers are specifically prohibited by the relevant collective bargaining agreement, an employer may transfer *work* out of the bargaining unit, as long as the employer first bargains in good faith and is not motivated by anti-union animus. [End of Respondent's quote.] See *University of Chicago v. NLRB*, 514 F.2d 942, 949 (7th Cir. 1975); accord, *Boeing Co. v. NLRB*, 581 F.2d 793, 797 (9th Cir. 1978). *It does not follow, however, that an employer, under the guise of the transfer of unit work, may alter the composition of the bargaining unit.* To do so would not only modify the job functions of the various unit members but also affect their right to representation. Thus, implicit in the requirement that the employer bargain in good faith before changing unit work is the assumption that the affected member of the unit be represented. [Emphasis added.]

Idaho Statesman, 281 NLRB 272, 275–277 (1986). For these further reasons, I conclude Respondent's proposal concerned a nonmandatory subject of bargaining. *Idaho Statesman*, ibid.; *Newspaper Printing Corp.*, 232 NLRB 291, 292 (1977); *Kobler Co.*, 273 NLRB 1508 (1985); and *Farlas Meat Co. I*, 239 NLRB 1396 (1979).

It also is clear, and I conclude, that Respondent insisted on the EBW proposal as part of an indivisible "must item" in a package containing five hang-tough items under circumstances reasonably leading to the perception that its agreement to a contract was conditioned on the Union's acceptance, and thus that Respondent had insisted in the face of continued, detailed union opposition on such proposals to the point of impasse over, inter alia, the nonmandatory EBW proposal. Indeed, by letter dated 9 November 1983 to the chairman of the Union's bargaining committee Industrial Relations Director Houser, long experienced in the field of labor relations, referred to the parties' "current impasse," and there was no doubt that, as clearly described by Houser, the Respondent's EBW proposal was a strikeable issue for the Company, a characterization unwithdrawn—indeed further confirmed—on the very eve of the strike. Accordingly, it is concluded that Respondent insisted to impasse on a nonmandatory subject as a condition or prerequisite to an agreement on mandatory subjects—the EBW proposal being "indivisible" from them thereby violating its collective-bargaining obligations under Section 8(a)(5) of the Act.

The conclusion that these parties were at impasse on 3 November takes into account more than just the gut-wrenching slowness and lack of any progress on Respondent's final offer that evening and in the early morning hours. Also considered is the Respondent's recognized right to engage in hard bargaining—oftentimes accompanied by the use of so-called final proposals. However, in this instance, Respondent's own description of its proposals as "final," consisting of "must" proposals which the Company viewed as "strikeable" are more than window dressing dramatics given the bone-chilling prelude to negotiations in September when Respondent announced it had to have economic recoveries, at which time the parties' effort at bargaining bogged down in

what developed into a long-lasting, vexatious dispute, discussed further below, over Respondent's alleged refusal to provide information concerning the need for such recoveries. Also preceding the 2 and 3 November final negotiations before the violence-characterized strike, the Respondent removed equipment and machinery from the Madison Heights plant it proposed to relocate. This job-destroying action infused still greater tension and obstinacy in the parties' attitudes against an agreement, except on terms deemed more favorable by each. Indeed, it was just such action which propelled Madison plant employees to strike authorization procedures preceding the 2 and 3 November negotiations, followed by still further strike authorization efforts in the course of those negotiations including, as noted, the EBW dispute. It is not, in the sense of present analysis, relevant whether Respondent had the right to do these things, but it is instructive as to the likely effect—a bad one I believe—such circumstances had on the parties' efforts to negotiate an agreement and the question, whether there were any reasonable prospects for such to occur. This is because it has long been established that "the contemporaneous understanding of the parties as to the state of the negotiations [are all] relevant to be considered in deciding whether an impasse in bargaining existed." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), petition for review denied 395 F.2d 622 (D.C. Cir. 1968). Further supporting this pessimistic view is the fact that the parties were confronting still again their age-old dispute over putting the EBW out of the unit and the view of the Union's representative on the striker's eve that the Union was being asked to make all the movement in the negotiations without concessions being advanced by the Company—again the truth behind such a statement not being wholly controlling but nevertheless revealing the cause and fact of hardened positions of the parties on that date. In addition the Union must have been further hardened against expecting any agreement by Respondent's efforts to reduce paid union representation time for unit employees, as by the Union's described perception that the Respondent raised subjects on 2 and 3 November which the Union believed had already been agreed on by the parties in earlier negotiations. Frankly, those very bleak and discouraging circumstances leave no room to conclude that there was even a glimmer of hope the parties could reach an agreement, and as characterized by the Respondent's own Industrial Relations Director Houser later, amply support the conclusion they were at impasse. *Newport News Shipbuilding Co.*, 236 NLRB 1637, 1643 (1978); *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985); *Idaho Statesman*, supra; *Newspaper Printing Corp.* supra; and *Bozzuto's Inc.*, 277 NLRB 977 (1985).

The importance of the EBW issue to the parties in this case has already been highlighted. It was a bone of contention in every contract negotiation since the Madison plant started operations. So important was it to the Madison plant unit members that, according to incumbent EBW operator Donald Doctor, when the upgrader letter was posted seeking candidates for a "future transfer" (conditioned on the Union agreeing to transfer Doctor out of the unit as a "working supervisor" who would on occasion perform the work—which the Union never agreed to) "about half the plant bid on it" because it was a good job involving a lot of overtime work. Union Representative Larry Smith, as corroborated by the testimony of Madison plant Local President Butler, told Respondent's representatives on the eve of the strike there was no way the Union would agree to the loss of the EBW position from the unit and, while Industrial Relations Director Houser denied this intention at the hearing, where he described the Union's representatives as being "confused" over the Company's position—which he described as merely seeking Doctor's placement outside the unit where he could perform EBW work as "necessary," the cold reality in Respondent's written final, must, hang-tough, strikeable indivisible proposal stated otherwise, according sole discretion to Respondent on the subject and effectively removing the EBW from the unit.

C. *Contributing Cause of the Madison Plant Strike*

Smith kept higher union levels aware of the Respondent's position on EBW on the evening of 2 November as part of impending strike authorization developments; in addition, it is clear that the EBW proposal—along with the other four items in the Respondent's final offer, which Houser informed Smith "could not be picked apart"—constituted a linchpin to an agreement being reached for. When the Union informed Houser it could not agree to *any one* of the proposals, let alone all five of them, in a kind of mutual understanding it was understood that negotiations could go no further in the face of the Respondent's final offer, with the parties being in a strike mode, with Smith hoping it would be a clean strike, and with Houser asking if there would be any problem with salaried employees crossing the line. At that moment there can be no reasonable dispute that the strike was caused, in significant part, by the Respondent's unlawful conduct in insisting to impasse on its EBW proposal. The union bargaining team consisted of Madison plant employee representatives, the full plant shop committee, as well as International Representative Smith, reacting on the very heels of the impasse involving, inter alia, the EBW matter with the announcement of a strike, which took place the morning of 3 November at the Madison plant. Consistent with the bargaining committee's actions, the Madison plant employees voted 87 to 3 in confirming rejection of Respondent's contract proposals on 6 November at a local union meeting where they were informed beforehand in writing and by speakers concerning the EBW issue, including a specific communication by Local Union President Butler that the Company's proposal insisted on EBW going salaried [*out of the unit*]. (G.C. Exh. 207.) Butler also testified in this connection to, "the EBW, the classifications, were the thorns in the side," and recalls one employee exclaiming "there'd be no way they'd accept a salary job on the beam welder." It is true that an earlier strike authorization at the Madison plant on 11 October 1983 made no mention of the EBW issue—but this would not militate against the causal connection finding because it was not until 2 November that Respondent proposed and unlawfully insisted on, the EBW proposal discussed above

about which the parties had a long and continuing dispute, described as "strikeable." Furthermore, while it is also true that other issues were present and in a block prevented the parties from reaching agreement thereby triggering a strike, it is readily apparent that the EBW issue contributed significantly to the employees' decision and action to strike on 3 November 1983, and I so find. Accordingly, it is concluded that the strike at the Madison plant was an unfair labor practice strike from its inception. *Newport News Shipbuilding*, 236 NLRB 1637 (1978), enfd. 602 F.2d 73 (4th Cir. 1979); *Tarlas Meat Co.*, supra; *C & E Stores*, 221 NLRB 1321 (1976), enfd. 611 F.2d 654 (6th Cir. 1979).

Respondent urges further on brief that, even assuming its proposal was a permissive subject of bargaining, it was privileged to insist on the Union's concurrence as a condition of Respondent's agreement to a contract because the Union had not refused to negotiate over the proposal and had even discussed it with Respondent, citing the Board's adoption of the administrative law judge's decision in *Inner City Broadcasting Corp.*, 270 NLRB 1230 (1984). This contention is without merit. The record shows that the Union rejected out of hand Respondent's written proposal to eliminate the EBW classification from the bargaining unit as found during discussion of Respondent's final offer package on 2 and 3 November. There was never any "bargaining" over that proposal in its final form by the Union. Even putting aside the factual mischaracterization, Respondent's cited authority also fails to support its assertion. In the *Inner City Broadcasting Corp.*, case, supra, the respondent there, unlike here, did not demand that its proposal be adopted by the union once the latter refused unequivocally to discuss the subject, hence no insistence to impasse was found to have occurred. Here, the record is clear that the Union rejected any proposal to put EBW outside the unit, to have EBW "go salaried" from the first time such proposal was advanced, and yet Respondent persisted in seeking such change in three proposals, including its final one. (G.C. Exh. 44-B; G.C. Exh. 47; G. Exh. 55, art. 9.) Thus factually the cited case is inapposite to the present case. Finally, there is grave doubt the Respondent's asserted legal principle has any life to it given the Board's rejection of such theory in both *American Stores Packing Co.*, 277 NLRB 1656, 1658 fn. 7 (1986); and its later affirmance of the decision of the administrative law judge in *Idaho Statesmen*, supra at 275. In *American Stores Packing Co.*, supra at fn. 7, the Board notes:

> Although we find it unnecessary to pass on whether an employer has any duty to furnish information about a permissive subject once it has voluntarily bargained about it, the Supreme Court has held that a permissive subject does not become a mandatory subject merely because the parties have bargained about it. *Chemical Workers v. Pittsburgh Glass Co.*, 404 U.S. 157, 187 (1971). Further, the Supreme Court has stated that "each party is free to bargain or not to bargain and to agree or not to agree" about permissive subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

Given the foregoing, Respondent's contention is rejected.

D. *Respondent's Refusal to Provide Financial Information*

At the outset in negotiations during a meeting on 23 August 1983 called by Respondent and attended by the parties' representatives for collective bargaining, Respondent told the Union that it was suffering at the three plants from a competitive disadvantage based on wages and benefits paid by its competitors, and that it was suffering at the Madison Heights and Elmira plants from a greater competitive disadvantage in terms of wages and benefits than was the case at the Detroit plant. Union Representative Jim Ellis, assistant to UAW's vice president, testified without contradiction that the purpose of the meeting was for the Company to review and update its status and to tell the Union that they were in "bad shape." Ellis testified that Robert Childress, then vice president of industrial relations, informed the union representatives the three operations needed some relief, specifically wage reliefs to become competitive. Childress did not deny Ellis' testimony and stated the Company was "extremely concerned" about insurance costs and its need for competitive wage rates, notifying the Union on 15 September 1983 that the local (the Union) was to discuss recoveries and the wage rates needed by the Company including ending the 8-cent bonus at Elmira and the recovery (reduction) of other wages.

Just how serious that concern was is shown by negotiations on 28 September, 31 October, and 2 November, during which the Company linked continuation of operations at the Madison Heights plant to obtaining competitive costs via economic concessions from the Union. (G.C. Exhs. 32, 47, and 54.) In fact, the Company announced the contemplated closing of the Madison Heights plant in a letter to employees dated 13 December 1983 where the Company advised employees that despite a record net income of $4.2 million the past years, inter alia:

> For the past few years the Elmira plant has lost money or been only marginally profitable. The Madison Heights plant has been marginally profitable for the past two years. Your plant, (Detroit) made a contribution to our record net income this past year.
>
> We are planning to close the Madison Heights plant in the near future. [G.C. Exh. 9.]

1. The Union's request for information

On 14 December UAW International Representative John Mando wrote to Facet's president and chief operating officer, James R. Malone, recounting the Company's repeated contention in negotiations that it needed takeaways (reductions in current wages and benefits) because of an alleged need to become competitive, and requesting information concerning the three plants in the bargaining unit to verify and assess the truth of the Company's

claim so that the Union, in turn could "evaluate [its] current position and to be able to respond to the Company's proposals." The letter requested access to books, records, accounts, and supporting schedules, as well as income statements for the last 3 full years (Respondent's letter dated 13 December 1983, it should be recalled, told employees the Elmira plant had lost money and had been only marginally profitable the past 4 years), Federal income tax returns for the same period, interim income statements and supporting schedules, cost and price information for any intercompany transfers of products, and consolidate income statements where applicable. (G.C. Exh. 10.)

Respondent sent the Union a reply on 19 December promising to consider the request and outline its position in future correspondence. (G.C. Exh. 11.) On 22 December Facet Attorney Fishman, deeply involved in hands-on bargaining responsibilities on Respondent's behalf, wrote the Union two letters, one announcing another contemplated plant closing this time, the Detroit plant, and the other replying to the Union's request for financial information, discussed more fully below. (The plant-closing letter is referred to in Union Counsel Page's letter to Fishman (G.C. Exh. 13), also dated 22 December and not disputed in this proceeding. The second letter, again dated 22 December, is in the record as G.C. Exh. 12.) In the Respondent's reply letter (G.C. Exh. 12) regarding the financial information request, Respondent does not deny the stated reasons which prompted the Union's request, namely, Respondent's stated need to become competitive by achieving economic concessions from the Union lowering employees' wages and benefits in any new contract.

2. Respondent's obligation to provide the information

Given the foregoing, including the Company's oft-repeated need to become competitive in its business, but *also* its reference to "losing money," "marginal profitability," its self-described "suffering" from competitive disadvantages, and the "need" for wage reliefs and other economic recoveries, and its being again, as self-described, "extremely concerned" about those needs, to the point where plant survivals were linked to economic recoveries (reductions in employees' wages and other benefits) followed by actual announcements of contemplated closing, I find that the Respondent was expressing an inability to afford to pay its employees the existing wages and benefits in support of its proposals seeking economic recoveries, thereby under law, assuming the obligation to disclose on the Union's request supporting information, rather than merely expressing an "unwillingness" to continue current wage and benefit levels which would not impose any such duty. *Nielson Lithographing Co.*, 279 NLRB 877, 880 (1986), citing *Advertisers Mfg. Co.*, 275 NLRB 100 (1985); *Harvstone Mfg. Corp.*, 272 NLRB 939 (1984), and cases cited therein; and *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). As stated by the judge in *Harvstone*, supra at 944:

> Against the background instruction of the Supreme Court, presumably enunciated to be heeded, that "if . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy" (*NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956)), the Board has held that it is unnecessary to use the talismanic word "poverty" in order to trigger the requirement of fair substantiation of a plea of economic necessity during collective bargaining. Thus, in *Cincinnati Cordage Co.*, 141 NLRB 72 (1963), the Board held that an employer's resistance to a wage increase demand on the stated ground that it could not remain "competitive" with other employers in the industry, constituted a "poverty" plea since in effect the employer was contending that granting of the demands would "lead to impoverishment" (id. at 77), requiring the furnishing of supporting data. To the same effect, see *Teleprompter Corp. v. NLRB*, 570 F.2d 4 (1st Cir. 1977); *Stockton District Kidney Bean Growers*, 165 NLRB 223 (1967); *Wheeling Pacific Co.*, 151 NLRB 1192, 1224–1225 (1965); *NLRB v. Western Wirebound Box Co.*, 356 F.2d 88, 90–92 (9th Cir. 1966), enfg. 145 NLRB 1539, 1543–1545 (1964); *Peerless Distributing Co.*, 144 NLRB 1510, 1514 (1963), enfd. 338 F.2d 1003 (5th Cir. 1964); *Tennessee Coal & Iron Div.*, 122 NLRB 1519 (1959).
>
> Respondents were thus under obligation to open their financial records to the Union to support their economic contentions and their failure to do so was inconsistent with their statutory duty to bargain in good faith.

3. Respondent's reply to the Union's request

Fishman wrote the Union on 22 December in reply, offering to make available only a current financial statement or one showing profit and loss, with the opportunity for verification by independent audit. Fishman described at length five conditions under which the "opportunity" for such an audit to verify the current financial statement would be governed: (1) restricting the examination to the Company's office or its accountant's office; (2) the examination to be conducted by a CPA selected by the Union's accountant but approved by Respondent's accountant; (3) costs to be paid by the Union; (4) the accountant so designated to work directly with the Company's accountant the latter making available the "necessary" company records and other information pertinent to such records and permitting the designated accountant to examine such records "to the extent necessary"; and finally (5) providing what the parties herein refer to as a "gag order."

4. The gag order in Respondent's proposal

The gag order in Respondent's proposal stated that:

> 5. The designated accountant is to be subject to a gag order forbidding the disclosure of details and permitting him only to advise the Union as to the accuracy of the facts, to explain *only* factors that would make the Employer's reports misleading and

to explain or substantiate his conclusions. [Emphasis added. G.C. Exh. 12.]

In the ensuing communications between the parties, a 22 December letter to Fishman from Union Counsel Page explained that more than a single current financial statement was needed and pointed out that the Union had requested access to financial information for the past 3 years, a request left unaddressed by Fishman's reply on 22 December to its 14 December request amounting to the reasonable inference on this record that he denied the request. Further, Page explained that the 3-year span in information was necessary in order to discover any unusual financial occurrences arbitrarily allocated to one fiscal year, but stated a willingness to go forward with a review of current financial statements rather than delaying the audit of past years' statements. Page accepted conditions one, two, and four and with a reservation on interpretation, paragraph 3, concerning division of expenses. He told Fishman that the Union was unable to agree to the gag order as it constituted in effect a prior restraint on its access to relevant information unknown to it until after a fully disclosed audit and further prevented the Union from ensuring that a thorough examination would be made. (G.C. Exh. 13.) Page assured Fishman that no information given to the Union by the designated accountant would become public or be made available to any Facet competitor. Fishman, without referring to Page's asserted reasons in opposition refused an audit without the gag order. (G.C. Exh. 15.)

The Union pressed its request for access to the requested information without the gag order restriction in a letter from Page to Fishman on 4 January 1984, pointing to the still greater urgency behind its request because of an impending decision under which it understood Respondent intended to close the Detroit plant by mid-January and urging Respondent to consider using union accountant Bruce DeCastro to make the audit. Page informed Fishman that DeCastro had made an earlier audit in 1980 of the three plants in connection with a company effort to reduce pension costs. Thus not only could he "update" the records he had examined, but also, due to his familiarity with the recordkeeping system, do the task with dispatch. In addition, Respondent would have the assurance of past confidentially honored by the Union on the occasion of that audit, as well as the Union's present assurances in that regard. The Union so proposed, while agreeing to consider an independent accountant if Respondent explained the need for one under the circumstances described. Page further supported the Union's view of the unworkability of the gag order by stating, as another example, that the Union needed to know how pension plan costs, in the time since the agreement was reached, had been allocated among the three plants before it could evaluate the accuracy of the Respondent's assertions and claims that the Madison Heights and Elmira operations were marginally profitable. (G.C. Exh. 160.) On 5 January Fishman wrote Page confirming a telephone conversation—the latter described as occurring 4 January—during which Page assertedly declined the proposed audit (G.C. Exh. 18); no reply to Page's letter of 4 January, its concerns, or its offer, was submitted into the record, and, on 24 January 1984 Engel wrote Fishman noting that Fishman had ignored the UAW's position on the Respondent's limited, conditional offer of an audit on 22 December. In her letter (G.C. Exh. 20), Engel stated she would expand further on why the limited disclosure procedure was defective and prevented the disclosure of information sufficient to allow meaningful bargaining. She included the fact that a "current statement" does not indicate whether it would be for a month or the most recently completed fiscal year; that a report over the last contract period was in order, especially since in that period, the effects of a settlement permitting the termination of the hourly person plan would have surfaced giving the Union information on the impact and sayings on the plants' performance; she pointed to the uncertainty over the gag order limitations placed on the designated accountant, who was unable, it appeared, to disclose any details on the operations to the Union's negotiators, and specified that a report from the accountant was necessary in order for the Union to bargain effectively—the report spelling out the performance of the three plants over the last 3 years analyzing the causes of any "red ink" and what part, if any, bargaining unit labor costs played in any losses. Further underscoring the need for such specifics Engel listed other numerous factors bearing on the need for details connected to how the Respondent assigned (economic) "burden factors" among plants, and contrasting grim/rosy economic predictions by company representatives concerning the future financial strength of the Company. (G.C. Exh. 20.)

Fishman called Engel's letter both specious in content and tone, "as well as ridiculous" and offered a "compromise" in a letter on 3 February under which if, after the audit *the designated accountant* is desirous (note it is he or she who must harbor the desire) of further explaining his conclusions then the company accountant, the designated accountant, and DeCastro (the Union's accountant) will seek a mutually agreed-on resolution or, failing that, the parties will discuss it further. (G.C. Exh. 23.) The "compromise" was rejected by Engel on 13 February as not remedying the Union's concerns with the gag order as identified to Respondent on prior occasions over the provision of information necessary for intelligent and meaningful bargaining. (G.C. Exh. 29.)

According to the undenied testimony of UAW Official Jim Ellis, the record shows that on numerous occasions in January 1984, in addition to those outlined above, the Union requested clarification or modification of the terms used in the gag order, only to be told by Fishman that the Union had his letter of 22 December (the letter setting forth Respondent's proposal on a limited audit procedure). Aside from a caustic and obviously sarcastic 24 January 1984 letter (G.C. Exh. 19) defining the literal definition of the terms—dictionary-like—in Fishman's gag order proposal, no elucidating helpful reply was ever given to the Union, nor did the compromise offer anything productive in the situation confronting the parties. (G.C. Exh. 23.)

5. Analysis of Respondent's offer

Not unexpectedly in my view—given the tortoise-like movement in the parties' fact-starved negotiations and the Respondent's attention-grabbing announcements of impending fatalities of plant operations at Detroit and Madison Heights which resulted on the hardening of attitudes and positions—events simply overtook the parties in this case and the information requests receded from the forefront of bargaining as the strike wound down, ending in mid-February 1984.

Whether or not Respondent's providing the requested information would have made any difference to the outcome here, where eventually both plant forces of employees lost their employment when the plants reportedly closed by August 1984, will never be known, because the offer of very limited information in a restricted procedure burdened by Respondent with layers of expectedly partisan interfacing—and thus time-consuming—delays led to rejection of the offer. For that rejection, I find Respondent fully responsible.

An employer, under an obligation to provide information, of course need not provide such information in the precise format or on the exact terms requested by the union, so long as it furnishes the sought-after data in a manner not so burdensome or time-consuming as to impede the process of bargaining. *United Aircraft Corp.*, 192 NLRB 382, 389 (1971), citing *Lasko Metal Product, Inc.*, 148 NLRB 976, 979 (1964). Moreover, an employer is free to limit its production, depending on access-governing relevancy to the issues before the negotiating parties, in order to withhold or restrict disclosure to third parties of, for example, information as to the identification of its buyers and sellers, and officer's salaries. *Yakima Frozen Food*, 130 NLRB 1269 (1961); and *Manitowoc Co.*, 186 NLRB 994 (1970). As stated in *American Stores Packing Co.*, supra, 277 NLRB at 1675, citing *Teleprompter Corp. v. NLRB*, 570 F.2d 4 (1st Cir. 1977):

> Moreover the court in *Teleprompter* stated that an employer's plea of a poverty or financial inability did not "trigger carte blanche discovering rights," but rather the union is entitled to what is "reasonably necessary to permit a union to make a meaningful evaluation, from its members' perspective, of the claim of financial inability."

Relying on *Yakima*, supra, and a claim of "confidentiality," however, Respondent asserts its proffered conditions on access and insistence thereon met its good-faith bargaining duties. The latter defense, "confidentially" for which Respondent offered no support is rejected on its face as specious, a conclusion even further warranted by the uncontroverted fact that Respondent in 1980 gave the Union free access to the same books and records the Union was willing to accept and examine—on an updated basis for its purposes in 1983 and 1984, the present negotiations without reference from any source in this record that the early confidences were betrayed—or that written assurances of confidentiality by the union attorneys regarding their use of the information would be unkept. Absent any "valid overriding reason for non-disclosure of this information" the defense is found meritless. *Boise Cascade Corp.*, 279 NLRB 422, 431 fn. 26 (1986).

The Respondent set numerous preconditions on the Union's access to any information which had to be met by Respondent's satisfaction before intelligent bargaining could proceed. Those conditions created by their very complexity a serious question whether such negotiations would ever ensue on the problems requiring enlightenment, let alone permit progress on the serious, rapidly developing plant closing and contract-type related issues requiring the parties' prompt attention. Respondent's requirement that the examination be conducted by a CPA selected by the Union but "approved" by Respondent is simply a thinly disguised play on words suggesting deference to the Union's rights in such matter, but in actuality according Respondent a virtual power to veto such union selection until an accountant meeting the Respondent's approval, for unspecified reasons it should be noted, was nominated. The requirement by an employer that it retain the authority to select the designated accountant—which I find Respondent as a practical matter insisted on here—is inconsistent with good-faith bargaining under Board law, *St. Joseph's Hospital*, 269 NLRB 862 (1984), the theory being that someone other than the employees' selected collective-bargaining representative is being forced to represent the employees' interest without the latter's consent. It is axiomatic, and far from speculative given their demonstrated distrust on this record, that the ratification procedure also posed an obvious time-consuming snare to the parties' efforts to negotiate.

The second defect, more serious, is Respondent's insistence on supplying the Union only with a "current" financial statement when it was Respondent who put into issue the contention in its 13 December 1983 letter to employees while negotiating with the Union that it had been *losing* money for the past 4 years at Elmira or had been only marginally profitable there, and Madison Heights had been only marginally profitable the past 2 years. Respondent's limitations in access to only a "current" statement therefore fell short of being an adequate disclosure of information reasonably necessary to the Union for intelligent bargaining regarding an issue Respondent itself raised in support of its proposal to reduce employee wages. It follows from this, that the never-defined "opportunity" which Respondent's proposal allowed the Union for verification by an independent audit, being also restricted to the also not-defined "current statement"—whether a monthly, quarterly, or annual statement not being indicated by Respondent and thereby posing another time-consuming ambiguity—is likewise inadequate to bargaining needs. These deficiencies regarding definitions noted above and further below, were real concerns raising questions as to how the audit would proceed, rather than speculative deficiencies as Union Counsel Page reminded Fishman, that more than a current statement on finances was needed and UAW Counsel Engel questioned Respondent counsel regarding such concerns only to be referred to the letter originally proposing the audit, without clarification. Fishman never responded to the Union's contentions that a statement limited to a 1-year period did not suffice.

The Respondent's proposal contained an internal restriction as well, permitting only a review by the designated accountant as noted into a severely limited area, regarding accuracy of the fact, factors that would make the reports misleading, and to substantiate his conclusions. This limited inquiry, as noted by Respondent's own witness accountant, Peter H. Burgher, would not show inventory adjustments, or allocation charges, or as UAW accountant Larry Mishel testified, the statement might show—and the audit verify—the fact of losses, but not the why and how the Union might respond with proposals based on the operative facts. For example, there could be nonrecurring losses on the current statements not fairly calling for Respondent's economic recoveries, the allocation of debt interest charges among all of Respondent's plants would be germane to the question of whether the "loss" at a single plant warranted employee concessions, the allocation of bargaining unit type costs would also be germane to proposed bargaining unit benefit reductions, and the tax returns requested by the Union would be necessary to determine depreciation allocation, whether unusual tax losses had occurred, and the consistency in recordkeeping systems.

It is readily apparent that the gag on the designated accountant, while under the Respondent's proposal allowing an explanation or substantiation of his conclusions regarding the accuracy of the figures shown, or plainly "misleading" in nature, would not permit the Union to discuss the details *behind* his conclusions and analyze for itself the economic inability of the plants to determine whether a concession on wages would be worthwhile as helpful to shoring up the Respondent's financial condition or futile if the facts showed otherwise, or indeed whether any concession at all was warranted. Labor costs, for example, have been held germane and therefore discloseable. *NLRB v. Western Wirebound Box Co.*, 356 F.2d 88 (9th Cir. 1966). In short much other relevant information tied to the issues raised by Respondent lay outside the scope of inquiry allowed by Respondent's proposal, which did not permit, under the gag as further example, the Union to bargain intelligently about the relative survivability and economic condition or competitiveness of the three plants. In her letter of 24 January 1984 to Fishman (G.C. Exh. 20) Union Counsel Engel explained why the inhibited accountant would be of no use to the Union, which needed a report on his findings spelling out the performance of the facility over the last 3 years and analyzing the cause of any red ink reported by the plants, including what part if any labor costs played in any losses. In short, there was a tightly limited restriction on what the accountant could discuss with the Union which was, as noted, limited to a narrow scope of inquiry to begin with.

Respondent also rejected the Union's substantially reduced request for information limited only to a look at the same books Respondent allowed the Union to examine in 1980, updated to 1983, without advancing any reason for such refusal, then or at this hearing, which in my view left the Union to feel its way in the dark as best it could to represent employees in contract negotiations, and placed a blind man's bluff-like burden on the Union without the light from the requested information. I find its entire course of conduct regarding the Union's request for financial information, which Respondent continued to withhold, sharply inconsistent with its good-faith bargaining obligations under the Act and therefore a violation of Section 8(a)(5) of the Act. *Metlox Mfg. Co. v. NLRB*, 378 F.2d 728 (9th Cir. 1967), cert. denied 389 U.S. 1037 (1968); *Washington Star Co.*, 273 NLRB 391 (1984); *Mashkin Freight Line*, 272 NLRB 427 (1984). Respondent's reliance on the Board's decision in *Yakima Frozen Foods*, supra, is without persuasive force as there the respondent employer offered to submit its books and records to a full audit by a CPA chosen by the union, the only restrictions being (1) that the CPA not be in the Union's regular employ; (2) information on the identity of seller and purchaser not be taken from the office; and (3) that any questions be directed to the employer's accountant. There were no limits imposed on the scope of the union's audit in that case, nor, the major distinguishing characteristic, was there any burdensome restriction on what the designated accountant could communicate to the union, unlike in the present case where not only was such a burden imposed but also a host of real barriers preventing the Union from access to the res gestae-like facts behind Respondent's inability to pay contention, unfairly preventing the Union from bargaining intelligently.

6. The Union's request for information concerning the transfer of jobs and machinery from the Detroit plant

An *overview* is helpful here. The parties began negotiations in late August and early September 1983 for a new master contract covering the three plants at Madison Heights, Detroit, and Elmira, New York. The strike ensued in early November and ended in February 1985 at which time striking employees offered to return to work. There is some brief reference in testimony, but no finding that by August 1984, the Detroit plant was closed and, by 30 September 1984, the Madison Heights plant, shut down in July, had also ceased operations.

7. Respondent's announcement on 13 December 1983

During the parties' negotiations over a host of unresolved matters in the above period, including the issue of strikers discharged for picket line misconduct, where I find Respondent unlawfully failed and refused to provide the Union with requested information, the Employer informed its employees on 13 December 1983 in a written memorandum that, inter alia, it must begin considering alternatives regarding the Detroit plant, and that due to a customer's request the "flame arrestor manufacturing line" had been moved out of the Detroit plant. Respondent also stated it might be forced to move out other lines of Detroit plant machinery as well. (G.C. Exh. 9.) By letter dated 22 December Respondent's counsel also informed the Union of the contemplated closing and relocation of the fuel devices of the Detroit plant operation. According to the undenied testimony of witness Sally Dorman, whose account in this respect is credited, E. J. Mullane, Detroit plant director of industrial relations in-

formed Dorman, Vernette Ward, and Jerome McKenny on 24 November 1983, while the three were picketing, that the Detroit plant was moving out. Respondent does not deny either the communications or the fact that Detroit plant machinery was being shipped out in this period, and subsequent communications further confirm the fact.

8. Union's request for information

By letter dated 22 December 1983, Union Counsel Page wrote Respondent Counsel Fishman requesting information as follows: "What work has been moved out of the Detroit plant within the last year and where has it moved to?" (G.C. Exh. 13, par. 10.) During master contract negotiations in early January 1984 UAW Assistant Vice President Jim Ellis testified that during the discussions of the Detroit plant that the Union again requested information on what work had been moved out from the Detroit plant, Fishman once replying that the matter would be discussed in Detroit.

Fishman wrote Union Counsel Engel on 25 January 1984 referring to a request by Engel during 19 January negotiations for information regarding the type of work permanently or temporarily removed and the identification of the location to which the work was recovered, from the Detroit plant. The response was without nourishing facts, stating only that "no work has been permanently removed," "Facet has temporarily removed work," and that Fishman saw no right in the UAW to information regarding the temporarily removed work. (G.C. Exh. 21.) It is instructive to note that in this very period as will be discussed further, Respondent was making separate Detroit plant contract proposals and that the Detroit plant operations were highly significant in the parties' ongoing negotiations toward a master agreement. In fact the parties here stipulated that one of the actual bargaining proposals on the table, placed there by the Union, was that, inter alia, the Detroit plant work not be relocated during the term of any new agreement (Tr. 735). In a 28 January 1984 letter to Fishman, Union Counsel Page referred to still another Detroit plant information request in an earlier letter on 13 January and (in the 28 January letter) reminded Fishman about some of the Union's "outstanding requests for information which you have not yet answered," the number one item being:

> (1) As to the machinery and equipment that have been removed from the Detroit plant—where is it now and is it being used for production purposes and where is it going to be eventually relocated? [G.C. Exh. 22.]

The information request arose again at master agreement level negotiations on 6 and 7 February 1984 according to Ellis when Engel asked Fishman for a response to the union request, Fishman replying he did not know. Engel asked that the work be identified, and for information regarding where it had been sent, Fishman also replying repeatedly that the Company had a right to move some work out from Detroit and had done so, but providing no details.

As late as 27 February 1984 Respondent was still on notice that the Union was pursuing its request for the information via service of a charge filed by the Union with the Board's Reqional Office that date alleging that since on or about 1 March 1983 Respondent had violated the Act by, inter alia, failing and refusing to furnish information regarding, "(a) temporary removal or subcontracting of work from the Detroit plant." (G.C. Exh. 1(i).)

The record evidence shows that the Respondent refused to provide the requested information at any time, although in effect admitting to its possession as shown above.

9. Analysis

The law is clear and well established that an employer has the duty to provide the union with information relevant and reasonably necessary to the union's representational or bargaining responsibilities, including contract negotiations, on request. Probable or even potential relevancy is all that is required. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Acme Industrial Co.*, 385 U.S. 432 (1967); *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61 (3d Cir. 1965); *J. I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958); and *Western Massachusetts Electric Co.*, 228 NLRB 607 (1977). The Board has also held that where the requested information is about terms and conditions of employment of bargaining unit personnel, and is therefore presumptively relevant to the union's representational obligations, the union need not demonstrate its exact relevance where the company has not rebutted that presumption. *Chicago Metallic Corp.*, 275 NLRB 871 (1985); *Pfizer, Inc.*, 268 NLRB 916, 918 (1984); and *Postal Service*, 276 NLRB 1282, 1285 (1985). Although matters not lying directly within the core of bargaining unit employees' working conditions require a demonstration that there is the required relevance, the standard is the same liberal discovery-type standard in all cases. *United Graphics*, 281 NLRB 463, 465 (1986), citing *Loral Electronic Systems*, 253 NLRB 851, 853 (1980); and *Curtiss-Wright Corp.*, supra.

The information requested here by the Union, as explained to Respondent numerous times, was to enable the Union to carry out its representational duty to "bargaining intelligently" on behalf of the bargaining unit employees during the course of bargaining on a wide range of topics including the status of the Detroit plant, where bargaining unit employees' work—employee-assigned plant machinery and jobs were leaving the plant under uncertain circumstances and conflicting reports from Respondent, whose representatives first informed employees the plant was closing and some machinery had already been sent out in December 1983, then later informed the Union no work had been sent out permanently, only "temporarily," in January 1984 followed subsequently by a complete cessation in Detroit plant operations in August after employees had returned to work in February, much of such communication and uncertainty arising in the course of contract negotiations as noted above and bringing the question even more to the forefront in negotiations.

Even without the perplexing confusion handicapping intelligent bargaining sought by the Union on this subject at negotiations, a needless impediment to any fair chance for bargaining which would be removed by the information's submission clarifying the matter, the further clear relevancy of the information regarding machinery, and thus work, removal from Detroit to the Union's performance of its statutory duties is readily apparent.

Section 9(a) of the Act provides in pertinent part, "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, *or other conditions of employment*." (Emphasis added.) Bargaining unit work is at the heart of the employee representative employer collective-bargaining relationship, and without machinery, and the connected jobs there is no "condition of employment" for employees whatsoever. It is self-evident that the matters about which the Union sought information fell well within the above statutory definitions. The need to take intelligent steps to preserve the work of unit employees, an area of union representational obligations about which the requested information clearly relates, has deeply imbedded roots in the labor relations history of collective bargaining in this Nation. As has been noted:

> In seeking this information, the Union was complying with its statutory obligation to represent its employees, so as to preserve the work that they regarded as their own. This concept of preserving work that employees regard as their own, has been exhibited in our industrial society since the origin of the industrial revolution, when cottage workers broke up factory machines in protest of losing work, down to the complex contractual and jurisdictional disputes of today. Board cases involving a union's effort to preserve work for its represented employees are legion. [*International Harvester Co.*, 241 NLRB 600, 604 (1979), where the Respondent was ordered to produce the requested information.]

The Board has in many cases held that where, as here, the employees' bargaining agent has received information that the employer is removing unit work, or transferring it elsewhere, by subcontracting or otherwise, that the Union is entitled on request to information bearing on that issue, "so that the Union may properly represent the unit employees." *Washington Star Co.*, 273 NLRB at 396 citing *Westwood Import Co.*, 251 NLRB 1213 (1980), and *Air Express International Corp.*, 245 NLRB 478 (1979). Respondent's view that it lawfully transferred or subcontracted out the work temporarily during the strike, and thus under Board law had no duty to disclose information concerning such action is a defense not factually established in the record and assumes not only that such information would be relevant to bargaining on that subject alone but also assumes facts to which it alone was privy, argues from the point of a self-made conclusion, and unilaterally precludes the Union from performing its duty to assess the facts and their effects on unit employees so as to engage in intelligent bargaining regarding the Detroit plant employees' then current and future conditions of employment. Furthermore, such a view puts the burden on the Union to establish that Respondent's actions were unlawful before it can be entitled to the information, a requirement at odds with the law. For, as stated by the Board, it is not necessary to find here that "the information sought is certainly relevant or clearly dispositive of the basic . . . issues between the parties [t]he fact that the information is of probable or potential relevance is sufficient." *Westinghouse Electric Corp.*, 239 NLRB 106, 107 (1978). Respondent's view is therefore rejected. See *Dane County Dairy*, 273 NLRB 1711, 1712 (1985) (facts in defense not established); *Sonat Marine*, 279 NLRB 100, 106 (1986) (respondent reasoning in its defense from its own conclusion, and "Nowhere does the Act require that the Union must accept without any verification an employer *claim* [emphasis added] that bargaining unit employees are now out of the bargaining unit," citing *Cherokee Culvert Co.*, 262 NLRB 917 (1982); *Ground Breakers*, 280 NLRB 146, 148 (1985), that the employer's view on the merits of an underlying dispute, even if probably correct would not be material on the question of whether the requested information should be furnished so "the Union can perform its function of representing employees" and *Indiana Cabinet Co.*, 275 NLRB 1209, 1213 (1985), in which employer merely responded to Union's request that "there have been no intervening changes."

It is clear from the foregoing that the requested information is presumptively relevant to the performance of the Union's representational duties and I so find. Even assuming for the sake of argument that the subject matter lies further removed from the core in employment conditions under a stricter review of the meaning and definition of actual wages, hours, and other conditions of employment as adopted so that a demonstration of potential relevancy is required, such is established here. Thus the information is relevant to contract negotiations regarding the Detroit plant highlighted above, the question of work loss incurred by unit employees while on strike and on return to work at the strike's conclusion, the effects of the loss of work on the Detroit employees, whether the Union would seek to retain article 19 in the parties' collective-bargaining agreement for many years, covering movement of department or plants and according transfer rights to employees affected by movement of a department "or portion thereof,"[2] related grievance

[2] Art. XIX provides in pertinent part as follows:

Article XIX. Movement of Department or Plants: (108) In the event the Company elects to move a department, or major portion thereof, or plant covered by this Agreement to another plant of the Company also covered by this Agreement, employees who worked in such departments or plant who are out of work as a result of the transfer, may it so desire, within thirty (30) days elect to be transferred to the new plant and carry their ranking seniority to the new plant.

(109) Employees who so elect to be transferred to the new plant will receive the corresponding wage rate of the job classification to which they are assigned at the new plant for fifteen (15) days after which they will receive the top rate of such classification. If such

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filing, overall negotiating goals given the interconnected bargaining over the three-plant unit, and filing proceedings with the Board, a decision requiring knowledge whether the machinery was, in fact, permanently moved out as part of what then was a partial closing in the three-plant unit or rather was merely temporarily removed. For all these reasons, the information sought by the Union "was important in the performance of its representation duties" for it would be in a position, with the facts, to negotiate or take other action on behalf of unit employees it was charged to represent. *Sonat Marine*, supra at 106. Far from being of speculative value, or based on surmise, there is shown a real, urgent necessity in the Union's need for the information concerning the actual admitted movement of machinery and loss of work from the Detroit plant impacting on unit employees there if the Union was to be able to intelligently assess the situation and bargain with Respondent during the concurrent ongoing negotiations. Compare *Southern Nevada Builders Assn.*, 274 NLRB 350 (1985). Accordingly, on the basis of the foregoing analysis and authorities cited, I conclude that Respondent unlawfully failed and refused to furnish the requested information thereby violating Section 8(a)(5) of the Act.

During negotiations on 9 or 10 January 1984 in Horseheads, New York, Respondent expressed to union representatives its intentions to discipline employees for violence on the picket line during the strike begun in early November 1983. Union counsel requested information on the number of employees involved, their identification and plant location, but was told by Respondent's vice president of industrial relations, Robert Childress—clearly an agent for Respondent—that it could not provide such information because the Company had no idea of the number or names. Respondent counsel, also present and active at negotiations on Facet's behalf, informed the Union that the matter was "still under investigation." By letter dated 28 January 1984, union counsel again requested the information but was told in a reply letter of 3 February by Attorney Fishman merely that the Company would not tolerate misconduct. (G.C. Exh. 24.) There is further undenied testimony by administrative assistant to Union Vice President Odessa Komar, Jim Ellis, that during negotiations on 8 February 1984 in New York, Union Counsel Betsy Engel specifically requested information from Respondent about how many employees were involved in the misconduct, what the charges were, and possible penalties under consideration. Fishman responded "he had no way of knowing." Arriving later in the evening Union Counsel Leonard Page also requested similar information from Respondent's negotiators but was merely told "they were still studying the tapes and investigating."

Union Staff Representative Walter Waller testified to a Detroit plant meeting attended by Waller, the industrial relations director at the Detroit plant E. J. Mullane—clearly an agent for Respondent—William Popadynec production manager—also on this record clearly a Respondent representative and agent—and Local Union President Tony Rahill in February, about the time striking employees were returning to work. Waller recalled asking the company representatives, in the course of several discussions over how the unconditional return of former strikers would be handled and who the employees were he had heard were accused of picket line misconduct. He says Mullane responded that the Company did have some employees under investigation but that when Waller asked how many Mullane said, "I'm not going to tell you how many, that's our business." When Waller asked whether Mullane could give him their names, Mullane told him he would not give him the names until after the Company notified them. Although a dispute arose at this hearing over the question whether Waller had made another request for the same information in February, Employer Representative Popadynec was not called on to deny Waller's testimony regarding the above, and Mullane was not brought forth to testify at all. Waller's account is credited.

Larry Smith, then an International union representative, testified that during a meeting with company representatives on 1 March 1984 he asked Facet's chief spokeman at local negotiations for the Madison Heights plant, Donald Houser, for the names of employees involved in the Company's picket line misconduct investigation but was told by Houser only that it was under investigation. Company co-counsel Frank Mamat told Smith the names of three employees under "serious investigation," indicating there were others as well: Harry Miller, Joe Scianimanico, and Harold Hall. When Smith asked about the circumstances, he testified he was told "they" did not want to talk about it any further, and when Smith asked when they would have the information he was told, "as soon as they could." On 15 or 19 March 1984 at another such meeting, Smith pressed the Union's request for information, asking if there was anything else he could learn. Houser merely told him the names of two employees already sent telegrams of recall, and three sent telegrams of discharge "for misconduct on the picket line and elsewhere." Smith again asked for "some particulars on it" and was told by Houser he hoped to have information within the next week or so. The General Counsel also established by Smith's undenied testimony concerning this meeting that Houser, referring to the strikers, some of whom were still under investigation who would be discharged (and had been discharged), said that he would waive time limits (in the parties' contract-established grievance procedures) on the Union's filing grievances over the firings, thereby establishing such grievances were fairly contemplated by the parties and further

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employees receive the top rate for the same job classification to which they are assigned at the new plant without a breaking-in period, they shall receive the top rate of pay for such classification at the new location.

(110) An employee whose seniority is transferred between plants pursuant to Paragraph (108) of this Agreement will be paid a Moving Allowance provided that:

a. The plant to which the employee is to be relocated is at least fifty (50) miles from the plant for which his seniority was transferred, and

b. As a result of such relocation, he changes his permanent residence, and

c. He makes application within six (6) months after assuming his new permanent residence in the area of this plant to which he was relocated in accordance with the procedures established by the Company.

that the relevancy of the requested information was self-evident under Board law since related to possible grievance and arbitration proceedings. *E. W. Buschman Co.*, 277 NLRB 189, 191 (1985).

Finally, on 2 April 1984 when Local Union President Butler asked Houser if there was any further information on employees discharged for picket line misconduct beyond telegrams discharging them without prior knowledge of the Union, Houser replied, "we would see what we wanted at the NLRB hearing."

Counsel for the General Counsel having established the Union's repeated requests, beginning in early January 1984 and continuing into April 1984 for Respondent's information on picket line misconduct, Respondent indicated it intended to act by disciplining employees, information clearly necessary and relevant to the Union's representational duties on behalf of employees, including filing grievances over these discharges under established grievance procedures noted above the burden fell on Respondent to justify its failure and refusal to provide the information as established above. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Pfizer, Inc.*, 268 NLRB 916 (1984); *Boeing Co.*, 182 NLRB 421 (1970).

Yet Respondent called none of its own representatives or officials to explain under oath its position in this matter, relying instead on purported "admissions" by union witnesses that in some of the numerous instances of refusals to provide the information, company officials had "explained" that the matter was still "under investigation," or "being reviewed," or that "no final decision" had been made, none of which reasons, on their face, justify the withholding of information Respondent may have had at the time the Union made its numerous requests. In this connection, the suggestion comes through Respondent's contention on brief that it provided the Union with "the information" once Respondent had "it," that Respondent simply did not possess the information at the times it was requested by the Union. Also implicit in this argument on brief is that Respondent did produce the requested information once it was available. The record fails to support either assertion.

Several witnesses, including Plant Manager Sheehan, Director of Manufacturing Popadynec, Supervisor Durlock, Customer Service Manager Phillippi, and Director of Quality Control John L. Smith, Respondent's officials, testified that they reported eyewitness accounts of picket line misconduct in writing and orally to Respondent's Director of Industrial Relations E. J. Mullane as early as mid-January 1984. Indeed, there is additional testimony that even as early as 5 December 1983, the assault on guard Buchanan's supervisor, and other picket line incidents on 3, 5, 12, 15, and 16 January had been observed, recorded, and reported. In addition, there are reports concerning picket line occurrences recorded by guard Oblinger dated 5 and 6 December 1983, and employee Zelda Greer testified she reported a 14 January 1984 incident to Mullane. Yet as late as 2 April, Respondent was informing union representatives it would still not furnish the particulars, on any details concerning this matter, advising the Union it would get what it wanted at an NLRB hearing where, as it turned out and is noted above, only the facts concerning two misconduct cases were described in the course of witness examination in the fall of 1985, over 10 months since the Union's first request of numerous inquiries seeking the information. Such limited disclosure as did occur was pursuant to this litigation, rather than the Union's fruitless requests. I find that Respondent failed and refused to provide the Union with the requested information concerning the picket line misconduct at all times material including from 9 January 1984 through April and May and onward thereby violating Section 8(a)(5) of the Act. *NLRB v. Acme Industrial Co.*, supra; *Pfizer*, supra; *Boeing Co.*, supra. Moreover, whatever little it did get was untimely communicated. *Postal Service*, 276 NLRB at 1288 (1985).

Respondent on brief points to the testimony of union witnesses Tony Rahill and Tom Butler, presidents respectively of the Detroit and Madison Heights locals, purportedly supporting the defense that Respondent did provide the requested information, yet their testimony reveals only, in Butler's testimony, that Company Representative Houser gave Butler notification concerning the discharge of three employees on 2 April and that Butler had already seen the telegrams discharging them as of 17 March. Further Butler testified he had no prior knowledge concerning those employees being discharged, and that when he asked for further details underlying the action such as "films, written documentation, etc." Houser refused to make any available, telling him to await the NLRB hearings. Yet it was undenied that as early as 8 February 1984 Respondent had informed Union Counsel Page it was still studying the *tapes* (films) taken of the picket line conduct, which Respondent, under Board law was required to produce on request. *Square D Electric Co.*, 266 NLRB 795, 797 (1983). Under cross-examination by Respondent later, Butler testified further that they (Respondent) advised him they would be responding to his inquiry independently of an NLRB hearing but testified without contradiction that Respondent never did so. Regarding Rahill, his testimony under cross-examination revealed that once the Union had learned of the letters identifying those persons who were receiving discipline for strike misconduct, Local 104 did not ask for further information. It was not the Union's duty to repeat the often repeated specific request for the names, locations, and underlying circumstances including the tapes reasonably necessary to evaluate the options open to it to represent employees in these matters still again simply because some small part of the request, after months of delay, was provided in the form of telegrams and later letters concerning Respondent's discharging the employees on 2 April. Rather, it was for Respondent to prove in this hearing that the numerous specific requests for information made by union counsel and union representatives in writing and orally, identifying there requested information specifically—which I find the Respondent had in its possession—was in fact provided to the Union by Respondent, and this cited limited testimony barren or elucidating details is insufficient to establish that fact. Nor did any Respondent witness take the stand to deny that the Respondent had refused to furnish the information as alleged in the complaint. In the same vein I note further that Union Representative

Waller testified he received at some date unspecified in the record information concerning the identity of about 10 employees the Respondent had decided to discipline, and while Respondent was in a position to elucidate the record as to the date and details, it did not do so. Waller also recalled that he made a second request on 29 February 1984 for Respondent to tell him the names and number of employees accused of picket line misconduct but was told by Mullane—who did not testify—he would be told after the employees were notified. In short, the references on brief by Respondent simply do not establish through union witness cross-examination that Respondent supplied the requested information at times relevant or substantially to the extent requested or required by law calling for timely production of all the requested information deemed relevant. *Washington Hospital Center*, 270 NLRB 396 (1984). Nor is the baldly stated assertion on brief by Respondent's counsel that Respondent provided the Union "and the GC" misconduct information sufficient enough to pare down the alleged discriminatees from 15 to only the 2 "tried before this Court" anywhere supported by the record evidence. Nor would such response, even if proven, by way of resolving alleged violations of Section 8(a)(3) of the Act being litigated in the formal NLRB hearing, control the determination of whether Respondent had violated its collective-bargaining duty to comply with Union's requests for information earlier under Section 8(a)(5) of the Act, the present issue being addressed.

By way of further justifying its conduct refusing the Union's request for, inter alia, the identification of those under investigation or to be charged with picket line misconduct, the number of them involved, their plant location, the penalities being contemplated, the tapes of picket line conduct, and nature of the charges, Respondent on brief cites Board cases holding that the production of employee witness statements in the context of imminent arbitration proceedings is not required due to possible intimidation of witnesses in such proceedings, and further that the production of whatever "undisclosed" relevant evidence in the hands of the possessor is too broad a discovery standard hence request for such are not within the scope of information production responsibilities under the Act as such requests are insufficient to oppose a respondent of the information sought. See *Anheuser Busch, Inc.*, 237 NLRB 982 (1978); and *Machinists Lodge 78*, 224 NLRB 111 (1976). Neither principle has any application here where the Union requested specifically identified information relevant to its function and responsibility to represent employees in a situation fraught with grave consequences for their employment free of any request or reference going to employee witness statements and seeking only germane information which the record discloses as described above, was in the Respondent's possession and for the most part was derived from its own representatives, supervisors, and agents (rather than employees) in December 1983 and January 1984. *NLRB v. Acme Industrial Co.*, supra, and *Square D Electric Co.*, supra at 797.

E. *Complaint Paragraph 12*

The General Counsel here contends that Respondent refused to bargain in good faith with the Union because Respondent engaged in a course of conduct during the parties' negotiations aimed at splitting apart the established appropriate bargaining unit by unlawfully inducing Detroit employees and the Union to negotiate and accept a separate contract for Detroit plant employees only, excluding unit employees at Madison Heights and Elmira, New York plants, without the Union's consent.

Background

The background evidence shows that the parties negotiate numerous employment matters, such as wages, pensions, insurance, vacations, SUB, paid absences, COLA, and grievance procedure details for all three plants in unitwide bargaining called "master-agreement" negotiations, the settled understanding being that the three plants are, in general, treated as one unit, though no general wage schedule is published and there can be minor variances, such as an incentive bonus at one plant alone. The parties also engage in "local" plant or supplementary bargaining over such subjects as starting and quitting times, work rules, job classification structures, wages for a particular position, job bidding, and the like. The overriding characteristic in all the bargaining that goes on, it is clear, is the unified three plant structured bargaining unit on which the parties contract negotiations have long been based over several years, a structure fortified by the requirement that votes of all plants be pooled to ratify a new contract.

F. *Respondent's 1983 Contract Proposals*

In their entire history of bargaining over successive master contracts the record shows no suggestion that the multiplant unit approach had ever been disturbed. However, on 15 November 1983 in an unprecedented action, Respondent for the first time presented a separately drafted contract proposal covering numerous master level contract subjects for the Detroit plant *alone*. (G.C. Exh. 6.) The proposal covered wages, COLA, insurance, SUB, pensions, holidays, paid absences, vacations, tuition assistance, contract duration, production rates, and letters of agreement. Respondent also presented a wide-ranging set of separate proposals for Madison Heights and Elmira combined, excluding any mention of Detroit in another draft. (G.C. Exh. 7.) This Elmira-Madison proposal, unlike Detroit's, called for different *general* wage increases, *elimination* of COLA, new insurance benefits unlike the Detroit proposal, differences in holiday benefits, scheduled the discontinuance of paid absences while Detroit's was merely reduced, and called for *elimination* of SUB entirely.

1. Union rejection

After consideration of the separate documents the Union accused the company negotiators of trying to split apart the bargaining unit and rejected such approach, insisting that a single agreement covering the three plants be negotiated. Respondent witness Robert Childress testi-

fied the Union never "complained" of any "splitting" effort yet later in the same day general counsel witness Ellis, UAW vice president, testified he informed Childress and Company Director of Human Resources Paul Dick that the Union would not split up the master contract (unit), and accused the Company of putting the Union in a "trick bag" by giving the Union two separate proposals all the while knowing the Union would not split off the "national agreement." Ellis testified further that Childress said he realized that would be the Union's position and so informed Respondent President Malone prior to negotiations—and that Dick confirmed the foregoing. Neither Childress nor Dick denied the foregoing and Malone did not testify. I further credit Ellis over Childress that the Union objected to the splitting effect inherent in Respondent's offer—both as to its separately documented format and its substantially contrasting terms vis-a-vis master level bargaining subjects between the Detroit offer and the offer at the other at the other plants—at the bargaining table, for I believe it would be unnecessary for the Union to take the position it was for a master agreement without the Company's level of demanded recoveries and then the parties could look at some local recoveries "instead"—as described by Childress himself—unless it was responding with an objection to the separate master level proposals put on the table by Respondent. Furthermore, as shall be noted, the Union repeated its objections on later occasions described below.

2. Respondent's direct contact with Detroit employees

Unheeding the Union's objections to divided-unit bargaining, Respondent tried to induce employees directly to accept a separate Detroit contract on 24 November 1983, when Detroit Plant Director of Industrial Relations Eugene J. Mullane approached picketing employees outside the plant inquiring why they had not returned to work in view of the good contract which had been offered Detroit employees. Employee Sally Dorman, whose testimony in this respect was not contradicted, stated that she told Mullane the employees could not accept the separate contract as it had not been offered to "our sister companies" (plants) and "before we had a master contract and there was three plants that always had that master contract and the company, Facet, only offered the contract to the Detroit plant." Mullane told the employees the Madison plant was moving out and that Elmira made different products than the Detroit plant and that the employees should return to work; whereon fellow picket Jerome Mckenny told Mullane he should be negotiating with the Union and, "that he know [sic] that we would not accept the contract that did not include the other two [plants]." Mullane then left Dorman, Mckenny, and a third picket Vernette Ward, whom he had been addressing as a group, and headed toward another two pickets. Mullane did not testify.

On 2 December 1983, Respondent mailed letters containing copies of the Detroit plant only contract proposal to about 140 employees, of that plant alone, not communicating with the other two plant forces in the unit comprising better than 500 employees overall. Without telling employees why the Union would not submit the offer to the Detroit force, viz that the offer was unaddressed to Madison and Elmira plant employees, Respondent urged employees to give the union-rejected proposal serious consideration, adverted to general job losses for all, the need to continue product and services [a hint striking Detroit employees would be replaced?] and "invited" employees only at the Detroit plant to return to work "now under the terms of the 15 November offer." (Emphasis added.) Respondent's urgently worded and toned entreatment plainly envisaged and contemplated a dismemberment of the Detroit plant from the multiplant unit because the Respondent's appeal, if accepted by Detroit plant employees returning to work "*now*" under the separate Detroit plant contract, would break the appropriate bargaining unit apart, leaving Madison and Elmira employees to fend for themselves in a fragmented unit reduced by one-third its size for all practical purposes, substantialiy weakened or diluted in bargaining strength. There was simply no provision in Respondent's 2 December letter regarding the status of other unit employees at Madison and Elmira and the impact on them were Respondent's limited invitation to Detroit employees accepted. (G.C. Exh. 8.)

3. Respondent's further contacts with picketing employees

Mullane again urged Detroit employees to accept Respondent's Detroit-only offer on 4 December, advising Mary Lewis with another striking employee present, Dolores Carter, that she should come back to work since "you have a good contract," Lewis testifying she understood Mullane was referring to the Detroit only proposal dated 15 November.

Not as yet successful in the efforts to isolate Detroit employees from the unit, Respondent adopted new techniques and displayed a sharper strategy on 5 December when high company official Facet President and Chief Executive Officer James R. Malone, together with Detroit Plant Manager T. J. Westfall, spoke further with striking Detroit employees asembly line worker Ilah Drake, job setter Jack Muhaw, and machine shop job setter Loyd Bastuba present at the picket line outside the Detroit plant, urging them to accept Respondent's Detroit plant contract offer and return to work.

4. Facet President Malone's appeal

Employee Ilah Drake testified that Malone drew employees' attention to Respondent's earlier letter and contract offer, advising employees not to get too upset or concerned over the excluded Elmira plant employees offer because, "they (Elmira employees) were not going to be thinking of us [the Detroit employees]." Drake stated Malone said he wanted "us" to come back to work—that Elmira employees could start drawing compensation after so many weeks asking pointedly whether Detroit employees thought the Elmira employees were going to offer to share any of their compensation with Detroit employees. Malone then advised employees, "So think about yourselves . . . not about the Union," concluding remarks at this point with the assertion, "the

Union wasn't going to be too worried about [it] because the union officials were going to be getting paid regardless of whether Detroit employees got any money or not."

Loyd Bastuba testified that Malone urged the Detroit employees to return to work, picturing the 15 November Detroit plant contract as a fair one. Bastuba told him it was not fair, "as it didn't give the other plants the same opportunity and we were all together." Malone responded that that should not matter as the Madison plant was moving—would be there no longer—and he was in the process of replacing workers in Elmira and, in the long run, Detroit employees would be alone anyway so "we might as well accept [the contract] now and return to work." Explaining under cross-examination by Respondent counsel that he remembered the conversation because it was important when he talked to someone that high up in the Company, Bastuba recalled that Company President Malone told employees if they "didn't return to work they'd be replaced and if that didn't work he'd move the plant or close." Employee Jack Muhaw testified that Malone told employees they should "get to members and our local to get us to go back to work, he said we were getting . . . it was going to be separate contracts; but he wasn't breaking up the master" adding that Madison would be gone in 6 months and Elmira's future was uncertain.

In further remarks to the employees later the same day, Malone told him to persuade union representatives at the Detroit local union to agree on having a vote to return to work. Drake further recalls that Plant Manager Westfall joined Malone in urging employees to get together and talk Detroit employees into returning to work, at one point asking employees if they had seen a movie about a plant closing, telling them the same thing could happen to them. Neither Malone nor Westfall testified and the employee accounts are credited.

5. Respondent's further requests on 6 and 12 December for a separate ratification at Detroit

A composite of testimony after careful evaluation based on minor variances, internal consistency, credibility, and the import or flow in other evidence reveals that during 6 December negotiations Respondent continued to press for separation of the Detroit plant from the unit, this time, according to Union Assistant Vice President Ellis, corroborated by Union Representative John Mando, openly pressing the Union to allow a separate Detroit employee vote, in effect a separate contract ratification. Ellis rejected the request as tantamount to the Union agreeing to split the unit. Union Representative Mando, mistaken by 1 day about the date of the 6 December meeting, testified that the union representative informed company officials Malone, Dick, and Childress that the Union was willing to discuss "2-tier" level of benefits but such had to be under a master agreement. Company spokesman Childress denied asking for a "ratification" vote, but did not deny asking the Union to afford Detroit an opportunity to vote on the proposal. Further, I credit Ellis over Childress on this point because I found Childress walked a very thin line of distinction—too careful to commend his testimony on this point as reliable, fully accurate, or unaffected by self-interest. Thus Childress denied the Union *ever* made accusations that the Company was trying to split the master agreement but testified indeed that Ellis had raised that very subject by asking Childress at an earlier meeting point blank, "Are you trying to break the master?" And, of course, Mando's testimony reflects pointed union concern over preserving the master agreement communicated to Respondent at this meeting.

As Respondent, concurrent with above efforts, sought differing benefits at the three plants, the Union responded fulsomely in such respect, agreeing to different levels at the three plants in a phone call between Ellis and company official Dick on 7 December, so long as the benefits and employees at the three plants remained under the master agreement. In fact, the Union was willing to "sell" Respondent's 15 November economic offer to Detroit if Union Representative Ellis could "work out" the Elmira plant issues, as indicated in a report by Ellis to Union Vice President Odesso Komar (G.C. Exh. 39), and by Ellis' testimony regarding a statement he was questioned about on examination so long as the master agreement unit remained intact.

Nonetheless, in a conference call on 12 December, Company President Malone again urged on the Union that a separate Detroit plant vote be taken on Respondent's contract offer, Union Representative Mando rejecting the idea again. Mando replied, "I said we'd not agree to break up the master concept, that that was what he was proposing and we couldn't permit separate votes." Mando suggested the parties get back to the bargaining table, that they were not that far apart and could work out a settlement—Malone responding he would think about it and call back. Malone did not testify and Mando's testimony is credible.

6. Respondent's 13 December letter to Detroit employees

Instead of returning to the bargaining table and devoting itself to the economic issues, Respondent, the very day following the Malone conference call, mailed another letter to some 140 or so Detroit employees only (G.C. Exh. 9), accusing the Union of unfairly punishing the Detroit employees "for the sake of other operations," claiming its offer to the Detroit employees was a fair one and urging Detroit employees to return to work. The letter contains the information that Respondent may have to move other manufacturing lines out of the plant in addition to one already transferred, in order to service customers. There can be no reasonable question but that in the context fairly established to this point this letter was yet another reinforcement in Respondent's efforts to break apart the Detroit plant from the three-plant unit discussed further below, by inducing the Detroit employees to return to work thereby creating a de facto acceptance of the separate Detroit contract.

Still hammering away at Detroit employees in efforts that would divide the unit, Respondent's Detroit Plant Director of Industrial Relations E. J. Mullane talked with picketing Detroit plant employee Susan Hagedorn on 15 December on the picket line at 8 a.m. asking her

why she did not bring her people back to work, warning her that the Company had hired 50 people to work at the Elmira plant and "we didn't want to see that happen here," and advising Hagedorn that employees had gotten the Company's best contract offer in the mail (the 15 November offer). She then protested that the employees could not return to work without a contract. Moreover, as late as the 9 and 10 January 1984 negotiations, Respondent, according to undenied testimony by Union Representatives Mando and Ellis that Respondent presented separate draft agreements, was still giving the appearance of seeking separate plant contracts though the negotiations were on the master level. In fact, in a telephone call Ellis recalled as occurring either 17 or 18 January 1984, which Facet President Malone had placed to Ellis, Malone again sought the Union to allow Detroit employees a separate vote, even alleging to Ellis that the International had once allowed such a procedure elsewhere, Ellis responding that the Union would not allow a Detroit vote on an agreement covering them only as "we'd [then] not be able to put together a master contract."

Analysis

There is no question on this record that the Respondent sought a fundamental alteration in the parties' long-established and appropriate bargaining unit consisting of the Detroit, Madison, and Elmira plants by seeking through coercive methods a separate contract resolution covering the Detroit plant employees alone.

It is well-established that the subject matter of redefining the composition of a bargaining unit established by either Board certification or the parties' longstanding practice and agreement touches a bedrock-like source for stability in the parties' collective-bargaining relationship and is therefore held to be a merely permissive subject of bargaining about which neither side can insist to the point of impasse—in short neither side can force the other to consent to such alteration, though a mutual agreement is permitted. *Newpaper Printing Corp.*, 232 NLRB 291, 292 (1977); *Tarlas Meat Co. I*, 239 NLRB 1396, 1397 (1979); *Newport News Shipbuilding*, 236 NLRB 1637 (1978); *Electrical Workers (White-Westinghouse) v. NLRB*, 604 F.2d 689 (D.C. Cir. 1979); *Canterbury Gardens*, 238 NLRB 864 (1978); and *General Motors Corp.*, 120 NLRB 1215 (1958). It follows that if a mutual agreement on the matter is lawful, a party can raise the subject at negotiations in an exploratory manner or even with a specific proposal—even take a strong position in the matter so long as such efforts fall short of causing an impasse to further negotiations between the parties.

But it is also true as a necessary, logical corollary that if neither side can attempt to force the other to agree to a change in the bargaining unit structure by insisting to impasse in the negotiations on such change, neither can either party attempt to force the other's consent by any other means and still fulfill the duty to bargain in good faith. If, in addition, such party were to select "other" means that were unlawful, such additional transgression would serve to compound the violation of law by seriously disrupting the collective-bargaining process still further.

Respondent's entreaties to the Detroit employees on the picket line, and its direct mailings to about 140 in the Detroit plant sought a separate contract resolution for them and were strongly laced with thinly veiled threats of further reductions in operations and even plant closing. Respondent's communications directly attacked the integrity of the Union by questioning the good faith of union representatives, insinuating they did not care about Detroit employees' interests since the representatives would still get their own pay even if Detroit employees did not. Respondent's communications further disparaged the Union by accusing it of punishing employees unfairly for the sake of other operations—a nonambiguous reference in this context I find—to the Union's allegiance to the three-plant unit and its objection to splitting Detroit employees away from that unit. President Malone's injunction-like advice to employees to "so think about yourselves . . . not about the Union" could only be an effort to drive a wedge between employees and their bargaining representative still further, the wedge already having been sharpened by the earlier allusions to reductions and plant closing.

This coercive action aimed at creating "division between the employees and their bargaining representative" in a similar context has been held violative of the 8(a)(5) mandated good-faith bargaining obligations. *General Athletic Products Co.*, 227 NLRB 1565 (1977), and *Safeway Trails*, 233 NLRB 1078, 1081 (1977). Moreover, Respondent's references both specifically and reasonably interpreted claims that Respondent is the true source for protecting the employees' interests rather than the employees' representative with such claims as the Company's offer being a fair one while the Union is presented as *unfairly* punishing employees. This provides a basis to conclude the Respondent unlawfully sought to undermine the Union's status as the employees' representative in order, plainly, to further its divided unit goal instead of sticking to collective-bargaining matters to the detriment of the latter and in derogation of its duty to bargain in good faith. *Adolph Coors Co.*, 235 NLRB 271, 277 (1978), citing *Texas Electric Coop*, 197 NLRB 10, 12, 14 (1972), and, in pertinent part, *NLRB v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969), as to an employer unlawfully dealing with the union through employees rather than dealing with the union as the employees' representative. See also the dissenting opinion by Member Johansen in *Putnam Buick*, 280 NLRB 868, 870 (1986), that an employer effort supposedly to merely "communicate" with employees "was an explicit attempt to convince employees that the Respondent was more interested than the Union in their welfare" and this was an indicator of bad-faith bargaining since it "undermined the Union's status as the collective-bargaining representative."

It is likewise true that in its campaign-like efforts to divide the unit, Respondent sowed the seeds of dissension among the Detroit employees and employees at Elmira, pitting the Detroit employees against their fellow union members by asserting the Elmira striking employees would soon be receiving unemployment compensation that they would not likely share with Detroit em-

ployees Respondent was then unlawfully importuning to return to work as a separate unit. This effort was in common with Respondent's other efforts to divide the unit by dividing the unity among employees.

All these efforts are the exact opposite of good-faith bargaining for "if there is one thing that frustrates collective bargaining with the majority representative, and causes nothing but continuing and extended conflict, it is disruption of the unified action by separating one segment of the whole from others." *Tarlas Meat Co. II*, 239 NLRB 1400, 1404–1405 (1979).

It is well-established that a party is held responsible as intending the foreseeable consequences of his acts which were either desired by the person or which, reasonably viewing matters, were almost virtually certain to occur as a result of the conduct engaged in. By the nature of things, Respondent's pressures and exhortations to employees and the Union could only lead to a fragmentation of the long-established master agreement unit. This is no mere speculation because once voting to ratify a separate contract and returning to work pursuant to the terms applicable to them only, as intended by Respondent, there would be no viable collective-bargaining associated reasons for the Detroit plant employees to be any longer a part of the bargaining unit from which they would be withdrawn by the force of the described events severely weakening the employees' bargaining representative. At the same time the Respondent would be in a better, stronger posture to prevail in negotiations concerning the remaining employees in the weakened unit looking in from the outside at Detroit plant employees back at work. Given the Respondent's ample motive and continuing effort to secure this goal as described above, its alleged denials of any such intention, and that it was only making proposals "within a master agreement contract" have a hollow ring and are not worthy of belief. In this instance, I find a preponderance of evidence supports the view that Respondent intentionally sought to force a division in the appropriate bargaining unit by clearly unlawfully coercive means, thereby violating the duty to bargain in good faith most seriously and, by the exercise of such coercion, losing the protection otherwise accorded employer communication to employees under the Act in these matters described above. *United Technologies Corp.*, 274 NLRB 609 (1985), and *Proctor & Gamble Mfg. Co.*, 160 NLRB 334 (1966).

G. *The Trident Defense*[3]

Respondent's defense, inter alia, that it cured such violation, if any, in a notice to employees repudiating such conduct mailed to them no later than 4 February 1984 is found meritless as such repudiation was clearly not a timely one, coming over 2-1/2 months after it had embarked on the unlawful conduct on 15 November 1983, and for the further reason that not long after the notice, as described above, Respondent engaged in further unlawful conduct described below. Such repudiation was therefore clearly ineffective. *Kroger Co.*, 275 NLRB 1478, 1480 (1985), citing *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

Respondent's further assertion that the Union preconditioned settlement of the strike and a contract resolution on amnesty and dismissal of strike replacements—permissive topics of bargaining—on and after 9 January 1984, thereby engagir3 in unlawful conduct serving as a defense to Respondent's unfair labor practice described above is patently without merit. In the first place, the bulk of Respondent's unlawful conduct toward splitting the unit occurred between 15 November 1983 and 9 January 1984 as described above so that any alleged conduct by the Union on and after 9 January would not serve to justify Respondent's unlawful action beforehand described above, either with regard to the amnesty matter or the replacement of strike replacements. In the second place, regarding the amnesty question, it is clear that Respondent from 9 January 1984 through April and May 1984 and beyond, unlawfully refused to furnish information regarding picket line misconduct as detailed above which was at the heart of the amnesty problem, and left the Union without the facts required to intelligently negotiate a resolution, so that the Respondent can not be heard to "defend" here on the basis of matters fairly arising from alleged union misconduct due to its own unfair labor practices and responsibility and well after its unlawful conduct in attempting to split the unit earlier. *Grede Plastics*, 235 NLRB 363, 364 (1978). Third, the strikers involved in this matter were unfair labor practice strikers on whose behalf, therefore, the Union was entitled to seek immediate replacement by, inter alia, demanding the dismissal of all strike replacements. *Kansas Van & Storage Co.*, 273 NLRB 855 (1984); *Coca-Cola Co. of Memphis*, 269 NLRB 1101 (1984); and *Charles D. Bonanno Linen Service*, 268 NLRB 552, 553 (1984). Finally, Respondent's reliance on *SCA Services of Georgia*, 275 NLRB 830 (1985), and other cases on brief, upholding the general right of an employer to seek the return of striking employees to work—including addressing only some segments of employees in the unit to do so, is misplaced as in those cases the employer's conduct in making such efforts was not coercive or intended to divide the established bargaining unit, as was the case here, which renders Respondent's citations inapposite.

H. *Respondent's Refusal to Reinstate Lemuel Harrison and Sally Dorman*

During the course of picketing at Respondent's Elmira, New York, and Detroit and Madison Heights, Michigan facilities employing 550 employees several incidents involving violence, threats, and property damage occurred, and were attributed to the striking employees by eyewitness accounts and security guard written reports identifying those responsible. Acting on this information, Respondent, at the conclusion of the strike, refused reinstatement to numerous employees resulting in the Union filing charges alleging discriminatory discharge under Section 8(a)(3) of the Act regarding 15 employees. This number fell to only two, Harrison and Dorman, at the hearing, the allegations covering the others having been dropped. *Harrison*, a Madison

[3] *Trident Seafoods Corp.*, 244 NLRB 566 (1979), affd. 642 F.2d 1148 (9th Cir. 1981).

Heights plant employee, was admittedly present on the picket line at both his plant and Respondent's Detroit facility frequently during the strike and is placed at the scene of many disruptive confrontations between striking employees and company personnel, guard forces, and local police.

Thus, guard Alton Buchanan, employed by an outside security force company testified to several encounters he had with Harrison, who was according to Buchanan, identified to him by Industrial Relations Director Don Houser as a suspected source of danger to employees and property at the onset of the strike. Buchanan, in response to my questioning, testified that Houser pointed to Harrison, then several feet away, and identified him by name as a company employee on the occasion noted. Buchanan testified that during the strike, on 5 December 1983 at the Madison Heights plant, he saw Harrison push a vice president in the security force company, Roger Schmedlin, from behind, the force propelling Schmedlin to the ground in front of oncoming traffic, injuring his hand and knee, and tearing his pants. On 3 January 1984, he testified, also at Madison Heights, Harrison waved a knife 2 or 3 feet away from Buchanan and other security force members as they approached the picket line, threatening to cut them and at one point further exclaiming to a firm official, "I'll cut your white ass." Again at the Madison plant, on 5 January, Buchanan testified that during a large massing of pickets, he saw police struggling to restrain Harrison, who was also seen by Buchanan kicking the sides of cars and hitting automobiles with his picket sign. Buchanan further observed Harrison throwing firewood and sticks, nearly hitting Schmedlin but for Buchanan's pushing the latter aside, on 12 or 15 January, at the Detroit plant when, he also testified, Harrison threw bottles, rocks, and stones at Buchanan and fellow security quards. On 15 or 16 January, back at the Madison plant, Buchanan again identified Harrison as threatening, in their general direction, about 1 foot away, to cut them, describing Harrison's approximate age, height, and weight for the record.

Milton J. Sheehan, then a Detroit plant employee, testified that during the Company's effort to remove machinery on 16 January 1984, while trucks were attempting to enter the plant's premises, he saw Harrison (mistakenly named by him as "Harris") jump on the cab of one of the trucks, beating on the truck with a 4-foot-long wooden picket sign, and screaming at the driver. Sheehan reported the incident to Gene Mullane, director of industrial relations at the Detroit plant. He testified that Harrison (and Sally Dorman) were the most "visible," the most "violent," and that he knew Harrison, who had been identified to him as an employee from the Madison plant by another person during prior occasions involving picket line occurrences when Sheehan had asked about Harrison.

I found no basis in the testimony offered by Buchanan and Sheehan to doubt their credibility while, on the other hand, I found Harrison's explanations concerning the knife and assault incidents unconvincing. It is clear on this record that the Respondent acted pursuant to the reports concerning Harrison's conduct on the picket line when it refused to reinstate him, as there is not a scintilla of evidence tending to show such reports were mistaken or fabricated, or that Respondent based its action on any other reasons. In sum, I find that Respondent had a reasonable, honest basis for its belief that Harrison had engaged in improper activities while on the picket line rendering his conduct as a striking employee unprotected by the Act. Accordingly, the burden fell on counsel for the General Counsel to prove by a preponderance of the evidence that Harrison had not been engaged in any unprotected activities forming the basis for his not being reinstated. *Harvey Engineering Corp.*, 270 NLRB 1290, 1301 (1984). This he was unable to do.

In this connection, I have considered the contention that Buchanan's testimony that Houser identified Harrison to Buchanan was hearsay on the issue of whether the person pointed out to Buchanan by Houser was in fact Harrison and agree that such would be hearsay regarding that issue, as well as Sheehan's testimony that someone had identified a picket as Harrison to him. However, the central or overriding issue is whether Respondent had a reasonable basis to believe Harrison had engaged in the cited conduct. On that issue, of course, the identification of Harrison plays an important part, but the record is devoid of any reason why Respondent could not reasonably rely on the reports of Buchanan and Sheehan as described. *Harvey Engineering Corp.*, ibid; citing *General Telephone Co. of Michigan*, 251 NLRB 737 (1980), affd. 672 F.2d 894 (D.C. Cir. 1981). It was Respondent's own Director of Industrial Relations Don Houser, who had reportedly made the identification for Buchanan, and there was no reason for Respondent to question or reject the account given by Sheehan, whose wife worked at the Madison plant, like Harrison, who was placed at the scene of violence by Sheehan on several occasions so that it would be natural or reasonable for Respondent to accept his identification as reliable. Thus, it is clear that the testimony by both witnesses concerning their being told the striker was Harrison is not unreliable hearsay on the limited question of what they were told; consequently, this finding of fact, to that limited extent, is based on uncontradicted, probative evidence on which both Respondent and the above conclusion is entitled to rely. Nor is counsel for the General Counsel prejudiced by such finding for he had the opportunity, and exercised it, to cross-examine both witnesses as to what they were told and, further, to recall Houser and test the accuracy and reliability of his reported identification of Harrison to Buchanan under cross-examination, but chose not to do so.

Sally Dorman, a striking Detroit plant employee, was likewise denied reinstatement by Respondent at the conclusion of the strike. At this hearing six witnesses credibly testified that they saw Dorman, during the picketing at the Detroit plant in January and February, engage in screaming, threatening conduct against company personnel, attacks on company and employee vehicles by beating on cars and trucks with picket signs, her fists and feet, and brandishing a 6-foot-long wooden picket sign menacingly toward employees, calling them scabs while waving it in such fashion that one witness testified he felt she was about to attack the employees. Each of the wit-

nesses, including Sheehan for whom Dorman once worked, was able to identify Dorman based on their personal knowledge of who she was, either because of being a long-term coemployee or supervisor or personnel administrator who had prior direct contact with her. Dorman herself, though down-playing or denying some of the reports, admitted the police had to twice order her to stop "touching" vehicles entering the plant, but refused to testify under oath. Director of Manufacturing William Popadynec, himself a witness to Dorman's beating on car windshields with her picket sign of 14 January, and hitting the side window of an incoming plant truck three or four times on 16 January with her picket sign, testified Dorman was discharged for her conduct that he and others had reported as summarized above. Based on the foregoing, I find that Respondent lawfully denied reinstatement to strikers Dorman and Harrison because they engaged in picket line misconduct clearly exceeding the bounds of peaceful and reasoned conduct required by law so as to coerce or intimidate employees in the exercise of rights protected under the Act as well as other persons who do not enjoy the protection of Section 7 of the Act. *Clear Pine Mouldings*, 268 NLRB 1044 (1984); *Southwest Forest Industries*, 273 NLRB 765 (1984); *New Galex Mirror Corp.*, 273 NLRB 1232 (1984); and *Harvey Engineering Corp.*, supra. Counsel for the General Counsel's reliance on case authority to the contrary is unavailing because in the authorities cited by him there was a preponderance in evidence showing either that the employers' belief regarding the employees' misconduct was mistaken, or that there was no basis at all to conclude the employees had engaged in the misconduct, the opposite of this situation.

I. *Respondent's Unilateral Changes*

The complaint alleges that Respondent made numerous changes in preexisting employment conditions at the strike's end on 17 February 1984 without bargaining with the Union: by dispensing with the parties' contract-established grievance procedure; reducing the number of recognized shop stewards at the Detroit plant from six to three; denying the Elmira local union president, a shop committeeman, access to the plant and his right to recall before other employees thereby denying him superseniority under the parties' agreement; and further, by reducing the amount of company-paid time accorded employee union committeemen and officers engaged in representational matters in the Detroit plant.

The sworn testimony of witnesses McElligott, Waller, Bastuba, and Rahill establishes without contradiction that while the parties' agreement covering the three plants was in effect, including concurrent supplementary agreements, the parties were bound by contract provisions and practices establishing a step-by-step grievance procedure which could be initiated by written complaints on prepared forms. Six shop stewards were recognized by the Company at the Detroit plant, plant access for union officers to represent employees, superseniority in recall for local union officers and shop committee members, paid time for conducting union-management-employee related matters viz: to the local's president, vice president, and financial secretary 3-1/2 hours a day, grievance committee chairman 10 hours a week, and union stewards and chief stewards were granted a reasonable amount of time to handle grievances. The parties are not in dispute over the particulars established and in force by contract prior to the strike's conclusion, and Respondent made no effort at the hearing or on brief to deny same. I find these employment conditions to have been in existence at all relevant times herein. See (G.C. Exh. 3), Local 104 *Supplemental Agreement* article I, paragraph 4; id. at 6; and Local 604 *Supplemental Agreement* at 6 and 12, paragraph 28.

On the strike's conclusion Respondent instituted wide-ranging changes in the employment conditions of its employees. Detroit Grievance Committee Chairman Loyd Bastuba testified without contradiction that Detroit Personnel Director Mullane told him after Bastuba had returned to work and had occasion to ask Mullane for a grievance form that, "there was no longer any contract between us and the company and there was no longer a grievance procedure," so Mullane refused to give him any grievance forms. Bastuba further testified that the "whole format of filing a grievance was gone—all you could do was talk with Mullane—[though] normally there were steps with foreman involved." On cross-examination Bastuba said, "We had no procedure—had to accept what Mullane decided after we returned to work."

Detroit Local Union President Tony Rahill also testified that after his return to work he had a discussion with Mullane on 27 or 28 February, the latter informing Rahill of reductions in the amount of paid time for union plant representatives to 2 hours a week, only for the three top officials, elimination of three area stewards and that the three remaining chief stewards would have no time in the plant. When Rahill asked for the reason behind Respondent's action, Mullane told him, "you're back on unconditional offer. No contract, no representation and no grievance procedure." Rahill further testified that there was no grievance procedure after employees returned to work.

In a phone call from Mullane to Union Staff Representative Walter Waller on 29 February in response to a question Waller had raised earlier regarding representation in the plant, Waller testified Mullane said, "they did not have to recognize anyone as far as representation purpose but because of the relationship we had we'd recognize three stewards in the plant but they'd not have any privileges as far as writing grievances is concerned." When Waller asked, "What was the sense in recognizing these people if they can't use the grievance procedure," Mullane replied, "Well, you came back unconditionally and as far as the grievance procedure is concerned, we don't have to do it and that's our decision . . . and we don't have to bargain on it." Waller testified that there was no formal grievance procedure in place after the strike concluded.

In the same timeframe Fred McElligott, who served variously as president, vice president, and a member on the shop committee at the Elmira plant at all relevant times, testified he arrived at the plant on 24 February at 1 p.m. and asked for access to the plant bcause he was a

union official and there were union members in the plant, but was informed by the secretary to John Evans, director of industrial relations at the Elmira plant, that "there'd be no union officials let into the plant." McElligott, who testified without contradiction that about 40 employees had been recalled to work since the unconditional offer on 17 February while he had still not been recalled on the 24 February occasion described despite his right to preferential recall before the others under the parties agreement, asked the secretary—a long-time acquaintance at the plant—to have Evans call him. Evans called McElligott later at the union hall, confirming that there would be no union officials allowed in the plant. On cross-examination, McElligott stated that the secretary was referring to union stewards being barred as well, and that when he asked Evans during the phone call whether there would be representation for the union people in the plant, Evans said there would be no union representation allowed in the plant, and refused McElligott's request for a written statement explaining the reason. Evans did not testify.

As was recently noted with Board approval in *PRC Recording Co.*, 280 NLRB 615, 634–635 (1986):

> It is the Board's obligation to protect the process by which employers and unions may reach agreements with respect to terms and conditions of employment. *Sea Bay Manor Home*, 253 NLRB 739, 740 (1980); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428 (1967). Old Man's Home of Philadelphia, 265 NLRB [1632 (1982)], the Board, quoting from the basic authority in this area, *NLRB v. Benne Katz*, 369 U.S. 736, 743 (1962), notes that the Supreme Court held:
>
> > A refusal to negotiate *in fact* as to any subject which is within § 8(d) and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union on an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's *unilateral change in conditions of employment under negotiations is similarly a violation of § 8(a)(5) for it is a circumvention of the duty to negotiate which frustrates the objective of § 8(a)(5) much as does a flat refusal* [emphasis added].
>
> An employer has a statutory obligation to continue to follow the terms and conditions of employment governing the employer-employee, as opposed to the employer-union, relationship in an expired contract until it has bargained to impasse with the collective-bargaining representative of its employees unless the union fails to timely request bargaining following the employer's notice of an intention to modify *NLRB v. Haberman Construction Co.*, 618 F.2d 288, 302–303 (5th Cir. 1980); *NLRB v. Antonino's Restaurant*, 648 F.2d 1206, 1214 (9th Cir. 1981); *Bay Area Sealers*, 251 NLRB 89 (1980), enf. denied 665 F.2d 970 (9th Cir. 1982); *Henhouse Market*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). Even if an impasse is reached, a unilateral change cannot be made unless it is reasonably encompassed within the employer's preimpasse proposal *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

See also *PRC Recording Co.*, 280 NLRB 615 (1986). The question of whether the unilateral change is encompassed or within the ambit of the proposals already made and rejected is not so much governed by timing or specific aspects of a change but such change cannot, it is clear, exceed the positions and offer previously extended to the union, cf. *Stone Boatyard*, 264 NLRB 981 (1982); and *NLRB v. Crompton Highland Mills*, 337 U.S. 217 (1949).

Turning to the Respondent's conduct I first note that it impacted on deeply imbedded terms and conditions of employment governing the "employer-employee, as opposed to the employer-union relationship" the latter being illustrated by, for example union security, arbitration, and check-off provisions. *PRC Recording Co.*, supra at 667, quoting *Freedman Electric*, 256 NLRB 432, 443 (1981).

Thus, Respondent's undeniable rejection of the parties' entire, carefully crafted, and long-established formal procedure for the imitation and step-by-step handling and resolution of employee grievance struck at the heart of the employer-employee relationship dispensing with written grievances and procedural steps designed to resolve problems in an orderly, understood-in-advance process in which the rights of employees and the employer were understood and agreed on. Such a rejection is calculated to leave the parties' earlier system for resolving employee-employer related grievances in a shambles. There were no prior negotations, union consent, waiver, or offers by Respondent concerning the elimination of the parties' formal grievance procedures, and I therefore conclude Respondent's announced repudiation and unilateral cancellation thereof as found above to violate Section 8(a)(5) of the Act on the cited authorities above. See also *Granite City Steel Co.*, 167 NLRB 310, 316 (1967).

Concerning as it did the availability of their union stewards to receive and adjust grievances from employees against their employer, I further find the subject of paid representational time for plant union representatives and the number of union stewards which Respondent reduced at the Detroit plant to also be within the above-described relationship of employment conditions that survived the expiration of the parties' contract. The record establishes that Respondent's last offer to reduce such paid time was limited to a reduction of only one-half hour a week from 17-1/2, no time outside the plant for the grievance committee chairman, no reasonable time in the plant, but the area stewards and chief stewards would have reasonable time for grievances. In action reducing those benefits in sharp contrast to both their former level under the parties' agreement as well as its last offer, Respondent eliminated paid time for all union representatives except the three top union officials at Detroit and, regarding them, wiped out all but only 2 hours from the former 17-1/2 hours, eliminated three area stewards, and disclosed there would be no paid time for

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the remaining chief stewards in the plant. Even under Respondent's theory of defense on brief of impasse but for the elimination of the positions of three area stewards, which is in accord with the Respondent's prior offer on this subject, Respondent's action was substantially beyond the ambit of earlier proposals and also as to which, further, I find there was no union consent or waiver. Moreover even though the reduction in the number of stewards to three was in accord with the Respondent's prior offer, Respondent failed to establish any justifying prior impasse in local Detroit plant negotiations in this area, union consent, or waiver, hence the reduction, like the elimination in paid representation time, was violative of the Act. See cases cited in *Bay Area Sealers*, 251 NLRB 89, 90 (1980).

As further noted in *PRC Recording Co.*, supra at 636, "As noted in *Caravelle Boat Co.*, 227 NLRB at 1357, it is 'axiomatic that unilaterally changing the method of recalling employees is violative of the Act' (unilateral change in recalling employees according to seniority)." Respondent's failure to recall McElligott until 28 February 1984, having recalled about 40 employees before him despite his admitted contract superseniority in recall worked a unilateral change in the existing methods of recalling employees thereby violating the Act. Respondent, herein found to have unlawfully refused to reinstate the unfair labor practice strikers including McElligott on their tender of unconditional offers to return to work in violation of Section 8(a)(3) of the Act, and to have, in McElligott's case, additionally refused to reinstate him according to his seniority in violation of Section 8(a)(5) cannot now defend its action denying McElligott access to the plant for the purpose of representing employees as union president and shop committeeman on the basis that he was not an "active employee" under the parties' former agreement for such result would reward Respondent on the basis of its own violations of employee rights and continuing status as employees under the Act.

Rebuffed at the plant office and in the phone call from Evans from entering the plant, McElligott and other Elmira plant employees serving as stewards were unlawfully deprived of their rights under the Act. *R. C. Cobb, Inc.*, 231 NLRB 99, 104 (1977). For the right of access denied here was a long-established practice contractually required in the past, and survived the expiration of the contract. Such denial removed a "real and substantial benefit," *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *J & H Rainwear*, 273 NLRB 497 (1984); *Houston Coca-Cola Bottling Co.*, 265 NLRB 766, 778 (1982); and *Kinard Trucking Co.*, 152 NLRB 449, 450 (1965). In *Granite City*, supra, it was noted:

> This is not to say that the statute freezes Respondent to the existing practices on plant access. It is to say that prior to effecting changes therein it is under a duty to give its employees' statutory representative an opportunity to bargain concerning proposed changes. The bargaining representative is entitled to "an opportunity to present arguments to the employer to dissuade him from effecting the change, and also an opportunity to propose alternatives or compromises which might moderate the change so as to accommodate the interests of the employees as well as of the employer. [*Kinard Trucking Co.*, 152 NLRB 449, 450 (1965).]

Respondent never afforded the Union an opportunity to bargain about this action depriving union access at the Elmira plant, and offered no valid reasons for imposing the change, which was material, substantial, and significant, hence a further refusal to bargain in violation of Section 8(a)(5) and (1) of the Act, as were the earlier related unilateral changes in employment conditions described above.

J. *The Prolongation and Conversion of the Strike*

Respondent's unlawful insistence to impasse on the EBW proposal, as discussed and established above, substantially contributed to causing from its outset the unfair labor practice strike at the Madison Heights plant beginning on 3 November 1983. The record is clear that beginning on 2 December 1983 Respondent's unlawful efforts to divide the three-plant unit service to prolong the strike, begun earlier at all the plants and as a result, from that date forward to its conclusion on 17 February 1984, the strike for such additional reasons was an unfair labor practice unitwide strike.

Thus, the Union filed unfair labor practices concerning, inter alia, Respondent's unlawful conduct seeking to divide the bargaining unit on 15 December 1983 (G.C. Exh. 1). The charges were read and explained to striking employees at local union meetings, along with, at Madison, transmittal letters to Company President Malone from Union Vice President Komar and Union Attorney Page to the NLRB Regional Office, employees being advised the strike was an unfair labor practice strike. Smith advised unit members Barbra Terrace and Randy Berner to print new picket signs stating the picketing was over unfair labor practices. Smith and Madison plant former operator Guisippi Scianimanico testified to such signs being carried thereafter, the latter supplying a photograph of same. (G.C. Exh. 209.)

Similarly, at the meeting for Detroit plant striking employees on 24 December 1983, Detroit employee Local 104 President Tony Rahill testified that assistant to UAW Vice President Jim Ellis was present to give employees an update on negotiatons and said (Ellis) that the Union was filing unfair labor practices against the company—"that people on the [picket] line were being approached by management asking them to come back to work with no contract and no union." Rahill further testified on cross-examination that Ellis explained "about the [letters] the company had written and the Union had written to the company," the Company using unfair labor practices "as far as talking to people on the picket line, trying to get them to come back to work without a contract." Rahill described a request by Ellis that if anyone other than those who had given statements was approached on the line they should make themselves known. Further direct evidence that Respondent's unlawful efforts to break apart the Detroit plant employees from the unit fueled Detroit employees' resolve to continue the strike is found in employee accounts described

above when Respondent officials approached picketing Detroit employees seeking their separate return to work on 24 November and 5 December 1983. Such appeals were rejected, employees voicing quickly and strongly the views that Respondent's proposals were aimed at separation of the unit consisting of "sister locals" were all together (employees Sally Dorman, Jerom McKenny, and Loyd Bastuba).

Witness Fred McElligott served as an employee for 21 years at the Elmira plant and held the position of vice president and acting Local 604 president, as such being a member on the shop bargaining committee throughout 1983 and 1984 negotiations for a new contract. He testified credibly that he knew the Union had filed the unfair labor practice charge noted above on 15 December 1983, as Union District Representative Jack Manione and UAW Counsel Leonard Page so informed him.

He testified that during a local union meeting attended by some 175 local union members during the third week in December 1983 Manione described company letters sent to one plant seeking a return to work by them without the other two plants, and a meeting between the Company and the Union where company negotiator Childress sought only the return of the Detroit plant to work. He then read the unfair labor practice charges involving Respondent's unlawful efforts to split the unit to the assembled striking employees and that numerous members expressed the view that "that they all went out on strike together and they will stick together. There is no way one plant will go back to work without the other two units." McElligott, an employee at Elmira himself for 21 years and personally involved in the negotiations was asked, based on his discussions, inter alia, with fellow striking employees and members under his leadership in the local union what effect the Respondent's separate (unit) proposals had on the strike, if any. He replied, "It made the membership more stronger than what they were. They were all more determined to stick together," and "to continue to strike and to continue to hold together the three units. . . ."[4]

Thereafter, until the conclusion in the strike, picketing employees carried newly painted signs, made by McElligott, stating that Facet was charged with unfair labor practices from around 21 or 22 December until 17 February. There were some 360 employees at the Elmira plant and only 300 combined at Madison and Detroit so that an agreement opposed by Elmira unanimously would not pass, and McElligott testified that Respondent's "separation" proposals were opposed at Elmira.

Respondent's conduct was calculated by unlawful threats and coercion to strike at the core of the employers' bargaining representative's source of bargaining power, the combination in a single bargaining unit of employees at all three plants, and such conduct foreseeably therefore would strengthen strikers' resolve to continue protecting the survival of such unit—since such survival was linked to the Union's chances of securing a better contract and thus the employees' own best interests in terms of improved employment conditions; and the way to protect that interest was to continue the strike, such reasons for doing so being repeatedly communicated to Respondent by employees and their representatives. As has been stated before, "More concrete evidence of causal connection between a violation and the reason for a continuation of a strike can hardly be imagined." *General Athletic Products Co.*, 227 NLRB at 1576.

The employees were aware of this conduct from 2 December 1983 through the end of the strike, as detailed here and as it has been noted with Board approval, and as the complaint here alleges such conduct "prolonged the strike" because it frustrated collective bargaining with the majority representative and caused nothing but continued and extended conflict disrupting unified action "by separating one segment of the whole from others." *Tarlas Meat Co.*, supra at 1405. Further, a careful assessment of the parties' bargaining efforts reveals that at every turn when a glimmer for possible negotiations headway arose, the specter of Respondent's unlawful efforts to seek a separate contract resolution for the Detroit plant dashed the prospects for agreement and I view the record in the connection, as a whole, further supports the finding of a causal connection between such and a prolongation in the strike. *Blue Fountain Manor*, 270 NLRB 199, 206 and case cited at fn. 14 (1984), in which it is stated, "the Board has held in numerous cases that such a connection may be inferred from the record as a whole." Moreover, the fact that union-granted news media interviews omit mention of all the causes for a strike is immaterial, since not shown to have been intended as a complete explanation for such activity being undertaken. *Berbiglia, Inc.*, 233 NLRB 1476, 1497 (1977).

I find that the strike at all three plants 2 December 1983 until its conclusion became an unfair labor practice strike—the strike at Madison being an unfair labor practice strike from its inception on 3 November 1983 and in the alternative like the situation unitwide, becoming an unfair labor practice strike on 2 December 1983. *Tarlas Meat Co.*, supra; *Buffalo Concrete*, 276 NLRB 839 (1985); *Charles D. Bonanno Linen Service*, 268 NLRB 552 (1984); and *Blu-Fountain Manor*, supra.

Accordingly, by refusing immediate reinstatement to the striking employees on and after their unconditional offer to return to work on 17 February 1984 as the record clearly established, Respondent also violated Section 8(a)(1) and (3) of the Act. *Kansas Van & Storage Co.*, 273 NLRB 855 (1984); *Coca-Cola Co. of Memphis*, 269 NLRB 1101 (1984); and *Charles D. Bonanno Linen Service*, supra at 552–553.

CONCLUSIONS OF LAW

1. Facet Enterprises, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and its Locals 104, 771, and 604 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent officials as identified hereinabove in the paragraph on *Agency Status* are supervisors and/or

[4] During his testimony, McElligott at first mistakenly placed the occasion when Respondent's efforts to divide the bargaining unit were discussed with employees as mid-October, but corrected himself shortly afterward by placing it in December; his correction being rendered in a spontaneous and candid manner.

agents and representatives of Respondent within the meaning of the Act.

4. The employees described above under the heading related to this finding constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material the Union and its locals have been the designated exclusive representatives of the employees in the appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

6. By insisting to impasse on the adoption of its proposal concerning the exclusion from the unit of the electron beam welder classification, a permissive subject of collective bargaining, during negotiations with the Union, Respondent violated Section 8(a)(5) of the Act.

7. Respondent's conduct described above in paragraph 6 was a contributing cause in the strike commencing on 3 November 1983 at the Madison Heights plant, which thereby was an unfair labor practices strike from its inception.

8. By refusing to furnish the Union with information concerning (a) the Company's financial status, (b) movement of jobs and machinery from the Detroit plant, and (c) picket line misconduct, all the foregoing being relevant and necessary to the Union's collective-bargaining responsibilities, Respondent violated Section 8(a)(5) of the Act.

9. By engaging in conduct, commencing on 2 December 1983, particularly described above as being calculated to split off the Detroit plant from the established appropriate bargaining unit Respondent refused to bargain in good faith with the Union thereby violating Section 8(a)(5) of the Act.

10. Due to Respondent's conduct described above in paragraph 9, the economic strike at the Detroit and Elmira plants underway since 7 November, was prolonged and thereby converted to an unfair labor practice strike while the strike at Madison described in paragraph 7 above, for such additional reason, in the alternative was an unfair labor practices strike due to such conduct commencing on 2 December 1983.

11. By unilaterally changing the employment conditions of its employees as to the established grievance procedures, number of shop stewards, paid time for representational matters, seniority recall rights, and plant access, as described in detail above, Respondent further violated Section 8(a)(5) of the Act.

12. By refusing, commencing on 18 February 1984, the day following their unconditional offer to return to work, to immediately reinstate unfair labor practice strikers to their old jobs, discharging, if necessary any replacements with respect to Madison Heights hired from the strike's inception, and regarding Detroit and Elmira, hired after the strikes there were converted to unfair labor practice strikes (discussed further below in the remedy section of this decision) Respondent violated Section 8(a)(1) and (3) of the Act.

13. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

14. There is no preponderance in the evidence to establish that Respondent unlawfully discharged Lemuel Harrison and Sally Dorman or has otherwise violated the Act.

The Remedy

The record contains passing references to relocations of the Detroit plant to Detroit environs several months after the strike concluded and the Madison Heights plant outside Michigan, but these matters were not directly involved in the issues litigated before me, and the full circumstances were not disclosed. Accordingly, the normal remedies for Respondent's unfair labor practices are warranted leaving any matter of mitigating circumstances remedy-wise, to supplementary compliance proceedings if such is demonstrated to be warranted. It will therefore be recommended that Respondent cease and desist from engaging in the aforementioned unfair labor practices, and to take certain affirmative action including, on request to bargain in good faith with the Union designed to effectuate the polices of the Act.

Respondent having set in motion unlawful new terms and conditions of employment, it is necessary under Board law to order restoration of the contractual status quo ante in the respects noted hereinabove in which Respondent acted unlawfully, to the extent feasible, and without imposing an unwarranted burden on Respondent. *T.M.L. Supply*, 258 NLRB 604 (1981); *S. Freedman Electric*, 256 NLRB at 432; and *Hood Industries*, 248 NLRB 597 fn. 3. Included in such remedy it will be recommended that Respondent make whole its employees for any loss of pay or other employment benefits that they may have suffered commencing on 18 February 1984 by reason of Respondent's unilateral changes of its employees' terms and conditions of employment, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). *E.G. & G Florida, Inc.*, 279 NLRB 444 (1986).

Respondent having violated Section 8(a)(1) and (3) of the Act, when on 18 February 1984, and thereafter, it unlawfully refused to reinstate unfair labor practice strikers on their unconditional offer to return to work, offering only to reemploy them when positions became available by normal attrition among poststrike permanent replacements and even then only pursuant to terms and conditions of employment unlawfully imposed, I shall recommend Respondent be ordered to offer immediate reinstatement to all Madison Heights plant strikers to their former or equivalent positions, discharging any replacements hired on or after 3 November 1983 under terms and conditions of employment of the expired contracts, and to make them whole for wages and other benefits measured under status quo ante conditions, lost by virtue of Respondent's unlawful conduct. Backpay to the Madison Heights unfair labor practice strikers refused lawful reinstatement shall be computed from 17 February 1984, the day of their unconditional offer to return to work, *Exchange Bank*, 264 NLRB 823 (1982), with ultimate net loss of earnings being computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, supra. Backpay shall

cease on offering such employees reinstatement to their former or substantially equivalent jobs. *PRC Recording Co.*, 280 NLRB at 99.

Regarding the Detroit and Elmira plant strikers—and on the alternative additional theory should such be found on appeal that they did not become unfair labor practice strikers until the strike was converted to an unfair labor practice strike beginning on 2 December 1983 as a result of Respondent's unlawful efforts to split the bargaining unit as described above, the Madison Heights plant employees—the following remedy shall be recommended.

On 17 February 1984, the Union requested unconditional reinstatement on behalf of all employees who participated in the strike begun on 3 November 1983 at Madison Heights, and 7 November elsewhere. The strike was converted to an unfair labor practice strike by the Respondent's violation of Section 8(a)(5) beginning on 2 December 1983. Accordingly, I recommend the Board require the Respondent to reinstate to their former or substantially equivalent positions all strikers who were not permanently replaced before 2 December 1983 without impairment of their seniority and other rights and privileges. In order to make room for them, the Respondent shall dismiss, if necessary, all persons hired after 2 December 1983. If, after such dismissal, there are insufficient positions available for the remaining former strikers, those positions which are available shall be distributed among them without discrimination because of their union membership or activities or participation in the strike, in accordance with seniority or other nondiscriminatory practice utilized by the Respondent. Backpay for such strikers will be computed from 17 February 1984 until the date of their reinstatement according to the *Isis*, *Woolworth*, and *Florida Steel* formulas designated above. Those former strikers who were permanently replaced prior to conversion and for whom no employment is immediately available shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by the Respondent, and they shall be reinstated before any other persons are hired or on the departure of their preconversion replacements. See *Gulf Envelope Co.*, 256 NLRB 320 (1981), and *Windham Community Memorial Hospital*, 230 NLRB 1070 (1977). *Ashe Brick Co.*, 280 NLRB 1383 (1986). No striking employee, found discharged for cause, need be reinstated provided that backpay and other benefits shall be paid to any such employee discharged after 17 February 1984, from that day until date of lawful discharge. *O. R. Cooper & Son*, 220 NLRB 287 fn. 1 (1975).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Facet Enterprises, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union by insisting to impasse in negotiations on the adoption of its proposal to exclude the electron beam welder job classification from the bargaining unit; refusing to provide the Union with information relevant and necessary to the Union's collective-bargaining responsibilities such as finanical data described herein, information concerning employees disciplined for picket line misconduct, and information concerning the movement of jobs and machinery from the Detroit plant.

(b) Refusing to bargain in good faith with the Union by engaging in conduct designed to split off the Detroit plant employees from the established bargaining unit, which is:

> All production and maintenance employees employed by Respondent at its Detroit, Michigan plant (Fuel Devices Division), its Madison Heights, Michigan plant (Filter Products Division) and its Elmira, New York plant (Motor Components Division); but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(c) Refusing to bargain in good faith with the Union by unilaterally changing employment conditions such as established grievance procedures, the number of shop stewards, paid time for representative matters, seniority recall rights, and plant access for employee representatives without notifying, consulting, or bargaining with the Union as the exclusive representative of its employees in the appropriate bargaining unit.

(d) Refusing to immediately reinstate Madison Heights unfair labor practice strikers to their former or substantially equivalent positions of employment discharging, if necessary, any replacements, and in the circumstances pertaining to them separately and noted hereinabove Detroit and Elmira unfair labor practice strikers to their former or substantially equivalent positions of employment.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to the Madison Heights unfair labor practice strikers to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing if necessary persons hired on or after 3 November 1983, and make them whole for any loss of earnings they may have suffered as a result of Respondent's unlawful refusal to reinstate them, in the manner described in the remedy section of the decision.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Reinstate and similarly make whole the Detroit and Elmira unfair labor strikers in the manner described above in the remedy section of this decision.

(c) On request rescind the above unilateral changes until such time as the Respondent negotiates in good faith with the Union to agreement or impasse.

(d) On request, restore the employment benefits herein found to have been unilaterally changed and make whole the employees in the above unit for all losses they may have suffered as a result of Respondent's changes, with interest thereon, to be computed as described in the remedy section of this decision.

(e) On request, recognize and bargain in good faith with the Union as the exclusive representative of all employees in the aforesaid appropriate unit and, if an understanding is reached, embody such understanding in a written, signed agreement.

(f) Furnish the Union with information relevant and necessary to its collective-bargaining responsibilities as described above.

(g) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, timecards, personnel records and reports, and all other records relevant or necessary to analyze the amounts due under the terms of this Order.

(h) Post at its Detroit, Madison Heights, and Elmira plants copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) In the event that it cannot reasonably be anticipated that posting alone will suffice to effectuate the purposes of this Order due to dispersal of employees involved arising from plant closing, relocations, or other circumstances arising from the passage of time, then Respondent is further ordered to promptly mail copies of the signed attached notices to the employees involved herein to their home addresses.

(j) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act other than those found here.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO[1] *and* Korean Air Lines, Co., Ltd. and AMR Services Corporation. Cases 29–CC–932 and 29–CC–933

July 29, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On August 7, 1987, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Charging Parties filed exceptions and briefs; the Respondent filed cross-exceptions and supporting and answering briefs;[2] and Charging Party Korean Air Lines filed an answering brief opposing the Respondent's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[3] and has decided to affirm the judge's rulings, findings, and conclusions[4] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] On December 15, 1987, the Board denied Charging Party Korean Air Lines' motion to strike the Respondent's cross-exceptions and briefs.

[3] Charging Party Korean Air Lines has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[4] The General Counsel and Charging Party Korean Air Lines have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's conclusion that the Respondent did not violate Sec. 8(b)(4) by enmeshing neutral employers covered by the Act in its dispute, we emphasize that, as found by the judge, there is no evidence of conduct other than that incidental to the Respondent's lawful activity. See *Electrical Workers IUE Local 761 v. NLRB*, 366 U.S. 667 (1961), and *International Rice Milling Co. v. NLRB*, 341 U.S. 665 (1951). We further disavow any speculation that the telephone call to Emery Air Freight could, in fact, have been placed by Korean Air Lines or AMR Services Corporation.

Alison Fairbanks, Esq., for the General Counsel.
Wilma B. Liebman, Esq., for the Respondent.
Reginald E. Jones, Esq. (Sofforth, Shaw, Fairweather & Geraldson), for AMR Services Corporation.
Madeline Balk, Esq. (Seligman & Seligman), for Korean Air Lines, Co.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. These consolidated cases were heard by me on various days in May 1987. The charge in Case 29–CC–932 was filed by Korean Air Lines Co. Ltd. (KAL) on 13 March 1987. The charge in Case 29–CC–933 was filed by AMR Services Corporation (AMR) on 13 March 1987. Thereafter, a consolidated complaint in these cases was issued by the Regional Director for Region 29 on 7 April 1987. At the hearing the complaint was amended in accordance with a notice of motion to amend issued on 4 May 1987.

The consolidated complaint as amended makes the following contentions:

1. That for a number of years KAL (a carrier within the meaning of the Railway Labor Act) subcontracted cargo-handling functions at JFK Airport to a company called Triangle Aviation Services Inc. (Triangle) whose employees were represented for collective-bargaining purposes by Local 851 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Local 851 IBT). There is no dispute that Triangle is not a "carrier" within the meaning of the Railway Labor Act (RLA) and is therefore an employer within the meaning of the NLRA.[1]

2. That the contract between KAL and Triangle expired at midnight on 28 February 1987 whereupon AMR replaced Triangle to provide the cargo-handling functions for KAL at its JFK terminal.

3. That at all times material the Respondent, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and helper of America, AFL–CIO has been engaged in primary dispute with AMR because that company's employees are represented for collective-bargaining purposes by another union, namely, the Transport Workers Union.

4. The General Counsel concedes that AMR is a "carrier" within the meaning of the Railway Labor Act.

5. That on 26 February 1987, Respondent demanded that KAL renew its contract with Triangle.

6. That on 26 February 1987 Respondent demanded that AMR employ the employees of Triangle who were about to lose their jobs at KAL's cargo terminal because of KAL's contract with AMR.

7. That on 27 February 1987 and thereafter the Respondent has engaged in picketing and handbilling at KAL's JFK cargo terminal with signs and publicity indicating that its dispute is with KAL rather than AMR.

[1] Respondent's position relative to Triangle is that because of the degree of control KAL exercised over Triangle's employees at KAL's JFK terminal, KAL and Triangle should be construed as joint employers. Respondent also contends that even if Triangle and KAL are found to be separate persons, such a conclusion would not be relevant to the ultimate outcome of this case.

8. That on 27 February 1987 employees of Triangle working at KAL's JFK cargo terminal engaged in a work stoppage.

9. That on 12 and 13 March 1987 Respondent picketed KAL's cargo building at Thomas Bradley International Airport in Los Angeles, California.

10. That on various occasions, Respondent by means of picket signs and otherwise, has induced individuals making deliveries to or pickups from KAL not to cross the picket line. Such persons would include, inter alia, Emery Air Freight, WTC Air Freight, Airborne Air Freight, East Asia Air Freight, and Kinetsu. There is no dispute about the General Counsel's assertion that these companies, which are freight forwarders or consolidators, are employers within the meaning of the NLRA.

The General Counsel's theory is that Respondent is engaged in a dispute with AMR who she alleges is the primary employer. She therefore asserts that because the New York picketing is specifically directed against KAL rather than AMR, such picketing is being directed against a person who is neutral to the primary dispute. She argues that although the picketing is taking place at a common situs (in New York) it is secondary conduct under standards enunciated in *Sailors Union (Moore Dry Dock)*, 92 NLRB 447 (1950). (A fortiori, the picketing at KAL's cargo terminal in Los Angeles would, under this theory, clearly be secondary because AMR does not occupy that site.)

Although acknowledging that AMR, the alleged primary employer, is an RLA carrier and that the target of the picketing, KAL, is also an RLA carrier, the General Counsel asserts that the conduct is secondary boycott activity prohibited by the NLRA because the Respondent was acting on behalf of the employees of Triangle, an employer covered by the NLRA. She also asserts that the Respondent has enmeshed other neutrals who are covered by the NLRA by inducing its employees not to cross the picket line. In the case of Emery Air Freight, it is alleged that Respondent violated the Act by threatening to picket that company unless it honored the picket line at KAL's JFK facility.

The Respondent contends that because the "primary" (AMR) is an RLA carrier and because the target of the picketing, KAL, is also an RLA carrier, the picketing is not subject to the NLRA. It asserts that such activity is permissible under the RLA and, therefore, to the extent that drivers employed by freight forwarders and/or consolidaters chose to honor the picket line, this is merely incidental to lawful picketing activity.

Regarding the contention that it threatened to picket Emery Air Freight, this allegation is denied.

Based on the entire record in this case, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel, I make the following

FINDINGS OF FACT

Before September 1983 KAL had its cargo-handling functions reformed by Trans-Mediterranean Airlines, which employed people represented by Local 851 IBT. In 1983 KAL obtained its own cargo facility at JFK (building 260) and entered into a contract with Triangle to provide certain cargo-handling services.[2] At the time of the transfer, KAL requested Triangle to hire about 20 employees of Trans-Mediterranean Airlines, and Triangle hired 12 of these people. Under the terms of the contract, which ran until 1985, KAL reimbursed Triangle on a per-pound basis.

In September 1985 KAL and Triangle renewed their contract with some modifications. Among the changes was that, during the period of this contract, Triangle was paid on a per-man-hour basis rather than a per-pound basis. This agreement was to remain in effect until midnight, 28 February 1987.[3]

In November 1986 KAL decided to solicit bids from various other companies to do its cargo-handling functions. On 28 January 1986 KAL awarded this work to AMR and on the same date notified Triangle that its contract would not be renewed. Triangle was therefore to cease operations at KAL's JFK terminal at midnight on 28 February, and AMR was to take over on 1 March.

About 20 or 21 February, William Genoese learned that Triangle was to be replaced by AMR. Genoese, in addition to being the secretary-treasurer and principal officer of Local 732 IBT, is also the director of the airline division of the International Brotherhood of Teamsters.[4] On or about 21 February, Genoese called KAL to get information regarding the change but was unsuccessful. On 24 February he sent a telegram to KAL reading:

> It has been brought to my attention that more than 60 members of the International Brotherhood of Teamsters employed by Triangle Maintenance will lose their jobs because Korean Airlines has changed contractors at JFK International Airport.
>
> Our members have a vested interest in these jobs. They were also members of our organization when your contractor was MTA.
>
> This is a request to meet with you as soon as possible to discuss job protection for our workers. Please contact my office immediately to set up a meeting before our members are irreparably hurt
>
> . . . .

---

[2] Triangle is a wholly independent corporation from KAL and provides a variety of services to a number of other airlines at JFK. Its employees are represented by Local 851 IBT in an airportwide bargaining unit. There is no evidence to suggest that KAL or any of Triangle's other customers participate in collective bargaining with Local 851 or are involved in grievance-handling functions under Triangle's contract with that union.

[3] In a nutshell, Triangle was responsible for putting cargo on KAL's planes for export out of the United States and for unloading KAL's planes for import to the United States. In conjunction with this, there obviously were a variety of other functions, including warehouse and document handling. Triangle generally had about 60 employees working at KAL's JFK cargo terminal, whereas KAL had about 20 employees directly employed by it.

[4] The airline division is a trade division of the IBT, which basically offers services to various local unions, which for the most part represent employees in the airline industry. It is not, however, a separate legal entity of the IBT, does not receive any dues or funding on its own, and does not file any separate forms (LM-2) with the Department of Labor.

Because it is conceded that the IBT is a labor organization within the meaning of the Act, I rejected Respondent's contention that the airline division of the IBT is not a labor organization within the meaning of Sec. 2(5) of the Act. See *Electrical Workers IBEW (B. B. McCormick)*, 150 NLRB 363, 370–372 (1964), affd. 350 F.2d 791 (D.C. Cir. 1965).

> Under fair representation, this organization will take whatever economic action is needed to protect the rights & benefits of our members. We are duty-bound to represent these workers. This is very important and urgent. Please contact me so we can set up a meeting.

On or about 26 February, Genoese phoned Richard Janisse of AMR and asked if AMR intended to hire the employees of Triangle. Janisse told Genoese that his company had a contract with the Transport Workers Union and that he would have his attorney get back to him.

Also on or about 26 February, Genoese's attorney called Cordert Brothers, the law firm representing KAL, and was turned over to Benjamin Seligman who had been retained for labor advice. According to Seligman, Lippman asked for a meeting with KAL concerning the employees in question. He states that when he told Lippman that Triangle was the employer, Lippman replied that he wanted the workers to be covered by a Teamsters contract; that it was up to KAL to negotiate a new contract with Triangle; and that if there were no meeting, KAL would face problems. Lippman, although confirming a phone call he had with Seligman, denies that he said that KAL should renegotiate a contract with Triangle. He does, however, acknowledge that he said that he wanted the Teamsters to be protected. (In either event, I do not think the difference in their testimony is meaningful.)[5]

On 27 February, before AMR began work for KAL, Respondent commenced picketing at the entrance to KAL's building 260 at JFK. The picket sign used at this time stated:

> Korean Air Refuses
> To Honor Teamsters Contract

Also a handbill was distributed that read:

> Korean Air has refused to honor Teamsters Contract covering the employees doing Teamsters work at this location.

At or about 10 a.m. on 27 February, Genoese called KAL's deputy general manager requesting that KAL meet to discuss KAL's termination of Triangle's contract. Shortly thereafter, the employees of Triangle who were employed at building 260 stopped working. When KAL compiained to Triangle's terminal manager about this work stoppage, the latter stated that he would take care of the problem. Within about 40 to 50 minutes the work stoppage ended and the Triangle employees resumed work. Regarding work stoppage, neither the General Counsel nor the Charging Parties have offered any evidence to establish that it was caused or induced by the Respondent. Indeed it seems more likely that in anticipation of the ending of their work the following day, these employees engaged in a brief wildcat strike.

On 28 February Respondent continued picketing at the entrance to building 260 in the manner described above. Also on that date Genoese sent a letter to AMR as follows:

> Dear Mr. Pasciuto:
>
> I'm sorry that we've been missing each other.
>
> What I would like to get from you is a little information about AMR Services Corp., a subsidiary of AMR Corp.
>
> I understand AMR Services Corp. may have entered into a labor agreement with a union representing its employees. If so, could you please give me the answers to these questions.
>
> 1. What is the name of the union:
>
> 2. Where are the workers covered by the contract located?
>
> 3. What are their job classifications?
>
> 4. When was the contract signed.
>
> 5. How long does it run?
>
> 6. How many workers were in the group when the contract was signed?
>
> 7. Was the contract certified by the U.S. Government?
>
> 8. How many workers are not covered by the contract?
>
> Most important of all, if there is a contract covering AMR Services Corp. employees, I would appreciate it very much if you would send me a copy right away. It is certainly public information and must be filed somewhere with the government.
>
> Finally, I would very much appreciate copies of any brochures you may have on the operations service of AMR Services Corp.
>
> Thanks for your cooperation.

Additionally, on 28 February Genoese wrote to KAL as follows:

> Dear Mr. Kim:
>
> The International Brotherhood of Teamsters has filed unfair labor practice charges against Korean Airlines at the National Labor Relations Board office at 16 Court Street in Brooklyn, New York.
>
> The charges, naming Korean Airlines as a co-employer, involve the fact that more than 60 of our members at Triangle Maintenance will lose their jobs because you have changed contractors at JFK Airport.
>
> I sent you a mailgram a week ago, asking that you contact me immediately so that we could set up a meeting to discuss job protection for our members. I later spoke to some Korean Airlines executives on the phone, but you have ducked the issue of a meeting.

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[5] On 26 February the IBT, by William Genoese, filed an 8(a)(1) and (5) charge against Triangle and KAL. However, as it did not produce any supporting evidence, the charge was dismissed. The charge alleged:

> The employers have maintained a collective-bargaining relationship with the International Brotherhood of Teamsters as it concerns their joint employees employed at John F. Kennedy International Airport. The employers have failed to negotiate a subcontracting of the aforementioned work and have failed and refused to apply the terms and conditions of the existing collective bargaining agreement and to recognize the representative of the aforementioned employees at John F. Kennedy International Airport.

This is my second notice to you, in writing, that we must have a meeting before our members are irreparably hurt. Please contact me immediately at my office (212/686-8135).

Under fair representation, we are duty-bound to protect the rights of our members. We will do whatever is necessary to carry out this responsibility.

We need your cooperation.

At midnight 28 February, Triangle ceased working at building 260 and AMR took over. In this respect AMR clearly is a separate corporation from KAL, engaged by the latter to perform cargo-handling functions as a subcontractor. The Respondent has not taken the position that KAL and AMR are joint employers regarding AMR's employees at building 260, and I therefore shall conclude that they are separate entities in that regard. As noted previously, the General Counsel concedes that AMR, which is an affiliated company with American Airlines, is a "carrier" within the meaning of the Railway Labor Act. Also, as noted above, AMR has a collective-bargaining relationship with the Transport Workers Union covering, inter alia, the workers employed by it at building 260.

Since about 9 March, Respondent has continuously picketed the entrance of building 260 using a variety of picket signs. In addition to the sign already described, one of the signs read:

Teamsters Airline Division
Korean Air Unfair
Fired Union Workers
Wanted Jobs Back

Another sign read:

No Teamsters Should Cross This Line
Call Your Local Union

On March 2, Respondent distributed a handbill to people working at JFK and away from the site of the picketing. This read:

AMR Corp., the holding company which owns American Airlines and other subsidiaries, has gotten into bed with the Transport Workers Union and made a deal which threatens the jobs of workers throughout the airline industry.

The agreement enables AMR Services to make low-ball bids to airlines and airports that want to contract out their work. The enclosed article from Aviation Daily explains some of the operations of AMR Services.

AMR Services can provide cheap labor in such areas as ramp services, cargo and clerical operations and Skycap work.

AMR Services can do this because it starts its workers at $4 an hour with no hospitalization benefits, only five holidays and very limited vacations.

All this is permitted under the TWU's top-down contract. We are getting a copy of this contract, and we intended to expose this cozy arrangement.

The TWU is a bad organization, and Vice President John Kerrigan was part of the whole deal with AMR.

We believe AMR Services will be going after ramp service work throughout the country. This could mean that thousands of teamsters and members of other unions would find their jobs in jeopardy.

To protect the rights of all airline workers, we must start organizing AMR Services. Otherwise, AMR Services and the TWU can bring all airline workers down.

The agreement between the TWU and AMR Services runs from February 1984 through February 1988. It is a disgrace to the labor movement.

For 2 days, 12 and 13 March, the Respondent picketed KAL's cargo terminal at Thomas Bradley International Airport in Los Angeles, California. The picket sign read:

Teamsters Union
Korean Air Lines Unfair
Fired Workers Want To Go
Back to Work

In relation to this picketing, a security guard at the terminal was told by one of the pickets that the picketing related to a dispute at JFK. It is noted that in Los Angeles, KAL uses a company called ARA Ground Services rather than AMR to perform the cargo-handling functions.[6]

On 30 March the Regional Director for Region 29, based on the instant charges, filed in the United States District Court, Eastern District of New York, a petition under Section 10(l) of the Act seeking to enjoin Respondent's picketing. On 30 March, Judge Eugene H. Nickerson denied the injunction holding, in substance, that the matter was within the jurisdiction of the Railway Labor Act and not the National Labor Relations Act. The Regional Director's request for reargument was denied on 28 April.[7]

The General Counsel presented a witness, James Hetherington, a manager of Emery Air Freight, who testified that someone who identified himself as William Genoese called him on 6 April. He states that this person said that

[6] It is not clear whether ARA Ground Services would be classified as a "carrier" within the meaning of the RLA in connection with its services for KAL at Los Angeles. I note that in a decision dated 17 April 1986, the National Mediation Board concluded that ARA fell within the jurisdiction of the RLA concerning services one of its wholly owned subsidiaries performed for an airline at Baltimore-Washington International Airport. *ARA Ground Services (BWI)*, 13 NMB 175 (1986).

[7] Subsequent to the 10(l) proceeding, AMR sought an injunction claiming that Respondent's picketing was for recognition and therefore not subject to the injunction prohibitions of the Norris La Guardia Act. Judge Nickerson also heard that case and concluded that because the picketing did not have any "present recognitional" intent and because the picketing did not in any other manner violate the RLA, no injunction should issue. *AMR Services Corp. v. Teamsters*, 658 F.Supp. 259 (D.C.N.Y. 1987).

he saw an Emery truck at building 260 and that if the truck was not removed, a picket line would be put up in front of Emery or that Emery's employees would be pulled off the job. In fact, no such picketing or strike ever occurred at Emery.

Genoese denies that he ever spoke to Hetherington and specifically denies making any threats to Emery. Further, the Respondent contends, correctly I think, that the evidence is insufficient to establish, pursuant to section 901 of the Federal Rules of Evidence, the identity of the caller. Thus, unlike evidence to establish the identity of a caller, through the testimony of a person who dials his or her correct number (i.e., an outgoing call) it is not sufficient to establish the identity of a caller merely by the caller's self-identification to the witness (i.e., an incoming call) *U.S. v. Benjamin*, 328 F.2d 854, 861 fn. 3 (2d Cir. 1964), cert. denied 377 U.S. 993 (1964). See *Wigmore Evidence*, subsec. 2155(c). Thus, in *U.S. v. Register*, 496 F.2d 1072, 1077 (5th Cir. 1974), the court stated, "[A] telephone call out of the blue from one who identifies himself as X may not be, in itself, sufficient authentication of the call as in fact coming from X."

In the present case Hetherington had no previous or subsequent contact with Genoese and, therefore, not being familiar with his voice, was unable to identify Genoese as the caller. Moreover, the scenario that the caller described (threatened picketing or strike of Emery if the truck was not removed from building 260) never came to pass.

Pursuant to rule 901 the identity of a telephone caller may be shown by circumstantial evidence in the absence of the witnesses' ability to identify the caller's voice. See *Federal Rules on Evidence, Advisory Committee Note*, and cases cited there. Nevertheless, I am persuaded that the degree of evidence necessary to establish Genoese as the caller in the present case is simply not sufficient. For example, in *Van Riper v. U.S.*, 13 F.2d 961, 968 (2d Cir. 1926), Judge Learned Hand writing for the court stated:

> If, for example, a man were to write a letter, properly addressed to another, and were to receive a telephone call in answer, professing to come from the addressee, and showing acquaintance with the contents of the letter, it would in our judgement be good enough identification of the speaker to allow in the proof, though in the end, or course, the issue of identity would be for the jury. This is the reasoning on which a complete correspondence is admitted, once its origin is established, so long as it continues to be consecutive in substance.

The advisory committee's note to the Federal Rules of Evidence, at example 4, states that "a document or telephone conversation may be shown to have emanated from a person by virtue of its disclosing information of facts known peculiarly to him."[8] In the present case, however, it was not shown that the caller, in disclosing the presence of Emery's truck at KAL's terminal, was dislcosing facts known peculiarly to Genoese. The fact of the truck's presence at building 260 may welf have been known to the pickets, but it was not known to them exclusively. The fact was known to KAL, to KAL's guard service, and to AMR. Although I am not suggesting that any person employed by the latter entities made the phone call to Hetherington using Genoese's name, it remains that the fact disclosed was not one known exclusively by Genoese as the alleged caller.[9]

On 9 April 1987 Jackie Presser, president of the IBT, sent a mailgram to KAL as follows:

> On behalf of the nearly two million members of the International Brotherhood of Teamsters, I am writing to express our outrage and strong protest over the recent actions taken by your organization aimed at circumventing the fair and long-established collective bargainging system in the United States. Your actions are a bad reflection not only on the relations you have with your employees, but on your entire country.
>
> As your are well aware, Korean Airlines, in collusion with AMR Services in the United States, had AMR Services enter into a "top-down" contract with the Transport Workers Union. This agreement allowed your airline to eliminate those employees who are paid the prevailing wage and represented by the Teamsters Union, under contract with Triangle Maintenace. More importantly, it allowed your airline to subcontract with AMR Services, whose employees are represented under the "top-down" agreement, and paid substandard wages. This practice has serious implications for the U.S. labor movement and constitutes unfair labor practices of the first degree.
>
> . . . .
>
> This organization has made numerous unsuccessful attempts to meet with officials of your airline. We are willing to discuss this situation, and believe such a meeting would be the first step towards an equitable solution.
>
> I look forward to hearing from you.

On the same date Presser sent a somewhat similar mailgram to the Federation of Korean Trade Union as follows:

> With our unions sharing strong ties of friendship, I have taken the liberty of writing you to solicit your support on a situation which affects many Teamster members and could have a negative impact on the entire U.S. Labor movement.

[8] If a caller (X) asked the witness, for example, if he had received the letter the caller had sent regarding subject (Y) which letter was shown to have been sent by the caller, then the witness testimony clearly would be sufficient to identify the caller as Mr. X. See, for example *Jarvis v. U.S.*, 90 F.2d 243, 245 (1st Cir. 1937); *U.S. v. Fassoulis*, 445 F.2d 13 (2d Cir. 1971).

[9] In a sense KAL and AMR would have been the beneficiaries of such a call. Thus, only 6 days before the call was made, Judge Nickerson denied the 10(l) petition seeking to enjoin the picketing on the grounds that the parties involved were all subject to the Railway Labor Act and not the National Labor Relations Act. It would therefore have been in the Charging Parties' interests to establish a threat of picketing directed to an employer who was within the NLRA's jurisdiction.

Korean Airlines Co., Ltd. had a contract for three years with Triangle Aviation Services, Inc. for Triangle to provide various jobs in New York and California. All these employees were Teamsters. In February, 1987, Korean Airlines, in collusion with AMR Services (a subsidiary of AMR Corporation, which is the parent company of American Airlines) entered into a "top-down" contract with the Transport Workers Union (AFL-CIO). A "top-down" deal, as it is referred to in the U.S. labor movement, is an agreement between a labor union and management that all employees of the company will be included in the collective bargaining agreement.

AMR Services had no real employees at the time this agreement was made with the Transport Workers Union. The contract, which provides for grossly inferior wages and benefits in comparison to the rest of the U.S. unionized airline workforce, was never voted on by a single member or ratified. It was designed solely as a vehicle for Korean Airlines to eliminate its higher-costing teamsters employed by Triangle and replace them with Transport Workers Union members on a substandard scale. As expected, Korean Airlines recently cancelled its contract with Triangle Maintenance and contracted with AMR Services to provide the same work that Triangle had previously provided. This caused the senseless loss of 60 Teamster jobs.

This shameful contract between Korean Airlines' subcontractor, AMR Services, and the Transport Workers Union allows TWU to steal other unions' members while it simultaneously benefits Korean Airlines, allowing it to undercut their operating costs by circumventing the collective bargaining system. Korean Airlines has refused to meet with Teamster officials, and also tried unsuccessfully to stop Teamster members from picketing at the job sites. United States Courts have ruled against the airline on this matter and the Teamsters are continuing to picket.

We have contacted Korea's ambassador to the United States, Kyung-Won Kim, and Korean Labor Minister Lee Hu Ki. As a mutual friend of our union and in the name of labor solidarity, I would certainly appreciate any assistance you could give on this matter.

Analysis

Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act was designed to prohibit secondary boycotts.[10] This provision of the Act prohibits certain types of conduct by labor organizations having an object of enmeshing neutral persons in disputes not their own. *NLRB v. Denver Building Council*, 341 U.S. 675, 692 (1951).[11]

Setting aside for the moment the contentions whether this dispute falls within the parameters of the NLRA or the RLA, the General Counsel's theory is esssentially as follows. In numerous cases when a union has protested the substitution of a subcontractor whose employees were represented by it with a subcontractor whose employees are either unrepresented or represented by another union, the Board has concluded that the Union's primary dispute has been with the new subcontractor. See *Teamsters Local 85 (William Volker)*, 253 NLRB 632 (1980); *Service Employees Local 73 (Andy Frain)*, 239 NLRB 295 (1978); *Teamsters Local 732 (Servair Maintenance)*, 229 NLRB 392 (1977). Thus, under this line of cases, the General Counsel is correct in identifying, under NLRA precedent, AMR as being a person with whom the Respondent has a primary dispute.[12] Moreover under the same line of precedent the General Counsel is probably correct in identifying KAL as being a secondary or neutral person.[13]

---

[10] Sec. 8(b)(4)(i) and (ii)(B) in pertinent part reads as follows:

> 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> . . . .
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> . . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacture, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

[11] In *NLRB v. Denver Building Trades Council*, supra, the Union contended that the district court's conclusion regarding jurisdiction in the 10(l) proceeding for a preliminary injunction was res judicata about the subsequent Board proceedings on the merits. The court rejected this contention in that case as I reject the Respondent's similar contention in this case.

[12] Because of the documentary evidence in this case, there is little room for dispute about the fact that the Respondent objects to AMR's alleged substandard contract with another union.

[13] KAL would only be considered as a "primary" if it is deemed to have been a joint employer with Triangle of the cargo-handling personnel doing work at building 260. If that were the case, the Respondent could argue that KAL is a person with whom it has a primary dispute because KAL discharged the employees who were represented by a local of the Respondent. Such a theory would, however, be difficult to sustain because a joint-employer relationship is not easily established. Thus, in *Cabot Corp.*, 223 NLRB 1388 (1976), the Board held that the determining factors for showing a joint-employer relationship in an owner-contractor situation is whether the owner:

> . . . exercises, or has the right to exercise, sufficient control over the labor relations policies of the contractor or over the wages, hours, and working conditions of the contractor's employees from which it may be reasonably inferred that the owner is in fact an employer of the employees.

See also *Clinton's Ditch Cooperative Co. v. NLRB*, 778 F.2d 132 (2d Cir. 1985), cert. denied 107 S.Ct. 67 (1986); *Squibb-Beechnut v. NLRB*, 443 F.2d 1066 (6th Cir. 1971); *Laerco Transportation*, 269 NLRB 324 (1984); *Teamsters Local 85*, supra at 635; *Service Employees Local 73*, supra at 305. *Teamsters Local 732*, supra at 402–403.

When, as here, a primary and a secondary occupy a common site (at least at JFK airport), the Board has established certain standards for determining whether picketing such a site has an object that would be prohibited or permitted by the secondary boycott provisions of the NLRA. In *Sailors Union (Moore Dry Dock)*, 92 NLRB 547, 549 (1950), the Board stated:

> When a secondary employer is harboring the *situs* of a dispute between the union and a primary employer, the right of neither the union to picket nor the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights. In the kind of situation that exists in this case, we believe that picketing of the premises of secondary employer is primary if it meets the following conditions: (a) the picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.[14]

Therefore, assuming NLRA jurisdiction in this case, it would be clear that the picketing at JFK would have a secondary object under the *Moore Dry Dock* standards because the picket signs identify KAL as the primary rather than AMR, which under the preceding analysis would be the proper primary. Also, assuming that AMR is the primary and that KAL is a secondary, the 2 days of picketing of KAL at Los Angeles would similarly be secondary activity because KAL is named on the picket signs and because AMR, the primary, is not at that location.

The problem faced by the General Counsel and the Charging Parties is that under their theory of this case, the primary (AMR) and the target of the Union's picketing (KAL)[15] are both "carriers" within the meaning of the Railway Labor Act. And under that Act, secondary boycotts are not illegal. In *Burlington Northern RR Co. v. Brotherhood of Maintenance of Way Employees*, 125 LRRM 2073, (1987) the union, which was engaged in a primary strike against Maine Central, expanded its picketing activity to include a variety of other railroads including Burlington Northern that interconnected with Maine Central. These "secondary" railroads sought injunctive relief arguing that the Norris La Guardia Act's prohibition on Federal courts from issuing injunctions in labor disputes did not apply because secondary boycotts were contrary to the intentions of the Railway Labor Act. Justice Brennan on behalf of the court stated (125 LRRM at 2080–2082):

> Indeed, this Court has already refused to find in the silence of the RLA an intent to prohibit secondary picketing. In *Trainmen v. Jacksonville Terminal Co.*, supra, we held that state courts may not enjoin secondary picketing in a railway dispute after parties exhaust the RLA's procedures. We noted that Congress had not provided the courts with the standards needed to distinguish primary from secondary picketing, and that "parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute . . . [may] employ the ful range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law." 394 U.S. at 392. We concluded that, in railway disputes, "until Congress acts, picketing—whether characterized as primary or secondary—must be deemed conduct protected against state proscription." Id., at 392–393.
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> . . . .
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> Petitioners next maintain that when, as here, the RLA does not provide a clear answer to a particular problem, this Court has looked to the National Labor Relations Act (NLRA) "for assistance in construing" the RLA. *Trainmen v. Jacksonville Terminal Co.*, supra, at 383. Petitioners argue that the NLRA embodies Congress' view that secondary activity is an unfair labor practice, and that this view should govern our construction of the RLA.
>
> The RLA does not contain a "sweeping prohibition" of secondary activity; instead it "describes and condemns specific union conduct directed to specific objectives." *Carpenters v. NLRB*, 357 U.S. 93, 98, 42 LRRM 2243 (1958). Moreover, the NLRA does not permit employers to seek injunctions against the activity that it does prohibit. It grants to the National Labor Relations Board (NLRB) exclusive authority to seek injunctions against some forms of secondary activity. 29 U.S.C. § 158(b)(4), 160(j), 160(l). Thus, Congressional policy, as expressed in the NLRA, remains that employers are not permitted to obtain injunctions of secondary activity. Finally, it is significant that Congress excluded rail carriers and rail employees from the coverage of the NLRA: even the NLRB has no authority to seek injunctions in railway disputes. §§ 152(2), 152(3). We conclude that the NLRA could not make clearer Congress' intent to prohibit federal courts from issuing the injunctions sought in this case.
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> . . . .
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> Turning to this case, petitioners argue that a ban on secondary picketing may be inferred from the general language of Subsection 2 First. Section 2 First states that:
>
> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements

[14] It is recognized that these standards should not be mechanically or inflexibly applied. *Electrical Workers Local 861 (Plaueke Electric)*, 135 NLRB 250 (1962).

[15] The General Counsel and the Charging Parties contend that there were a number of other neutral NLRA employers who were enmeshed in the dispute, these being freight forwarders and consolidaters who made deliveries to or pickups from KAL's cargo terminal. Yet except for some evidence that the drivers were merely asked to honor the picket line, there is no evidence of any conduct within the meaning of Sec. 8(b)(4)(i) or (ii) vis a vis these employers.

concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of ay carrier growing out of any dispute between the carrier and the employees thereof. 45 U.S.C. § 152 First.

Petitioners place particular emphasis on the duty this section places on employees to attempt to settle disputes and thereby avoid any interruption to interstate commerce. This duty, petitioners correctly note, is consistent with the major purpose of Congress in passing the RLA: "to prevent, if possible, wasteful strikes and interruptions of interstate commerce" . . . Petitioners conclude that construing the RLA to allow unions to resort to secondary activity is manifestly inconsistent with the major purpose of the RLA.

Although we agree with petitioners that the primary goal of the RLA is to settle strikes and avoid interruptions to commerce, we see nothing in the RLA to indicate that Congress intended to permit federal courts to enjoin secondary activity as a means toward that end. An injunction does not settle a dispute—it simply disables one of the parties. Moreover, "in view of the interests of both parties in avoiding a strike," Virginian R. Co., 300 U.S., at 552, the availability of such self-help measures as secondary picketing may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures:

. . . .

Furthermore, as this case illustrates, § 10 of the RLA provides a ready mechanism for the Executive Branch to intervene and interrupt any self-help measures by invoking an Emergency Board and thereby imposing at a minimum a 60-day cooling-off period. If the Board's recommendations are not initially accepted by the parties. Congress has the power to enforce the Board's recommendation by statute, as it has done here. Allowing secondary picketing in the self helped period is thus not inconsistent with the structure or purpose of the Act, and may in fact increase the likelihood of settlement prior to self-help. This therefore not a case in which the "the scheme of the Railway Labor Act could not begin to work without judicial involvement." *Chicago & North Western*, supra, at 595 (Brennan, J. dissenting).

While opinions regarding the RLA's success in meeting its goals have varied over time, it does appear that under the RLA labor and management have been able to resolve most conflicts without resort to secondary picketing. We decline, at this advanced stage of the RLA's development, to find in it an implied limit on a union's resort to secondary activity. Instead, "if Congress should now find that abuses in the nature of secondary activities have arisen in the railroad industry . . . it is for the Congress, and not the Courts, to strike the balance between the uncontrolled power of management and labor to further their respective interest.'" *Trainmen v. Jacksonville Terminal Co.*, 394 U.S., at 392.

The NLRB can assert jurisdiction and find a violation of the secondary boycott provisions of the NLRA when the primary is an employer within the meaning of the NLRA, but when the secondary is either a railroad or an airline, (i.e., a carrier within the meaning of the RLA). *Steelworkers v. NLRB*, 376 U.S. 492 (1964).[18] Conversely, the General Counsel argues that when the primary is a carrier within the meaning of the RLA and the secondary is an NLRA employer, the secondary boycott provisions of the NLRA will also prevail. In this respect she relies on *Marriott In-Flite Services v. Transport Workers Local 504*, 557 F.2d 295 (2d Cir. 1977). In that case the union had a primary dispute with an airline (KLM) regarding KLM's discontinuance of meal preparations by its own employees who were represented by Local 504 TWU and KLM's subcontracting of such work to Marriott which was an NLRA employer. The union picketed Marriott. In the face of this activity, an action was brought, pursuant to Section 303 of the NLRA which permits an employer to sue a union for damages for activity which would be violative of Section 8(b)(4) of the Act. The court denied the Union's Motion for Summary Judgment, which was based on the union's contention that the RLA rather than the NLRA was applicable. The court in ordering the case remanded for trial stated:

> Appellees rely heavily on the opinion of the Supreme Court in *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 89 S.Ct. 1109, 22 L. Ed. 2d 344 (1969). This reliance is misplaced. The dispute in *Jacksonville Terminal* was over the validity of a Florida law banning secondary picketing. The parties were two railroads and a railway union. The Court held that the Florida statute was invalid because federal labor law had preempted the field. The Court explicily did not decide whether the activity at stake was "primary" or "secondary," or whether it was protected by the RLA.
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> . . . .
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> The *Jacksonville Terminal* opinion, moreover, was careful to distinguish the case from one very like the present appeal:
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> > Whatever might be said where railway organizations act as agents for, or as joint ventures with unions subject to the NLRA, see *International Brotherhood of Electrical Workers v. NLRB*, 122 U.S. App. D.C. 8, 350 F.2d 791 (1965); or where railway unions are engaged in a dispute on behalf of their nonrail employees; or where a rail carrier seeks a remedy against the conduct of nonrailway employees, see *United Steelworkers v. NLRB*, 376 U.S. 492, 501 (1964); *Teamsters Union v. New York, N. H. & H. R. Co.*, 350 U.S. 155 [76 S. Ct.

[18] See also *Service Employees Local 73*, supra; *Teamsters Local 732*, supra.

> 100 L.Ed. 166] (1956), none of these is this case. *This is a railway labor dispute, pure and simple.*
>
> 394 U.S. at 377 (emphasis added). Thus, we conclude that the decision in *Jacksonville Terminal* does not support the result reached in the district court below.

Despite the above-cited case, neither the General Counsel nor the Charging Parties have cited any precedent holding that when the primary is an RLA employer and when the secondary activity is directed against an RLA employer, the provisions of the NLRA would come into effect. Indeed to reach such a conclusion would on the face of it be inconsistent with the Supreme Court's holding in *Burlington Northern.*

In making her argument, the General Counsel relies almost exclusively on dicta in *Jacksonville Terminal* where the court said that its conclusion that an injunction was precluded, might not apply to a situation "where railway unions are engaged in a dispute on behalf of their nonrailway employees." As such the General Counsel argues that because there is evidence showing that the Respondent was acting on behalf of Triangles employees and because those employees (unlike the employees of KAL or AMR) were at the time of their work at building 260, nonrailway employees, the holding of *Jacksonville Terminal* and *Burlington Northern* would not apply. I disagree.

For one thing Triangle, having been replaced by KAL on 28 February 1987, no longer is involved in this case and under the General Counsel's theory is *not* the primary employer. Thus the language in *Jacksonville Terminal* describing a union acting on behalf of its nonrailway employees implies to me that it is acting on behalf of such employees vis a vis a primary employer. Indeed none of the cases cited in the quoted paragraph of *Jacksonville Terminal* involved situations in which *both* the primary and the secondary employer/persons were carriers within the meaning of the RLA.

In the present case the primary is AMR and the only person against whom "secondary" activity has been directed is KAL. Yet because both of these companies are "carriers" within the meaning of the RLA the secondary conduct of picketing KAL at JFK or at Thomas Bradley Airport in Los Angeles is lawful under the holding of *Burlington Northern.* Thus, under the aforesaid case, the picketing of KAL is legal activity and would in a sense be legally equivalent to primary picketing. Therefore, if picketing of KAL by the Respondent is legal conduct, the fact that the pickets ask truckdrivers employed by persons making deliveries to or from KAL to honor the picket line must be construed as conduct incidental to the Respondent's lawful activity. Accordingly, being merely inducements to honor a legal picket line at KAL's premises I cannot see how such inducements would constitute unlawful secondary activity against other persons within the meaning of Section 8(b)(4)(i)(B) of the Act. *NLRB v. International Rice Milling*, 341 U.S. 665 (1951); *Newspaper & Mail Deliverers (Interborough News)*, 90 NLRB 2135 (1950).

Finally, because I have already concluded that the evidence concerning the alleged threat to Emery Air Freight has not been shown to have originated from the Respondent, I shall recommend that this allegation also be dismissed.[17]

CONCLUSIONS OF LAW

1. The Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. The Charging Parties, Korean Airlines Co. Ltd. and AMR Services Corporation are "carriers" within the meaning of the Railway Labor Act.

3. The Respondent's picketing of Korean Airlines is lawful conduct under the decision in *Burlington Northern RR Co. v. Brotherhood of Maintenance of Way Employees*, 125 LRRM 2073 (1987).

4. Appeals to individuals engaged by persons making deliveries to or from Korean Airlines not to cross the aforesaid picket lines do not constitute unlawful secondary boycott activity.

5. The General Counsel has failed to establish by competent evidence that the Respondent has engaged in any conduct prohibited by Section 8(b)(4)(i) or (ii)(B) against Emery Air Freight or Triangle Aviation Services Inc.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

On the entire record in this case, I recommend that this consolidated complaint be dismissed.

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[17] As noted previously, although Triangle is an NLRA employer, and would, under the General Counsel's theory be secondary, there is no evidence that the Respondent induced or encouraged individuals employed by this company to engage in a strike or work stoppage within the meaning of Sec. 8(b)(4)(i) of the Act.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Standard Roofing Co.[1] *and* United Union of Roofers, Waterproofers and Allied Workers Local Union No. 44, AFL–CIO. Case 8–CA–18337

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On December 30, 1986, Administrative Law Judge Russell M. King Jr. issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a response to the General Counsel's brief as well as cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by its unilateral and untimely withdrawal from a multiemployer bargaining group, the Greater Cleveland Roofing Contractors' Association (the Association), and by its subsequent refusal to sign the collective-bargaining agreement reached by the Association and the Union on August 19, 1985.[2] The Respondent contends that its withdrawal, part of a general dissolution of the Association by all its members, was justified by "special circumstances," i.e., by the Union's attempts to fragment the Association and by the Union's course of bad-faith bargaining during negotiations. We agree with the judge, for the reasons set forth below, that the Union did not attempt to fragment the Association and that it did not engage in bad-faith bargaining during its negotiations with the Association.

1. As the judge noted, the parties' collective-bargaining agreement provided for termination in writing by either party on or before December 31, 1984. On December 26, 1984, Union Business Agent Michael Branca sent a notice of termination and request for negotiations for a new agreement to each employer member of the Association and to employers with which the Union had a collective-bargaining relationship but which were not members of the Association. Branca did not send a letter to the Association. The Respondent urges that by this letter the Union was seeking individual negotiations with members of the Association. The evidence, however, does not support this contention. Branca testified that the notices were sent to individual employers rather than to the Association itself because several timely withdrawals from the Association had already occurred during December 1984, that he expected more timely withdrawals to occur, that the Union was not certain which employers were in or out of the bargaining group, and that the Union wished to make certain that all employers received the notice of termination. Branca further testified without contradiction that no individual negotiations with any Association members took place before March 5, 1985, when the Association itself commenced negotiations with the Union. The Respondent presented no documentary evidence or testimony to refute Branca's testimony.

The Respondent makes a similar argument regarding the Union's March 25, 1985 letter requesting the signing of an interim agreement, sent both to Association members and to nonmember employers. The judge credited Branca's testimony that this letter and the accompanying interim agreement, which extended the terms of the old agreement until a new agreement could be reached, were sent to Association members in error, and the Respondent has presented no testimonial or documentary evidence to refute Branca's testimony. We also note, as did the judge, that no Association member signed the interim agreement and that negotiations between the Association and the Union continued after the letter was sent. In our view, based on the evidence uncontradicted in the record and credited by the judge, neither the December 26, 1984 letter nor the March 25 letter, or the two letters taken together, indicate that the Union sought either to establish individual negotiations with Association employers in derogation of the Association's authority or to undermine the authority of the Association.

2. As noted above, the Respondent excepts to the judge's failure to conclude that the Union engaged in bad-faith bargaining that justified its withdrawal from the Association. In so doing, the Respondent attacks virtually every aspect of the Union's conduct during bargaining and contends that the Union engaged in bad-faith bargaining designed to disrupt the negotiations. We, however, find no merit in the Respondent's exception and we adopt the judge's finding that the Union did not

[1] As noted by the judge, the complaint was amended at the hearing to delete all Respondent Employers except Warren Roofing and Insulating Co. and Standard Roofing Co. On July 28, 1987, the Board granted the General Counsel's motion to sever from the complaint any allegations pertaining to Warren Roofing and Insulating Co. and to remand those complaint allegations to the Regional Director for settlement. Thus, the sole remaining Respondent is Standard Roofing Co. The case caption has been amended accordingly.

[2] Unless otherwise noted, all subsequent dates will refer to 1985.

bargain in bad faith. During the course of the negotiations for a new contract, the Association and the Union met about nine times between March 5 and the June 19 dissolution of the Association. Briefly, as outlined as far as possible by the Respondent's own exhibits concerning the meetings, the negotiating sessions progressed as follows.

The parties met first on March 5. At this session the Union presented no proposals but agreed to meet with its membership and to present proposals to the Association after the membership meeting.[3] The Association proposed numerous changes to the old agreement or past practice, including the right to employ helpers, or "pre-apprentices," in place of journeymen roofers, without restriction. The union representatives told the Association that the union membership would meet March 11 and that its proposals would be forthcoming after the meeting.

The next session was on April 1. At this session the Union presented 16 proposals, none of which were ultimately included in the negotiated contract. The parties also agreed to a "dangerous chemicals" provision, eliminated the breaks provision, and discussed the use of helpers in place of journeymen to reduce labor costs. Concerning the latter, according to the testimony of Lally, the Association's spokesman in negotiations, the Union orally raised the possibility of a "targeted jobs proposal," whereby employers would seek the Union's permission to substitute helpers for journeymen on a job-by-job basis. The Union expressed flexibility on the issue of a helper category, but stated that it would not agree to a proposal that lacked safeguards and that it would submit a proposal at the next session.

At the next session, held on April 17, the parties discussed a proposed union clause on work preservation and the use of helpers. The Union proposed a "targeted jobs" system, which the employers stated would not work. The next meeting was on April 22, at which the parties discussed, among other things, wage data distributed by the Association, the helper category and what terms were acceptable to the Union, the targeted jobs proposal, and a possible wage rollback. The Union stated that it would try to formulate a helper proposal and present it in writing at the next meeting. According to Lally's testimony, the Association reduced its original proposal on the maximum ratio of helpers to journeymen from 100 percent to not more than 75 percent. The parties met on April 27, but no minutes of this meeting were kept by the Association. The Respondent's witness testified that at that meeting the Association lowered its offer on the ratio of helpers to journeymen on each job from not more than 50 percent to not more than 40 percent to not more than 33-1/3 percent. The Union made no counterproposals.

On April 30, the parties met again. The Union presented a "pre-apprentices clause," whereby preapprentices would be paid 40 percent of the journeyman rate and would be used to complete crews when all journeymen were working. The Union also proposed a 3-year contract with a wage freeze the first year and $1 raises the second and third years. The Association presented a final offer of employment at the journeyman rate under the old contract; the use of preapprentices to constitute up to one-third of the work force; the payment by the employer of certain benefits for preapprentices; contract duration and a wage freeze of 2 years; overtime of time-and-one-half except Sundays and holidays; and $10 reporting pay. The Association's spokesman told the union representatives that the Union's proposals were unacceptable because they were inconsistent with reducing labor costs and that introducing their counterproposal "at this late hour" was inconsistent with the party's ground rules. The Union's spokesmen told the Association that to ask their membership to agree to the helper proposal would be to ask them to vote themselves out of a job and that a change in the provision (which the Association rejected) might make the proposal more palatable.[4] Union Spokesman Branca asked if the Association would consider Federal mediation, but denied that this suggestion meant that he viewed the negotiations as at impasse and asserted that the Union was willing to work under the old contract on a day-to-day basis, but that the Union could not accept the Association's final offer.[5]

The parties met next on May 10. The Union presented written proposals that new wage rates be effective May 1 and be frozen for the duration of the contract (2 years); $13 reporting pay; and the use of probationary apprentices at 40 percent as long as all journeymen were working. The Association rejected the last proposal. The Union agreed to take the Association's last proposal back to its members, but indicated again that the preapprentice issue would probably cause it to be rejected, and again asked for Federal mediation.

On June 19 the parties met again. According to Lally's testimony, the Union, at the request of the

[3] Union Business Agent Branca testified that the Union's failure to present proposals at this meeting was caused by his illness and hospital stay.

[4] The union membership voted to reject the Association's final offer on May 5 or 6.

[5] The Union and the Association apparently did meet with the Federal mediator on April 23, but the record does not reflect what transpired at the meeting.

Association spokesman, distributed a "letter of understanding," apparently under discussion in the Union's negotiations with nonassociation employers. The letter contained a provision authorizing the use of probationary employees "in quoting for roofing work which is likely to be lost to nonunion contractors." The following language had been stricken out by hand: "The ratio [of journeymen to probationary apprentices] will not be less than 1 Journeyman to 1 Probationary Apprentice per Project unless a higher ratio of Journeymen to Probationary Apprentices is requested by the Contractor." The Association suggested that this language be restored and that language relating to the Union's discretion in authorizing the use of probationary apprentices be deleted. The union representatives then told the Association that they needed to discuss the letter of understanding. The Association members agreed to disband the group on June 19 and the Union was notified formally by letter on June 24 that the Association had disbanded and that the contractors were seeking negotiations on an individual basis.

Under Section 8(d) of the Act, an employer and a union must "meet at reasonable times and confer in good faith with respect to wages, hours, and terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." *NLRB v. Reed & Prince Mfg. Co*, 305 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953). In the course of bargaining "[a] party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (citation omitted).

In the case at hand, it is clear from both the minutes of the bargaining sessions and the testimony of witnesses at the hearing that the Respondent sought to reduce its labor costs through a curtailment of some economic benefits contained in the expired contract and through discretion in its use of helpers who were to work for a wage rate significantly lower than that of journeymen. It is also clear that the Union sought to augment the economic position of the employees and to forestall, limit, or place controls on the use of helpers by the employers. The Union's failure to accede to the Association's general position that it wanted to cut labor costs or to its position that its member employers should have discretion in the use of helpers is not, of itself, an indication of bad-faith bargaining. In assessing the lawfulness of a party's conduct in bargaining, the Board's inquiry is whether, based on the context of the party's total conduct, it was seeking to frustrate agreement to a contract or lawfully engaging in hard bargaining to negotiate a contract that it considers desirable. Ibid. We note that the Union met with the Respondent regularly, exchanged proposals albeit with some delays, modified or dropped some demands, and agreed to some of the Respondent's proposals. We do not find, under all the circumstances of this case, that the Union's failure to present proposals at the parties' first meeting, some of its initial proposals, its refusal to accede to the Association's proposals concerning the use of helpers, or its presentation of proposals intended to augment the economic position of its members are indicia of bad faith. Therefore, we find, based on the Union's total conduct in negotiations, that the evidence does not support a finding that the Union engaged in bad-faith bargaining.[6] We, accordingly, further find that the Respondent's contention that the Union's conduct justified the Respondent's untimely withdrawal from the Association is without merit and we conclude that the Respondent's conduct violated Section 8(a)(5).[7]

3. In her brief to the judge, the General Counsel moved to amend the complaint to include factual averments regarding the reformation of the Association in August and the Association's execution of a collective-bargaining agreement with the Union, and to allege further violations of Section 8(a)(5) arising out of the Respondent's refusal to acknowledge that it was bound by the signed agreement and its failure to implement its terms. The judge denied the General Counsel's motion to amend, but, despite his denial of the motion, found that the Respondent had violated Section 8(a)(5) by "refusing to become a signatory to the collective-bargaining agreement reached by the Association and the Union on 19 August 1985," and ordered the Respondent to "[f]orthwith sign and implement the above described agreement and give it retroactive effect from 1 May 1985." The General Counsel has excepted to the judge's denial of her motion. The Respondent opposed the General Counsel's motion to amend and now argues that the remedy imposed by the judge is inappropriate in that it depends on the grant of the General

[6] We note that the judge stated that the Union was "derelict on occasions in presenting proposals or counterproposals" and that "at various times" the Union "took an almost cavalier attitude towards bargaining." Notwithstanding these characterizations, however, the judge ultimately concluded that the Union had not bargained in bad faith. Our review of the course of bargaining here reveals that the judge's ultimate conclusion is fully supported by the record.

[7] In view of our conclusion that the Union did not, in fact, engage in bad-faith bargaining, we find it unnecessary to pass on the issue of whether a union's bad-faith bargaining with a multiemployer bargaining association would constitute "special circumstances" justifying untimely and unconsented-to withdrawal from multiemployer bargaining. Cf. *Charles D. Bonanno Linen Service*, 243 NLRB 1093 (1979), affd. 454 U.S. 404 (1982).

Counsel's motion, which it contends was properly denied, and in that the newly alleged violation was not fully litigated at the hearing.

We agree with the judge's denial of the General Counsel's motion to amend, inter alia, as unnecessary to the remedy and, accordingly, we do not adopt the judge's finding that the Respondent violated Section 8(a)(5) by refusing to sign and implement the agreement reached by the Association and the Union on August 19. We, however, further find no merit in the Respondent's contentions that the remedy ordered by the judge is inappropriate and we adopt the judge's recommended Order with the modifications discussed below. Thus, under the circumstances of this case, the remedy of requiring the Respondent to sign and implement the agreement is necessary to restore the status quo ante. We disagree with the Respondent that this remedy depends on a finding that the Respondent separately violated the Act by failing to sign and implement the collective-bargaining agreement reached by the Union and the Association. The Respondent withdrew from its multiemployer bargaining group in violation of Section 8(a)(5) of the Act. By so withdrawing, it did not cease to be bound by the actions of that group. The judge found that after the dissolution of the Association on June 19 all members except Warren Roofing and Insulating Co. and the Respondent reformed the Association, and that, on August 19, the Association entered into an agreement with the Union on behalf of its members. The Respondent therefore is bound by the terms of the collective-bargaining agreement duly executed by the Association on behalf of its members. To remedy the Respondent's unfair labor practice by ordering it to sign and implement that agreement does nothing more than restore all parties, and the employees affected by the Respondent's unlawful withdrawal as well, to the positions they would have been in absent the Respondent's unfair labor practice. Further, we note that the issue of the appropriate remedy was raised at the hearing and that the judge put the Respondent on notice that the nature of the remedy would be at issue in the case. In light of the foregoing, we shall modify the judge's recommended Order by deleting paragraph 1(c).[8]

[8] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

The General Counsel has requested the inclusion of a visitatorial clause in the Order. Under the circumstances of this case we find it unnecessary to include such an Order. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Standard Roofing Co., Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c).

2. Substitute the following for paragraph 2(a).

"(a) Forthwith sign and implement the collective-bargaining agreement reached by the Union and the Association representing its employer members on August 19, 1985, and give it retroactive effect from May 1, 1985."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Union of Roofers, Waterproofers and Allied Workers Local Union No. 44, AFL–CIO by participating in the unilateral and untimely disbandment of our multiemployer bargaining group.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL forthwith sign and implement the agreement of August 19, 1985, between the Union and the employer-members of the Greater Cleveland Roofing Contractors' Association, Inc. and give it retroactive effect from May 1, 1985.

WE WILL make whole our employees in the appropriate bargaining unit for any loss of pay or other employment benefits they may have suffered by reason of our refusal to sign and implement the collective-bargaining agreement, plus interest.

STANDARD ROOFING CO.

Steven D. Wilson, Esq., for the General Counsel.
Allen G. Ross, Esq. (Wickens, Herzer & Panza Co., L.P.A.), of Cleveland, Ohio, for the Respondent Employers.[1]

[1] Attorney Allen G. Ross was counsel for Respondents, Standard Roofing Co. and Warren Roofing and Insulating Co. The motion, and its ramifications, will be discussed later herein.

Lawrence M. Oberdank, Esq. and *Wrey Bradlkey, Esq.*, of Cleveland, Ohio, for the Charging Union.

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING, JR., Administrative Law Judge. This case was heard by me in Cleveland, Ohio, on 19, 20, and 21 May 1986. The original charge was filed by the United Union of Roofers, Waterproofers and Allied Workers Local Union No. 44, AFL–CIO (the Union) on 18 June 1985, and an amended charge was filed by the Union on 27 August 1985.[2] Based on the charge, as amended, a complaint was issued on 29 August by the Regional Director for Region 8 of the National Labor Relations Board (the Board) on behalf of the Board's General Counsel.[3] The original complaint alleged that the Greater Cleveland Roofing Contractors' Association, Inc. (the Association), together with its employer-members, violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) on or about 24 June by disbanding the Association after negotiations for a new collective-bargaining agreement (contract) had commenced.[4] At the commencement of the hearing in this case, the General Counsel moved to delete or drop from the case the Respondent Association and all Respondent Employers except for Standard Roofing Co. (Standard), and Warren Roofing and Insulating Co. (Warren). The motion was unopposed and was granted. The complaint, as it then and now stands, in essence charges Standard and Warren with an untimely withdrawal from the multiemployer group in violation of Section 8(a)(1) and (5) of the Act. Respondents Standard and Warren defend on the grounds that certain acts or actions by the Union rendered the withdrawal from the multiemployer group (and negotiations) timely and proper.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, counsel for the Company, and counsel for the Union, I make the following

FINDINGS OF FACT[5]

I. JURISDICTION AND THE LABOR ORGANIZATION

The pleadings, admission, and evidence in the case establish the following jurisdictional facts. Respondents Standard and Warren are separate business entities, which maintain principal offices and places of business in the Cleveland, Ohio area. Both Standard and Warren are engaged in the installation of roofing systems in the Cleveland, Ohio area, and, in the course and conduct of their business operations during a representative period, each individually purchase and receive at their facilities in the Cleveland, Ohio area products, goods, and materials valued in excess of $50,000 directly from points outside of the State of Ohio. Thus, I find, as alleged and admitted, that Standard and Warren are now, and have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Also as alleged and admitted, I find that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

The Association (the multiemployer bargaining group or unit) and the Union had maintained a collective-bargaining relationship for a period in excess of 30 years. The most recent contract expired on 30 April. Negotiations on a new contract commenced in early March, but after some 8 to 10 negotiating sessions, the last of which was on 19 June, the parties were unable to agree on a new contract and the multiemployer group, unilaterally, came to the decision to disband and seek individual negotiations with the Union. The Union opposed the actions of the multiemployer group and requested a resumption of negotiations on a group basis through the Association. On or about 13 August, all former members of the group reformed except Standard and Warren, and on or about 19 August, the Association, on behalf of its member employers, reached agreement on a new contract. Thereafter, Standard and Warren expressed a continued desire to bargain individually, but the Union refused and insisted that Standard and Warren accept the contract that had been reached with the Association on or about 19 August. The Union thereafter filed the initial charge in this case, which was followed by the issuance of the complaint on 29 August. Subsequently, and before the hearing in this case was opened on 19 May 1986, the Association, together with its member-employ-

[2] All dates hereafter are in 1985 unless otherwise stated.

[3] The term "General Counsel," when used herein, will normally refer to the attorney in the case acting on behalf of the General Counsel of the Board, through the Regional Director.

[4] The pertinent parts of the Act (29 U.S.C. § 151 et seq.) provide as follows:

> Sec. 8.(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> . . . .
>
> (5) to refuse to bargain collectively with teh representatives of his employees . . . .
>
> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

[5] The facts found herein are based on the record as a whole and on my observation of the witnesses. The credibility resolutions herein have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony and evidence, regardless of whether mentioned or alluded to herein, has been reviewed and weighed in light of the *entire* record.

ers (except for Standard and Warren), and the Union reached a settlement of the issues alleged in the original complaint, with the approval of the Regional Director. Thus, at the commencement of the hearing the Association, and all members-employers except for Standard and Warren, were dismissed from the case.

The contract between the Association and the Union expired on 30 April. The duration clause of the contract (art. II) provided for automatic renewal of the contract from year to year unless either party terminated the contract by written notice on or before 31 December 1984, or any subsequent 31 December. The contract also provided that in the event the parties were unable to reach an agreement prior to the expiration date, by mutual consent the parties could agree to continue the terms of the contract until a new contract was negotiated. The contract was an areawide contract, and the Union had a contractual relationship with many roofing contractors or employers in the Cleveland area, not all of which were members of the Association. Pursuant to the duration or termination clause of the contract (art. II), on 26 December 1984 Union Business Manager Branca wrote to all employers (both Association and non-Association contractors) as follows:

> Gentlemen:
>
> Local 44, United Union of Roofers' Waterproofers' and Allied Workers does hereby give notice pursuant to Article II of the collective-bargaining agreement of its intent to terminate the same on April 30, 1985.
>
> Local 44 wishes to begin collective bargaining for a new agreement as soon as possible and it is ready to meet with your representatives at their earliest convenience. Kindly contact the undersigned to arrange a time and place for the meeting.

The first negotiating session between the Association and the Union was on 5 March. On 25 March, Branca wrote to all contractors or employers with whom the Union had entered into a contract (both Association and non-Association employers) as follows:

> Dear Sir:
>
> Enclosed is an Interim Agreement which is self-explanatory and will enable your company to continue working in the event a new collective bargaining agreement is not consummated by April 30, 1985.
>
> I would appreciate your executing the same and returning it to me at your earliest convenience. Do not hesitate to contact me if you have any questions.

The interim agreement, which was attached, was a short document that in effect continued the expiring contract "until a new collective bargaining agreement is consummated." This interim agreement further provided that "all terms and conditions of any collective bargaining agreement that is consummated shall be made retroactive to April 30, 1985." Thereafter, bargaining continued between the Association and the Union, and it is clear from the record that the Union desired the new contract to be an areawide contract, applying additionally to non-Association employers. Branca testified that the mailing of the interim agreement to members of the Association on 25 March was an error.[6] However, it is clear from the record that no member of the Association entered into the interim agreement. Aside from bargaining with the Association, the Union continued bargaining with other nonmembers, and on or about 1 August entered into what the Union hoped would be an areawide agreement with two independent employers, which agreement became known as the Weathermark agreement. These two employers engaged in a considerable amount of roofing work in the Cleveland area. On 13 August, the former members of the group reformed the Association, with the exception of Standard and Warren, and on or about 19 August, the Association entered into the Weathermark agreement on behalf of its member-employers.

B. *The Fragmentation Issue*

The Respondents argue in this case that the Union intended at the very outset to fragment the multiemployer group and thus caused to exist unusual circumstances which justified the unilateral withdrawal from the group (the Association). I disagree. Once negotiations for a new contract have commenced, the Board will permit withdrawal from the multiemployer group only if there is "mutual consent" or "unusual circumstances." *Retail Associates*, 120 NLRB 388 (1958). The Board has limited application of the term "unusual circumstances" to those cases in which the withdrawing employer has been faced with dire economic circumstances, or where a bargaining unit has been substantially fragmented. *Polar Air Sheet Metal Co.*, 264 NLRB 1331 (1982); *Bonanno Linen Service v. NLRB*, 454 U.S. 404 at 411 fn. 6 (1982). The Board has also held, with approval, that an impasse reached in multiemployer bargaining did not constitute an unusual circumstance that would have permitted an employer to withdraw from the group. *Hi-way Billboards*, 206 NLRB 22 (1973); *Bonanno Linen Service v. NLRB*, supra. In *Sangamo Construction Co.*, 188 NLRB 159, 160 (1971), the Board approved a union's negotiation of interim agreements with individual members of a multiemployer group, stating as follows:

> We . . . conclude that the Respondents did not violate the Act by entering into or performing the terms of the interim agreement. The record does not convince us that such conduct has a significantly adverse impact upon the integrity of the multiemployer bargaining unit. Nor does the evidence show that the agreement was in derogation of the Association's bargaining authority or outside the coverage of the ultimate Association's contract. The facts show, rather, that bargaining did continue during the operative period and indeed resulted in an agreement which included the [employer] in its coverage.

[6] One such letter was admitted into evidence. This letter was to Warren Roofing and plainly appears to have been addressed by machine.

See also *Charles D. Bonanno Linen Service*, 243 NLRB 1093 (1979); *Polar Air Sheet Metal Co.*, supra. I find that the Union's letter of 26 December 1984 was sent to Association and non-Association members in the normal course of events prior to the onset of multiemployer bargaining, and pursuant to the contract's reopener mandates on or before 30 December 1984. There is no evidence whatsoever in this case that the Union wished to terminate its relationship with the Association in this regard, and thus I find that the 26 December 1984 letter in no way constituted any proof or evidence that the Union desired to fragment or dissolve its bargaining relationship with the Association. Likewise, I find that the Union's 25 March letter regarding the interim agreement was not tantamount to a rejection by the Union of the existence of the multiemployer group (the Association), and I note in this connection that bargaining between the Union and the Association continued and no Association members signed, or considered execution of, such an interim agreement. In this case, the Association and all employer-members were dismissed from the case with the exception of Standard and Warren. In my opinion, it cannot be concluded from this that Standard and Warren were in any way forgiven for the original and total disbandment of the multiemployer group, nor did this fact in any manner act as an approval for their continued withdrawal after the Association was reformed and the contract was signed. Had all original Respondents been maintained in this case, it would have been my conclusion that they all had violated the Act by their untimely disbandment and withdrawal from the multiemployer bargaining unit and process.

C. *The Union's Bargaining Tactics*

The Respondents also argue in this case that the Union bargained in bad faith, resulting in the dissolution of the Association on 19 June. There were some 8 to 10 bargaining sessions commencing 5 March and ending on 19 June. During these sessions, notes or minutes were kept by either one party or the other, and most of those notes or minutes were admitted into evidence. The main thrust of the Association during bargaining was to hold down labor costs by increasing the utilization of helpers. The Association claimed that through the use of such helpers, the member-employers could better compete in the marketplace with nonunion employers. At one point in the negotiations, the Union mentioned a targeted jobs proposal, a plan in which the Employer would seek and obtain permission from the Union to use helpers on a particular job the Employer was preparing to bid on. The Association maintained that such a proposal had been shown not to work.[7] There were three categories of employees as follows: journeymen, apprentices, and probationary apprentices. Probationary apprentices were also defined as helpers. One goal of the Union was to increase the number of journeymen, the highest pay category, through the training and qualification of apprentices. Thus, the two sides were at odds in the use of the lowest pay category of employees. Throughout the negotiations, and as alleged by the Respondent, the Union was in fact derelict on occasions in presenting proposals or counterproposals, and at various points took an almost cavalier attitude towards bargaining. However, proposals were ultimately made, exchanged, and discussed. Robert Lowry was chairman of the Association's bargaining committee, and testified that the Association was disbanded because progress in the negotiations "was virtually halted." The Respondents, in their brief, characterized some of the Union's behavior during negotiations as "sand bagging." A review of the entire record, including the testimony and minutes of the various negotiating sessions, does in fact reveal that the Union was loosely prepared for some of the negotiating sessions, and that the Union on occasion took positions that could be characterized as somewhat extreme, but I do not find that the Union's actions were calculated to sabotage the negotiations. At best, the Union was guilty of dereliction on occasion, and at other times guilty at best of hard bargaining. The subject was of great concern to the Respondents, and the majority of the testimonial evidence in the case is centered on the bargaining aspects of the case, and was presented by the Respondents.[8] The General Counsel showed little interest in this area, choosing in the main to rest his case on the wrongful and untimely disbandment of the Association itself. Neither party actually argues that an impasse occurred in the bargaining. Based on the record, I cannot find that the Union was guilty of bad-faith bargaining tantamount to a violation of the Act, as alleged by the Respondents. In any event, such a finding would not have constituted "unusual circumstances" or sufficient grounds for the disbandment of the Association or withdrawal of any employer from the Association. *Hi-Way Billboards*, supra; *Bonanno Linen Service v. NLRB*, supra.

I find in this case that the initial disbandment of the Association by its member-employers was violative of the Act, and because I have before me only two of those Respondent Employers, I so find and conclude that the Respondents, Standard and Warren, violated Section 8(a)(1) and (5) of the Act by their untimely withdrawal from the multiemployer group or unit when it disbanded.

On the foregoing findings of fact and initial conclusions, and on the entire record, I make the following

CONCLUSIONS OF LAW

1. The Respondents, Standard Roofing Co. and Warren Roofing and Insulating Co., are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[7] The contract eventually entered into by the Association after it was reformed did involve a targeted jobs provision.

[8] As noted earlier, the contract finally entered into by the Association and the Union was the Weathermark agreement, which had earlier been executed by the Union and two somewhat substantial non-Association employers in the area. Throughout the Union made clear its intent to obtain an areawide agreement, as it had in the past. The Respondents maintain that they were more or less forced into accepting the Weathermark agreement. There may be some validity in this contention. However, the Association knew of the Union's areawide aspirations, and also knew that the Union was bargaining with other non-Association employers. The Weathermark agreement was in the nature of a breakthrough for the Union, which, I conclude, the Association members knowingly chanced when they decided to disband the Association.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and has been at all material times, an exclusive bargaining representative of the employees of the Association's members, including the Respondents, in the following appropriate multiemployer unit:

> All working foremen, block floormen, journeymen and apprentices, excluding all office clerical employees and guards and supervisors as defined in the Act.[9]

4. By participating in the disbandment of the Association on or about 19 June 1985, and thereafter refusing to become a signatory to the collective-bargaining agreement reached by the Association and the Union on 19 August 1985, the Respondents have engaged in, and continue to engage in, unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action that I find necessary to effectuate the policies of the Act. In this connection, I shall recommend that the Respondents be ordered to immediately sign and implement the collective-bargaining agreement reached by the Union and the Association on or about 19 August 1985, and apply the agreement retroactively through 1 May 1985, and further make their employees whole for any loss of earnings or other benefits suffered since then as a result of their failure to apply the agreement. Interest on wages due, if any, shall be paid in accordance with the provisions of *Florida Steel Corp.*, 231 NLRB 651 (1977),[10] and shall be calculated from 1 May 1985, the effective date of the new contract entered into by the Association and the Union.[11]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondents, Standard Roofing Co. and Warren Roofing and Insulating Co., Cleveland, Ohio, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with United Union of Roofers, Waterproofers and Allied Workers Local Union No. 44, AFL–CIO as the exclusive representative of their employees in the appropriate unit described and found herein.

(b) Withdrawing from the mulitemployer bargaining, except on adequate written notice given prior to the date set by the contract for modification, or to the agreed-on date to begin the multiemployer negotiations, except at such other time as it may lawfully withdraw.

(c) Refusing to sign and to implement the agreement reached by the Union and the Association representing its employer-members on 19 August 1985.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Forthwith sign and implement the above-described agreement and give it retroactive effect from 1 May 1985.

(b) Make whole their employees in the above-described bargaining unit for any loss of pay or other employment benefits they may have suffered by reason of their refusal to sign and implement the aforesaid agreement, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at their places of business in or around Cleveland, Ohio, copies of the attached notice marked "Appendix A" or "Appendix B"[13] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that

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[9] Respondents, in their answer to the complaint, denied the appropriateness of the unit as alleged in the complaint. However, the issue was not raised during the hearing or in the Respondents' posthearing brief. Also, as the General Counsel points out in his brief, the same unit was agreed on in the expired contract, and was also not the subject of any negotiations. I also note that it was again approved in the new contract.

[10] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[11] The subject of an appropriate remedy was raised by me at the hearing. The General Counsel, in order to ensure an appropriate remedy, made a motion in his posthearing brief to amend the complaint to additionally allege the reformation of the Association, the new agreement between the Union and the Association, and the wrongful refusal of Standard and Warren to rejoin the Association and be bound by the new agreement. The Respondents (Standard and Warren) in turn, and in addition to their posthearing brief, filed a motion for leave to file an opposition to the General Counsel's motion and a brief in opposition to the motion. Respondents' motion is granted and the brief in opposition is accepted and has been considered. However, I now do not consider the General Counsel's proposed amendments necessary for an appropriate remedy in this case, and for this and other reasons, the motion to amend the complaint is denied.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondents have taken to comply.

Lynn-Edwards Corp. *and* Chauffeurs, Teamsters and Helpers Local 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] Case 20–CA–18133

July 29, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On October 29, 1986, the National Labor Relations Board issued a Decision, Order, and Direction of Second Election[2] in this proceeding in which it affirmed the judge's rulings, findings, and conclusions and adopted his recommended Order as set forth in the attached judge's decision. The Board in the absence of exceptions adopted pro forma the judge's conclusions that the Respondent had violated Section 8(a)(1) of the Act by threatening employees with the loss of a profit-sharing plan should they become covered by a retirement plan negotiated by the Union, and by maintaining an eligibility provision in its Employee Stock Ownership Plan (ESOP), and by related explanatory language in its employee handbook and summary plan document, which unlawfully excluded employees from participation in the plan.[3]

The Respondent thereafter filed a petition to review the Board's Order with the United States Court of Appeals for the Ninth Circuit and the Board filed a cross-application for enforcement. On August 10, 1987, the court vacated the Board's Order and remanded the case to the Board.[4] The court determined that the Respondent, in fact, had adequately raised an exception to the judge's finding that the Respondent's ESOP eligibility provision violated Section 8(a)(1) of the Act. Accordingly, the court directed the Board on remand to consider three specified questions raised to the court by the Respondent regarding its ESOP. These questions are:

> 1. Is Lynn-Edward's ESOP a retirement plan or a profit sharing plan?
>
> 2. Is the current ESOP eligibility provision lawful?
>
> 3. May Lynn-Edwards amend the eligibility provision in light of the principles of *Rangaire Corp.*, 157 NLRB 682 (1966)?

By letter dated November 3, 1987, the Board advised the parties that it had decided to accept the remand from the court and invited them to submit statements of position with respect to the issues raised by the remand. Thereafter, the Respondent and the Charging Party filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reconsidered this case in light of the court's decision, which we consider the law of the case, and the parties' statements of position, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

Initially, we reaffirm our adoption of the judge's finding, to which it appears the Respondent has not taken exception, that the Respondent violated Section 8(a)(1) of the Act on April 5, 1983, when its president, Scarzella, told employees that the "union cannot participate in ESOP" and its vice president, Riley, stated that "[a]ny employee who is a member of collective bargaining cannot be eligible for this [ESOP] plan." The basis for these violations is fully set forth in the judge's attached decision at section III,C,1, paragraphs 1–2.[5]

We next proceed to an analysis of the questions remanded to us by the court. To put the issue in perspective, we first note the following as background.

The Respondent's ESOP, in effect since 1977, was amended in 1983, retroactive to June 1, 1981. The amendment includes the following pertinent provisions:

ARTICLE I

Name and Purpose of Plan

1.1 *Name*

The Employee Stock Ownership Plan established by the LYNN-EDWARDS CORPORATION, a California Corporation (Employer herein) shall be known as the Stock Bonus Employee Stock Ownership Plan (Plan herein)

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] 282 NLRB 316.

[3] Chairman Stephens dissented in part, finding that the Respondent's exceptions did in fact call into question the characterization of the ESOP. Chairman Stephens would have found that the Respondent's ESOP was a retirement plan, not a profit-sharing plan, and would have revised the remedial order to permit an amendment to the eligibility provision that "makes the participation of bargaining unit employees in the ESOP a matter to be negotiated in the context of a collective bargaining agreement." 282 NLRB at 52.

[4] *Lynn-Edwards Corp. v. NLRB*, 825 F.2d 413 (9th Cir. 1987).

[5] Notwithstanding the later language in the judge's Conclusion of Law 3, which appears to base this violation on a finding, which we reverse infra, that the Respondent's ESOP is a profit-sharing plan, it is clear from the judge's earlier discussion that he based his finding of a violation in these comments on the fact that, whether the ESOP was a profit-sharing or a pension plan, the Respondent unlawfully threatened its employees with the loss of the ESOP immediately on their being represented by a union.

and the Employee Stock Ownership Trust executed by Employer and EDWARD F. SCONBERG, JR. and WALTER E. RILEY, (Trustees herein) shall be known as the Employee Stock Ownership Trust (Trust herein).

1.2. *Purpose*

It is the purpose of this plan to recognize the contribution of the Employees to the successful operation of the Employer and to reward such contribution by establishing the system that would enable the employees to acquire through a Stock Ownership Plan equity ownership in the Employer without diminishing take-home pay. A major portion of the Employer contributions to the trust will be invested in stock of Employer.

. . . .

ARTICLE 3

Eligibility and Participation.

3.1 *Eligibility.*

. . . However, notwithstanding any provision to the contrary, no employee covered by a collective bargaining agreement between an Employee representative and the Employer shall become a Participant in the Plan, provided that retirement benefits of said class of Employees was the subject of good faith bargaining between the Employee representative and the Employer, and said Employee's retirement benefits are being funded pursuant to said collective bargaining agreements.

The General Counsel argued to the judge that the eligibility provision in the amendment violated Section 8(a)(1) of the Act and the judge agreed. In so finding, the judge noted that in *Rangaire Corp.*, 157 NLRB 682 (1966), the Board found that similar exclusionary language in a *pension* plan was held permissible. The judge further noted the Respondent's argument that the exclusionary language of its amendment fell "within the parameters" of *Rangaire* and similar cited cases. The judge rejected this argument, noting that "the gravamen of the violations in [the General Counsel's cited] cases as well as the instant case involves the language in the employers' '*profit sharing plans*' which automatically preclude employees from enjoying the benefits of such plans if they become covered by a '*retirement*' plan negotiated by the union [emphasis added]." (Sec. III,C,1, par. 6.) Thus, in the judge's estimate, the case turned on whether the Respondent's ESOP was a profit-sharing or a pension plan. The judge found it to be a profit-sharing plan and concluded that an employer "may not, through provisions of a profit sharing plan, automatically deprive employees of benefits therefrom if they elect to be covered by a retirement or pension plan negotiated by the union." (Sec. III,C,1, par. 8.) He thus found the Respondent's amendment with its unlawful exclusionary language violated the Act. This is the finding that the court has directed us to consider on the merits by an analysis of the three questions remanded to us. We answer those questions now in the order set out by the court.

1. *Is Lynn-Edwards' ESOP a retirement plan or a profit-sharing plan?*

The Respondent argues that its ESOP is a retirement plan as a matter of Federal statutory law under the Employee Retirement Income Security Act of 1974 (ERISA).[6] The Charging Party takes the position that the ESOP is a profit-sharing plan, and argues that although the Respondent's ESOP may qualify for certain tax benefits under ERISA, this does not mean that the Respondent is not offering greater benefits to nonunion employees, such as profit-sharing *and* retirement plans, than employees represented by the Union, and is thus violating Section 8(a)(1) of the Act. This argument is but another way of claiming that the Respondent's ESOP is a profit-sharing plan.

We now find Lynn-Edwards' ESOP to be a retirement plan within the meaning of ERISA. In this regard, we note that the Respondent's ESOP was amended in 1983 retroactive to June 1, 1981, for the express purpose of causing the plan to be a Stock Bonus ESOP under ERISA and to obtain tax-qualified status under ERISA and the Internal Revenue Code.[7] Thus, the Respondent's ESOP was designed to come within the statutory purview of ERISA. We have further considered that ESOPs, such as the one in question, are in fact created under and defined by ERISA and related regulations.[8] By statutory definition, an ESOP is an "individual account plan."[9] An individual account plan, in turn, by statutory definition, is a "pension plan."[10] Thus, individual account plans are, by definition, pension plans. Moreover, an examination of the ERISA definition of an employee pension benefit plan confirms that ESOPs are merely subspecies

[6] Pub. L. 93-406, 88 Stat. 829 (codified as amended 29 U.S.C. §§ 1001-1462, and in various sections of 26 U.S.C.).

[7] The preamble to the Stock Bonus Employee Stock Ownership Trust states:

> 2. The restated plan and this restated trust constitutes the plan intended to comply with and qualify under Section 401(a) of the Internal Revenue Code of 1954, as an Employee Stock Ownership Plan, which is defined in Section 4975 (e)(7)(A) of said code, the Employee Retirement Income Security Act of 1974 particularly Section 407 (d)(3)(a) and 407 (d)(6) and corresponding provisions of the laws of the State of California.

[8] The term "ESOP" is defined by ERISA at 29 U.S.C. § 1107 (d)(6) and by 29 C.F.R. § 2550. 407d-6 (1987).

[9] 29 U.S.C. § 1107 (d)(6).

[10] 29 U.S.C. § 1002 (34).

of federally regulated employee retirement benefit plans.[11]

We therefore find, contrary to the judge, that ESOPs, by statutory definition, are retirement plans, even if they are funded from the profits of a company. Accordingly, we conclude that Lynn-Edwards' ESOP is a retirement plan within the meaning of ERISA for purposes of the case before us.[12]

2. *Is the current ESOP eligibility provision lawful?*

The Respondent, relying on *Handleman Co.*, 283 NLRB 451 (1987), argues that its ESOP's eligibility provision is lawful. It also contends that because the provision is functionally identical to the exception to minimum participation standards described in 26 U.S.C. § 410(b)(3)(A) of the Internal Revenue Code, to find that the provision violates Section 8(a)(1) would be tantamount to finding that the language Congress chose to describe the exception to minimum participation standards for tax qualification purposes also violates Section 8(a)(1) of the Act. The Charging Party, relying on *Kroger Co.*, supra, argues that once it is determined that the Respondent's ESOP is a profit-sharing plan it is clear that the exclusionary language of the Respondent's plan is unlawful. It further asserts that *Handleman* is distinguishable from the instant case. We find, for the following reasons, that the Respondent's ESOP eligibility provision does not violate Section 8(a)(1) of the Act.[13]

As mentioned above, the Respondent's ESOP contains an eligibility provision, which states:

> 3.1 *Eligibility*
>
> . . . [N]otwithstanding any provision to the contrary, no employee covered by a collective bargaining agreement between an Employee representative and the Employer shall become a Participant in the Plan, provided that retirement benefits of said class of Employees was the subject of good faith bargaining between the Employee representative and the Employer, and said Employee's retirement benefits are being funded pursuant to said collective bargaining agreements.

In finding that the Respondent's eligibility provision does not violate Section 8(a)(1), we note that the provision does not automatically terminate the employees' benefits upon selection of the Union as its exclusive representative. Rather, it provides that the benefits may only be terminated if two conditions are met. First, retirement benefits for the covered employees must be the subject of good-faith bargaining. Second, the employees' retirement benefits must be funded pursuant to the collective-bargaining agreement. Thus, the employee's participation in the Respondent's ESOP continues throughout the negotiation process and is discontinued *only* in the event that a new retirement plan is funded through the agreement. Finally, we note that the Respondent and the Union under this scheme maintain the option, through good-faith negotiations, to either continue coverage for employees under the Respondent's ESOP, or to negotiate for the substitution of a different plan, which may include stock ownership features. Under these circumstances, it is clear that the Respondent's eligibility provision does not run afoul of Section 8(a)(1).[14]

3. *May Lynn-Edwards amend the eligibility provision in light of the principles of Rangaire Corp.*, 157 NLRB 682 (1966)?

The Respondent argues that this issue has been rendered moot by the Board's decision in, inter alia, *Handleman Co.*, supra, since both the language and application of the disputed provision here are less restrictive concerning the eligibility of represented employees than the eligibility provisions involved in that case. By contrast, the Charging Party premises its argument on the assumption that the Respondent's ESOP is a profit-sharing plan, a contention that we have rejected above.

We agree with the Respondent. Thus, although the Respondent may, if it so desires, amend the eligibility provision in its ESOP in light of the principles of *Rangaire Corp.*, there is no need to do so because the eligibility provision as written does not run afoul of Section 8(a)(1).

In conclusion, we find, contrary to the judge, that the Respondent's ESOP is a retirement plan and that its eligibility provision does not violate Section 8(a)(1). Nonetheless, we reaffirm that part of the judge's Conclusion of Law 4 in which he found that "Respondent has violated Section 8(a)(1) of the Act . . . by maintaining those por-

[11] 29 U.S.C. § 1002 (2)(A).

[12] Further, for the reasons set forth by Chairman Stephens at fn. 8 of his prior concurring and dissenting opinion in this case and contrary to the Union's contention in its statement of position, we find that the Board's decisions in *Kroger Co.*, 164 NLRB 362 (1967), enfd. 401 F.2d 682 (6th Cir. 1968), cert. denied 395 U.S. 904 (1969); and *Winn-Dixie Stores*, 224 NLRB 1418 (1976), enfd. in part 567 F.2d 1343 (5th Cir. 1978), are not inconsistent with this holding.

[13] The Union's argument is rejected because, as more fully discussed above, the plan is a retirement plan, not a profit-sharing plan, for the purposes of the case before us. We again note that the finding that the disputed provision is lawful is not inconsistent with the holding in *Kroger*, supra.

[14] See, e.g., *Rangaire Corp.*, 157 NLRB 682, 683–684 (1966); *Tappan Co.*, 228 NLRB 1389, 1390 (1977), enfd. 607 F.2d 764 (6th Cir. 1979); *Niagara Wires*, 240 NLRB 1326, 1328 (1979); *Sarah Neuman Nursing Home*, 270 NLRB 663, 680–681 (1984); *Handleman Co.*, 283 NLRB 451 (1987).

In finding that the disputed provision does not violate Sec. 8(a)(1), we also note the similarity between this provision and 26 U.S.C. § 410(b)(3)(A).

tions of existing booklets and documents which contain related explanatory material." It is clear that by "existing booklets and documents" the judge was referring to the Respondent's employee handbook and summary plan document, and by "related explanatory material," it is clear the judge was referring to the description in both documents that indicated that eligible for the ESOP were "[a]ll full-time employees, except those covered by collective bargaining agreements."[15] It is well settled that an employer violates Section 8(a)(1) through a provision in, or a statement about, a plan that suggests that coverage of employees will automatically be withdrawn as soon as they become represented by a union or that continued coverage under the plan will not be subject to bargaining. See, e.g., *Niagara Wires*, 240 NLRB 1326 (1979), and cases cited therein. Accordingly, we find the description of the ESOP in the handbook and summary plan document here violated the Act.[16]

In so concluding, we find *Handleman Co.*, supra, and *Dallas Morning News*, 285 NLRB 807 (1987), to be distinguishable on this point from the instant case. In *Handleman*, unlike the present case, the exclusionary language contained in the respondent's eligibility provision indicated that coverage for represented employees was subject to negotiations and, thus, did not automatically withdraw or completely foreclose coverage for such employees. In *Dallas Morning News*, employees represented by a union had historically been excluded from coverage from various sick-pay plans instituted by the employer for the benefit of nonunion employees. Some of these plans were written and some were not. The respondent subsequently drafted a written plan to provide a consistent policy in all departments in which the employees had sick leave benefits of one kind or another and indicated that the plan excluded "those covered by a collective bargaining arrangement." The Board reversed the judge's finding there that the institution of this plan, with its exclusion of "those covered by a collective bargaining arrangement," was a per se violation of Section 8(a)(1). In doing so, the Board noted that in the past sick pay had been a subject of negotiations between the respondent and the union but that the parties had never entered into contracts that provided a sick-pay plan. The Board held that "[w]ere the *per se* violation found by the judge to stand, an employer would effectively be required to grant its unionized employees *any* benefit that the nonunit employees possessed, or at least would not be able to provide accurate descriptions of the details and scope of all its existing employee benefits when non-unit employees were the beneficiaries of any plan in which the unit employees were not included." Noting that there was no allegation of bad-faith bargaining in the unit employees' not securing a sick-pay plan or no allegation that the announcement of the plan was used as a device to defeat the union, the Board dismissed the complaint allegation. In so holding, however, the Board distinguished its decision in *Melville Confections*, 142 NLRB 1334 (1963), enfd. 327 F.2d 689 (7th Cir. 1964), cert. denied 377 U.S. 933 (1964), on which the judge had relied. The Board indicated that, in *Melville*, employer statements that suggested that employees would *automatically* forfeit an existing benefit plan if they voted for a union in the pending representation election constituted a violation of Section 8(a)(1). The statements in the employee handbook and summary plan document here likewise indicate that employees covered by a collective-bargaining agreement will automatically forfeit their entitlement to the ESOP and are therefore unlawful.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraphs 3 and 4 of the judge's Conclusions of Law:

"3. The Respondent has violated Section 8(a)(1) of the Act by threatening employees with loss of the Employee Stock Ownership Plan in the event they become represented by a union.

"4. The Respondent has violated Section 8(a)(1) of the Act by maintaining those portions of its employee handbook and summary plan document, which contain language specifying that the Respondent's Employee Stock Ownership Plan excludes full-time employees who are covered by collective-bargaining agreements."

AMENDED REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom, and that it take certain affirmative action to effectuate the policies of the Act. Accordingly, we shall order the Respondent to amend any existing employee handbooks or summary plan documents so as to eliminate therefrom any language which indicates that employees who are covered by collective-bargaining agreements

[15] The Respondent clearly was aware that the judge had found violations based on the language in the handbook and summary plan document. Thus, we note that in its brief to the Board in support of its exceptions to the judge's decision it specifically stated, at p. 2, that the judge "found that Lynn-Edwards maintained an unlawful exclusionary provision in its profit-sharing plan, in its employee handbook, and in its summary plan document."

[16] As the judge noted, these documents were in existence during the election campaign. We therefore find no basis to reconsider our prior determination in the representation case to set aside the election and direct a second election.

automatically will be excluded from the Respondent's Employee Stock Ownership Plan.

ORDER

The National Labor Relations Board orders that the Respondent, Lynn-Edwards Corp., North Highlands, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of Employee Stock Ownership Plan in the event they become represented by a union.

(b) Maintaining those portions of the employee handbook and summary plan document which contain language specifying that the Respondent's Employee Stock Ownership Plan excludes full-time employees who are covered by collective-bargaining agreements.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Amend its existing employee handbook and summary plan document so as to eliminate therefrom any language that indicates that employees who are covered by collective-bargaining agreements automatically will be excluded from the Respondent's Employee Stock Ownership Plan.

(b) Post at its North Highlands, California facility copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten you with loss of the Employee Stock Ownership Plan in the event you become represented by a union.

WE WILL NOT maintain those portions of the employee handbook and summary plan document which contain language specifying that our Employee Stock Ownership Plan excludes full-time employees who are covered by collective-bargaining agreements.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL amend those provisions of our employee handbook and summary plan document which indicate that employees covered by a collective-bargaining agreement automatically will be disqualified from participating in our Employee Stock Ownership Plan.

LYNN-EDWARDS CORP.

Carmen Plaza De Jennings and *Boren Chertkov, Esqs.*, for the General Counsel.

Dennis R. Murphy, Esq. (Diepenbrock, Wulff, Plant & Hannegan), of Sacramento, California, for the Respondent.

Carol Livingston, Esq., of Sacramento, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing regarding this matter was held before me in Sacramento, California, on November 29, 1983.[1] The initial charge was filed on June 16, by Chauffeurs, Teamsters and Helpers, Local 150, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), and an amended charge was filed by the Union on July 27.

Thereafter, on July 29, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Lynn-Edwards Corp. (Respondent) of

[1] All dates or time periods are within 1983 unless otherwise specified.

Section 8(a)(1) of the National Labor Relations Act (the Act).

Pursuant to a representation petition filed by the Union on April 7 in Case 20-RC-15616, an election by secret ballot was conducted on June 2. The tally of ballots reflects that of the approximately 79 eligible employees, 16 cast ballots for the Union and 53 cast ballots against the Union. There were three challenged ballots which were insufficient in number to affect the results of the election. Subsequently, the Union filed timely objections to the election. Pursuant to a Report on Objections, notice of hearing, and order consolidating cases issued by the Regional Director on August 31, certain objections were consolidated with the instant unfair labor practice proceeding for the purpose of hearing, ruling, and decision by an administrative law judge.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel[2] and counsel for Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation, with an office and place of business in North Highlands, California, and is engaged in the wholesale sale and distribution of office products and supplies. Respondent, in the course and conduct of its business operations, annually purchases and receives products, goods, and materials valued in excess of $50,000 directly from points outside the State of California.

It is admitted, and I find, that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues raised by the pleadings are whether the Respondent, pursuant to the provisions of its Employee Stock Ownership Plan, unlawfully excluded employees represented by a union from participation in the plan, and threatened its employees with loss of plan benefits if the employees were to unionize; and whether such conduct warrants the direction of a second election.

[2] The General Counsel's request to correct the transcript is granted.

B. *The Facts*

On April 4 the Union requested recognition from Respondent in an appropriate unit.[3]

On April 5, the day following the Union's request for recognition, but before the filing of the representation petition, the Respondent held separate meetings for unit employees on each of three shifts. The Respondent was represented by Jack Scarzella, president and chief executive officer; Walter Riley, vice president in charge of marketing, and a trustee of Respondent's Employee Stock Ownership Plan (ESOP);[4] and Ken Saunders, Respondent's chief financial officer.

President Scarzella's outline of the meetings reflect that he began by telling the employees that the Company had received a claim for recognition by the Union and that it doubted whether the Union represented a majority of its employees. He then went on to enumerate six points under the general topic "UNIONS TELL YOU WHAT THEY CAN DO FOR YOU—NO GUARANTEE OF WAGE INCREASE OR SECURITY." He apparently spoke negatively about the "LARGE UNFUNDED VESTED LIABILITY" of the Teamsters pension plan, and then mentioned the Respondent's ESOP plan, telling the employees that "UNION CANNOT PARTICIPATE IN ESOP." Scarzella testified that although he did not read from the outline, he "essentially" followed it in conveying its meaning. After further statements regarding the costs of belonging to a union and other matters, Scarzella introduced Riley and Saunders for the express purpose of discussing the Respondent's ESOP plan. Riley commenced this portion of the meeting by reading the following description of the plan:

> Lynn-Edwards Corporation Employee Stock Ownership Plan (ESOP) was adopted on June 1, 1977. ESOP is a voluntary program on the part of corporation's management and its continuance and growth is dependent on contributions from profits which are not needed for growth, debt reduction, etc. ESOP is a form of retirement program designed to benefit the long term employee.
>
> The purpose of this plan is to recognize the contribution of the employees to the successful operation of Lynn-Edwards and to reward their contribution by enabling the employees to acquire equity ownership in the Corporation without diminishing take home pay. A major portion of the Corporate contribution to the Employee Stock Ownership Trust will be invested in Lynn-Edwards Corporation Stock. The value of the stock fluctuates with the performance of the business. *Any employee who*

[3] The unit as described here is as follows:
All shipping and receiving employees including stock pullers, stockers, returns, packers, shipping/strappers, maintenance employee drivers, and forklift operators employed by Lynn-Edwards Corporation at its North Highlands, California facility; excluding office clerical employees, salespersons, managerial employees, guards, and supervisors as defined in the Act.

[4] The record clearly shows, and I find, that Riley is a supervisor and agent of Respondent, as alleged.

is a member of collective bargaining cannot be eligible for this plan. [Emphasis added.]

After providing the details of the plan's operation, including the vesting provisions, Riley told the employees that:

> All participating employees as of May 31, 1982 will be receiving their individual statements in the mail this week. This is being done to respect individual employee privacy.

Scarzella testified that during additional group meetings subsequent to the April 5 meetings and following the filing of the representation petition, he did recall that he compared the ESOP plan to the "contributory nature and the solidity" of the Teamsters' pension plan. However, according to Scarzella, the matter was not considered to be a major point during the preelection campaign.

The parties stipulated that all employees are furnished with Respondent's employee handbook, which contains a detailed summary of the ESOP plan. Significant portions of the handbook summary are as follows:

> EMPLOYEE STOCK OWNERSHIP PLAN (ESOP)
>
> The purpose of this plan is to enable full time permanent employees of the Company to share in the growth and prosperity of the Company and to provide participants with an opportunity to accumulate capital for their future economic security. The Plan is designed to do this without any deductions from participant's paychecks and without calling upon them to invest their personal savings. A primary purpose of the Plan is to enable participants to acquire a proprietary interest in the Company—consequently a major portion of the Employer Contributions made to the Trust will be invested in Company stock.
>
> This Plan is administered by a Committee consisting of not less than three (3) nor more than five (5) members.
>
> All full-time employees, *except those covered by collective bargaining agreements,* who have attained the age of 20 and have completed two (2) months of continuous service prior to the Plan Entry Date of May 31st, are eligible to participate. [Emphasis added.]
>
> Vesting Schedule:
>
> Vesting measures a Participant's right to receive the value of the Employer's contributions which have been allocated to his account in the event he terminates employment for reasons other than death, disability or retirement.
>
> ESOP contributions are made from corporation funds and are divided to all participants in same proportions as their salary is to total salaries. It is important to note that no money is withheld from the employee's salary. *The Plan is totally funded by the Corporation and should be thought of as extra salary being invested for each participant.* [Emphasis added.]

In 1978 a "Summary Plan Document" was distributed to employees. This summary, inter alia, contains the following:

> The purpose of this Plan is to enable participating employees of the Company to share in the growth and prosperity of the Company and to provide Participants with an opportunity to accumulate capital for their future economic security. The Plan is designed to do this without any deductions from Participants' paychecks and without calling upon them to invest their personal savings. *A primary purpose of the Plan is to enable Participants to acquire a proprietary interest in the Company*—consequently, a major portion of the Employer Contributions made to the Trust will be invested in Company stock. This Plan is adopted as an amendment of the Company's Profit Sharing Plan, and the assets of the Profit Sharing Plan will be transferred to the Trustee under this Plan. The Plan is administered by a Committee consisting of not less than three, no more than five members. [Emphasis added.]
>
> 2. When do I become eligible to participate?
>
> All full-time employees, except those covered by collective bargaining agreements, who have attained age 20 and have completed at least 2 months of continuous service are eligible to participate as of the effective date of the Plan. [Emphasis added.]

The documentary evidence indicates that the ESOP plan, which has been in effect since 1977, was amended in 1983 retroactive to June 1, 1981.[8] The amendment, a document of some 37 pages, contains the following:

> ARTICLE I
>
> *Name and Purpose of Plan*
>
> 1.1 *Name*
>
> The Employee Stock Ownership Plan established by the LYNN-EDWARDS CORPORATION, a California corporation (Employer herein) shall be known as the Stock Bonus Employee Stock Ownership Plan (Plan herein) and the Employee Stock Ownership Trust executed by Employer and EDWARD F. SCONBERG, JR. and WALTER E. RILEY (Trustees herein) shall be known as the Employee Stock Ownership Trust (Trust herein).
>
> 1.2 *Purpose*
>
> It is the purpose of this plan to recognize the contribution of the Employees to the successful operation of the Employer and to reward such contribution by establishing the system that would enable the employees to acquire through a Stock Ownership Plan equity ownership in the Employer without diminishing take-home pay. A major portion of

[8] The amendment does not denote the month and day in 1983 when the plan was amended. This case was litigated on the premise that the amendment has been in effect at all times material.

the Employer contributions to the trust will be invested in stock of Employer.

. . . .

ARTICLE 3

Eligibility and Participation

3.1 *Eligibility*

. . . However, notwithstanding any provision to the contrary, no employee covered by a collective bargaining agreement between an Employee representative and the Employer shall become a Participant in the Plan, provided that retirement benefits of said class of Employees was the subject of good faith bargaining between the Employee representative and the Employer, and said Employee's retirement benefits are being funded pursuant to said collective bargaining agreements.

C. *Analysis and Conclusions*

1. The unfair labor practice case

Both the Respondent's employee handbook and its summary plan document, copies of which have been furnished to the employees since 1977 or 1978, specify that all employees are able to participate in the plan "except those covered by collective bargaining agreements." Similarly, on April 5, the Respondent's president, Scarzella, told the employees at a series of meetings that the "union cannot participate in ESOP," and Vice President Riley stated that "Any employee who is a member of collective bargaining cannot be eligible for this plan." Such statements by Scarzella and Riley are clearly violative of the Act, as alleged.

In *Niagara Wires*, 240 NLRB 1326, 1327–1328 (1979), the Board found that virtually identical language appearing in a pension plan and summaries of the plan, constituted a violation of Section 8(a)(1) of the Act. The Board stated:

> While, as Respondent notes, the Board has indeed found violations under the Act based on an employer's unlawful conduct in implementing a restrictive eligibility provision to deprive otherwise eligible employees of benefits, or by explicitly using the eligibility restriction as a coercive device during an election campaign,[3] it is clear that such conduct is not a *sine qua non* for finding a violation in this area. Rather, we have consistently stated that the mere maintenance and continuance of a provision in a pension plan, making lack of union representation one of the qualifications for eligibility to participate therein, itself tends to interfere with, restrain, and coerce employees who are otherwise eligible in the exercise of their self-organizational rights.[4] Here, Respondent's plan, in limiting eligibility to employees who are *not* covered by a collective-bargaining agreement, in effect, conditions eligibility on the unrepresented status of the employees. It is clear that Respondent publicized this restriction by distributing summaries of the plan to its employees a few weeks before they were scheduled to vote in the union election. While there is no reason to assume that the distribution of the plan was unlawfully motivated, the communication and the continued existence of such an exclusionary eligibility requirement necessarily exert a coercive impact on the employees. It is for this reason that an employee benefit plan which restricts coverage to unrepresented employees is *per se* violative of Section 8(a)(1) of the Act, regardless of whether the employer adds to the misconduct by implementing the restriction or exploiting it during an organizing campaign.[5]

[3] See, e.g., *Firestone Synthetic Fibers Company*, 157 NLRB 1014, 1018, 1019 (1966), enforcement denied 374 F.2d 211 (1967); *Sunshine Food Markets, Inc.*, 174 NLRB 497, 504 (1969).

[4] See, e.g., *Jim O'Donnell, Inc.*, 123 NLRB 1639, 1643 (1959); *Melville Confections, Inc.*, 142 NLRB 1334, 1338 (1963), enfd. 327 F.2d 689 (7th Cir. 1964), cert. denied 377 U.S. 933. See also *A. M. Steigerwald Co.*, 236 NLRB 1512 (1978).

[5] See, e.g., *White Sulphur Springs Company, d/b/a Greenbrier Hotel*, 216 NLRB 721, 727 (1975); *Sunshire Food Markets, Inc.*, 174 NLRB 497, 504 (1969); *Goodyear Tire & Rubber Company*, 170 NLRB 539, 550 (1968), modified in part 413 F.2d 158 (6th Cir. 1969); *Dura Corporation*, 156 NLRB 285, 288, 289 (1965), enfd. 380 F.2d 970 (6th Cir. 1967).

Further, even assuming the exclusionary language of the amendment to the plan, supra, is not unlawful, and that Scarzella and Riley simply misrepresented the provision to the assembled employees, as the Respondent maintains, their statements are nevertheless unlawful. Thus, in *Rangaire Corp.*, 157 NLRB 682, 684 (1966), the Board found under similar circumstances that although the exclusionary language of the plan was not unlawful, nevertheless a "plainly misleading statement of fact which purports to exclude the possibility of bargaining over continuation of an existing condition of employment interferes with the protected right of employees to engage in collective bargaining." See also *Tappan Co.*, 228 NLRB 1389 (1977). It is therefore clear, and I find, that the similar misleading statements by Scarzella and Riley during the course of the April 5 group meetings were per se unlawful and violative of Section 8(a)(1) of the Act.

In *Rangaire*, supra at 683, the Board found that language in a pension plan excluding "any person covered by a collective bargaining agreement entered into with the employer, which agreement does not provide for coverage of such person by this plan" was permissible. Similarly, in *Tappan*, supra at 1390, the language in the "retirement savings benefit plan" which was further described as "Tappan Company Retirement Savings Plan for Non-Bargaining Unit Employees" was not found to be unlawful, in that it did not automatically exclude union employees, but rather provided that they would be excluded only if they become members "of a bargaining unit recognized for the purpose of collective bargaining, and for whom the Company maintains or contributes to an employee benefit plan pursuant to agreement with the collective bargaining representative for the unit."

The Respondent contends that the exclusionary language in its amendment to the plan falls within the parameters of the cited cases, and is therefore lawful be-

cause, as stated by the Board in *Solo Cup Co.*, 176 NLRB 823 at fn. 3 (1969):

> This does not mean of course, that an employer may not advise his employees, in a noncoercive fashion, that pensions for those in the unit are subject to bargaining and that if a separate pension plan for those in the unit is agreed upon, coverage in the existing plan will not be maintained, i.e., the employer is not obligated to provide "double coverage."

The General Counsel, however, citing *Solo Cup*, supra *Kroger Co.*, 164 NLRB 362 (1967), enfd. 401 F.2d 682 (6th Cir. 1968), cert. denied 395 U.S. 904 (1969), and *Winn-Dixie Stores*, 224 NLRB 1418 (1976), enfd. in pertinent part 567 F.2d 1343 (2d Cir. 1978), maintains that the language is unlawful because of the nature of Respondent's plan. As argued by the General Counsel, the gravamen of the violations in the foregoing cases as well as the instant case involves the language in the employers' "profit sharing plans" which automatically preclude employees from enjoying the benefits of such plans if they become covered by a "retirement" plan negotiated by the union. Thus, profit-sharing plans and retirement plans, as characterized by the Board, are different entities.

Profit-sharing plans are essentially dependent on an employer's current and future profits and, as in the instant case, constitute a bonus for employees whose efforts have enabled the company to make a profit. As stated in the Respondent's employee handbook, the contributions are to be viewed as "extra salary." Indeed, the amendment to the plan renames it to reflect that it is a "Stock Bonus" plan designed to reward the employees for their contributions to the Respondent's success. Although certainly more elaborate, the plan, in essence, may be viewed as similar to an annual Christmas bonus rewarding employees for a job well done; and indeed, the value of the bonus to the employees may diminish with time, as the benefits are dependent on the value of the Respondent's stock upon the employees' retirement. In contrast, retirement plans or pension plans, as contemplated or discussed by the Board in the foregoing cases, are not subject to the vicissitudes of an employer's business operations, but rather are customarily funded on a different basis, ensuring regular contributions and stability. The fact that Respondent's plan is sometimes denominated as a retirement plan by the Respondent in the various documents or speeches referred to above does not alter the plan's essential purpose. As the Board has stated in *Winn-Dixie*, supra at 1419, the fact that "enjoyment of the benefits derived from Respondent's contributions is deferred until a point of time normally associated with retirement," is not a determinative factor.

On the basis of the foregoing, I find that Respondent's ESOP plan is a profit-sharing plan within the purview of the aforementioned cases. It is clear that an employer may not, through provisions of a profit-sharing plan, automatically deprive employees of benefits therefrom if they elect to be covered by a retirement or pension plan negotiated by the union. Because this is precisely the express intent of the language in Respondent's profit-sharing plan, such provisions are unlawful. I therefore conclude that by maintaining such an unlawful exclusionary clause in its profit-sharing plan Respondent has violated Section 8(a)(1) of the Act, as alleged. *Winn-Dixie Stores*, supra; *Solo Cup Co.*, supra; *Kroger*, supra.

2. The representation case

Insofar as the record shows, and as found above, the Respondent has maintained an unlawful exclusionary provision in its profit-sharing plan during all times material. The amended plan was in existence during the election campaign, as were the employee handbook and the summary plan document. Immediately before the filing of the petition, and as a direct consequence of the Union's request for recognition, the Respondent emphasized language contained in the employee handbook and summary plan document, by telling the employees that the benefits of the ESOP plan were not available to union-represented employees.[6] Further, during the course of the postpetition campaign, Respondent admittedly mentioned its ESOP plan to the employees, for purposes of comparison with the Union's retirement plan.

It is clear that conduct violative of Section 8(a)(1) as found here is, a fortiori, conduct which interferes with a free and untrammeled choice in the election. *Federated Department Stores*, 241 NLRB 240, 253 fn. 38 (1979); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). Respondent contends that the ESOP plan was not considered by Respondent to be a significant issue during the preelection campaign and therefore should not constitute grounds for setting the election aside. The Board stated in *Enola Super Thrift*, 233 NLRB 409 (1977), the "only recognized exception to this policy [of finding that conduct violative of Section 8(a)(1) constitutes a fortiori interference with a free election] is where the violations are such that it is virtually impossible to conclude that they could have affected the results of the election." Applying this test to the instant factual situation, it is clear that Respondent's contention is without merit.

Moreover, I find no merit to Respondent's similar argument that because the vote was overwhelmingly against union representation, it would serve no useful purpose to conduct a second election. It is clear that "whether certain conduct warrants setting aside an election does not turn on the election results, but rather on its likelihood to coerce prospective voters to cast their ballots in a particular manner." *United Broadcasting Co.*, 248 NLRB 403, 404 (1980).

The Respondent's profit-sharing plan is a financial benefit which, it may reasonably be presumed, significantly affects each unit employee. Indeed, the Respondent, when confronted with the Union's request for recognition, deemed it expedient to present the employees with the details and benefits of the plan in an effort to per-

[6] It is well-established that prepetition conduct may be considered for purposes of evaluating objections insofar as it lends meaning and dimension to postpetition conduct or assists in its evaluation. *Arthur Briggs, Inc.*, 265 NLRB 299 (1982); *Maywood, Inc.*, 251 NLRB 979 fn. 4 (1980); *Dressler Industries*, 231 NLRB 591 (1978); *Parke Coal Co.*, 219 NLRB 546 (1975).

suade them that not only was a union unnecessary, but that selecting a union would result in their exclusion from the plan. I therefore conclude that, under the circumstances, it is necessary to recommend that a second election be conducted.[7]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act by threatening employees with loss of a profit-sharing plan in the event they become covered by a retirement plan negotiated by the Union.

4. The Respondent has violated Section 8(a)(1) of the Act by maintaining article 3.1, Eligibility, of its amended profit-sharing plan which unlawfully excludes employees from participation in the plan, and by maintaining those portions of existing booklets and documents which contain related explanatory material.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. By the unfair labor practice found above, the Respondent has interfered with the freedom of choice of its employees in the representation proceeding, and it is recommended that the election in Case 20–RC–15616 held on June 2, 1983, be set aside and that a second election be conducted.

THE REMEDY

Having found that Respondent violated and is violating Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act, and take certain affirmative action described here, including the posting of an appropriate notice attached hereto as "Appendix [omitted from publication]."

Having found that Respondent violated Section 8(a)(1) of the Act by maintaining article 3.1 "Eligibility" of its amended profit-sharing plan, it is recommended that Respondent cease and desist from further maintaining the paragraph. Further, Respondent shall be ordered to amend the plan and any existing employee booklets and/or publications so as to eliminate therefrom any language which suggests that employees covered by a retirement plan resulting from collective bargaining through a union will be disqualified from participating in Respondent's profit-sharing plan.

[Recommended Order omitted from publication.]

[7] A separate, unrelated election objection was withdrawn by the Union at the hearing.

The Wackenhut Corporation *and* Dwain Haines *and* Michael Wascheck *and* Robert Condo *and* Mark Nixon. Cases 4–CA–16657–1, 4–CA–16657–2, 4–CA–16657–3, and 4–CA–16657–4

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On April 6, 1988, Administrative Law Judge Claude R. Wolfe issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Henry R. Protas and *Monica McGhie-Lee, Esqs.*, for the General Counsel.

Adin C. Goldberg, Esq., of New York, New York, for the Respondent.

DECISION

[1]CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Philadelphia, Pennsylvania, on 25, 26, and 27 January 1988 pursuant to charges timely filed and served in June 1987 and complaint issued on 11 August 1987.[1] The complaint alleges that The Wackenhut Corporation (Respondent) refused to hire Dwain Haines, Michael Wascheck, Robert Condo, and Mark Nixon because they supported and assisted the United Plant Guard Workers of America, Local 506 (the Union), and thereby violated Section 8(a)(3) of the Act. The General Counsel theorizes that the refusals to hire were prompted by the four employees' activities in processing grievances and opposing ratification for the current collective-bargaining agreement between Respondent and the Union. Respondent contends it based its refusal to hire Wascheck, Condo, and Nixon on their work and discipline record as employees of Yoh Security, Inc., and that Haines did not file an application for work with Respondent.

After considering the record, the demeanor of the witnesses testifying before me, and the posttrial briefs submitted by the parties, I conclude, for reasons set forth below, that Respondent has not violated the Act as alleged.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is, and has been at all times material, a Florida corporation engaged in the provision of security services at several locations throughout the United States, including Salem Hope Creek Nuclear Generating Station in Lower Alloways Township, New Jersey, and, during the year preceding the issuance of the complaint, Respondent, in the course and conduct of these business operations, derived gross revenues in excess of $500,000 and performed services valued in excess of $50,000 to customers located outside the State of New Jersey. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

On 29 April, Respondent commenced performing its contractual duty to supply security services at the Salem Hope Creek Nuclear Generating Stations. Before that date, those services had been furnished by Yoh Security, Inc. (Yoh). During its incumbency, Yoh was party to a collective-bargaining agreement with the Union which covered Yoh's employees at this location. Condo, Nixon, Wascheck, and Haines were among those employees. After securing the contract to perform the security work, Respondent advised Yoh employees by letter of 23 December 1986 that it had been awarded the work, would prepare transition plan and discuss continued employment of Yoh employees in January, and would be in touch with their bargaining representative regarding wages and benefits. Subsequently, Respondent negotiated a collective-bargaining agreement with the Union effective 1 May which was ratified by the employees. The ratification was not unanimous, and the General Counsel adduced uncontroverted and credited testimony that the alleged discriminatees opposed ratification of the agreement.

There were two ratification meetings for each shift. The first series of meetings was held on or about 24 March 1987. During the meeting with his particular shift on this date, each of the four men named above expressed his opposition to Respondent's contract proposal. The proposal was rejected. There is no evidence that Respondent knew these employees had so acted. Several

[1] All dates are 1987 except where otherwise indicated.

other employees opposed ratification during these March meetings.

After the March rejection of Respondent's proposal, further negotiations were held on or about 10 April. Robert Condo served on the Union's negotiating team during this bargaining session which resulted in a contract reached by the parties on that date. On redirect examination, Condo testified that, as everyone was leaving the meeting and shaking hands, he said to Respondent's representative, Frobea, and union negotiators McConville and Hartladge that he was shaking hands under protest and did not agree with the agreement reached by the other participants. On recross-examination, Condo testified that he did not so tell Frobea, but so told McConville. Heltien added that Frobea was there and heard it. I do not rely on Condo's conclusion that Frobea heard his comments to McConville because he does not explain how he knows that to be the case; his two statements are inconsistent; and his failure under repeated questioning to relate in even vague detail what transpired during the 3-hour negotiation meeting of 10 April indicates either faulty recollection or evasion, either of which detracts from the reliability of his testimony regarding the events of that day. Nevertheless, he was believably certain, and I find, that he did state his opposition to Respondent's proposal during the meeting in the presence of Respondent's negotiators and was not in agreement with the results of the negotiation. These results were placed before the various shifts of employees on or about 13 April. Condo attended each of these shift meetings as a member of the negotiating team, but spoke neither for nor against ratification during these meetings. Nixon, Wascheck, and Haines did not speak at these meetings in opposition to ratification, as did other employees. The trust of the credible testimony is that these were more insistent in their opposition than the others, but there is no evidence that Respondent knew which of the employees opposed the contract in ratification meetings or who were the most insistent in their opposition. The proposal was ratified, with about 20 employees voting against against ratification, and, as I have noted above, the Union and Respondent became party to a collective-bargaining agreement concerning the security employees at the installation involved here.

Condo, Nixon, Wascheck, and Haines all served as union shop stewards during their employment with Yoh. Condo was the Union's vice chairman for the bargaining unit in 1987 until he resigned that position about 2 weeks before 24 April 1987. Wascheck filed a class action grievance on 2 April 1987 seeking 2 hours' pay at time and a half from Yoh for item spent by its guards filling out applications and related documents for Respondent. He also acted as steward on five grievances filed by other employees of Yoh between March and November 1986. Haines filed seven grievances on his own behalf between March and November 1986, and represented another employee on a grievance filed on November 1986. Nixon filed no grievance on his own behalf, but represented others on two grievances filed in May and August 1986, respectively. There is some testimony from Wascheck, Nixon, and Condo that grievances were processed and union business discussed by them with Brian Eastman, Yoh's acting project manager at the time, in an office shared by Eastman and John Robbins, Respondent's director of operations. Robbins agrees that for a time after he arrived at the site in early February 1987 he shared an office with Eastman, and that two or three grievances were discussed while he was present in the office. He denied any involvement in the discussions or any recollection of the identity of the union representatives involved. In this regard, I note that Condo testified that Robbins probably was not aware Condo had asked Eastman to have Robbins leave, even though Robbins was present in the office at the time. Robbins does recall that someone told him Condo took part in the negotiations and that he (Robbins) considered at one point, due to Wascheck's dress in coat and tie, that Wascheck may have been a candidate for union office.

The date is not certain, but it appears Respondent commenced its employment process among Yoh employees in early March 1987. The first step was the posting of notices establishing two dates for employees on each shift to file applications. That Respondent was amenable to a change of date on reasonable excuse is shown by Condo's testimony that although he was on vacation on 31 March, the date he was scheduled to apply, he was permitted by Respondent to file on 3 April 1987. At the time of filing, employees were also fingerprinted and required to sign a release of their personnel records maintained by Yoh. On receipt of the Yoh files, Respondent by its agents, Program Manager Robert Young and Director of Operations John Robbins, examined them and determined which employees they would hire and which they would not. Robbins testified it was decided not to hire Condo, Nixon, Wascheck, Michael Ottinger, or Robert Merritt. One hundred and five (105) Yoh employees were hired by Respondent effective 29 April 1987, including several union officials and stewards.

When Condo appeared for his scheduled job interview on 24 April, he was told by Robbins that Respondent would not hire him because of incidents in his work record. Robbins enumerated an altercation with a nonemployee motorist on the access road to the facility, not wearing a hardhat, and sleeping on the job. Robbins asserts the key reasons were the 2 November 1986 confrontation with the motorist, which showed Condo had a quick temper, and a 22 February 1983 incident where Condo was observed with his eyes closed for 2 minutes, which Robbins concludes is an indication Condo was sleeping. Condo's personnel record at Yoh also shows Condo was not wearing a hardhat on 14 May 1983, and took his badge home on 22 February 1985. These later two incidents were not cited by Robbins as significant factors in his decision not to hire Condo.

Mark Nixon does not recall the reasons other than attendance given by Robbins for rejecting his application. I therefore credit Robbins that he told Nixon of each and every incident set down in Yoh's files, which are in substance as follows:

> 23 April 1986—refusal to sign for a 24 minute late arrival at guard mount.

17 October 1983—eating in the break trailer with his radio off [an intercom] when he was supposed to be on another post.

21 November 1983, 19 January, and 5 February 1984—reading newspaper on post.

24 May 1984—counselled to button his shirt.

26 May 1984—involved with controlled substance.

30 April 1983—another guard reported that after he signed in at a post, Nixon left and was not seen for the rest of the night.

18 August 1986—19 points[2] for absence and tardiness.

23 October 1985—drove through guard post barricade with minor damage to his car.

March 1987—20 points for absenteeism.

Robbins testifies that he rejected Nixon principally because of the volume of incidents and the alleged involvement with a controlled substance which, as he recalls, was ownership of marijuana. Robbins notes that he placed little reliance on absenteeism and tardiness unless it displayed an unacceptable level like that of Merritt who, among other things, was suspended seven times by Yoh for absence and tardiness.

Wascheck's record at Yoh reflected the following incidents, in substance:

26 August 1986—11 points for absenteeism.

05 May 1986—wearing a union badge on his uniform.

25 August 1985—not wearing hard hat or safety glasses.

10 September 1984—not wearing safety glasses.

29 August 1984—no hard hat or safety glasses.

30 May 1984—playing cards in the break trailer.

12 February 1984—reading newspaper on post.

06 January 1984—drove personally owned vehicle in an unauthorized area.

30 November 1982—took public service bicycle for a joy ride.

Robbins told Wascheck this work record was the reason he would not be hired, and testified that this decision was reached because of the number of items as well as the taking of the bicycle which, although may be a prank, displayed a personality and attitude which could be a major problem.

The General Counsel submitted the Yoh work records of 13 employees whom Respondent hired. These records were included in the personnel documents examined by Robbins and Young when they were hiring Yoh employees. An examination of these records shows that Respondent hired employees who had engaged in conduct similar to that presented as primary reasons for refusing to hire Condo, Nixon, and Wascheck. Condo's sitting with his eyes closed for 2 minutes is not unlike the conduct of Charles Maurer in 1984 when he was suspended for 5 days because he was leaning back in his chair with his eyes closed giving the impression he was sleeping. Thomas Davis was also suspended for 5 days in 1985 for nodding and inattentiveness on duty. Kenneth Coombs was warned for nodding on duty; no date shown. In 1985, Kenneth Stanton was warned for lying on the floor on his back, but not sleeping. Maurer, Davis, Coombs, and Stanton were all hired by Respondent.

In the case of Nixon, Robbins stresses the volume of his misdeeds and his alleged involvement with a controlled substance. Kenneth Stanton was counseled 15 times on personal grooming, and was suspended 9 times for absence and lateness. Valerie Robinson was suspended seven times for absence and lateness. Several other employees who were hired were suspended from four to six times for absence and lateness. Valerie Robinson, Thomas Davis, and Michael Dawson had all been warned for reading on post, Dawson twice, but they were hired. In this connection, Nixon was warned three times for reading on post. Thomas Davis and Michael Dawson left their posts without proper relief. Kenneth Coombs left his post without authorization. Dianne Hunter was late to her assigned post on two occasions. These improper comings and goings of employees hired by Respondent are of the same genus, but not the same species, as Nixon's refusal to sign for late arrival, his leaving his post and not returning, and his eating in the break trailer when he was supposed to be at another post. There is no evidence that any other employee engaged in conduct equivalent to Nixon's driving through a guardpost barricade. With respect to Nixon's alleged involvement with a controlled substance, I note that another employee who was hired was accused of using drugs by an anonymous phone caller.

As with Nixon, Wascheck's record of infractions is not as lengthy as those of some employees hired. There is, however, no evidence of conduct by any other employee paralleling Wascheck's joyride on the bicycle owned by the public service company.

The hiring of employees who, while employees of Yoh, had been warned or otherwise disciplined for conduct similar to that advanced as reason for the failure to hire Condo, Nixon, and Wascheck, and had engaged in other misconduct sufficient to require a warning or suspension, warrants viewing the reasons advanced for the refusals to hire with suspicion. Nevertheless, the General Counsel's case is deficient in terms of employer knowledge and hostility. It has not been shown that, with the single exception of Condo's opposition during negotiations, Respondent was aware of the alleged discriminatees' opposition to the negotiated collective-bargaining agreement. The opposition was, except in the case of Condo, voiced in ratification meetings limited to employees and union officials. There is no evidence it was made known to, or could or should have been known by, Respondent in all the circumstances. Similarly, there is no persuasive evidence Respondent resented employee opposition to the contract, or the filing of grievances, or believed the alleged discriminatees were or might have been the most active grievance filers or processors. The other stewards and union officials were hired. So far as this record shows Respondent never uttered any antiunion statements or otherwise displayed any hostility

[2] Yoh utilized a point systems whereby an accumulation of sufficient points for absence or tardiness led to suspension and/or dismissal.

toward the Union, its adherents, or employee union activities. To the contrary, Respondent made no discernible effort to evade its bargaining obligations, but, rather, promptly entered into bargaining with the Union resulting in a collective-bargaining agreement opposed by a minority of bargaining unit employees. Concurrently with the bargaining, Respondent accepted applications from Yoh employees who were represented by the Union, and subsequently hired all but a very few.

Discrediting the reasons assigned for refusing to hire Condo, Nixon, and Wascheck would not prove the requisite unlawful motivation which must rest on the result of an evaluation of all the relevant evidence.[3] There is no other evidence of unlawful motivation in this case. The rationale applicable is set forth in *Briarwood Hilton*, 222 NLRB 986 (1976); where the Board stated at 991:

> The employer's explanation for a discharge is a factor which is weighed in determining whether the action was unlawful. However, a feeble reason for the termination, alone, or together with evidence that the employer knew of the dischargee's union sympathies and was opposed to an ongoing organizational campaign, does not spell out an unlawful discharge. To find a violation of Section 8(a)(3) the evidence must permit a positive finding (which may be based on circumstantial evidence) that union activity was a contributing factor in the decision to discharge the employee. Suspicion that such was the case is not enough.

I conclude the same reasoning is applicable to refusal to hire. Assuming, at the risk of being guilty of substituting one's own business judgment for that of the employer, that the reasons for refusing to hire Condo, Nixon, and Wascheck are feeble, there is no other evidence, circumstantial or direct, of unlawful motivation. Furthermore, the proof of employer knowledge is somewhat less than persuasive. *Briarwood Hilton* was a far stronger case than this in terms of evidence. The alleged discriminatee, Turner, was known to be an active union adherent. Respondent was vigorously opposed to union organization, and committed an independent violation of Section 8(a)(1) of the Act. Finally, the reason for Turner's discharge was very weak. With all this, no violation was found. This case is not that strong. Accordingly, I conclude and find that the General Counsel has failed to establish a prima facie case that Respondent violated Section 8(a)(3) of the Act by refusing to hire Condo, Nixon, and Wascheck. *Briarwood Hilton*, supra; *Raysel-Ide, Inc.*, 284 NLRB 879 (1987).

The situation of Dwain Haines is completely different. His prior work record is not in issue. Respondent simply contends that Haines never filed an application for work with Respondent. Haines was off sick on 31 March, the date his shift was scheduled to apply. He knew before that date that 31 March was his date to apply. On 1 April, he asked Lieutenant Jerry Hand, a Yoh employee, if there would be a makeup date. Hand said he thought there would. On several other occasions before 20 April, Haines asked Hand when he would be able to file an application. Hand each time told him he had not heard anything. On 20 April, Haines again asked when he could file an application. Hand promised to call back and let him know. Hand did call back on 20 April and told Haines that Wackenhut would get back to Hand.[4] On 24 April, Haines again contacted Hand who said he would contact the program manager to "find out anything" and would call Haines back. Hand did call Haines back that day, and told him that Brian Eastman, program manager, had said Haines should go see Wackenhut after work that day. Haines had not prior to that date talked to any Wackenhut representative regarding employment. Haines met with Robbins and Young between 2 and 2:30 p.m. that day. There is no serious disagreement between Robbins, Young, and Haines regarding what was said. I regard their testimony as complementary, and conclude the following is a fair summation of what happened at this meeting. Haines inquired about filing an application. Robbins responded that, because he had filed no application, Respondent had concluded Haines was not going to work for Wackenhut. Robbins further explained Respondent had reached its manning level, but would entertain Haines' application at its offsite office in Pennsville, New Jersey, when Respondent needed more people. Robert Young credibly testified that commencing about 3 April all applications were handled at the Pennsville office, none at the site. Haines has never applied, and the mere fact that Hash and Rizzo later applied and were hired in the next group is probative evidence of nothing. There is no probative evidence Respondent had not reached its manning level by 24 April, and no one else was hired for more than a month thereafter. I therefore credit Robbins. Its work force for 29 April was full when Haines showed up. Respondent explained that Nathaniel Pierce, who did not file his application until 26 April, had been advised in March that although he would not be able to file his application with his shift, he did want to work for Respondent. Respondent decided to hire him on the basis of his personnel file, and Pierce was permitted to file the late application after he had in fact been told he would be hired. Two other employees were hired who filed applications on 22 April. The Respondent was lenient with these three employees and Condo with respect to filing applications, and the same might well have been true with Haines had he applied with Respondent before the employee complement had been completed. Haines, however, directed his inquires to Hand, an employee of Yoh for whose conduct Respondent is not responsible. Contrary to the General Counsel's assertion in his brief, Respondent is not responsible for Haines' failure to make application. He was not refused an application, but was advised future needs would be filled from applications filed at its Pennsville office where he elected not to go. Regarding the other three alleged discriminatees, there is insufficient evidence

[3] *Garrett Flexible Products*, 270 NLRB 1147, 1148 (1984).

[4] Haines' testimony as to what Hand told him is hearsay received over Respondent's objection to explain further actions by Haines, but not for the truth of Hand's statement. Hand did not testify. I therefore do not find that Hand's statements constitute probative evidence of the content of communications to him by Respondent's agents.

to support a finding that Respondent was hostile to any statutorily protected activity by Haines. It is unfortunate that he was not given better advice by Hand, or that he did not himself inquire of Respondent before he did, but Respondent cannot be held responsible for either of these circumstances. There is no evidence Haines would have been rejected had he filed an application earlier, or had earlier let Respondent know he wanted to be considered. I have credited Respondent that its manning level had been met when Haines first made known his interest. This alone would be sufficient to defeat the allegation Haines was unlawfully denied employment, but it is not necessary to rely on this factor because counsel for the General Counsel's failure to affirmatively prove unlawful motivation leaves him without a prima facie case that Section 8(a)(3) of the Act has been violated by the failure to hire Haines.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization with the meaning of Section 2(5) of the Act.

3. The General Counsel had not established by a preponderance of the credible evidence that Respondent has violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed in its entirety.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Raytown United Super, Inc. *and* United Food and Commercial Workers Local Union 576. Case 17–CA–1294(E)

July 29, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On May 20, 1988, Administrative Law Judge Claude R. Wolfe issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

IT IS ORDERED that the application of the Applicant, Raytown United Super, Inc., Raytown, Missouri, for an award under the Equal Access to Justice Act is dismissed.

[1] We find it unnecessary to rely on the judge's finding that the General Counsel was substantially justified because she prevailed before the judge in the unfair labor practice stage of the proceeding.

[2] The Applicaut argues that the General Counsel was not substantially justified in pursuing the complaint because the Board, in finding there was no agreement on the contract's term, relied on the Union's own negotiating notes, which clearly rebutted the General Counsel's case. We disagree. The context in which the Board referred to the Union's negotiating notes makes clear that it was the Respondent's testimony coupled with the notes which led the Board to conclude the contract's term was unresolved. The Board did not indicate that it would have reached the same result on the basis of the Union's notes alone and it may not have if the contract term was the only unresolved issue, particularly in light of the credited testimony of the Union's witnesses.

SUPPLEMENTAL DECISION

CLAUDE R. WOLFE, Administrative Law Judge. On September 8, 1986, I issued a decision in this proceeding finding that Raytown United Super, Inc. (Raytown) and the Union orally agreed to all substantive contract terms by September 25, 1985, and Raytown therefore violated Section 8(a)(5) of the Act by refusing to execute a collective-bargaining agreement embodying those terms. Raytown filed exceptions. The National Labor Relations Board then issued its decision on January 29, 1988,[1] finding Raytown had not violated the Act because the parties had not reached agreement on the contract term or a seniority provision, and therefore did not reach full agreement on a contract.

On February 24, 1988, Raytown filed an application for award of attorney's fees and expenses under the Equal Access to Justice Act, Pub. L. 96–481, 94 Stat. 2325 and Section 102.143 of the Board's Rules and Regulations, contending that the General Counsel was not substantively justified in proceeding to complaint and litigating the case. The Board referred the application to me on February 24, 1988, for appropriate action.

On March 29, 1988, counsel for the General Counsel filed a motion to dismiss the application because the General Counsel's position in the underlying unfair labor practice was at all times substantially justified. Raytown opposes the motion.

Raytown argues as follows:

> From the outset of the investigation, it was or should have been clear that there had been no agreement between the parties on the length of the alleged contract or on a seniority proposal made by the Company.
>
> As noted in the Board's decision, *the Union's own bargaining notes* confirmed the absence of an agreement on the critical issue of contract duration. All that General Counsel could argue in her brief (citation omitted) was that the reference in the Union's bargaining notes was likely "either a mistake . . . or simply a reflection of another attempt by Kays to toss in a red herring and go back on an earlier agreement." As to the former, it was not substantially justified for General Counsel to have proceeded on a complaint when the Charging Party's own notes reflected no agreement for the term of the alleged agreement. As to the latter, General Counsel's argument that the Company was seeking to backtrack on earlier agreements was inconsistent with the theory of alleged violation on which the case was tried, as noted by the Board in its decision.
>
> [A]s found by the Board, the case does not turn on disputed issues of credibility. The Board held:
>
> > It is clear that the parties had not agreed on at least two material terms . . . .
>
> This had been the employer's position from the outset of the Regional investigation. General Counsel was in possession of the Union's own bargaining notes substantiating the Company's position. The Board held that it was clear no agreement was reached, and General Counsel's position to the contrary was not substantially justified.

Raytown refers to the notation in the Union's negotiating notes for September 17 reading "Term-Date of rat.-2/28/87." The Board pointed to this as part of the evidence supporting its conclusion that Raytown on September 17 proposed the effective date of the contract to be the date of its ratification, but the Board rejected Raytown's contention that the evidence showed "it was resolved" on Septemeber 17 that the effective date would be the ratification date. If, as Raytown initially

[1] 287 NLRB 1151.

argued in its exceptions to my decision, the union notes and testimony showed the parties had agreed on September 17 to make the collective-bargaining agreement effective on the date of ratification, there would have been no open issue on the contract term on September 25. Now Raytown argues it should have been clear from the outset of the precomplaint investigation that the Union's September 17 notes confirmed the absence of any agreement on the contract term. Thus we have the Board viewing the note as evidence of a Raytown proposal on September 17, and Raytown viewing it first as proof of a September 17 agreement on the effective date of contract and second as proof of no agreement. That the note is ambiguous and susceptible of different interpretations appears obvious. The General Counsel cannot be faulted for continuing to investigate and to prosecute merely because Costanza's notes are ambiguous.

The General Counsel urges, and I find, that the fact the Board's conclusions differ from those of the General Counsel's and my conclusions does not necessarily mean that the General Counsel's prosecution of the case was not substantially justified.[2] Keeping in mind that "substantially justified" means "more than mere reasonableness,"[3] I find, for the following reasons, that the General Counsel's position was substantially justified.

Raytown correctly notes that the Board found it clear that the parties had not agreed on the term of the contract and seniority. That is the law of the case, but that does not mean that no other reasonable inference could have been drawn from the facts. I credited Union Representative Costanza's testimony regarding his September 25, 1985 negotiations with Raytown's president, Kays, wherever their testimony conflicted. This determination was not disturbed by the Board. According to Costanza's credible testimony, a complete agreement was reached by the end of this meeting that seniority was agreed to. When one considers this credible testimony together with the written list of unresolved issues presented to Costanza by Kays at the beginning of the September 25 meeting, which does not enumerate term of agreement as an unresolved issue and only notes with respect to seniority that language was being drafted by Raytown's counsel, it may reasonably be concluded that the General Counsel had a prima facie case that complete agreement was reached. Combine all this with Kay's statement on October 13 that he would not sign the agreement if it had a union-security provision (which he had specifically agreed on September 25 was a settled issue) without protest or question of any other portion of the contract the was asked to sign, it is clearly not unreasonable to conclude term of contract and seniority had been agreed on September 25.

What we have in this case is a situation where the Board and Raytown drew certain inferences from the facts leading to conclusions contrary to those drawn by me and the General Counsel. None of these inferences drawn by the parties, the Board, or me are so bereft of reason as to be suject to rejection out of hand. Given the inferences drawn by me and the General Counsel, a finding that there was a prima facie case of final agreement is warranted. That alone is sufficient to establish that the General Counsel had substantial justification for litigating the issue.[4] That the General Counsel did not prevail before the Board does not indicate otherwise.[5] It appears to me that the fact the General Counsel prevailed at the administrative law judge stage should suggest that the General Counsel was substantially justified for proceeding as she did from the outset, and certainly was substantially justified in proceeding after she prevailed at that stage. As judge King has cogently observed, "Where the General Counsel advances in good faith a close question of law or fact, and thereafter loses, a finding that [s]he was not substantially justified in issuing the complaint would have a chilling effect on the proper pursuit of the duties of the General Counsel to enforce the Act, as the Act so mandates."[6] Here there was a close question of fact susceptible of various reasonable interpretations. Accordingly, when the General Counsel in good faith selected one, issued a complaint, and litigated the issue before me, where she prevailed, and the Board, she was substantially justified in so doing. I therefore find that Raytown United Super, Inc. is not entitled to an award under the Equal Access to Justice Act, and issue the following recommended[7]

ORDER

IT IS ORDERED that the application of Raytown United Super, Inc., Raytown, Missouri, award under the Equal Access to Justice Act be dismissed.

[2] *Bennington Iron Works*, 278 NLRB 1087 (1986); *Tajon, Inc.*, 277 NLRB 1639 (1986); *Jim's Big M*, 266 NLRB 665 (1983).

[3] *Bennington Iron Works*, supra at fn. 1.

[4] *Tajon*, supra at 1641; *Enerhaul, Inc.*, 263 NLRB 890 (1982).

[5] *Westerman, Inc.*, 266 NLRB 799, 800 (1983), and cases cited there, affd. *Westerman, Inc. v. NLRB*, 749 F.2d 14 (6th Cir. 1984).

[6] *Tajon*, supra at 1641.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Greensboro News & Record, Inc. *and* Greensboro Printing and Graphic Communications Union, Local 319, Graphic Communications International Union, AFL–CIO, CLC. Cases 11–CA–12135, 11–CA–12193, and 11–CA–12263

July 29, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On September 30, 1987, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Greensboro News & Record, Inc., Greensboro, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge erroneously stated that employee James Roberts was reinstated in October 1985 rather than in October 1984. In adopting the judge's conclusion that the Respondent unlawfully warned Roberts, we do not rely on statements in the employee handbook as evidence of union animus.

Further, we find that the Respondent and the Union had not bargained to impasse on the subject of overtime assignment prior to the Respondent's unlawful unilateral assumption of control of the overtime board.

Ann B. Wall, Esq., for the General Counsel.
Ronald A. Lindsay, Esq. (Seyforth, Shaw, Fairweather & Geraldson), of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The original charge in Case 11–CA–12135 was filed on 17 September 1986[1] by Greensboro Printing and Graphic Communications Union, Local No. 319, Graphic Communications International Union, AFL–CIO, CLC (the Union), and an amended charge on 23 October. The Union also filed the original charge in Case 11–CA–12193 on 20 November, an amended charge on 2 December, and a second amended charge on 2 January 1987. Further, the Union filed the original charge in Case 11–CA–12263 on 2 February 1987 and an amended charge on 6 March 1987.

After prior issuance of two complaints, a consolidated complaint issued on 6 March 1987. It alleges that Greensboro News & Record, Inc. (Respondent or the Company) violated Section 8(a)(3) and (4) of the National Labor Relations Act (the Act) by issuing warnings to employee James L. Roberts on three occasions because of his union activities and because he cooperated with the National Labor Relations Board in the investigation of a prior case, testified before the Board in the case, filed charges with the Board, and cooperated in the investigation of other cases.

Further, the consolidated complaint alleges that Respondent violated Section 8(a)(5) of the Act by engaging in various unilateral actions, to wit (1) assuming control of the overtime board; (2) altering the method of operation of the overtime board by (a) refusing to allow substitutes to work, (b) giving press assistants priority, (c) changing the journeyman to press assistant overtime ratio, and (d) changing the overtime reporting requirements for foremen; (3) altering its break policy by first restricting breaks to two specified areas, and then to one area; (4) altering its cleanup policy; and (5) altering its vacation board and vacation policy.

Finally, the consolidated complaint alleges that the Respondent unlawfully refused to provide the Union with information regarding the number of employees who would have had to work double shifts in order to fill the unfilled shifts in May, June, and July 1986.

A hearing was held before me on this matter in Greensboro, North Carolina, on 7 and 8 April 1987. On the entire record, including briefs filed by the General Counsel and the Respondent and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish that Respondent is a North Carolina corporation with a facility located at Greensboro, North Carolina, where it subscribes to an interstate news service, publishes nationally syndicated features, advertises nationally sold products and, during the 12-month period preceding issuance of the complaint, received at its Greensboro, North Carolina facility goods and raw materials valued in excess of $50,000 directly from points located outside the State of North Carolina. The pleadings further establish that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] All dates are in 1986 unless otherwise specified.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings further establish that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED DISCRIMINATORY WARNINGS AND UNILATERAL CHANGES IN BREAK POLICY

A. *The Prior Proceeding*

In a former proceeding,[2] the Board found that Respondent violated Section 8(a)(1) of the Act by threatening reprisals against employees for associating with persons engaged in union activities, by issuing a warning to an employee for engaging in such activities, and by unlawful interrogation of employees.[3]

The Board also found that the Respondent discriminatorily discharged employee James Roberts because of activities on behalf of the Union, thus violating Section 8(a)(3) and (1) of the Act. The Board concluded that the Respondent's asserted reason for discharging Roberts, sabotage, was pretextual, and that the reason was his "substantial and continuous union activity at the Respondent's plant, which include enforcing the terms of the pressmen's collective-bargaining contract and work rules, organizing in other departments, and filing unfair labor practice charges and testifying before the Board."[4] The Board's remedial Order, inter alia, required that the Respondent reinstate Roberts.

B. *The Current Allegations*

The facts underlying the allegations of discriminatory warnings issued to Roberts are linked to the evidence concerning the alleged unilateral changes in the Company's break policies. Accordingly, these matters will be considered together.

C. *Roberts' Renewed Union Activities*

Roberts was reinstated in October 1985[5] and, as president of the Union, resumed his union activities. A few months after reinstatement, while filing a grievance, Roberts informed Production Director Merrell B. Stafford that he intended to continue his efforts to organize the newspaper.

Roberts concentrated on Respondent's approximately 200–250 mailroom employees.[6] These employees were represented by another union, but only 20 were union members according to Roberts, and there was no collective-bargaining agreement. During the year preceding the hearing in this matter, Roberts talked to 20–30 mailroom employees, principally during lunchbreaks. He originally tried to get the mailroom employees to join his union. However, they expressed a preference for the Teamsters, and Roberts continued to talk with them thereafter. A notice was posted in the mailroom in October 1986 regarding a Teamsters meeting. Production Director Stafford was aware of the Teamsters' organizing effort, and discussed the matter with his supervisors. The Teamsters were organizing at the time of the hearing in this matter.

D. *Prior Restrictions on Breaks by Pressroom Employees*

The General Counsel adduced evidence that Roberts was warned against going into the mailroom and the cafeteria. Similar evidence was elicited in the former proceeding. Thus, the Respondent posted a notice in 1982 "that no one from the pressroom could go into the mailroom or any other department. However, when Roberts complained about it, the notice was taken down."[7]

In the instant proceeding, Former Vice President for Administration Richard Hendricks agreed that the notice had been "taken down," but also asserted that a concomitant "agreement" with the Union limited the withdrawal of the restriction to pressroom employees working in the reel room, i.e., other pressroom employees were still restricted to the "quiet room." Although the issue is not crucial in this proceeding, I note the inconsistency in Hendricks' contention that a notice assertedly still applicable to some pressroom employees was nonetheless removed. For this reason, and because Hendricks' testimony is contrary to the Board's finding in the former case, I do not credit Hendricks on this issue.[8]

E. *The October Conversation and Letter to Roberts*

1. Summary of the evidence

Mailroom Superintendent Don Lister testified that he noticed "pressroom employees" coming into the mailroom and its breakroom "on a regular basis" in October 1986. He asserted concern that "pressmen" with ink on "their" uniforms were soiling seats in the mailroom breakroom, and thus staining the clothes of mailroom employees, most of whom did not wear uniforms. According to Lister, he complained about this in mid-Octo-

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[2] *Greensboro News Co.*, 272 NLRB 135 (1984). Although the name of Respondent is not exactly the same as the name in the former proceeding, the fact that the same Employer is involved is established by the parties' situplation that the discriminatee in the prior case, James Roberts, was reinstated by Respondent here in compliance with the Board's prior Order (Jt. Exh. 33), and by the testimony of witnesses for the General Counsel (Roberts) and the Respondent (Richard Hendricks).

[3] Ibid.

[4] Id., 272 NLRB at 143.

[5] Jt. Exh. 33.

[6] Roberts estimated 200 mailroom employees, although Mailroom Superintendent Don Lister said there were 250.

[7] *Greensboro News Co.*, 272 NLRB at 140. The notice, dated 19 January 1982, is in evidence in this proceeding and reads as follows:

TO PRESSROOM EMPLOYEES

Because of the noise in the Press Room, employees working there have been allowed and recommended to rotate in leaving the Press Room every 20 or 30 minutes. They can spend a few minutes in the "quiet room," or go to the canteen.

Some Press Room employees have developed a habit of spending such break time in other areas of Company operations, talking to employees in such departments. This not only makes it difficult for Press foremen to locate Press employees if they are needed suddenly, but it also distracts the workers of other departments to have Press Room employees appear at odd times in areas other than their own.

In the future, Pressmen taking a noise break will restrict themselves to the "quiet room" or the Canteen [R. Exh. 12].

[8] The administrative law judge in the former proceeding made findings contrary to Hendricks' testimony, and specifically discredited him at one point (272 NLRB 140 fn. 19).

ber to Production Director Stafford. Stafford asked who was in the mailroom, and Lister replied that Roberts was "one of them." Stafford stated that he would have Pressroom Supervisor Clayton Patterson speak to Roberts about the matter.

Pressroom Superintendent Dennis Clark testified that Lister came to him in October and asked that Clark's "people" eat their lunch and take breaks in their own breakroom because of ink on their uniforms and limited space in the mailroom. Clark's testimony about this conversation does not mention Roberts. According to Clark, he talked to Stafford about the matter, and the latter said he would bring it up at a staff meeting.

Production Director Stafford's description of his conversation with Lister omits reference to any employees other than Roberts, or to the regularity of the alleged infractions. According to Stafford, all that Lister said was that Roberts had taken a break in the mailroom; the two supervisors agreed to bring the matter up at a staff meeting. Stafford contended that he had no knowledge of employees other than Roberts taking breaks outside the pressroom area.

Roberts testified that, on 30 October 1986, Pressroom Supervisor Clayton Patterson told him that he was spending too much time in the mailroom. Roberts replied that he did not spend any more time there than did other employees, and asked whether Patterson was ordering him not to go into the mailroom. Patterson replied in the negative. Roberts then got Union Secretary-Treasurer William D. Seward to join the conversation, and asked Patterson to repeat what he had said. Patterson did so. Seward's testimony corroborates Roberts. Patterson did not testify.

Roberts had a conversation the next day, 31 October, with Production Director Stafford. Roberts was on the job in the pressroom about 8:30 a.m. He testified that Stafford came up to him and said that he had been warned the day before not to go into the mailroom but, nonetheless, he had had lunch there. The production director stated that he was concerned about the possibility of Roberts getting ink on something. Roberts replied that Stafford had never been concerned about this problem before. Stafford remarked that Roberts could go to the cafeteria or the mailroom lunch area if he changed clothes. Roberts objected that he would have to change clothes twice, and that this had never previously been required. Stafford said that he might have to discipline Roberts, at which point the union president got Union Chairman Jerry Holsclaw to join the conversation, which resumed in the pressroom breakroom.

At Robert's request, Stafford repeated what he had said, and Holsclaw stated that the Company was setting up Roberts for another discharge. According to Roberts, he told Stafford that the latter was simply trying to stop Roberts from talking to other employees about the Union. Roberts asked whether the new policy applied to everybody or just to him. According to Roberts, the production director replied that it applied only to Roberts, because he was the only one going "down there." Various statements about lawsuits and threats of lawsuits followed.

Holsclaw corroborated Roberts, regarding his own comment that the Company was about to discharge Roberts, Stafford's threat of discipline, and his statement that the policy applied only to Roberts.

Stafford testified that he talked with Roberts about keeping out of the mailroom breakroom or the cafeteria wearing a dirty uniform. He denied that he was concerned with Roberts' conversations with other employees about the Union.

Subsequent to the conversation, Stafford caused a letter to be delivered to Roberts summarizing Stafford's version of it.[9] On direct examination, Stafford was asked the following question and answered as indicated:

> Q. Now was this something that you were addressing just to Mr. Roberts or to all pressroom employees or—why don't you explain what you were trying to do with this letter.
>
> A. Well, this particular letter was to Mr. Roberts. I mean there's no doubt about it. It had his name on it and he's the one that did it and it was addressed to him.

Later in his testimony Stafford denied that he told Roberts during the conversation that the restriction was intended to apply only to him.

2. Factual analysis

Mailroom Superintendent Lister's testimony about "pressroom employees" coming into his department on a "regular basis," and Pressroom Superintendent Clark's testimony about Lister's complaints concerning Clark's "people," show that Lister at least professed concern about more than one pressroom employee. I credit his testimony, not contradicted by Stafford, that he told the latter that Roberts was "one of them."

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[9] The letter, dated 31 October 1986, reads as follows:

This letter is just a reminder regarding our conversation today and Pat Patterson, Supervisor, talk with you yesterday.

I chose to talk with you today because after Pat talked to you, before lunch yesterday you decided to have lunch in the mailroom.

I explained to you the purpose of press breakrooms and why we asked you to use it for lunch, and not the mailrooms.

Pressmen cannot help but get ink and grease on their uniforms during work and that is why we supply the uniforms. When you lunch in another area you leave ink and grease on the chairs and fellow employees get this on their street clothing.

I mentioned to you also, if you changed out of your uniform you were welcome to have lunch in the mailroom.

In my 2 years at the News & Record I have not seen other pressmen have lunch in the cafeteria or Mailroom breakroom. They may have, but I have not seen them or has it been brought to my attention.

You said I am singling you out, because of the grievance with the Labor Board. This is not the case. We do not want the pressmen to start using other breakrooms because of the reasons given.

Your threat of a law suit was not necessary over this matter.

I want to emphasize we are not restricting your movements if you choose to change your cloths [sic] you may have lunch in the Mailroom breakroom.

I hope you understand our position and the common courtesy to other employees. If you need further clarification, please contact me [Jt. Exh. 5].

Stafford stated that the letter was not "intended to be a warning," and was not placed in Roberts' personnel file.

I credit Robert's and Holsclaw's consistent testimony that Stafford threatened discipline of Roberts, and that Holsclaw said the Company was trying to set up Roberts for discharge. Further, I credit Roberts' and Holsclaw's averments that Stafford said the new policy applied only to Roberts because he was the only one going "down there." Because Holsclaw was a current employee of Respondent his testimony is unlikely to have been fabricated.[10] I do not credit Stafford's denial that he said this in the conversation because of the greater probative weight of Roberts' and Holsclaw's testimony. Further, I note the contradiction in Stafford's assertions about what he said during the conversation, contrasted with his testimony that the letter was addressed to Roberts, not "to all pressroom employees." Stafford's denial in the letter that he was "singling out" Roberts was simply an attempt to gloss over what he actually said.

On 10 November 1986, Roberts filed a grievance over the incident, and requested that the Company withdraw its action,[11] but Stafford refused to do so.

F. *Roberts' Visit to the Mailroom in December and Stafford's Second Letter*

Roberts testified that he went to the mailroom breakroom on 11 December to make a purchase from one of the vending machines, and paused on the way back. The evidence is conflicting on where he stopped.

Respondent submitted two photographs taken within the mailroom showing a door leading to the reelroom.[12] Roberts testified with the assistance of one of these photographs (R. Exh. 23). Immediately to the right of the door, approximately 3 feet from the wall abutting the door, is a vertical piece of machinery at least as tall as the door. Immediately to the right of this piece of machinery is another device resting on a bar, which in turn appears to be resting on a cylindrical turntable. The bar seems to be about 4 or 5 inches high, and extends almost back to the wall. Roberts testified that he paused "just a couple of feet" to the right of the door, and was watching some employees operate a machine. There was a skid of papers to the left of the door.

According to Roberts, Mailroom Superintendent Lister was looking at him "through the window in his glass on a higher level." Lister came down and said that Roberts was "bothering" people by watching them work and requested him to leave. Roberts denied that he was bothering anybody, and asked why Lister said nothing to other employees who came into the mailroom. Lister asserted that Roberts was the only one who came there, and Roberts denied it. Roberts then returned to the pressroom and spoke to two pressmen,[13] who told him that they had been in the mailroom themselves that morning, one of them twice.

Lister agrees that he had a conversation with Roberts, but his testimony is ambiguous on Roberts' location. Although Lister appears to say that Roberts was initially near the door, he contends that Roberts later was "standing away from the wall in the flow of traffic." Lister told Roberts that he was standing "in the middle of the floor" interfering with employees trying to get to work during a shift change. The superintendent agreed that he did not see Roberts talking with anybody. He also asserted that the mailroom employees, most of whom are female, do not like being watched and had complained about obscenities yelled through a "window" by pressroom employees.

Because Roberts testified with the assistance of Respondent's photograph, and because of uncertainty in Lister's testimony, I credit Roberts' testimony as to his location. On the basis of Respondent's Exhibit 23 and Roberts' credited testimony, there is no way in which Roberts could have been in the "flow of traffic." The next day Stafford gave Roberts another letter.[14]

G. *Applicability of Stafford's First Two Letters*

Roberts contended that Stafford's first two letters applied only to him despite the reference to "other pressmen" in the second letter. The matter was never brought up at employee meetings by Pressroom Superintendent Clark, and Roberts' fellow employees believed that Roberts was being singled out. "The same thing happened when I was fired before," Roberts testified. "It started with them barring me from going to other departments and the guys felt like they were doing the same thing again." Roberts denied that the other pressmen believed they were affected by the letters. As Roberts put it, if Stafford had wanted "a rule for everybody, he would have posted it."

H. *The Warning to Roberts on 8 January 1987*

According to Roberts, Production Director Stafford and Pressroom Superintendent Clark approached him

[10] *Bohemia, Inc.*, 266 NLRB 761, 764 fn. 13 (1983).

[11] Jt. Exh. 10.

[12] R. Exhs. 22 and 23. The reelroom was underneath the pressroom. The mailroom breakroom was formerly located next to the reel room, but was later moved to the opposite side of the mailroom.

[13] Roy Marsh and Ronnie Meyers.

[14] Stafford's letter, dated 12 December 1986, reads in relevant part:

> This letter is another reminder regarding your visits to other departments during your working hours and rest periods.
>
> Yesterday at approximately 2 p.m. you were in the Mailroom, and I believe it was your rest period, because you were there about 10 minutes. I am sure you are completely aware of taking rest periods in the Pressroom breakroom. I will explain it again. Pressmen are to take their rest periods in the Pressroom breakroom or they can go to the cafeteria and return quickly. By following this procedure the Supervisor can locate press employees if they are needed suddenly.
>
> By you standing in the middle of the Mailroom floor with your arms crossed and having Mailroom employees go around you to perform their work is distracting at best.
>
> . . . .
>
> Jim the other pressmen understand our reasoning of the breakroom and lunchroom periods. Why do you persist on being different?
>
> Patterson and myself have verbally spoken to you so you could hear it. This is my second letter to you so can see it. If you decide to continue on this course of action I will have no other recourse but to take disciplinary action. This disciplinary action could lead to you terminating yourself from the Greensboro News & Record.
>
> Read this letter and the one dated 10/31/86 very carefully and respect our position in this matter. If you do not understand it or need clarification, please see me. Also, please do not test us by asking other pressmen to violate this procedure.
>
> I emphasize we are not restricting your movements, but ask you as an employee to follow these simple procedures as your fellow employees do [Jt. Exh. 6].

while he was at work on 8 January. Stafford asked whether he had eaten lunch in the cafeteria that day, and Roberts replied affirmatively. Roberts added that he had done so for 10 years, and did not think that the warnings applied "to that." The production supervisor said he was concerned about Roberts getting ink on something, and added that he was going to have to discipline Roberts. The latter then got Union Secretary-Treasurer Seward to join the conversation.

Roberts asked Stafford whether he had any complaints about Roberts or any other pressman getting ink on anything. Stafford replied that he had no complaints but wanted to make sure that there was none. Roberts reminded Stafford that only a few months before, Stafford had been having lunch in the cafeteria with the composing room superintendent when Roberts came in to get something. Stafford invited Roberts "to sit down and have lunch with them," and made a "big joke" of it when Roberts refused. Roberts testified that Stafford professed not to remember the invitation. The production director said that he was going to post a notice stating that no pressroom employee could go into other departments or eat in the cafeteria. Roberts protested that this was a "change of conditions." Secretary-Treasurer Seward corroborated Roberts' testimony.

On the same day, 8 January, Stafford delivered a letter to Roberts that Stafford considered to be the first specific warning.[15] A few days later, Roberts filed a grievance on the matter.[16]

Stafford does not contradict Roberts, and omits any reference to the asserted invitation from Stafford to Roberts to "sit down" for lunch with him in the cafeteria. In one portion of the transcript, Stafford appears to say that he had had no conversations about lunchbreaks with Roberts prior to 8 January when he warned Roberts for violating prior instructions.[17]

I. *Respondent's New Policy on 9 January 1987 Regarding Lunch and Breaks—Prior Policy*

On 9 January 1987, the day after the last Roberts-Stafford conversation, Respondent posted a notice that all pressroom employees were to take lunch periods and breaks in the pressroom breakroom, with indicated exceptions.[18]

The General Counsel elicited a large body of evidence that pressroom employees and others with and without ink on them customarily ate in the cafeteria and took breaks in the mailroom breakroom. According to Roberts, prior to the 1982 notice,[19] pressroom employees ate and took breaks wherever they wished—in the mailroom, the advertising department, or the cafeteria. Other employees such as electricians, machinists, and maintenance men also wear uniforms, work on presses, and get as dirty as the pressmen. Supervisors occasionally get dirty when working as part of a crew.[20] These employees customarily took breaks in the mailroom breakroom or the cafeteria. Roberts identified two such employees.[21]

Union Chairman Jerry Holsclaw testified that two maintenance men were eating lunch in the cafeteria with dirty uniforms on the same day that they had been working in the pressroom. Holsclaw himself and other employees[22] customarily took breaks in the mailroom breakroom, and were seen by various supervisors.[23]

Union Secretary-Treasurer William D. Seward affirmed that he ate in the mailroom breakroom, and on one occasion met Production Director Stafford, who spoke with him briefly. Seward testified that "just about everybody at one time or another on the press crew's been in there," with the knowledge of various supervisors.[24]

Press apprentice Roy Marsh testified that there was no rule against eating in the cafeteria with the pressman's uniform on prior to 9 January 1987. He identified three supervisors[25] who saw him eating there, and three others[26] who observed him taking breaks in the mail-

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[15] The letter reads:

> This is a written warning regarding your actions today. You had lunch in the cafeteria when specifically we asked you to use the Pressroom breakroom for this purpose.
>
> We explained our reasons for doing so verbally and in writing twice.
>
> If you continue on this course, knowing our position, you leave us no other choice but to take further disciplinary action [Jt. Exh. 7].

[16] Jt. Exh. 11.

[17] The transcript of Stafford's testimony on direct examination reads at one point as follows:

> Q. Do you recall having any conversations with Mr. Roberts or any other communications with Mr. Roberts between December 12, 1986 and prior to January 8, 1987 regarding lunches or breaks?
>
> A. Lunch, yes.
>
> Q. Prior to January 8, 1987?
>
> A. I believe it was on January 8th.
>
> Q. So—but—so to answer my question, prior to January 8th you didn't have any—
>
> A. No.
>
> Q. —conversations with him. Okay . . . .

[18] The notice, signed by Pressroom Superintendent Dennis Clark, reads:

> This memo is to remind all pressroom employees that all lunch periods and breaks are to be taken in the pressroom breakroom.
>
> When on a break you must be readily available in the event of press problems.
>
> The reason for this is that you may have ink or grease on your uniforms that could transfer to the chairs in the cafeteria and ruin somebody's clothes inadvertently.
>
> You are welcome to have lunch in other areas if you change into your street clothes.
>
> If you go to the cafeteria for food or drink items, please be careful not to track ink on the floors.
>
> We hope you understand this common courtesy to other employees.
>
> Your cooperation is expected and appreciated [Jt. Exh. 4].

[19] Supra, fn. 7.

[20] According to Roberts, it is impossible to tell a dirty uniform from a clean one by looking at it because the cleaning process does not remove all the stains.

[21] Doug Wells and Roy Marsh.

[22] Roy Marsh, Dewey Seward, and Dennis Kiker were named.

[23] Holsclaw identified Troy Parish, Jimmy Davis, and Hudson Owens (retired) as supervisors who knew he was eating in the mailroom breakroom or the cafeteria.

[24] Seward identified Jimmy Davis as a supervisor, "Duncan," and "Cublan."

[25] Harold Copeland, Bill Duncan, and Kenneth Burd.

[26] Mailroom Superintendent Don Lister, Jimmy Davis, and Dan Wilkins.

room breakroom, sometimes two or three times a day without protest. Marsh identified employees[27] who spent "large chunks of their breaks . . . four or five minutes, in the mailroom breakroom."[28]

Respondent did not elicit testimony from any of the persons asserted to be supervisors or introduce evidence contradicting their asserted supervisory status. I credit the testimony of the General Counsel's witnesses.

Finally, the 1982 company rule, taken down after the Union's protest, itself permitted pressmen to eat in the "canteen," i.e., the cafeteria.[29]

Production Director Stafford testified that he "counselled" an employee whom he found eating in the paper handlers' area. This employee, unlike Roberts, was not given a warning because Roberts had previously been "counselled."

J. Conclusions With Respect to the Alleged Discrimination

It is obvious that Stafford's statements and letters to Roberts on 31 October, and his letter on 12 December, constituted warnings despite Stafford's denial. Thus, on 31 October, Stafford told Roberts that he had been warned by a supervisor the prior day about visiting the mailroom, and that Stafford might have to discipline Roberts. Stafford's second letter, on 12 December, contains an explicit reference to the possibility of disciplinary action. Respondent concedes that the third letter was a warning.

Roberts resumed his union activities soon after his reinstatement, and Respondent had knowledge of those activities. In the prior proceeding, the Board concluded that Respondent's maintenance of an employee handbook stating that union membership was not necessary for its employees constituted evidence of antiunion animus.[30] The Company continues to maintain an employee handbook with a similar statement,[31] and I reach the same conclusion here.

Respondent's argument that Roberts was barred from visiting the mailroom and eating in the cafeteria because of ink on his uniform is pretextual because of the disparate treatment of other employees with ink who were not similarly restricted.

Respondent's knowledge of the activities of these other employees is clear. Production Director Stafford saw Seward in the mailroom breakroom and spoke with him—apparently without criticism. Stafford in fact invited Union President Roberts to have lunch with him in the cafeteria. The pleadings establish that Stafford and Don Lister, named by Union Official Seward as an observer of mailroom breaks by other pressroom employees, are supervisors within the meaning of the Act,[32] and I make the same conclusion with respect to the other employees named as supervisors by the General Counsel's witnesses. The knowledge of such individuals concerning the break activities of other employees is attributable to Respondent under established law.[33]

The fact that Respondent's new break policy on 9 January was intended as a mask for its discrimination against Roberts is evidenced by the inconsistent provisions in the new policy. In addition to its asserted concern about inky uniforms, Respondent said in the notice that pressroom employees had to be restricted to the pressroom breakroom because of the need to have them "readily available in the event of press problems."[34] But the same notice states that pressroom employees may eat in the cafeteria if they change into street clothes. What happens if a press breaks down while employees are eating in the cafeteria in their street clothes? How are they to be contacted? Are they expected to rush back to the pressroom and handle the problem in their street clothes? Take additional time to change back into their uniforms? The clothes-changing exception to the new rule was simply Respondent's attempt to make its new rule seem reasonable. The rationale is contradicted by Respondent's asserted need to have pressroom employees readily available to handle problems, and by the prior policy of allowing employees with inky uniforms to have free access to other locations in the plant.

Because of the pretextual nature of the reasons advanced by Respondent for its three warnings to Roberts, Respondent's animus, and Roberts' union activities and prior testimony before the Board, I conclude that the warnings issued because of those activities, and that Respondent thereby committed unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act.[35]

K. The Alleged Unilateral Change in Break Policy

The consolidated complaint alleges that on or about 11 December 1986 Respondent unilaterally altered its break policy governing pressroom employees by restricting breaks to two specified areas and, on or about 8 January 1987, further altered its policy by restricting breaks to one specified area.[36] The only evidence with respect to the first allegation is that listed above in connection with the discriminatory warning issued to Roberts. This evidence shows that the new rule applied only to Roberts and, accordingly, could not have been a rule applying to the other pressmen. Indeed, the fact that it did not apply to them is the reason for the finding that they were disparately treated and, accordingly, that Roberts was discriminatorily treated. This complaint allegation is incon-

[27] Doug Wells, Ronnie Myers, and William D. Seward.

[28] Respondent attempted to distinguish between employees who spent several minutes in the mailroom breakroom, and those who just "walked through."

[29] Supra, fn. 7.

[30] *Greensboro News Co.*, 272 NLRB at 136, 143.

[31] The statement reads:

> We do not believe our people benefit from representation by a labor union. While we respect the right of individuals to decide whether they wish to belong to a union, we firmly believe that the best interest of our people can be served without third-party interference. We greatly value the ability of our managers and supervisors to work with our people individually to solve problems and to provide opportunity for advancement [Jt. Exh. 32, p. 17].

[32] G.C. Exhs. 1(aa), par. 8 and 1(cc), par. 8.

[33] Stafford's testimony about "counselling" an employee is insufficient to offset the weight of the General Counsel's evidence.

[34] Supra, fn. 18.

[35] *Alert Medical Transport*, 276 NLRB 631 (1985); *Cerock Wire & Cable*, 274 NLRB 888 (1985).

[36] G.C. Exh. 1(aa), pars. 15(f) and (g).

sistent with the allegation of discrimination in December, and I shall recommend that it be dismissed.

The second allegation is not precisely accurate. Respondent's notice on 9 January restricted pressroom employees to all breaks in the pressroom breakroom *unless* they changed to street clothes. This, however, was a unilateral change in break policy and, although not precisely alleged, was fully litigated. I shall consider the legal significance of this change hereinafter in connection with the other allegations of unilateral changes.

IV. THE ALLEGED VIOLATIONS OF SECTION 8(A)(5)

A. *The Contractual Relationship Between the Parties*

The Union has represented the Company's pressroom employees since 1966 and has entered into successive collective-bargaining agreements with the Company.[37] The record contains a copy of the agreement preceding the last agreement.[38] The parties engaged in bargaining for a new contract from January 1981 to 13 May 1983.[39] On that date they entered into a new agreement terminating on 31 December 1983.[40]

The parties stipulated that, in an attempt to reach a new agreement, they "bargained to impasse sometime prior to June 1985." The testimony of Union President Roberts and former Vice President for Administration Richard Hendricks establishes that the parties reached impasse over the Company's demand that the Company's president be the final arbitrator in all grievance proceedings. Although there is reference to other issues prior to impasse, none is specified.

B. *History of the Overtime Board*

As noted, the complaint alleges that Respondent violated the Act by unilateral assumption of control of the overtime board. The overtime board was a method of offering overtime to employees on a departmental seniority basis. Under the Union's operation, it was a bulletin board on which employees were given a "mark" each time they were offered overtime, whether they accepted it. As new overtime became available, the employee with the least number of "marks" was offered the additional work.

Except for a brief period in 1981, the overtime board was run by the Union. Union Chairman Jerry Holsclaw affirmed that the Union went through the "whole board," by seniority, in assigning overtime. Union Secretary-Treasurer Seward testified that the Union assessed a fine against an employee rejecting overtime. According to Seward, when the Union was operating without a contract in 1981, union counsel advised it that the assessments may have been unlawful. Accordingly, they were discontinued.

Despite the fines, union witnesses contended that overtime work was voluntary except for work at the end of a shift. The Company contended that a "reasonable" amount of overtime was mandatory, but imposed no penalties on employees who refused overtime. The expired contract was silent on this point.[41]

During the negotiations for a new contract in 1981, the operation of the overtime board was taken over by the Company for about a month. According to Union Secretary-Treasurer Seward, the Company posted "work rules" during the period in 1981 when no contract was in effect and, after discussion with union counsel, the Union suggested that the Company operate the board. Union President Roberts testified that the Union's offer was a negotiating tactic that it thought would impose a burden on the Company. According to Roberts and Seward, a short time later, the Company asked the Union to take it back because it was a "headache," the foreman did not have time to run it, and the employees complained about the way the Company was operating it. Production Director Stafford, who was not employed by Respondent in 1981, asserted that the Company "took it away" from the Union.

Former Vice President for Administration Hendricks agreed with the Union's chronology, but contended that it was the Union that asked for return of the Board, and that the Company agreed because, supposedly, the Union promised to run it fairly. However, Hendricks conceded that the Company's operation of the board caused "the foremen a lot of time . . . on the phone." I credit the accounts of Seward and Roberts as to the circumstances in which the board was briefly given to the Company by the Union in 1981 and then returned.

C. *Discussions in 1986 and the Company's Assumption of Control of the Overtime Board*

The Company had no complaints through 1985 about the Union's supply of employees willing to work overtime, according to former Vice President for Administration Hendricks. However, in 1986, the Company's business increased significantly, and staffing became a problem. A series of conversations about the overtime board took place in 1986 between the Company and the Union.

The first discussion took place on 22 April 1986. Production Director Stafford said that the men were not working enough overtime. Roberts replied that the Company needed to hire more employees because of all the work and the fact that the existing employees had to work double and sometimes triple shifts. Stafford said that the Company might have to take the overtime board away from the Union and discipline the union chairman. Roberts objected to both suggestions. Stafford's testimony does not disagree with this account and adds that he asked the Union for suggestions on how to fill the vacant positions.

Another discussion took place in July, and the parties asserted basically the same arguments. The Company said that the "overtime positions were not being filled." The Union suggested that the Company hire more employees and utilize "substitutes," i.e., qualified pressmen from outside the bargaining unit. Stafford testified that the Union's suggestions were "silly." However, he ac-

[37] G.C. Exhs. 1(aa) and 1(cc).

[38] R. Exh. 11. The first page of the contract is missing and the record thus does not disclose the exact term.

[39] Testimony of former Vice President for Administration Richard Hendricks.

[40] Jt. Exh. 1.

[41] R. Exh. 11, art. VII.

knowledged that the Company had three pressroom vacancies in July 1986. According to Roberts, Stafford again said that the Company might have to take the overtime board away from the Union. He gave the Union a few more weeks to come up with new ideas.

An additional discussion took place on 15 August, and the parties asserted the same basic positions. Stafford announced that the Company was taking operation of the overtime board away from the Union, and Roberts objected. The Company posted a notice on 21 August announcing the new policy.[42]

On 5 September, the Union asked for return of the board, and the Company refused. According to Stafford, he told the union representatives that the Company's assumption of control of the board was a "past practice."

Under the Company's operation of the system, it changed from a bulletin board to a looseleaf notebook. Production Director Stafford conceded that the Company does not call all employees for overtime according to the seniority system and their "marks," but only those employees whom it knows, through experience, will be willing to work.[43]

Pressroom Superintendent Dennis Clark affirmed that under the Union's operation of the overtime board, the Company would be "short-handed" on the night shift because overtime positions had not been filled, and the Company did not find this out until late in the day. Production Director Stafford agreed, and asserted, that under the Company's operation of the overtime system it knows by 2 p.m. each day which positions will be filled. However, Stafford and Pressroom Superintendent Clark conceded that the Company never asked the Union to give the Company notice of overtime staffing problems at any particular time of the day, nor did Clark complain to the Union about personnel shortages that occurred on one particular day.[44]

Clark said that the problem of shortages of personnel on overtime had "decreased" since the Company took over, but that the Company still worked "short-handed" at times. Roberts testified that he informed Stafford on 5 September that the pressroom was still working "short a lot of men" on every shift.

D. *The Alleged Unilateral Refusal to Allow Substitutes to Work*

1. Contractual provisions regarding substitutes—past practice on area and traveling substitutes

The last two contracts barred overtime work by regular employees if competent substitutes were available at straight time rates.[45] However, according to Union President Roberts, this provision was not literally enforced. The Union made a distinction between area substitutes, those living nearby with full-time jobs elsewhere, and traveling substitutes, individuals from other locations looking for new full-time jobs. For what the Union considered to be equitable reasons, it gave preference to the traveling substitutes, and applied the contractual ban on overtime by regular employees only when traveling substitutes were available. Traveling substitutes were given regular work if possible. If only area substitutes were available, the ban did not apply, and regular employees were given overtime work in preference to straight time work by area substitutes. Roberts testified that this had been the practice for at least 10 years, that the Company did not question it, and that he did not recall any conversation about the practice with former Vice President for Administration Hendricks. The latter asserted that from 1979 to 1985, the Company did not "contend" that the overtime ban applied only to traveling substitutes. However, Hendricks did not contradict Roberts' testimony that the Company did not question the Union's application of this contractual provision. Accordingly, I credit Roberts that this was the Union's practice.

The Company contends that it was unaware of the distinction between area and traveling substitutes. However, in a September 1986 discussion with Roberts, Stafford did not assert surprise at Roberts' advocacy of the policy, but merely argued that it was "dead wrong." It is highly unlikely that the Company did not know the home addresses of the substitutes it employed, and thus that the Union's policy was to give preference to traveling substitutes. Accordingly, I do not accept the Company's position on this issue.

The Union's president stated that no substitutes had worked during the 2 years prior to the hearing, i.e., during the period in which, according to Hendricks, the Company had no overtime staffing problems. However, before that time, hiring of substitutes happened "a lot," according to Roberts.

2. Summary of the evidence on the alleged change

a. *The Union's position*

As indicated above, the Union suggested hiring of substitutes during its 1986 meetings with the Company as one solution of the overtime staffing problem. Roberts testified that during the 15 August meeting of the parties,

[42] The notice reads:

> Beginning Friday, August 22, 1986 the office, in an effort to fill the overtime positions available, will hire all personnel to work overtime. The following procedure will be used.
>
> Each shift the Supervisor will post a list with the number of overtime positions to be filled for the next day or nights run. This list will be posted by 12:00 noon on the dayside, and 12:00 midnight on the night side. Anyone desiring to claim an overtime shift must sign up by 12:00 midnight for a day shift or 12:00 noon for a night shift. If a person is off they may call the Supervisor if they want to be put on the list.
>
> At 12:00 the Supervisor will fill the overtime positions "Round Robin" from the list of personnel signed up.
>
> If there are more positions than personnel signed up to fill them the Supervisor will call anyone he feels may work to fill these positions.
>
> After 12:00 the Supervisor will notify those signed up for work if they are needed and at what time. If you haven't been contacted by 2:00 you may assume you were not needed, and you will not be charged for working or turning down a shift [Jt. Exh. 3].

[43] Stafford contended that the Union did the same thing, but could not identify the employee who assertedly told him this. I do not credit this aspect of Stafford's testimony. The General Counsel conceded that the failure of the Company to call all employees according to their seniority ranking and "marks" was not a separate complaint allegation.

[44] R. Exh. 26.

[45] Jt. Exh. 1, sec. 12.01; R. Exh. 11, sec. 13.01.

he again suggested this solution, and told Stafford that he thought the Union could get substitutes to cover part of the overtime. Stafford replied that he was not interested, according to Roberts. The Union's president did not supply specific names because of this answer.

On 29 August, the Union filed a grievance protesting the asserted fact that since 22 August the Company "refused to allow the Union to give available work to substitutes in violation of established conditions of employment."[46]

Roberts testified that the Union repeated the suggestion during a meeting on 5 September. Stafford then agreed to hire only "area" substitutes, and to give them work prior to any overtime to regular employees. The Union objected to "another change after they'd already made a change."

On 18 November, Stafford sent Roberts a letter stating that the Company was willing to hire substitutes and was waiting to hear from the Union.[47] At a meeting on 10 December, Stafford originally told Roberts that substitutes could be hired as they had in the past, according to Roberts. However, Press Superintendent Clark objected, the Company "caucused," and Stafford then changed his mind and said that the Company would not hire substitutes.

b. *The Company's position*

Stafford testified that when the Union suggested substitutes during the July meeting between the parties, Stafford replied that he did not wish to hire them at that time, but would not "rule it out" in the future—he preferred to keep overtime within the unit. However, Stafford denied that he ever refused to hire a substitute specifically proposed by the Union.

With respect to the September meeting on the issue, as described above, Stafford told Roberts that the Union was "dead wrong" in wanting overtime for regular employees before straight time for area substitutes—this was contrary to the contractual language. Stafford repeated his preference for overtime within the unit rather than substitutes. However, Stafford asserted the Company would hire a substitute named by the Union "with the understanding that they know that the unit is going to lose their overtime."

Neither Stafford nor Pressroom Superintendent Dennis Clark discussed Roberts' testimony that on 10 December the Company first agreed to continue the former method of hiring substitutes and then, after a caucus, refused to hire them at all.

3. Factual analysis

The complaint alleges that Respondent unilaterally altered the method of operation of the overtime board by refusing to allow substitutes to work.[48]

It is clear that the Company had a history of hiring substitutes and that the contractual ban on overtime work by regular employees when substitutes were available for straight time work was, in practice, applied only to traveling substitutes. When only area substitutes were available, regular employees were first offered overtime work.

Roberts' testimony that the Company refused to hire substitutes in July is corroborated by Stafford, despite the latter's assertion that he would not rule it out in the future. In the middle of 1986, the Company asserted willingness to hire substitutes, but only on condition that area substitutes get work in preference to overtime for regular employees—contrary to past practice and the way in which the overtime board had been run. Further, crediting Roberts' uncontradicted testimony about the December meeting, the Company finally returned to its original position that it would not hire substitutes. Respondent's argument that it never refused to hire a specific substitute named by the Union is mere sophistry. When Roberts said that he had some substitutes available, Stafford replied that he was not interested. Roberts was not required to engage in the futile act of supplying a list of names in light of this answer.

There is no explanation for the Company's reluctance to hire substitutes in 1986 and Stafford's asserted desire to keep overtime "within the unit," in the face of the Company's increased business, the double and triple shifts regular employees were working, and the inability to fill many overtime positions. In any event, the credited evidence supports the complaint allegation.

E. *The Alleged Unilateral Overtime Priority for Press Assistants*

1. The contractual provisions

The last contract provided for "two classifications of pressroom employees: pressmen, including journeymen and apprentices, and press assistants."[49] The latter's "duties shall be, and limited to, all work performed in the reel room." This work consisted principally of the loading of reels with paper, to be fed up to the presses immediately above the reel room. When positions for apprentice pressmen became available in the pressroom, press assistants were to be given first choice for these positions based on seniority.[50]

Section 3.08(b) reads as follows:

> (b) Where all press assistants have declined to accept an apprentice pressman situation, and the employer has to hire from outside the bargaining unit, the new employee (apprentice pressman) will immediately assume priority over all press assistants for vacation choice, layoffs, or any other area where priority is a deciding factor, as it is understood that all pressmen, journeymen and apprentices, shall at all times have priority over all press assistants.[51]

In addition to limiting press assistants to the reel room, the contract contained language limiting their number, their ratio as compared to pressmen, and shift assignments, as follows:

[46] Jt. Exh. 8.
[47] Jt. Exh. 13.
[48] G.C. Exh. 1(aa), par. 15 (b).
[49] Jt. Exh. 1, sec. 3.01.
[50] Id. at sec. 3.08(a).
[51] Jt. Exh. 1.

> Section 3.04. Effective May 13, 1983, the Company may employ in the bargaining unit four press assistants for the night shift. The total number of press assistants the Company may employ during the life of this agreement shall be four. If the number of press assistants employed exceeds a ratio of one press assistant to each six journeymen and apprentices employed, then the Company shall reduce the number of press assistants to the allowable ratio by offering press assistants with the most seniority an apprenticeship in the pressroom.[52]

The contract also provided that in the event of a layoff or reduction in force, all press assistants were to be laid off before any journeyman or apprentice.[53] "With the exception of the provision in this article," press assistants were to be governed by the same rules, working conditions, and hours of labor as all other pressroom employees.[54]

Article X, entitled "Priority," asserts that "[i]n filling day situations, preference shall be given employees according to priority (seniority as a journeyman pressman with the Company) as to length of service on night shifts."[55] The overtime section of the contract defines overtime and recites the amount of compensation therefor, but does not state the employees entitled to overtime.[56]

Union President Roberts testified that he prepared the contract language concerning press assistants, that it represented the combined views of the Union and Company Representative Hendricks, and that the latter told him that the Company wanted press assistants to work only at night.

2. Summary of the testimonial evidence

Union Secretary-Treasurer Seward was acting president of the Union during the time when Roberts had been discharged, as described in the former proceeding. Seward testified that because of an increase in work, he made a verbal agreement with Vice President for Administration Hendricks that press assistants would be allowed to work overtime on day shifts, after the pressmen had been offered overtime. Roberts corroborated Seward. Press assistants worked only at night, but there was "so much work" that Seward made an oral agreement with Hendricks to allow press assistants to work overtime on day shifts, but only after the pressmen had declined.

The Company presented two responses to this evidence. First, Hendricks acknowledged that he had a discussion with Seward about press assistants. According to Hendricks, he insisted that press assistants share overtime "equally" with pressmen, and Seward objected. "After that," Hendricks testified, "I think they shared in the overtime equally." This was followed by a more affirmative answer from Hendricks in response to a leading question.

The Company's second response was a legal argument—the last contract allows press assistants to work overtime on the day shift even if a pressman desires the work. According to Hendricks and Stafford, the language of the contract restricting press assistants to night shifts in the reel room applies only to straight-time work. Shown the last contract, Stafford remarked that it "doesn't say they can't work overtime on days." Hendricks asserted that overtime work on day shifts was part of the "bargaining history."

Roberts testified that the Company had made changes in the overtime board by "hiring press assistants on the day shifts ahead of journeymen and apprentices," although Stafford acknowledged that the Company was hiring press assistants on the day shift to do press assistant work "even if a pressman wanted that position." Roberts filed a grievance asserting "blatant violation of established agreements" and demanding that pressmen be "made whole" for all shifts from which they had been "illegally denied."[57] Thereafter, in a meeting between the Union and the Company, Pressroom Superintendent Clark argued that the Union's method of giving overtime to press assistants was illegal because it was not hiring them even though they had "a lower number on the board." Roberts reminded the Company of the contractual provisions, and Stafford told Clark to continue operating the board in the same way.

3. Factual and legal analysis

The complaint alleges that the Company unilaterally altered the method of operation of the overtime board by giving press assistants priority.[58]

The Company argues that the Hendricks-Seward discussion of press assistants involved only the issue of whether they were to get equal treatment during overtime work on day shifts—not whether they were to do any work at all on day shifts. The implied premise in this argument is that press assistants were allowed to work overtime on day shifts prior to the Hendricks-Seward conversation. Hendricks claimed that such overtime had previously been allowed, and was part of the "bargaining history."

This position is not only contrary to the language of the last agreement stating that the Company could employ four press assistants "for the night shift," but is also contrary to similar language in the prior agree-

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[52] Jt. Exh. 1, sec. 3.04. The prior contract also limited the number of press assistants, then known as reel tenders, to work on the "night shift" (R. Exh. 11, sec. 4.05).

[53] Id. at sec. 3.09.

[54] Id. at sec. 3.08(e).

[55] The entire article reads:

> In filling day situations, preference shall be given employees according to priority (seniority as a journeyman pressman with the Company) as to the length of service on night shifts. When situations are switched from day to night, the opposite procedure shall govern. Priority employees shall have choice of new shifts, new situations, off days and vacation dates. When a new situation arises, each priority employee shall have five (5) days to claim this situation after notification of eligible employees. However, with the exception of the above, length of service with the Company shall determine earned benefits such as vacations, retirement benefits, and any other benefits which are contingent upon length of service with the Company [Jt. Exh. 1, Art. X].

[56] Jt. Exh. 1, art. VI.

[57] Jt. Exh. 8.

[58] G.C. Exh. 1(aa), par. 15(c).

ment.[59] For this reason, the Company's position on "bargaining history" is not persuasive. Roberts' testimony that Hendricks stated he wanted press assistants for night-shift work only is uncontradicted. Because of the language of the agreements, and because Roberts and Seward appeared to be more truthful witnesses than Hendricks and Stafford, I credit the testimony of the former on this issue.

In addition, I credit Seward's testimony about his conversation with Hendricks concerning press assistants. Faced with a contract limiting press assistants to night work and an increased workload, the acting union president made a concession to the Company by relaxing the contractual restrictions. Hendricks did not explicitly deny this aspect of Seward's testimony; he merely asserted that they disputed whether pressmen should get overtime priority over press assistants. Accordingly, I find that Seward made an oral agreement with Hendricks allowing press assistants to work overtime on day shifts, but only after pressmen had declined it.

The Company contends that the contractual provisions cited above do not specifically give pressmen priority over press assistants for overtime work. An argument may be made that such priority is implied in some of the contractual language, but this is beside the point. The last two contracts clearly limited press assistants to night work, and this was changed only after the Hendricks-Seward oral agreement. If the contracts *had* permitted day-shift work by press assistants, no such agreement would have been necessary.

I also find that the Union ignored Hendricks' argument that press assistants should receive equal overtime assignments on day shifts, and that it gave them such assignments, subsequent to the Hendricks-Seward agreement, only after overtime had been declined by pressmen.

As noted, the complaint alleges that the Company unilaterally altered the operation of the overtime board so as to give press assistants "priority." On the basis of the company-union meeting subsequent to the union grievance, and the colloquy between Roberts and Clark, I conclude that the Company changed the Union's practice and gave press assistants overtime work on day shifts in the same manner as that utilized with respect to other employees, i.e., the employee with the least number of marks received the work. Whether this constituted giving the press assistants "priority" is a semantic question.

However, it is clear that by agreement of the parties, the contractual ban on daytime work by press assistants was relaxed so as to permit their overtime work on day shifts after pressmen had declined the overtime. After the Company took over the overtime board, this practice was unilaterally altered so as to give press assistants equal opportunity for overtime work on day shifts, and so as to deprive pressmen of the priority for such work to which they were entitled pursuant to the contract, the Seward-Hendricks agreement, and established practice resulting therefrom. The parties understood the issues, and the matter was fully litigated.

F. *The Alleged Unilateral Change in Journeyman to Press Assistant Overtime Ratio*

1. Summary of the evidence

The complaint alleges that Respondent unilaterally altered the overtime board by changing the journeyman to press assistant overtime ratio.[60] This allegation is unclear, because the only overtime issue pertaining to press assistants is that related above, and concerns the issue of priority rather than ratios. However, as noted above, the last contract prescribed a 1-to-6 ratio of press assistants to pressmen.[61]

In addition, the contract provided that, "[w]hen press assistants are employed on any shift, a journeyman pressman will be designated as a lead journeyman in the reel room, to instruct the press assistants.[62]

Roberts testified that, after the Company assumed control of the overtime board, it employed press assistants in the reel room without the presence of a journeyman. On 29 August, Roberts filed a grievance on the issue.[63] Although the grievance also asserts that the Company has hired press assistants "in the place of journeyman and apprentices," it does not precisely allege violation of the one-to-six ratio requirement of the contract,[64] and there is no testimony from the General Counsel's witnesses directly addressed to this issue.

Stafford testified that newly hired reel tenders for "the first sixty days [sic] [were] supposed to be one above the crew. In other words, they're not counted as the crew." This is an apparent reference to section 3.05 of the last contract, which provided that press assistants shall serve a 2-year training period "and for the first ninety days, for training purposes, shall be above the requested number of employees in the reel room during this training period." According to Stafford, at the time the Union grievance was filed, "the sixty [90 according to the contract] days wasn't up."

With respect to the required presence of one journeyman in the reel room, Stafford testified as follows:

> The one about the crew, we were still short. We were not getting the overtime and we said that we would bring that journeyman in the reel room upstairs if we needed to get that press started or run. We were doing what we needed to do to get that paper out.

2. Factual and legal analysis

Because of the ambiguity of the complaint allegation, the absence of any explicit evidence from the General Counsel on the 1-to-6 ratio issue, and Stafford's uncontradicted testimony that any press assistants were still within their training period and thus "above the request-

[59] Hendricks erroneously testified that the last agreement was the only one dealing with press assistants.

[60] G.C. Exh. 1(aa), par. 15(d).
[61] Jt. Exh. 1, sec. 3.04.
[62] Jt. Exh. 1, sec. 3.07.
[63] Jt. Exh. 8.
[64] Ibid.

ed number of employees in the reel room,"[65] I am unable to conclude that this issue was fully litigated.

Nonetheless, Roberts did testify that the Company employed press assistants in the reel room without the presence of a journeyman (contrary to the requirements of sec. 3.07 of the contract), and Stafford admitted that he brought "that journeyman in the reel room upstairs . . . to get that paper out." Accordingly, despite the inadequacies of the complaint, I conclude that this matter was fully litigated and that the Company unilaterally altered the ratio of press assistants to journeymen in that it removed the one journeyman required by the contract and established practice to be in the reel room in order to instruct press assistants.[66]

G. *The Alleged Change in Overtime Reporting Requirements for Foremen*

Foremen were given opportunity for overtime work, as were the other employees, and were treated the same way as the others under the Union's operation of the overtime board. The General Counsel's witnesses testified that on several occasions after the Company took over the overtime board, foremen were given overtime without being "marked up," i.e., without having a record of their overtime entered in the overtime book that the Company maintained. However, the witnesses agreed that the Company took corrective action when these matters were brought to its attention. The General Counsel has not adduced evidence that these matters were the result of deliberate company policy, and Stafford denied that he instructed foremen to work overtime without recording it. Accordingly, I shall recommend that this allegation be dismissed.

H. *The Alleged Unilateral Change in Cleanup Policy*

The work of the pressmen involved occasional spillages of ink, chemicals, and water on the pressroom floor. The witnesses generally agreed that the pressmen responsible for such spillages were required to clean them up, particularly if they constituted safety hazards. Thus, Union Chairman Jerry Holsclaw affirmed that the pressmen "always got it up" if a "lot of ink" was spilled, and Roberts, who had a dispute with Pressroom Superintendent Clark over a water spill, agreed that he would have cleaned it up without protest if it had constituted a safety hazard. Former Vice President for Administration Hendricks said that pressmen clean up the spills during working hours and maintenance employees thereafter. Production Director Stafford and Pressroom Superintendent Clark stated that spillages constituting a safety hazard should be cleaned up immediately.

In the spring of 1986, newly arrived Pressroom Superintendent Clark posted a cleanup notice requiring spoils and loose paper to be picked up, dirty rags to be disposed of, tools to be kept clean, chemicals to be marked, and spillages of ink, water, or chemicals to be wiped up immediately.[67]

In early January 1987, Clark ordered Union President Roberts to clean up a puddle of water underneath a press that was not operating. Roberts said that it was not his job and questioned that it constituted a safety hazard, but nonetheless cleaned up the puddle.

Union Chairman Holsclaw asserted that there had been a recent change in cleanup policy in that the pressmen were required to clean up "footprints and different spots of ink on the press." Press apprentice Roy J. Marsh added "paper" to the list, and said that building maintenance employees used to do this work.

The dispute between Roberts and Clark involved a factual issue—whether the water puddle constituted a safety hazard. The evidence establishes that hazardous spillages were previously required to be cleaned up by pressmen during their hours of work, and the Clark-Roberts incident is insufficient to indicate a change of policy.

However, the notice posted by new Pressroom Superintendent Clark in the spring of 1986, and the credible testimony of Holsclaw and Marsh establish that additional duties, not involving hazardous spillages, were assigned to the pressmen. These had previously been the function of maintenance employees. Accordingly, the evidence supports this complaint allegation.

I. *The Alleged Unilateral Alteration in the Vacation Board and Policy*

Roberts and Stafford agree that, according to past practice, three pressmen were allowed to be on vacation at one time. They also agree that, in January 1987, the Company unilaterally reduced this figure to two. Roberts and Stafford also agreed that the Company removed certain weeks from the vacation schedule—three of the busiest weeks according to Stafford and more according to Roberts.[68]

Stafford conceded that he made these changes without discussing the matter with the Union. It would have been futile to do so, according to Stafford.

J. *The Alleged Refusal to Provide Information*

Because of the shortage of employees for overtime work, Production Director Stafford directed Pressroom Superintendent Clark to prepare a study showing how many employees were available for overtime during certain periods in 1986 without having to work triple shifts. Utilizing shift records, Clark did so[69] and, according to his testimony, needed about 6 hours to complete the work.

At a meeting on 15 August, the Union asked for information on the number of employees available for overtime without having to work double shifts, and the Company replied that it did not have this information. Rob-

[65] Jt. Exh. 1, sec. 3.05.

[66] On the blurred issue of whether the Company was replacing pressmen with press assistants, as indicated hereinafter, I am recommending a broad order.

[67] G.C. Exh. 2.

[68] Roberts filed a grievance contending that the Company had given vacation priority to night-shift pressmen, thus violating the seniority of daytime pressmen (Jt. Exh. 12), whereas Stafford testified that one day-shift and one night-shift pressman were allowed to be on vacation simultaneously.

[69] Jt. Exh. 21.

erts testified that he did not understand how the triple-shift information was derived and, on 1 October, filed a grievance demanding the double-shift information.[70] The Company took the position that it was not required to do the calculations required to derive the double-shift information from the shift records. However, on 18 November, Stafford wrote Roberts a letter with the following offer: "We will supply to you, upon request, the material needed for you to determine double shifts in regard to overtime."[71]

Roberts conceded that the Company offered the underlying data, and that he may have replied that he wanted the Company to do the calculations. This, in effect, was the issue dividing the parties—the Union believed that the Company should do the double-shift calculations just as it had done for triple shifts.

I therefore find that the Company offered to provide the underlying data required to produce the information requested by the Union, but refused to do the required calculations.

K. *The Parties' Negotiating Positions*

The parties manifested different conceptions of their functions during these meetings. The Company contended that whenever it made a specific proposal, the Union insisted on going back to the (preimpasse) "bargaining table" on the specific issue. Roberts conceded that he may have made such statements as this, and may have demanded that the Company make proposals to the "negotiating committee." The reason, he contended, was Stafford's asserted habit of discussing issues individually with employees on the floor.

On 25 February 1987, Roberts wrote Stafford a letter on "the contract impasse our bargaining unit is now working under," and declared willingness to make a change in the Union's position.[72] However, the union membership was still unwilling to accept the Company's president as final arbitrator of grievances, according to Roberts. He therefore wrote Stafford on 13 March 1987 that he had been "a bit premature" in his prior letter.[73]

The Union's position was that the Company was "trying to piece meal (the Union) one item at a time, while refusing to bargain on the contract." According to Union President Roberts and Secretary-Treasurer Seward, at a meeting on 24 September, Stafford said that "the only thing the Company had to do if they wanted to change something was meet with (the Union) a few times and then go ahead and put it into effect." Stafford denied that he made this statement. I credit Roberts and Seward. Former Vice President for Administration Hendricks testified that the Company had bargained to impasse with all the unions representing its various employees, and had secured agreements from two of them to operate without a contract.

[70] Jt. Exh. 9.
[71] Jt. Exh. 13.
[72] Jt. Exh. 27.
[73] Jt. Exh. 29.

L. *Conclusions with Respect to the 8(a)(5) Allegations*

1. The issue of "past practice" concerning operation of the overtime board

The evidence shows that the Union traditionally operated the overtime board except for a brief period in 1981 when no contract was in effect and the parties were negotiating. At that time, operation of the board was voluntarily transferred from the Union to the Company and then transferred back again voluntarily.

The Company argues that its assumption of control of the Board in 1986 was not a unilateral change because it was consistent with past practice. In support of this argument, the Company cites *Chef's Pantry*, 274 NLRB 775 (1985), and apparently relies on the employer's notices therein prohibiting employees from leaving their jobs unless they had completed their work or had obtained supervisory permission. However, the Board's conclusion that this did not constitute a unilateral change was grounded on its finding that supervisors previously had discretion to require completion of a job, that employees had not generally worked more overtime since posting of the new rule and that, accordingly, the employer had not "applied a new policy as to overtime" (id., 274 NLRB at 776). Further, contrary to Respondent's position, the Board, in *Chef's Pantry*, held that the employer's grant of a 2-day holiday on one occasion during the 1979–1980 Christmas-New Year holiday season, without any announced change in its holiday practices, was insufficient evidence on which to base a finding that the employer's practice was to grant 2-day holidays. Accordingly, the employer's later withdrawal of the 2-day holiday and its return to prior practice did not constitute a change in an established condition of employment (ibid.).

Respondent also relies on *Gulf Coast Automotive Warehouse Co.*, 256 NLRB 486 (1981), in which the employer's use of polygraph tests was found to be a past practice, although the practice had been applied on a "haphazard basis" (256 NLRB 486 at 489). Respondent also cites *Fafnir Bearing Co.*, 151 NLRB 332 (1965), but here again, the allegedly unlawful action—the subcontracting of maintenance work—had been engaged in by the employer for "many years" (151 NLRB 332 at 340).

Unlike these cases, there is no history herein of prior company operation of the overtime board, except for the brief period during negotiations in 1981. There is no evidence that this short hiatus in what was otherwise union assignment of overtime was intended to be binding precedent.

The contract is silent on the issue. In *Consolidated Aluminum Corp.*, 258 NLRB 281 (1981), the General Counsel contended that the employer's prior settlement of a grievance concerning payment of witness fees constituted past practice to which the employer refused to adhere on another occasion. Noting the ambiguity of the contract, the Board rejected this position and stated that "there is no evidence that the parties intended the settlement to be binding precedent. . . . Indeed, the record shows that [the employer] has never before or since settling [the employee's] grievance paid out witness pay to employees

for attendance at administrative or regulatory proceedings" (258 NLRB 281 at 281–282).

For these reasons, and on this authority, I conclude that past practice herein was that the Union controlled the assignment of overtime through the overtime board, and that the Company's assumption of control of the board in 1986 was a change in this practice.

2. The impasse issue and conclusions concerning the overtime board

Respondent argues that it "bargained to impasse with the Union prior to assuming control of the overtime board"[74] and, accordingly, that its assumption of control of the board thereafter was not unlawful.

The Board's position on this issue is well established. As stated in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968):

> An employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.

The problem with Respondent's argument is that, as the parties stipulated, they had previously bargained to impasse prior to June 1985, and the only issue that separated them, as far as the evidence shows, was the identity of the final arbitrator of grievance proceedings. There is no evidence, e.g., that the Company repeatedly demanded, and that the Union refused, to give up control of the overtime board prior to impasse in 1985. Accordingly, control of the board was not "reasonably comprehended" within Respondent's "pre-impasse proposals" (ibid.). Respondent appears to take the position that once impasse has been reached on one issue, it is at liberty to continue to bargain to impasse, individually, on all remaining terms and conditions of employment. As long as it discusses the matter with the Union a few times, it is free thereafter to make unilateral changes. In fact, Stafford asserted this right during his discussions with the Union. Such a position is without precedent, and its implementation would continue the bargaining process ad infinitum.

In a recent case in which there was no evidence that the employer's unilateral changes were part of its pre-impasse negotiations with the union, the Board held that those changes violated Section 8(a)(5).[75] It is clear in this case that Respondent did not, after impasse, secure the Union's agreement that the Company take over the overtime board. Accordingly, I conclude in so doing Respondent thereby violated Section 8(a)(5) and (1) of the Act.

3. The unilateral refusal to hire substitutes

The Company argues that the Union's distinction between area and traveling substitutes was a "hypothetical" issue, that there was no such distinction in the contract, and that practice about which one party is unaware is not binding on the other. However, as noted above, after some vacillation on the issue, the Company finally returned in December 1985 to the position that it would not hire any substitutes. The Company's only argument is that it never refused to hire any "specific" substitutes referred by the Union. As indicated above, the Union was not required to engage in the futile act of referring individuals that the Company had previously stated it would not hire. Accordingly, I conclude that, by unilaterally changing this previous employment policy, the Company violated Section 8(a)(5) and (1).

4. The unilateral changes in overtime for press assistants and the requirement that one pressman be in the reel room

As shown above, the Company unilaterally changed the provisions of a Company-Union agreement whereby the contractual prohibition against day-shift work by press assistants was relaxed so as to permit their overtime work on day shifts provided the pressmen were first offered such overtime. The Company's change consisted in permitting press assistants equal opportunity for such work.

Further, the Company unilaterally changed the contractual requirement and practice of requiring one pressman in the reel room at all times in order to train press assistants. I find that, by making such changes unilaterally, Respondent further violated Section 8(a)(5).

5. The remaining unilateral changes

As hereinafter explicated, the Company also unilaterally changed its break policy on or about 8 January 1987, altered its cleanup policy, and changed its vacation board and policy.[76] I conclude that these actions constituted similar violations of the Act.

6. The alleged refusal to supply information

As shown above, Pressroom Superintendent Clark compiled information showing the number of triple shifts that would have been necessary to fill all overtime positions in the spring of 1986. He used shift records for this purpose, and it took him about 6 hours to make the compilations. The Union wanted the same information with respect to double shifts. The Company offered the underlying shift records but refused to engage in the additional calculations necessary to derive the double-shift information.

The requested information appears to be relevant and necessary for intelligent bargaining, and the Company offered the underlying data from which the information could have been derived. The dispute, therefore, is over

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[74] R. Br. 30.

[75] *Triple A Maintenance Corp.*, 283 NLRB 44 (1987). Accord: *Caravelle Boat Co.*, 227 NLRB 1355 (1977).

[76] Respondent argues that the Union refused to bargain over the Company's proposed change in vacation policy. This argument has no merit.

who should have borne the expense of the additional calculations.

In similar circumstances, the Board approved of a finding that the employer was not required to go through 30,000 Rolodex cards in light of "the substantial nature of the cost."[77] In a case where the employer offered underlying data to the unions but refused to expend its own funds to prepare the reports and information desired, the Board held that the employer was not required to duplicate or conform its records, at its own cost, for the convenience of the "Unions."[78] In another case the employer had previously furnished monthly information on the basis of which the union could have prepared the seniority list which it had requested from the employer, and the Board dismissed the allegation.[79] More recently, the Board reaffirmed that an employer is not required to furnish relevant information to the union in the exact form requested by the latter.[80]

I conclude that it would have taken approximately the same amount of time to calculate the double-shift information as it did the triple-shift information, i.e., approximately 6 hours, and that this would have involved an expense that was more than de minimus. On the basis of the authority cited above, I further conclude that Respondent was not obligated to do this work, and that it satisfied its obligation by offering to the Union the underlying shift records from which the Union could have made the calculations. Accordingly, I shall recommend that this allegation be dismissed.

In accordance with my findings above and on the entire record, I make the following

Conclusions of Law

1. Greensboro News & Record, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Greensboro Printing and Graphic Communications Union, Local No. 319, Graphic Communications International Union, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by delivering verbal and written warnings to employee James L. Roberts about 31 October 1986 and about 8 January 1987 and a written warning about 12 December 1986 so as to restrict Roberts' movements throughout the plant because of Roberts' union activities and prior testimony before and filing charges with the Board, thereby committed unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act.

4. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All pressroom employees employed by Respondent at its Greensboro, North Carolina facility, including journeymen and apprentice pressmen and press assistants; excluding office clerical employees, guards and supervisors as defined in the Act.

5. Since about 1966 and at all material times, the Union has been the designated collective-bargaining representative of the employees in the above-described appropriate unit and has been recognized as such representative in prior collective-bargaining agreements with Respondent.

6. Following expiration of the last collective-bargaining agreement on 31 December 1983, the parties engaged in bargaining but reached impasse sometime prior to June 1985.

7. Following impasse, Respondent unilaterally and without the Union's agreement changed its past practice by making the following alterations in the terms and conditions of employment:

> (a) Assumed control of the overtime board, a system of assigning overtime that had previously been controlled by the Union.
>
> (b) Refused to hire substitute employees and demanded that area substitutes be given work prior to overtime by regular employees.
>
> (c) Gave press assistants equal opportunity for overtime work on day shifts, in lieu of giving priority for such work to pressroom employees.
>
> (d) Removed the one journeyman from the reel room previously required to be there for the training of press assistants.
>
> (e) Altered its cleanup policy so as to impose additional duties on pressroom employees.
>
> (f) Changed its vacation policy to the detriment of employees.
>
> (g) Altered its break policy so as to restrict pressroom employees to the pressroom breakroom unless they first changed to street clothes.

8. None of the changes in terms and conditions of employment described above was reasonably comprehended within Respondent's pre-impasse proposals to the Union.

9. By engaging in the unilateral actions described above, Respondent thereby committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

10. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

11. Respondent has not committed any unfair labor practice except as specified herein.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily issued warnings to employee James L. Roberts restricting his movements, I shall recommend that it be ordered to inform Roberts in writing that its letters to him dated 31 October 1986, 12 December 1986, and 8 January 1987

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[77] *Pacific Telephone & Telegraph Co.*, 246 NLRB 327, 330 (1979).

[78] *United Aircraft Corp.*, 192 NLRB 382, 389 (1971), enfd. as modified 532 F.2d 422 (2d Cir. 1975).

[79] *Leland Stanford Junior University*, 262 NLRB 136, 142–143 (1982), enfd. 715 F.2d 473 (9th Cir. 1983).

[80] *Roadway Express*, 275 NLRB 1107 (1985).

are null and void, that he is to disregard any statements to him by Production Director Merrell B. Stafford or any other supervisor regarding locations where he may take breaks, and that he is free to engage in union activities and other activities before the National Labor Relations Board. I shall further recommend that Respondent be required to remove from its records all references to its aforesaid actions and, in its writing to Roberts, inform him that it has done so and that it will not base any future personnel actions against him on such records or references.

Having also found that Respondent unilaterally changed certain terms and conditions of employment of its employees in violation of the Act, I shall recommend that it be required to rescind such changes and restore the status quo ante.[81] Thus, I shall recommend that Respondent be ordered to rescind its assumption of control of the overtime board and of overtime and to restore the control to the Union.

Further, I shall recommend that Respondent be required to hire substitutes when work for them is available in the same manner as that established by past practice, i.e., despite the contractual ban on overtime work for regular employees when substitutes are available, regular employees are to get such overtime when only area substitutes are available, but not when traveling substitutes are available.

I shall also recommend that Respondent be required to restore the prior right of pressroom employees (journeymen and apprentices) to overtime work on day shifts in preference to press assistants and to give the latter such work only when it has been refused by pressroom employees. This recommendation supplements the recommendation above that overtime in general be returned to the control of the Union.

In addition, I shall recommend that Respondent be required to maintain one journeyman in the reel room at all times, in accordance with the last contract and past practice.

It will also be recommended that Respondent be required to publish a rescission of its notice to employees entitled "Standard Operating Procedure,"[82] and to notify employees in writing that its cleanup policy will continue to be that which was in effect prior to publication of the notice.

I shall additionally recommend that Respondent be required to reinstate its prior vacation board and vacation policy, and to grant to employees such vacation rights as may have been denied to them by reason of Respondent's unilateral change in its vacation policies.

Finally, I shall further recommend that Respondent be required to rescind its unilaterally imposed change in breakroom policy for pressroom employees, to rescind its notice to such effect dated 9 January 1987[83] and to notify pressroom employees that their break privileges will remain as they were in the past, and that they need not change to street clothes prior to taking breaks in areas other than the pressroom breakroom.

This is the second time that Respondent has discriminated against union activist James L. Roberts. Further, its postimpasse unilateral changes and statements justifying same manifest a bargaining policy which, if successful, would defeat the purpose of the Act to encourage meaningful collective bargaining. Accordingly, I shall recommend that the cease-and-desist order be a broad one requiring Respondent to cease-and-desist from infringing in any other manner on the rights guaranteed employees by Section 7 of the Act.[84]

On these findings of fact and conclusions of law, and on the entire record,[85] I recommend the following[86]

ORDER

The Respondent, Greensboro News & Record, Inc., Greensboro, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Greensboro Printing and Graphic Communications Union, Local No. 319, Graphic Communications International Union, AFL–CIO, CLC, or any other labor organization, by delivering verbal or written warnings to employees, so as to restrict their movement throughout the plant, because of their union activities or testimony before or the filing of charges with the National Labor Relations Board, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

(b) Unilaterally changing the terms and conditions of employment of the employees in the bargaining unit[87] by assuming control of the overtime board and/or the assignment of overtime, refusing to hire substitute employees, except under terms of denying prior overtime rights to regular employees when only area substitutes are available; giving press assistants equal opportunity for overtime work on day shifts, in lieu of giving priority for such work to pressroom employees; removing the one journeyman from the reel room previously required to be there for the training of press assistants; altering its cleanup policy so as to impose additional duties on pressroom employees; changing its vacation policy to the detriment of employees or in any manner; or altering its break policy so as to restrict pressroom employees to the pressroom breakroom unless they first change to street clothes or in any manner.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act.

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[81] *Teamsters Local 164*, 267 NLRB 8, 18 (1983), enfd. 753 F.2d 53 (6th Cir. 1985).

[82] G.C. Exh. 2.

[83] Jt. Exh. 4.

[84] *Carpenters Local 720 (National Maintenance)*, 283 NLRB 617, 623 (1987).

[85] The General Counsel's unopposed motion to correct transcript, Appendix A [omitted from publication] is granted.

[86] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[87] The bargaining unit is:

All pressroom employees employed by the Respondent at its Greensboro, North Carolina facility, including journeymen and apprentice pressmen and press assistants; excluding office clerical employees, guards, and supervisors as defined in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Inform James L. Roberts in writing that its letters to him dated 31 October 1986, 12 December 1986, and 8 January 1987 are null and void, that he is to disregard any statement to him by Production Director Merrell B. Stafford or any other company officer regarding locations where he may take breaks, and that he is free to engage in union activities and other activities before the National Labor Relations Board.

(b) Remove from its records all references to Respondent's actions set forth in subparagraph (a) above, and inform James L. Roberts in writing that it has done so and that it will not base any future personnel action against him on such references or records.

(c) Return to the above-named Union the overtime board and the assignment of overtime.

(d) On request by the Union and when vacancies are available, hire substitutes for straight-time work, provided the regular employees be first offered overtime when work only substitutes living in the vicinity of Respondent's plant (area substitutes) are submitted by the Union; but further provided that regular employees are not to be first offered such overtime work when only the names of employees living outside the vicinity (traveling substitutes) are submitted.

(e) Offer press assistants overtime work on day shifts only after pressroom employees (journeymen and apprentices) have first been offered such work.

(f) Keep one journeyman in the reel room at all times when a press assistant is employed there.

(g) Rescind its notice on cleanup entitled "Standard Operating Procedure" posted in the spring of 1986 and publish a notice to employees that cleanup policy will remain as it was prior to such notice.

(h) Change its vacation board and vacation policy so that it is the same as that in effect prior to Respondent's change in such policy in January 1987, and grant to employees such vacation rights as may have been denied to them by reason of Respondent's unilateral change in its vacation policies.

(i) Rescind its notice to pressroom employees dated 9 January 1987 changing the break policy for such employees, and publish a new notice that the break policy shall be the same as it was prior to such prior notice, and that pressroom employees need not change to street clothes before taking breaks in areas other than the pressroom breakroom.

(j) Preserve and, on request, make available to the Board or its agents, for examination and copying, all records of vacations and other records necessary to effect compliance with this Order.

(k) Post at its plant at Greensboro, North Carolina, copies of the attached notice marked "Appendix B."[88] Copies of said notice, on forms provided by the Regional Director for Region 11, shall be posted immediately upon receipt and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(l) Notify the Regional Director for Region 11 in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

'IT IS FURTHER RECOMMENDED that, except with respect to the unfair labor practices found herein to have been engaged in by Respondent, the complaint is dismissed.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in Greensboro Printing and Graphic Communications Union, Local No. 319, Graphic Communications International Union, AFL-CIO, CLC, or any other labor organization, by delivering verbal or written warnings to employees so as to restrict their movement throughout the plant because of their union activities, or testimony before, or the filing of charges with, the National Labor Relations Board, or by discriminating against them in any other manner.

WE WILL NOT unilaterally change the terms and conditions of employment of our pressroom employees by (a) assuming control of the overtime board and the assignment of overtime; (b) refusing to hire substitute employees except under the terms denying prior overtime rights to regular employees when only area substitutes are available; (c) giving press assistants equal opportunity for overtime work on day shifts in lieu of giving priority for such work to pressroom employees; (d) removing the one journeyman from the reel room required to be there for the training of press assistants; (e) altering our cleanup policy so as to impose additional duties on pressroom employees; (f) changing our vacation policy to the detriment of employees; or (g) altering our break policy so as to restrict pressroom employees to the pressroom breakroom unless they first change to street clothes.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the Act.

WE WILL inform James L. Roberts in writing that our three letters to him concerning where he may take breaks are null and void, that he is to disregard any statements made to him by company officers on that subject, and that he is free to engage in union activities and other activities before the National Labor Relations Board.

[88] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL remove from our records all references to these letters and statements to Roberts, and inform him in writing that we have done so and will not base any future personnel action against him on such references or records.

WE WILL return to the Union control of the overtime board and the assignment of overtime.

WE WILL, on request by the Union and when vacancies are available, hire substitutes for straight-time work provided that regular employees be first offered overtime work when only substitutes living in the vicinity of our plant (area substitutes) are submitted by the Union; but further provided that regular employees are not to be first offered such work when only the names of employees living outside this vicinity (traveling substitutes) are submitted.

WE WILL offer press assistants overtime work on day shifts only after pressroom employees have first been offered such work.

WE WILL keep one journeyman in the reel room at all times when a press assistant is employed there.

WE WILL rescind our prior notice on cleanup entitled "Standard Operating Procedure," posted in the spring of 1986, and publish a new notice to employees that cleanup policy will remain as it was before such prior notice.

WE WILL change our vacation board and policy so that it is the same as that in effect prior to our change in such policy, and grant to employees such vacation rights as may have been denied to them by reason of our unilateral change in this policy.

WE WILL rescind our notice to pressroom employees dated 9 January 1987 requiring them to change to street clothes before they take breaks in areas other than the pressroom breakroom.

GREENSBORO NEWS & RECORD, INC.

International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433 *and* **David Frye Companies, Inc. and Carpenters Local 42L, United Brotherhood of Carpenters and Joiners of America, AFL–CIO.** Case 21–CD–559

July 29, 1988

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

The charge in this Section 10(k) proceeding was filed April 1, 1988, by David Frye Companies, Inc. (David Frye Companies or the Employer), alleging that the Respondent, International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433 (Iron Workers Local 433) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Carpenters Local 42L, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Carpenters Local 42L). The hearing was held April 21, 1988, before Hearing Officer Martha Z. Villanueva.[1] The Employer and Carpenters Local 42L waived their right to file briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, David Frye Companies, Inc., a California corporation, engages in commercial plastering and drywall installation in the building and construction industry, with its offices located in Bakersfield, California. During the past 12-month period, David Frye Companies, Inc. purchased and received goods valued in excess of $100,000 directly from suppliers located outside the State of California. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Iron Workers Local 433 and Carpenters Local 42L are labor organizations within the meaning of Section 2(5) of the Act.

[1] Although served with notice of the 10(k) hearing, Iron Workers Local 433 was not present at the hearing.

II. THE DISPUTE

A. *Background and Facts of Dispute*

David Frye, the president of the Employer, testified that the Employer is signatory to a contract with General Contractor H. Phelps at a jobsite located in Riverside, California, which began in January 1988. Pursuant to the contract, the Employer was to furnish and install exterior prefabricated Dryvit panels, fireproofing, interior light gauge metal framing, and drywall. By a letter dated February 24, 1988, the Employer assigned the installation of Dryvit panels, which includes the rigging, lining, leveling, welding, placing, and any other incidental work, to employees represented by Carpenters Local 42L.

Sometime in January or February 1988, Frye received a phone call from Dan Prentiss, the labor representative for Iron Workers Local 433, who told Frye that employees represented by Iron Workers Local 433 should be hired to set the panels and attach the angle clips; otherwise, there was "the possibility" the job would be picketed. Frye replied that he had no intention of hiring Iron Workers-represented employees as the Employer was already signatory to the Carpenters agreement, and the Employer had used Carpenters-represented employees in the past and was satisfied with their work.

A few days after this conversation, Frye met with H. Phelps' job superintendent who told Frye that Prentiss had informed him that if H. Phelps did not hire Iron Workers Local 433-represented employees at the Riverside jobsite, Iron Workers Local 433 would picket the job. According to Frye, H. Phelps was preparing for the expensive operation of pouring concrete at this time, and Phelps was concerned about a picket line shutting down the jobsite. For this reason, Frye agreed to allow Phelps to hire one employee represented by Iron Workers Local 433 to do welding alongside the employees represented by Carpenters Local 42L. The employee represented by Iron Workers Local 433 was hired in late February or early March 1988.

About March 28, 1988, Phelps laid off the employee represented by Iron Workers Local 433 for 2 days because there was not enough welding work available, and no welding work was being performed on one day due to windy weather. On March 30, 1988, this employee was recalled to work. On the same day, Prentiss appeared at the jobsite and complained that the employee represented by Iron Workers Local 433 was not performing 100 percent of all the welding on the clips and also that the employee had lost 2 days of work

due to the layoff. Frye replied that he had only agreed to allow one Iron Workers-represented employee to work with the crew, but if more than one welder was needed, the Carpenters-represented employees that were certified heavy gauge welders would also perform the welding work in order to keep up with the schedule set forth by the general contractor.

On March 31, 1988, Iron Workers Local 433 set up a picket line at the Riverside jobsite and, as a result, no work was performed at the jobsite. Iron Workers Local 433 stopped the picketing when Frye, Phelps, and Carpenters Local 42L agreed to have a meeting that day. According to Frye, Prentiss stated at the meeting that if Iron Workers Local 433 came to the Riverside jobsite and observed that the Iron Workers-represented employees were not doing 100 percent of the welding, picketing would resume. The parties failed to reach an agreement at this meeting.

B. *Work in Dispute*

The disputed work involves the attachment, through welding, of steel angles to the steel subframes of buildings for use in the alignment and attachment of Dryvit panels on the exterior of buildings at a jobsite located at 9997 County Farm Road[2] in Riverside, California.

C. *Contentions of the Parties*

The Employer contends that the work in dispute should be awarded to employees represented by Carpenters Local 42L based on the fact that it has a collective-bargaining agreement with the Carpenters, employer preference, past practice, area and industry practice, relative skill, and economy and efficiency of operation.

Carpenters Local 42L contends that the work in dispute should be awarded to the Carpenters-represented employees based on the fact that it has a collective-bargaining agreement with the Employer, past practice, area and industry practice, relative skill, and economy and efficiency of operation.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

As indicated above, sometime in January or February 1988, the labor representative for Iron Workers Local 433 told the Employer that there was "the possibility" that the Riverside job would be picketed if the Employer did not use Iron Workers-represented employees to perform the disputed work. On March 31, 1988, Iron Workers Local 433 set up a picket line at the Riverside jobsite. Furthermore, the Employer and Carpenters Local 42L stipulated at the hearing that they had been unable to agree on a method for the voluntary adjustment of the work in dispute.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

There was no evidence presented that either Union has been certified by the Board as the collective-bargaining representative of any of the employees involved. Accordingly, this factor is not helpful in determining the dispute.

Iron Workers Local 433 and David Frye Companies have no collective-bargaining agreement. David Frye Companies is signatory to a master labor agreement between United General Contractors, Inc. and United Brotherhood of Carpenters and Joiners of America. By virtue of the Employer's being signatory to this agreement, the Employer is also signatory to the Drywall/Lathing Master Agreement between California State Council of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO and California Drywall Contractors Association when it performs lathing or drywall work. Both agreements cover the disputed work. Accordingly, we find that this factor favors

[2] The jobsite is referred to as 9997 County Farm Road in the hearing transcript and as 9998 County Farm Road in the February 24, 1988 letter from the Employer assigning the disputed work to employees represented by Carpenters Local 42L.

an assignment of the work to employees represented by Carpenters Local 42L.

2. Company preference and past practice

David Frye, president of the Employer, testified that David Frye Companies prefers to assign the disputed work to employees represented by Carpenters Local 42L. David Frye Companies has hired employees represented by the Carpenters Union in the past to perform similar work at Shell Plaza, California Corporate Towers, and the San Joaquin Medical Office Building. The Employer has never previously used employees represented by Iron Workers Local 433 to perform such work. These factors favor an assignment of the work in dispute to employees represented by Carpenters Local 42L.

3. Area and industry practice

David Frye testified that other companies in the Southern California area, such as E. F. Brady Company, Pierce Enterprises, The Rutherford Company, George Raymond Company, and Design Cast West, have utilized employees represented by the Carpenters Union to perform work similar to the disputed work. Frye also testified that the practice in the industry is to use Carpenters-represented employees to perform such work. Accordingly, these factors favor an assignment of the work in dispute to employees represented by Carpenters Local 42L.

4. Relative skills

David Frye testified that the skill required of the employees to perform the disputed work entails welding, heavy gauge welding, experience in fine alignment within an eighth of an inch of segments of 10 feet, a basic concept of how the clip is attached and positioned, and reading blueprints and positioning angles in accordance with blueprints. According to Frye, the employees represented by Carpenters Local 42L possess such skills and have been trained to work within smaller tolerances than Iron Workers-represented employees. There is no record evidence indicating that employees represented by Iron Workers Local 433 possess skills comparable to those of Carpenters-represented employees. Accordingly, we find this factor favors an assignment of the disputed work to employees represented by Carpenters Local 42L.

5. Economy and efficiency of operation

Both David Frye and Uri David Laub, a business representative of Carpenters Local 42L, testified that Carpenters-represented employees are more versatile than Iron Workers-represented employees as the former are able to perform different tasks on the jobsite, whereas the latter are limited to welding. Based on the above, we find that the factor of economy and efficiency of operation favors an award to employees represented by Carpenters Local 42L.[3]

Conclusions

After considering all the relevant factors, we conclude that employees represented by Carpenters Local 42L are entitled to perform the work in dispute. We reach this conclusion relying on collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operation. In making this determination, we are awarding the work to employees represented by Carpenters Local 42L, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.[4]

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of David Frye Companies, Inc., represented by Carpenters Local 42L, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, are entitled to perform the work of the attachment, through welding, of steel angles to the steel subframes of buildings for use in the alignment and attachment of Dryvit panels on the exterior of buildings at the jobsite located at 9997 County Farm Road, Riverside, California.

2. International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433 is not entitled, by means proscribed by Section 8(b)(4)(D) of the Act, to force David Frye Companies, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days of this date, Iron Workers Local 433 shall notify the Regional Director for Region 21 in writing whether it will refrain from forcing David Frye Companies, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

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[3] Although the Employer and Carpenters Local 42L argued that using Carpenters-represented employees was less costly, we do not consider wage differentials in reaching our decision. See *Painters Local 91 (Frank M. Burson)*, 265 NLRB 1685, 1687 (1982); *Cincinnati Mailers (S. Rosenthal & Co.)*, 265 NLRB 1052, 1055 fn. 10 (1982).

[4] At the hearing, the counsel for Carpenters Local 42L asked that the Board issue a broad award. We find that a broad award is not justified by the proffered evidence. See *Bricklayers Local 1 (Lembke Construction)*, 194 NLRB 649, 654 (1971).

Achilles Construction Co., Inc. *and* Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO. Cases 29-CA-6897 and 29-CA-6934

July 29, 1988

SUPPLEMENTAL DECISION AND ORDER

MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On June 30, 1987, Administrative Law Judge James F. Morton issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Supplemental Decision and Order.

Year/Qtr.	*Amount*
1981-2	$3838
1981-3	2929
1981-4	4459
1982-1	4459
1982-2	4459
1982-3	2219

The Respondent's employees, represented by Local 455, the Union, went on strike July 1, 1975. The Respondent subsequently violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union when it requested bargaining in July 1978.[2] In August 1978, the Union made an unconditional offer to return to work. In 1980, the Board found that the Respondent violated Section 8(a)(3) by failing to reinstate fully its striking employees.[3] Thereafter, the Regional Director issued the instant backpay specification.

The judge found that the Respondent must reimburse discriminatees Smith, Kurm, and Kuzma for their net earnings lost. We agree. The judge also found, inter alia, that no discriminatee for whom the General Counsel sought backpay pursuant to the make-whole order was entitled to reimbursement for fringe benefits lost as a result of participation in the strike. Additionally, he did not find that John Kuzma and Michael Griffin were entitled to reimbursement of medical expenses. For the reasons set forth below, we disagree with the judge.

1. It is well settled that the "finding of an unfair labor practice . . . is presumptive proof that some backpay is owed by the [Respondent]."[4] The burden is on the General Counsel to prove the gross amount of backpay due.[5] The burden then shifts to the Respondent to establish facts which negate or mitigate its liability.[6]

In analyzing the General Counsel's backpay claims for the discriminatees, the judge acknowledged that the collective-bargaining agreement effective just prior to the 1975 strike provided unit employees various fringe benefits. He also found that the Respondent did not provide these contractual benefits to employees after the strike began. The judge mistakenly stated that the Regional Director's amended backpay specification sought to make the discriminatees whole by requiring the Respondent to provide them the fringe benefits that the Union had established in an industrywide agreement, notwithstanding the Respondent's timely withdrawal from multiemployer bargaining in 1976. The judge then reasoned that requiring the Respondent to provide such benefits would compel the Respondent to grant concessions to the Union, which had not been achieved in negotiations, thereby violating Section 8(d) of the Act.

The amended backpay specification does not seek to impose on the Respondent any terms in the Union's collective-bargaining agreements with other employers; rather, the specification uses a formula based on continuing the terms of the parties' expired agreement. Although the Second Circuit held that the Respondent validly withdrew from the multiemployer group following the 1976 impasse in bargaining between the group and the

[1] In sec. E, part 3, of his supplemental decision, the judge inadvertently stated that John Kuzma's hourly wage rate would have increased to $10.70 by September 8, 1981, rather than September 8, 1978.

Also in sec. E, part 3, the judge set forth by calendar quarter the amounts of net earnings Kuzma lost as claimed in the amended backpay specification and for which he is entitled to reimbursement. The judge inadvertently excluded the following lost earnings for which Kuzma is entitled to reimbursement as claimed in the amended backpay specification:

In agreeing with the judge that Joseph Chopko is not entitled to backpay, we rely only on Chopko's testimony that he did not seek interim employment. Michael Griffin's backpay period therefore commences on July 1, 1979.

[2] *Kuno Steel Products Corp.*, 252 NLRB 904, 905 (1980), enfd. sub nom. *NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982). Achilles Construction Co., Inc. was one of the respondents in *Kuno*.

[3] Id. at 905-906.

[4] *NLRB v. Mastro Plastics Corp.*, 345 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).

[5] *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963).

Union,[7] the Union, as the incumbent, was still entitled to a presumption of majority status among the Respondent's unit employees.[8] The Respondent was, therefore, obligated to bargain on request with the Union as an individual employer because the Respondent did not show a good faith doubt as to the Union's majority status.[9] As the Union retained majority status, the Respondent was obligated to bargain with the Union on its July 1978 request for bargaining.[10] The Respondent was likewise required to continue giving effect to its expired collective-bargaining agreement with the Union until bargaining to impasse.[11] Thus, the amended backpay specification, based on the expired agreement's terms, correctly calculated the gross amounts of backpay due. The Respondent, on the other hand, has not established any facts to negate or mitigate its liability.

Specifically, the judge denied all claims set forth in the amended backpay specification for vacation, holiday, and sick leave pay, as well as contributions to the Union's welfare, pension, and annuity funds. We will, therefore, order the Respondent to make the discriminatees whole by making the contributions to the Local 455 welfare fund,[12] pension fund, and annuity fund on their behalf in the respective amounts set forth in the amended backpay specification, and by paying Louis Douda the amounts set forth in the amended backpay specification for vacations, holidays, and sick leave.

2. The General Counsel has excepted to the judge's failure to include in the make-whole remedy reimbursement of John Kuzma and Michael Griffin for the purchase of substitute health insurance and out-of-pocket medical expenses incurred during the backpay period. The documented expenses total $1222 and $904.38 for Kuzma and Griffin, respectively. The judge, who, as stated above, dismissed all fringe benefit claims for all discriminatees, did not specifically address medical expenses.

It is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost.[13] Because the Respondent has established no facts that would negate or mitigate its liability, we will order the Respondent to reimburse Kuzma $1222 and Griffin $904.38 for their documented medical expenses during the backpay period.

ORDER

The National Labor Relations Board orders the Respondent, Achilles Construction Co., Inc., Brooklyn, New York, its officers, agents, successors, and assigns, to make whole the employees named below by paying them the amounts of backpay set forth opposite their names, plus interest in the manner prescribed in *New Horizons for the Retarded*,[14] less tax withholdings required by Federal and state laws, and by paying to the welfare fund, pension fund, and annuity fund of Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO, the respective amounts on their behalf set forth opposite their names, plus interest in the manner prescribed in *Merryweather Optical Co.*[15]

[7] *NLRB v. Independent Assn. of Steel Fabricators*, 582 F.2d 135 (2d Cir. 1978), cert. denied 439 U.S. 1130 (1979).

[8] Id. at 150.

[9] *Kuno Steel Products Corp.*, 252 NLRB 904, 905 (1980), enfd. sub nom. *NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982).

[10] Ibid.

[11] See *NLRB v. Katz*, 369 U.S. 736 (1962); *Taft Broadcasting Co.*, 163 NLRB 475 (1967).

[12] The Respondent asserts that a discriminatee is made whole when he is reimbursed for the cost of premiums incurred in obtaining substitute health insurance coverage and for his out-of-pocket medical expenses to the extent that those expenses would have been reimbursed through the Local 455 welfare fund. In order to be made whole, however, a discriminatee must be restored to the position he would have occupied had the discrimination not occurred. This includes not only reimbursement of the discriminatee's premiums and medical expenses, but also requires the Respondent to contribute to the welfare fund according to the expired contract's terms so that the discriminatee's future interests in the Fund will be ensured. "[T]he diversion of contributions from the union funds undercut[s] the ability of those funds to provide for future needs." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

Hassett Maintenance Corp., 260 NLRB 1211 (1982), a cryptic decision on which the Respondent relies, focused on what it characterized as the double insurance costs that would result from requiring the employer (which had provided other coverage) in that case to make contributions to the welfare fund. *Hassett* did not address restoring the full range of an employee's interests in the welfare fund. The *Hassett* decision did not reconcile its limited remedial order with pre-*Hassett* precedent requiring employer contributions to union welfare funds on employees' behalf, see, e.g., *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), affd. mem. 661 F.2d 940 (9th Cir. 1981), as does precedent decided after *Hassett*. See *Stone Boat Yard*, 264 NLRB 981 (1983), which the Ninth Circuit enforced. The court rejected the double-coverage/punitive claim: the "employer cannot complain of the extra cost of improperly created, substitute fringe benefits . . . . The company is merely required to repay what it has unlawfully withheld." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

[13] See, e.g., *RMC Constructors*, 266 NLRB 1064 (1983).

[14] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[15] 240 NLRB 1213 (1979).

Name	*Backpay*	*Medical Expenses*	*Welfare Fund*	*Pension Fund*	*Annuity Fund*
G. Smith	$8,595.50		$752.64	$940.80	$188.16
J. Kurm	4,301.00		524.64	655.80	131.16
J. Kuzma	35,647.00	$1,222.00	5,703.36	7,129.20	1,425.84
M. Griffin		904.38	4,916.16	6,145.20	1,229.04
L. Douda	6,790.50		11,249.20	14,061.50	2,812.30

Beatrice Kornbluh, Esq., for the General Counsel.
Stanley Israel, Esq. (Kliegman, Goldstein, Israel & Cooper), of New York City, New York, for the Respondent.
Vicki Erenstein, Esq. (Sipser, Weinstock, Harper, Dorn & Leibowitz), of New York City, New York, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. This is a proceeding to determine how much, if any, backpay is owed by Achilles Construction Co. Inc. (Respondent) to six employees. Respondent had been ordered to make them whole for earnings they lost as a result of its having discriminated against them in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent unlawfully failed to reinstate five of these six employees when they sought to return to work after they had gone out on strike. The sixth employee had been reinstated; the issue, as to him, is whether he was fully reinstated.

The hearing in this case was held in New York City in connection with five related cases. It opened on 12 September 1984 and closed on 7 October 1986.

On the entire record including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following

FINDINGS OF FACT

A. *Background*

As reported in the decision by the Board that underlies this compliance hearing, i.e., *Kuno Steel Products Corp.*, 252 NLRB 904 (1980), and as related in the decision issued in an earlier case, *Independent Assn. of Steel Fabricators*, 231 NLRB 264 (1977), Respondent had, before mid-1975, been part of an employer association that bargained with Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO (Local 455) as the representative of a production and maintenance employees unit employed by the employer-members of that association. A collective-bargaining agreement between that association and Local 455 expired on 30 June 1975. Local 455 struck the next day. Respondent, in early 1976, effected a timely withdrawal from the associationwide bargaining. At that time Local 455 was contending that Respondent was still part of the multiemployer bargaining group. Respondent, since the strike started, put into effect a number of changes in employee benefits. Indeed, as noted recently, Respondent operated for the next 7 years as if it were a nonunionized company. See JD–(NY)–9–85. Respondent had discontinued contributions to the various benefit plans provided for in the Local 455 contract; it reduced the number of paid holidays, set up its own medical insurance plan, and made other changes. It was not until late 1978 or early 1979 that Local 455 requested Respondent to bargain with it as the representative of the unit limited to Respondent's production and maintenance employees. The Board in *Kuno*, supra, ordered Respondent to bargain with Local 455 for those employees.

In the amended answer filed by Respondent, it avers that Respondent and Local 455 have not reached agreement on a contract.

The Board, after finding in *Kuno*, supra, that Respondent has unlawfully refused, since 9 August 1978, to reinstate five strikers, further noted

> Our order of course, does not require [Respondent] to create new jobs for the discriminatees or pay them backpay for periods when employment was not available at [Respondent's] plant. [Respondent] will be permitted to introduce evidence in the compliance stage of this proceeding concerning the existence of jobs for unreinstated strikers at all times material therein.

The Board, in *Kuno*, also held that several of the employers there, including Respondent, had violated Section 8(a)(1) and (3) of the Act by not having fully reinstated employees who had been on strike but who had returned to work on their own, prior to Local 455's application therefor of 9 August 1978. Louis Dauda is the only one of Respondent's employees affected by that holding. The following excerpt, from footnote 5 of the *Kuno* decision, is relevant to the backpay claim that the General Counsel has asserted on behalf of Dauda:

> The General Counsel presented evidence establishing a prima facie case which [Respondent has] not adequately rebutted, that [one] striker individually returned to work prior to August 9, and [was] not fully reinstated to conditions current at the time the strike began. . . . We agree. . . . that determination whether the total wages and benefits package [he has] received since returning to work in substantially equivalent to the wages and benefits [he] received prior to the strikers—and thus satisfies the full reinstatement requirement—should be consid-

ered in the compliance stage of this proceeding. Under the circumstances of this case, we hold that [Respondent's] backpay liability to [Dauda] should run only from 6 months prior to the filing of the charges herein [N.B.—As the charge was filed 2 January 1979, the backpay period began 1 July 1978].

B. *The Wage Claims*

The amended specification also seeks backpay for five strikers whom Respondent refused to reinstate on 9 August 1978. Respondent's amended answer places in issue whether there was work available for all of them, whether two had retired, whether another was too ill to work, whether the rates of pay sought by the General Counsel for them are appropriate and whether these five were entitled to fringe benefits claimed. These contentions shall be considered insofar as they relate to the respective claims. The striker with the most seniority would have been the first one recalled. His claim is now discussed.

1. Grover Smith

Smith had worked for Respondent for 31 years as a mechanic when he went on strike on 1 July 1975. His backpay period, according to the Board's decision in *Kuno* began on 9 August 1978 and ended on 31 December 1978 when he would have retired, according to the amended backpay specification.

Respondent asserts that the language of footnote 5 in *Kuno* spells out the appropriate gross backpay formula to be used. That language clearly applies to strikers, such as Louis Dauda, who returned to work before 9 August 1978 and not to the unreinstated strikers, including Smith.

Respondent contends that Smith had retired from active employment prior to the start of his backpay period and urges that he is thus entitled to no backpay. In support thereof, it placed in evidence a questionaire he signed that was filled out by his wife. Therein is a notation that he had "retired December 31, 1978" and a "No" box is checked alongside a question asking if he was unemployed and looking for work during the backpay period. A "Yes" box was checked alongside another question asking if there was any period after 1 July 1978 when he was unavailable for work.

Smith testified that he had looked for work in the industry but was unsuccessful. He did obtain other work. During the third quarter of 1978 (i.e., in the backpay period) he had interim earnings that offset in part the gross backpay claimed for that quarter. In the *Kuno* decision supra, the administrative law judge noted that, based on the record made before him in September 1979, two of the unreinstated strikers whom he named had retired on pension. Smith was not one of them.

I find that Smith was available for work in 1978, i.e., during his backpay period. The questionnaire he signed is conclusional and insufficient to offset the simple fact that he was working in the latter part of 1978 and had interim earnings then. If Respondent had any genuine doubts about his work availability then, it could have resolved them simply by having offered him reinstatement, instead of by violating the Act as it did.

Smith had been earning $6.70 an hour when he and the other discriminatees were out on strike on 1 July 1975. As noted above, one of the discriminatees, Louis Dauda, returned to work before the strike ended. Dauda received wage increases totaling $1.50 in the interval between his return and the start of the backpay period. The General Counsel postulates that Smith would have received similar increases and alleges that as of 9 August 1978 Smith's wage rate would have been $8.20 had he been recalled. Respondent's payroll records, based on the testimony before me, demonstrate that it had a turnover of employees such that Dauda, during the backpay period, was the only one that could reasonably be said to be an employee similarly situated to the unreinstated strikers. I find that, absent the discrimination, Smith would have been receiving $8.20 an hour as of the start of the backpay period. I further find that as Dauda received a further hourly wage increase of $1 on 8 September 1978, Smith's hourly rate would have been increased then to $9.20.

Respondent's answer places in issue whether there was any work for Smith in the backpay period. The testimony offered by the General Counsel in explication of the amended specification establishes that Respondent had, on its payroll in the backpay period, a number of irregular employees in addition to Louis Dauda and that the hours of these employees were sufficient to have permitted Smith to work a 40-hour week, as set out in the General Counsel's formula.

I find that he would have worked the hours set out in the specification at the rates noted above, and conclude that his backpay for the last two quarters of 1978, after deducting interim earnings, is as follows:

1978, 3d quarter—$3811
1978, 4th quarter—$4784

2. John Kurn

Kurn is the next most senior unreinstated striker, in terms of service with Respondent. He was earning $8.90 an hour in 1975 and based on wage increases given to Louis Dauda, as discussed above, I find that Kurn's hourly wage rates as of 1 January 1979 would have been $11.40, and that he would have received a 50-cent-an-hour increase on 6 August 1981 when Dauda received the same increase.

The General Counsel alleges that, on the retirement of Grover Smith on 31 December 1978, as related above, Kurn would have replaced him as the next senior employee. His backpay period ended on 15 August 1982 on Respondent's offer of reinstatement.

Respondent, in its answer, asserts that work would have been available for Kurn during the backpay period on a limited basis, e.g., for 105 hours in the third quarter of 1979. It based this contention on a further assertion that Kurn would have replaced a specifically named employee for the quarter. In support of both these assertions, it offered the testimony of the individual who maintained Respondent's books. Her testimony did not

controvert the testimony of the General Counsel's witness, discussed above with respect to Smith's claim. The evidence offered by the General Counsel, and the formula the General Counsel proposes give weight to the experience and seniority of the unreinstated strikers and make for a more rational basis to evaluate their backpay claims. Any confusion or uncertainty that exists is not to redound to Respondent's benefit. I find, based on the evidence before me, that Kurn would have, during the backpay period, worked the hours on which the net backpay claim for him has been predicated in the amended specification. I find applicable thereto are the hourly wage rates noted earlier. Accordingly, and as set out in the amended specification, Kurn lost net earnings of $4301 plus interest.

3. John Kuzma

Kuzma is the next most senior of the unreinstated strikers. Based on the wage formula discussed above, I find that his $8.20 an hour wage rate as of 1975 would have been increased by $1.50 to $9.70 by the start of the backpay period, to $10.70 by 8 September 1981, and to $11.20 by 6 August 1981. His backpay period ended on 15 August 1982 when Respondent offered to reinstate him.

Respondent would limit the hours of available work for him to those worked by a specific replacement employed in each of several quarters of the backpay period. I rejected this approach in the section above relating to Kurn's claim for backpay. I accept, instead, the testimony offered by the General Counsel that because of high employee turnover, it is appropriate to consider the total available hours of work and allocate these according to seniority and on the premise that the unreinstated strikers would have been assigned to work on a steady basis, as Louis Dauda had been. Thus, Kuzma should be compensated based on the available hours as allowed for him in the amended specification, multiplied by the appropriate wage rate, for each quarter.

Respondent would disallow Kuzma's claim in material part because he had been injured during the course of his interim employment and, as a result, unavailable then for work. The Board had rejected this argument. See *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189, 1200 (1982), and the discussion there of the governing principles. I therefore reject this contention of Respondent.

Based on the foregoing, I find that Kuzma is entitled to the net backpay claimed for him in the amended specification.

Year/Qtr.	*Amount*
1979–3	$1028
1979–4	1028
1980–1	1740
1980–2	1740
1980–3	1740
1980–4	1740
1981–1	4268

4. Joseph Chopko

Chopko earned $8.20 an hour when the strike began. The General Counsel contends that he would have been recalled along with John Kuzma on 1 July 1979, inasmuch as Respondent's payroll records disclose that its work force increased to the equivalent of two positions. Respondent asserts that Chopko had retired and was unavailable for employment.

Based on the original hearing in *Kuno*, in February 1979 the administrative law judge observed that Chopko had retired on pension. He was born in 1905 and was 74 when the backpay period began. He had no interim earnings during this backpay period. Indeed, he acknowledged at the hearing that he had not looked for work of any kind.

Based on the foregoing, I find that Chopko had retired from active employment as of about January 1979 before any backpay could be claimed for him and therefore, no backpay is due him.

5. Michael Griffin

The General Counsel, in an asterisked footnote to her motion to amend, dated 28 January 1985, states that no backpay, based on lost wages sought for Griffin as his interim earning equaled or exceeded the gross backpay due him under the General Counsel's formula.

6. Louis Dauda

The sixth discriminatee named in the specification, Louis Dauda, had abandoned Local 455's strike long before Local 455 applied for reinstatement of the five employees whose claims were just discussed. The amended backpay specification makes no wage claim for Dauda as the General Counsel concedes that he, at all times, had been fully compensated insofar as his wage rates and hours worked are concerned. A claim for fringe benefits, however, has been asserted for him, as well as for the other five discriminatees. That matter is next discussed.

C. *The Claims Based on Fringe Benefits*

In the amended backpay specification, the General Counsel seeks, on behalf of the six discriminatees, payment by Respondent of contributions to a pension fund a welfare fund and an annuity fund for the period 1 July 1978 to 1 July 1983. Respondent had, under the collective-bargaining agreement it had with Local 455, prior to 1 July 1975, contributed to those funds. The General Counsel contends further that other contractual fringe benefits (vacation, holidays, sick leave, overtime pay, and so on) also must be compensated for. The rationale offered in support of this contention appears to be that Respondent would thereby remedy the discrimination found by the Board in *Kuno Steel*, supra. There, the Board noted that as various reinstated discriminatees employed by several companies (including Louis Dauda, employed by Respondent) were not reinstated to the benefits enjoyed prior to the start of the strike, a prima facie showing of discrimination had been made out and as it was not thereafter rebutted by any evidence proferred by any

of those companies, Respondent, inter alia, violated Section 8(a)(1) and (3) of the Act.

Respondent contends that the Board, in *Kuno*, specifically directed the use of the backpay formula contained in Respondent's answer, i.e., that a comparison he made of the total package of wages and benefits paid by Respondent on an after 1 July 1978, with the package as it existed three years before—with no allowance for any wage or other increments in the years between 1975 and 1978. Respondent asserts that such a comparison shows that no backpay is due.

I find no merit in the General Counsel's claim for the following reasons. In view of the bargaining history recounted earlier, it is readily apparent that, were Respondent ordered to furnish the discriminatees in effect, with contractual benefits on and after 1 July 1978, it would for all practical purposes be thereby compelled to grant these individuals the benefits of an industrywide agreement, notwithstanding that, as found by the U.S. court of appeals, it had timely withdrawn from multiemployer bargaining in 1976. It is not appropriate to use a backpay specification as a vehicle to compel concessions that Local 455 has been unable to secure from Respondent in the course of collective bargaining. Section 8(d) of the Act forbids the compelling of concessions. It would be equally erroneous to provide Dauda and the other discriminatees with a Local 455 fringe benefit package, pursuant to a backpay award, while ignoring Respondent's other employees. Such disparate treatment would itself be invidious and certainly should not be required under an award that is aimed at remedying discriminatory conduct.

I therefore find that the fringe benefits claimed for the discrimatees in the amended backpay specification should be denied.

[Recommended Order omitted from publication.]

Shelter Island, Inc. *and* San Diego Bartenders and Culinary Workers Insurance Trust Fund. Case 21-CA-25263

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On December 16, 1987, Administrative Law Judge George Christensen issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act when it refused to remit to the Trust Fund in January 1987 a report with payments for shifts worked by employees from December 1 to December 22, 1986. We find no merit to the Respondent's contention that it was not obligated to make the payments because the parties reached a valid impasse in negotiations on December 23, 1986, before the payments became due in January 1987. Rather, on the record before us we find that the employees' entitlement to have payments made on their behalf by the Respondent to the Trust Fund accrued with the completion of each shift worked by an employee. Thus, the Respondent's liability for the payments in question here attached prior to the December 23, 1986 impasse date, and not in January 1987, as claimed by the Respondent. That the Respondent was permitted to defer remittance of the payments to the month following the one in which the shifts were worked does not alter the fact that the obligation to make payment arose on completion of the shifts, events which took place prior to impasse.[2] For this reason, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by refusing to comply with the Trust Fund's January 29, 1987 request for payment.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Shelter Island, Inc., San Diego, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Refusing to pay to the Trust Fund the amounts owed for each such shift."

2. Substitute the attached notice for that of the administrative law judge.

[1] The General Counsel has excepted only to the portion of the judge's recommended Order which requires the Respondent, Shelter Island, Inc., to make the Charging Party whole by paying the Fund $2 for each shift worked by its employees from December 1 to December 22, 1986. The General Counsel contends that the trustees of the Fund had authority to and, in fact, did raise periodically the rate which the Respondent under the contract was required to contribute per shift and that, consequently, the recommended Order should be modified to provide for a general make-whole remedy, with the correct amount to be paid by the Respondent left to the compliance stage of this proceeding for determination. We find merit in the General Counsel's exception and shall, accordingly, modify the judge's recommended Order to provide for a general make-whole remedy. We leave to the compliance stage of these proceedings the determination of the correct rate and amount to be paid into the Fund by the Respondent.

[2] We find nothing in the record to support our dissenting colleague's conclusion that "the use of the previous month's shifts to calculate fund payments for the subsequent month was merely a convenient method of calculation used by the parties to determine the amount of contribution due . . . ." Sec. 19(b) of the parties' agreement states, in relevant part, that: "The Employer shall pay the sum of two dollars ($2.00) per day for each shift worked by each employee covered by the terms of the contract to the San Diego Bartenders and Culinary Workers Insurance Fund. The Employer shall forward to the Trustees (on forms approved by, and at a time and place designated by them) a report of the names and number of days of employment of all employees covered by this contract." Sec. 19(g) of the agreement further authorizes the Trustees to take legal and other action "in the event payments have not been received by the Trust by the twentieth of the month succeeding the month for which *payments are due*" (emphasis added). The above contractual language clearly indicates that the Respondent was liable for payments for shifts worked by employees as a matter of obligation, not calculation. There is nothing in the contract which provides that the previous month's shifts will be used to calculate payment for the subsequent month. That it has been the Fund's practice (within the discretion granted the Trustees in the agreement) to use the payment for the previous month's shifts to assure coverage for the month in which payment is received has no bearing on the Respondent's obligation to make payment for shifts worked prior to impasse.

[3] We find, for the reasons stated by the judge, that the Board's decision in *O'Malley Lumber Co.*, 234 NLRB 1711 (1978), is distinguishable from the present case and, therefore, not controlling here. We further note that although in *O'Malley*, as here, the employer, inter alia, was alleged to have ceased unilaterally, making payments to a union trust fund, the issue in *O'Malley* centered on whether the parties reached a valid impasse in negotiations and, if so, whether the employer's unilateral changes were consistent with its preimpasse proposals. There is nothing in the *O'Malley* decision to suggest that any of the parties to the proceedings either raised or litigated the issue posed by the instant case of whether the payments which the employer failed to make had accrued prior to impasse. Finally, we note that in *O'Malley* the contract expired on May 31, 1976, and the respondent made no payments in July 1976 for work completed in June 1976. While the judge in *O'Malley* found that the parties initially reached impasse on the health and welfare issues on June 16, 1976, he did not pass on whether the impasse was broken by a strike which occurred that same day because the parties, in any event, were at an impasse on this issue on June 29, 1976. In view of his failure to pass on that issue, we cannot determine for certain if the impasse occurred before the employees had worked the full June hours which would have triggered the employer's obligation to make the July payment. On these facts, we do not find *O'Malley* to be controlling or inconsistent with our decision here.

MEMBER CRACRAFT, dissenting.

Contrary to my colleagues, I would not find that the Respondent violated Section 8(a)(5) and (1) by failing to make payments to the San Diego Bartenders and Culinary Workers Insurance Trust Fund for shifts worked by its employees between December 1 and December 22, 1986, and by failing to submit a report indicating which shifts were worked during this period.

The expired collective-bargaining agreement[1] provided, inter alia, that the "Employer shall pay the sum of two dollars ($2.00) per day for each shift worked by each employee covered by the terms of the contract to the San Diego Bartenders and Culinary Workers Insurance Fund." Each contribution paid for health coverage for the entire month in which payment was made. The amount of the premium was based on the number of shifts worked the previous month. Legal action for delinquencies could be instituted by the Trust in the event payments were not received by the 20th of the month following the month for which payments were due.

The parties reached impasse in negotiations on December 23, 1986. Prior to impasse the Respondent had forwarded a December payment to the Fund, thereby providing health coverage for the employees through December 1986. The December payment was calculated based on the number of shifts worked in November. In January 1987, the Respondent notified the Fund that it was withdrawing from the contract plan and would not make any further payments to the Fund because it was going to institute the health plan it had proposed during negotiations. Initially, the fund administrator notified the Respondent that because the Respondent was providing coverage beginning January 1, it was unlikely that further contributions would be required. However, in late January the Fund advised the Respondent that it was entitled to payments on behalf of unit employees for shifts worked through the date of impasse and requested a report reflecting the number of shifts worked between December 1 and December 22 and payment for those shifts.

This case is essentially a contract dispute. In *NCR Corp.*, 271 NLRB 1212 (1984), the Board held that in cases involving contract interpretation where there is no evidence that the respondent acted out of animus toward the union or in bad faith, or that the respondent was seeking to undermine the union, the Board will not attempt to determine which of two equally plausible contract interpretations is correct. See also *Thermo Electron Corp.*, 287 NLRB 820 (1987). Here, there is no evidence of union animus or that the Respondent was acting in bad faith.[2] The Respondent was not attempting to undermine the Union. Moreover, the parties present two plausible contract interpretations. Thus, the principles of *Thermo Electron* and *NCR* would normally apply and the complaint would be dismissed.

However, both *Thermo Electron* and *NCR Corp.* are grounded, in part, on a discretionary exercise of jurisdiction.[3] I believe it would effectuate the purposes of the Act to exercise that jurisdiction here.

There are no private dispute resolution mechanisms available to the parties herein. The Trust Fund is not a party to the collective-bargaining agreement and thus could not use the contract's grievance-arbitration procedure even if the requirements in *Indiana & Michigan Electric Co.*[4] were satisfied. Furthermore, there is no ERISA remedy for an employer's failure to make fund contributions after the expiration of the collective-bargaining agreement. *Laborers Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988). Because there is no forum for resolution of the two plausible contract interpretations herein, in these limited circumstances it would effectuate the purposes of the Act to resolve the dispute.

I conclude, contrary to my colleagues, that the fact that the fund payments were calculated based on hours worked during the previous month and that legal action for delinquencies could be instituted by the 20th of the month following the month for which payment was due does not compel the conclusion that the benefits accrued with the completion of each shift. Rather, I believe that the use of the previous month's shifts to calculate fund payments for the subsequent month was merely a convenient method of calculation used by the par-

[1] The collective-bargaining agreement expired October 31, 1986.

[2] The Respondent provided health coverage for the employees under the terms of the expired contract up to and beyond the date of impasse.

[3] The cases relied on by the Board in *NCR Corp.* and *Thermo Electron* are based on an abstention doctrine. See, e.g., *Vickers, Inc.*, 153 NLRB 561, 570 (1965) ("the Board ordinarily will not exercise its jurisdiction to resolve a dispute between the parties as to whether the employer's interpretation was correct."); *Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949, 955 (6th Cir. 1947) ("the dispute . . . was a dispute as to the interpretation of the management clause, and the contract specifically provided that such disputes were to be settled within the grievance procedures."); *Consolidated Aircraft Corp.*, 47 NLRB 694, 706 (1943), enfd. 141 F.2d 785 (9th Cir. 1944) (Board "deems it unwise" to exercise jurisdiction to attempt to police contract where the parties have not exhausted their remedies under the contract); *National Dairy Products Corp.*, 126 NLRB 434, 439 (1960) ("the Board does not ordinarily exercise its jurisdiction to resolve conflicts regarding which party has correctly interpreted the contract.").

[4] 284 NLRB 53 (1987).

ties to determine the amount of contribution due, and did not indicate that benefits had accrued.[5]

The Respondent provided health coverage under the expired collective-bargaining agreement beyond December 23, 1986, the date of impasse. No other benefits had accrued as of that date. Accordingly, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to make fund payments in January 1987.

[5] I do not find *O'Malley Lumber Co.*, 234 NLRB 1171 (1978), in which on similar facts no violation was found, to be particularly relevant to the instant case.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT continue to refuse to file with the San Diego Bartenders and Culinary Workers Insurance Trust Fund a report reflecting the number of shifts each of our employees in the following unit worked between December 1 and December 22, 1986:

> All kitchen and stockroom employees, lunch and dining room employees, bartenders and cocktail lounge employees, special occasion bartenders, housekeeping and service department employees and cafeteria employees employed by the Employer; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT continue to refuse to pay to the Trust Fund the amounts owed for each shift worked by each employee within that unit between December 1 and December 22, 1986.

WE WILL file the report and pay the amount or amounts described above.

WE WILL make whole any employees within the unit who suffered losses because of our nonpayment of the amount or amounts described above.

WE WILL pay to such employees and to the Trust Fund any interest, penalties, or other sums adjudged payable in the compliance phase of this proceeding before the Board.

SHELTER ISLAND, INC.

Theodore R. Scott, for the General Counsel.
Dennis Childs, Esq. (Sheppard, Mullin, Richter & Hampton), of San Diego, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On July 30, 1987, I conducted a hearing at San Diego, California, to try issues raised by a complaint issued on April 10, 1987, based on a charge filed by San Diego Bartenders and Culinary Workers Insurance Trust Fund (Fund) on March 2, 1987.

The complaint alleged Shelter Island, Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act) by refusing to make payments to the Fund for shifts worked between December 1 and 22, 1986, by its employees represented by Local 30, Hotel and Restaurant Employees Union, AFL–CIO (Union).

The Respondent conceded it refused to make the payments in question but denied it thereby violated the Act.

The issue is whether the Respondent violated the Act by refusing to make those payments.

The General Counsel and the Respondent appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Both filed briefs.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find at all pertinent times the Respondent was an employer engaged in commerce and in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Facts*

The Respondent operates two restaurants in San Diego (The Bali Hai and Tom Ham's Lighthouse). Since at least 1975, the Respondent has recognized the Union as the exclusive collective-bargaining representative of:

> All kitchen and stockroom employees, lunch and dining room employees, bartenders and cocktail lounge employees, special occasion bartenders, housekeeping and service department employees, and cafeteria employees employed by the Employer; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.[1]

[1] I find this unit is appropriate for collective-bargaining purposes within the meaning of Sec. 9 of the Act.

Through its duly designated representative for collective-bargaining purposes, the Restaurant-Hotel Employers Council of San Diego, Inc. (Council), the Respondent entered into collective-bargaining contracts with the Union setting forth the wages, rates of pay, hours, and working conditions of its employees within the unit. The latest contract was executed in 1980.

That contract, inter alia, contained the following provisions:

SECTION 19—HEALTH AND WELFARE PLAN:

(a) The San Diego Bartenders and Culinary Workers Insurance Fund Trust Indenture executed on the Seventh (7th) day of January, 1952, and any amendments as may be made from time to time thereto, are hereby incorporated by reference and made a part of this Agreement. The Employer, by signing this Agreement, agrees to be bound by all the terms and provisions of said Trust Indenture.

(b) The Employer shall pay the sum of two dollars ($2.00) per day for each shift worked by each employee covered by the terms of the contract to the San Diego Bartenders and Culinary Workers Insurance Fund. The Employer shall forward to the Trustees (on forms approved by, and at a time and place designated by them) a report of the names and number of days of employment of all employees covered by this contract. Said payments are to be made by the Employer directly to the Trustees of the San Diego Bartenders and Culinary Workers' Health and Welfare Trust Fund. The Employer signatory hereto hereby accepts the present Council appointed Trustees and their duly selected successors and alternates as his representatives on said Trust Fund.

. . . .

(d) The Employer, upon demand of either the Trustees of the San Diego Bartenders and Culinary Workers Insurance Fund or of the Local Joint Board, shall submit such reasonable information, employment and payroll records as may be relevant and necessary for the ascertainment by the Trustees or the Union, of the amount of monies due and owing by the Employer of the Trust.

. . . .

(g) The Trustees of the Fund, in the event payments have not been received by the Trust by the twentieth of the month succeeding the month for which payments are due, may sue said Employer for one or more of the following: An accounting, injunction, recovery of the delinquent payments, reasonable costs of suit and any other relief that may be appropriate under the circumstances.

Reports of the number of shifts worked by each unit employee were normally prepared shortly after the end of each month and sent to the Fund, accompanied by the requisite payments. Those payments assured health coverage under the plan administered by the Fund *for the month in which the payment was received*, provided the Fund received payments from the Respondent and other employer participants in the health plan for more than 12 shifts worked by each covered employee during the preceding month.[2]

Prior to the October 31, 1986 expiration of the contract, the Respondent timely withdrew the Council's authority to represent it, so notified the Union, and terminated the contract.

During subsequent negotiations between the Respondent and the Union over terms for a successor contract, the Employer proposed to substitute a health plan of its choice for the contract plan and the Union proposed to continue the contract plan unchanged.[3]

The parties reached an impasse in their negotiations on December 23, 1986.

Between the date the contract expired and the impasse date, the Respondent sent an early November and early December 1986 report to the Fund accompanied by the requisite payments, assuring eligible employees health coverage under the contract plan for November and December 1986.

In early January 1987, the Fund received a letter from the Respondent dated December 31, 1986, stating it was withdrawing from further participation in the contract plan, would not make any further payments to the Fund, and was going to institute the health plan it proposed during negotiations. In response to a telephone inquiry by a Fund representative in early January 1987, a representative of the Respondent confirmed the Respondent was not going to send any report to the Fund concerning the number of shifts unit employees worked during any part of December 1986 nor tender any payments to the Fund based thereon. In further conversations (there were two telephone conversations), the Fund representative, in response to inquiries, informed the Respondent's representative the contract plan would not provide January 1987 coverage for any unit employee on whose behalf it did not receive payments for 12 or more shifts worked during December 1986.

The Respondent placed its plan in effect in January 1987; for January and February 1987, it made special arrangements to cover its part-time or on-call employees, but ceased to cover them thereafter.

The parties stipulated unit employees covered by the contract plan in December 1986 worked a substantial number of shifts between December 1 and 22, 1986, and further stipulated all unit employees were covered in January 1987 either by the contract plan (by virtue of shifts worked for participating employers other than the Respondent) or by the Respondent's plan.

On January 29, 1987, following receipt of advice from counsel that the Fund was egally entitled to payments on behalf of unit employees for shifts worked through the date of impasse, the Fund wrote a letter so advising the Respondent and requesting transmission to the Fund of a

[2] Though the Fund needed payments for at least 22 shifts to fund its payouts (I credit the Fund administrator's undisputed testimony to that effect).

[3] The Respondent's plan covered only its employees, limited coverage to full-time employees (excluding part-time or on-call employees), and contained a $100 deductible feature; the contract plan covered full-and part-time or on-call employees, was portable (i.e., it credited payments for work performed by all participating employers), and had no deductible feature.

report reflecting the number of shifts unit employees worked between December 1 and 22 and payment therefor.

At all times since, the Respondent has refused to tender the requested report and payments.

B. *Analysis and Conclusions*

The Board, with court approval, has consistently held an employer violates the Act by failing or refusing to make deferred payments based on work performed prior to a bargaining impasse, and on the premise the purposes of the Act are best served by requiring an employer to maintain its employees' wage components (including payments to provide health and pension coverage) provided under an expired collective-bargaining agreement, unchanged, while the parties negotiate over terms for a possible successor agreement.[4]

In this case the Respondent refused to pay to the Fund $2 for each shift worked by unit employees between December 1 and 22, 1986, the day the Respondent and the Union reached impasse in their negotiations over the terms for a successor to an expired contract requiring such payments. On these facts, the line of cases just recited support the conclusion the Respondent thereby violated the Act.

The Respondent contends *O'Malley Lumber Co.*, 234 NLRB 1171 (1978), dictates a contrary conclusion. While that case holds the employer did not violate the Act by discontinuing payments to a health fund established under an expired collective-bargaining agreement with the union representing its employees following the expiration of the agreement, the case is readily distinguishable from this one; the major issue litigated in *O'Malley* was whether the parties to the expired agreement ever reached a bargaining impasse prior to the employer's implementation of the health plan it proposed during negotiations, with the General Counsel contending no such impasse was reached and the employer contending a bargaining impasse was reached 16 days after the agreement expiration. The employer's contention was sustained and on the basis: (1) prior to the expiration of the *O'Malley*-union agreement, the fund adopted the policy of not accepting payments for any hours worked after the expiration of a collective-bargaining agreement requiring them[5] (a policy known by the employer by virtue of the service of one of its representatives as a fund trustee); (2) the employer nevertheless placed payments in an escrow account covering the 15 days its union-represented employees worked between the date the agreement expired and the date of impasse; (3) no evidence was developed that the fund ever requested the employer to tender the escrowed funds or the employer refused to remit them; (4) the fund provided extended coverage to the affected employees for a minimum of 4 and a maximum of 7 months after the agreement expired; (5) the employer did not institute the health plan it proposed during negotiations until the expiration of each affected employee's health coverage by the fund; (6) it was held the General Counsel failed to establish employer conduct violative of the Act.

In this case the Fund followed the policy of *accepting* payments from employers for all shifts worked between the date of contract expiration and date of impasse, based on an opinion by legal counsel it was legally entitled to. The General Counsel *proved* the Fund requested payment for shifts worked by unit employees between those dates and the Respondent *refused* to comply with that request. The Respondent could have tendered the requisite payments and placed its plan in effect and assured unit employee coverage under the contract plan for January 1987 but, instead unilaterally announced it was refusing to do so and placed its plan in effect that month. The Respondent's plan materially differed from the contract plan in that it excluded part-time or on-call employees from coverage,[6] and contained a deductible feature (which may have forced some unit employees to pay the amount of the deductible under the Respondent's plan for any treatment in January 1987, that would not have occurred had they been covered for that month by the contract plan).

On the basis of the foregoing, I find and conclude by its refusal to comply with the Fund's request for a report reflecting the number of shifts unit employees worked between December 1 and 22, 1986, and by its refusal to remit to the Fund $2 for each such shift, the Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. At all pertinent times the Respondent was an employer engaged in commerce and in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times the following unit of the Respondent's employees was appropriate for collective-bargaining purposes within the meaning of Section 9 of the Act:

> All kitchen and stockroom employees, lunch and dining room employees, bartenders and cocktail lounge employees, special occasion bartenders, housekeeping and service department employees, and cafeteria employees employed by the Employer; excluding all other employees, office clerical em-

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[4] *NLRB v. Katz*, 369 U.S. 736 (1962); *Southwestern Steel & Supply*, 276 NLRB 1569 (1985), enfd. 806 F.2d 1111 (D.C. Cir. 1986); *Auto Fast Freight*, 272 NLRB 561 (1984), enf. denied 793 F.2d 1126 (9th Cir. 1986); *American Distributing Co.*, 264 NLRB 1413 (1982), enfd. 715 F.2d 446 (9th Cir. 1983), cert. denied 466 U.S. 958 (1984); *Stone Boat Yard*, 264 NLRB 981 (1982), enfd. 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984); *Cauthorne Trucking Co.*, 256 NLRB 721 (1981), enfd. 691 F.2d 1023 (D.C. Cir. 1982); *Antonino's Restaurant*, 246 NLRB 833 (1979), enfd. 648 F.2d 1206 (9th Cir. 1981); *Hen House Market No. 3*, 174 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970); *Emsing's Supermarket*, 284 NLRB 302 (1987); *Santulli Mail Services*, 281 NLRB 1288 (1986); *Buck Brown Contracting Co.*, 272 NLRB 951 (1984).

[5] Based on an opinion by the fund counsel, the fund was not legally entitled to such payments.

[6] As noted above, however, the Respondent arranged for coverage of those employees under its plan for January 1987. This resulted in double coverage of unit employees who worked a sufficient number of shifts for employers participating in the contract plan other than the Respondent during December 1986, the result the Respondent now complains about. That result could have been avoided by the Respondent's compliance with the Fund's request and placing its plan in effect following expiration of coverage by the contract plan.

ployees, professional employees, guards, and supervisors as defined in the Act.

3. At all pertinent times the Union was the exclusive representative of the employees within the aforesaid unit for the purpose of bargaining collectively with the Respondent with respect to their wages, rates of pay, hours, and working conditions.

4. By refusing to comply with the Fund's request for a report reflecting the number of shifts its employees within the above unit worked between December 1 and 22, 1986, and for tender to the Fund of $2 for each such shift, the Respondent violated Section 8(a)(1) and (5) of the Act.

5. The above unfair labor practice affected commerce as defined in the Act.

THE REMEDY

The normal remedy in cases of this type is a direction the employer file with the entity designated in the expired contract the requisite report and payments, to make employees whole for losses they suffered by virtue of the nonpayment, and any interest, penalties, or other sums due affected employees and the entity.

Citing *Hassett Maintenance Co.*, 260 NLRB 1211 (1982), the Respondent argues directing such a remedy in this case would "unjustly enrich" the Fund and constitute a "windfall," noting either the Fund or the Respondent or both provided health plan coverage to all unit employees for January 1987.

The argument ignores the fact the Respondent unilaterally and without union or Fund concurrence failed in early January 1987 to file a report reflecting the number of shifts unit employees worked between December 1 and 22, 1986, accompanied by the requisite payments, refused in late January 1987, following its reaching of delinquency status, to comply with the Fund's request for such report and payments, and unilaterally, without Fund or union concurrence, instituted its health plan for all unit employees[7] in January 1987, rather than dovetailing coverage by its plan as contract plan coverage expired.

It also ignores the fact that payments to the Fund represent a pool designed to cover a broad spectrum of employees, which is why the contract plan contains a portability feature and provides coverage even though a particular employee has worked 12 and not 22 shifts during the covered period. As the Ninth Circuit stated in *Stone Boat Yard*, supra:

> The company is merely required to repay what it has unlawfully withheld. As in [*Antonino's Restaurant*, supra] it was the company that unlawfully chose to incur the additional expense of a private insurance program. Even if Stone's substitute fringe benefit program met the present needs of its employees, the diversion of contributions from the union funds undercut the ability of those funds to provide for future needs. 715 F.2d 441, at 446.[8]

I shall therefore recommend the Respondent be ordered to file with the Fund a report reflecting the number of shifts each unit employee worked between December 1 and 22, 1986, to tender $2 to the Fund for each such shift, to make whole any unit employees who suffered any losses due to the Respondent's failure to timely tender to the Fund the payments just set forth, and to pay to those employees and to the Fund such interest, penalties, etc., as may appear warranted in the compliance phase of this proceeding.[9]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Shelter Island, Inc., San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to file with the San Diego Bartenders and Culinary Workers Insurance Trust Fund a report reflecting the number of shifts each of its employees within the following unit worked between the dates of December 1 and 22, 1986:

> All kitchen and stockroom employees, lunch and dining room employees, bartenders and cocktail lounge employees, special occasion bartenders, housekeeping and service department employees, and cafeteria employees employed by the Employer; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Refusing to pay to the Fund $2 for each such shift.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) File with the Fund the report described above.

(b) Pay to the Fund the amount or amounts described above.

(c) Make whole any employees within the aforesaid unit for any losses they may have suffered by virtue of Shelter Island, Inc.'s nonpayment of the prescribed amount or amounts.

(d) Pay to such employees and to the Fund any interest, penalties, or other payments adjudged due and payable in the compliance stage of this proceeding.

(e) Post at its facilities at San Diego, California, copies of the attached notice marked "Appendix."[11] Copies of

[7] At times pertinent there were approximately 140 employees in the unit. This finding is based on testimony by one of the Respondent's owners.

[8] Also see *Antonino's Restaurant*, supra; *Buck Brown Contracting Co.* supra; and *Southwestern Steel & Supply*, supra.

[9] See *Taurus Waste Disposal*, 263 NLRB 309 (1982); and *Merryweather Optical Co.*, 240 NLRB 1213 (1979), for guidance.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Nation-

Continued

the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

al Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

San Diego Princess *and* San Diego Bartenders and Culinary Workers Insurance Trust Fund. Case 21–CA–25264

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On December 16, 1987, Administrative Law Judge George Christensen issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, San Diego Princess, San Diego, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Refusing to pay to the Trust Fund the amounts owed for each such shift."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER CRACRAFT, dissenting.

For the reasons stated in my dissent in *Shelter Island, Inc.*, 290 NLRB 246 (1988) I would find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to make payments to the San Diego Bartenders and Culinary Workers Insurance Trust Fund for shifts worked by its employees between December 1 and December 18, 1986, and by failing to submit a report indicating which shifts were worked during this period.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT continue to refuse to file with the San Diego Bartenders and Culinary Workers Insurance Trust Fund a report reflecting the number of shifts each of our employees in the following unit worked between December 1 and December 18, 1986:

> All kitchen and stockroom employees, lunch and dining room employees, bartenders and cocktail lounge employees, special occasion bartenders, housekeeping and service department employees and cafeteria employees employed by the Employer; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT continue to refuse to pay to the Trust Fund the amount owed for each shift worked by each employee within that unit between December 1 and December 18, 1986.

WE WILL file the report and pay the amount or amounts described above.

WE WILL make whole any employees within the unit who suffered losses because of our nonpayment of the amount or amounts described above.

WE WILL pay to such employees and to the Trust Fund any interest, penalties, or other sums adjudged payable in the compliance phase of this proceeding before the Board.

SAN DIEGO PRINCESS

Theodore R. Scott, Esq., for the General Counsel.
Dennis Childs and *John D. Collins, Esq. (Sheppard, Mullin, Richter & Hampton)*, of San Diego, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On July 30, 1987, I conducted a hearing at San Diego, California, to try issues raised by a complaint issued on April 10, 1987, based on a charge filed by San Diego

[1] In *Shelter Island, Inc.*, 290 NLRB 246 (1988), a companion case to this one, the General Counsel filed exceptions and a brief addressing Judge Christensen's proposed order in both cases concerning the rate at which the Respondent in each case should be required to make the Fund whole. As in *Shelter Island*, supra, we find merit to the General Counsel's exception and shall, accordingly, modify the judge's recommended Order to provide for a general make-whole remedy. We leave it to the compliance stage of this proceeding to determine the correct rate and amount owed to the Fund pursuant to this decision.

[2] For the reasons stated in *Shelter Island*, supra, we find no merit to the Respondent's contention that it was under no obligation to submit payments to the Fund for shifts worked by its employees from December 1 to 18, 1986, because an impasse in bargaining was reached on December 19, 1986, and payment for the preimpasse shifts worked by employees was not due, and coverage would not begin, until January 1987, after impasse had been reached.

Bartenders and Culinary Workers Insurance Trust Fund (the Fund) on March 2, 1987.

The complaint alleged that San Diego Princess (the Employer) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing to make payments to the Fund for shifts worked between December 1 and 18, 1986, by its employees represented by Local 30, Hotel & Restaurant Employees Union, AFL–CIO (the Union).

The Employer conceded it refused to make the payments in question but denied it thereby violated the Act.

The issue is whether the Employer violated the Act by refusing to make the payments in question.

The General Counsel and the Employer appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Both filed briefs.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs, and research, I enter the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find at all pertinent times the Employer was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Facts*

The Employer operates a resort hotel in San Diego. At least since 1980, the Union has represented and has been recognized by the Employer as the exclusive collective-bargaining representative of a unit consisting of the following:

> All kitchen and stockroom employees, lunch and dining room employees, bartenders and cocktail lounge employees, special occasion bartenders, housekeeping and service department employees and cafeteria employees employed by the Employer; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.[1]

On October 26, 1980, by its designated collective-bargaining representative, Restaurant Hotel Employers Council of San Diego, Inc. (Council), the Employer entered into a collective-bargaining agreement with the Union in which the Employer recognized the Union as the exclusive collective-bargaining representative of the unit employees, and specified their wages, rates of pay, hours, and working conditions for a term commencing April 7, 1980.

The agreement, inter alia, contained the following provisions:

SECTION 19—HEALTH AND WELFARE PLAN:

(a) The San Diego Bartenders and Culinary Workers Insurance Fund Trust Indenture executed on the Seventh (7th) day of January, 1952, and any amendments as may be made from time to time thereto, are hereby incorporated by reference and made a part of this Agreement. The Employer, by signing this Agreement, agrees to be bound by all the terms and provisions of said Trust Indenture.

(b) The Employer shall pay the sum of two dollars ($2.00) per day for each shift worked by each employee covered by the terms of the contract to the San Diego Bartenders and Culinary Workers Insurance Fund. The Employer shall forward to the Trustees (on forms approved by, and at a time and place designated by them) a report of the names and number of days of employment of all employees covered by this contract. Said payments are to be made by the Employer directly to the Trustees of the San Diego Bartenders and Culinary Workers' Health & Welfare Trust Fund. The Employer signatory hereto hereby accepts the present Council appointed Trustees and their duly selected successors and alternates as his representatives on said Trust Fund.

. . . .

(d) The Employer, upon demand of either the Trustees of the San Diego Bartenders and Culinary Workers Insurance Fund or of the Local Joint Board, shall submit such reasonable information, employment and payroll records as may be relevant and necessary for the ascertainment by the Trustees or the Union, of the amount of monies due and owing by the Employer of the Trust.

. . . .

(g) The Trustees of the Fund, in the event payments have not been received by the Trust by the twentieth of the month succeeding the month for which payments are due, may sue said Employer for one or more of the following: An accounting, injunction, recovery of the delinquent payments, reasonable costs of suit and any other relief that may be appropriate under the circumstances.

Payments and reports tendered to the Fund assured coverage under the agreement's plan for the month *in which the tender was received*, provided the employee completed 12 shifts for participating employers during the preceding month.[2]

After timely Employer withdrawal from council membership, and timely notice to the Union, the Employer terminated the agreement, effective October 31, 1986. Negotiations between the Employer and the Union over terms for a new or successor agreement reached an impasse on December 19, 1986. In the course of the negotiations, the Employer proposed the substitution of a health plan of its choosing for the agreement's health plan. The Employer's health plan limited coverage to

[1] I find this unit is appropriate for collective-bargaining purposes within the meaning of Sec. 9(b) of the Act.

[2] Though it required payment for at least 22 shifts ($44) to fund the Fund's monthly payouts for monthly benefits and administrative costs.

"key employees" and excluded "on-call employees,"[3] it also required an employee work at least 25 hours each week during a month to qualify for coverage during that month. The Union resisted any change from the health plan provisions of the agreement.

Between the date the agreement was terminated (October 31, 1986) and the date the impasse occurred (December 19, 1986), the Employer continued to participate in the agreement's health plan, sending a report to the Fund in early November 1986 reporting the number of shifts worked by covered employees during October 1986, and tendering the requisite payment (assuring coverage for eligible employees during November 1986), and sending a similar report to the Fund in early December 1986 reporting the number of shifts worked by covered employees during November 1986, and tendering the requisite payment (assuring eligible employees coverage during December 1986).

Following the December 19, 1986 impasse, the Employer notified the Union and the Fund it was withdrawing from any further participation in the agreement's health plan, and that it was going to institute the health plan it proposed during negotiations. In a subsequent conversation between representatives of the Employer and the Fund, in response to Employer inquiries, a fund representative stated the Fund's rules and regulations prevented its acceptance of payments from the Employer for any shifts unit employees worked on and after December 19, 1986 (the impasse date), and the Fund "probably" would not demand payments from the Employer for shifts unit employees worked between December 1 and 18, 1986, in the event the Employer provided those employees coverage under its plan for January 1987.[4]

The Employer instituted the health plan it proposed during negotiations in January 1987. The plan provided benefits equal or superior to benefits provided under the agreement's plan and was more costly to the Employer than the plan but, as noted above, was more limited in coverage of unit employees because it excluded "on-call" employees.

The fund representative received an opinion from counsel that the Fund was entitled to payments from the Employer for all shifts unit employees worked between December 1 and 18, 1986. She addressed a letter to the Employer following nonreceipt by January 20, 1987 (the date any December 1986 report and payments became delinquent), of any report or payments for the December 1–18, 1986 period, stating counsel advised her such report and payments were due and payable, and requested their tender.

At all times thereafter, the Employer refused to tender the requested report and payments.

It was established (by stipulation) several unit employees worked a substantial number of shifts for the Employer between December 1 and 18, 1986: Carlos Bernal, 3; Maria Conriguez, 16; Jose Diaz, 14; Brad Fox, 14; Alberto Jimenez, 10; Gumereindo Jimenez, 14; Daniel Lopez, 14; and John Medina, 2.[5]

Conriguez, Diaz, Fox, A. Jimenez, G. Jimenez, and Lopez were classified as "key employees" under the employer health plan and worked a sufficient number of hours in January 1987 to qualify for coverage; Bernal and Medina were classified as "on-call" employees under the employer health plan and were not covered.[6]

B. *Analysis and Conclusions*

The Board, with court approval, has consistently held an employer violates the Act by failing or refusing to make deferred payments based on work performed prior to a bargaining impasse, on the premise the purposes of the Act are best served by requiring an employer to maintain its employees' wage components (including payments to provide health and pension coverage) provided under an expired collective-bargaining agreement, unchanged, while the parties negotiate over terms for a possible successor agreement.[7]

In this case, the Employer refused to pay to the Fund $2 for each shift worked by unit employees between December 1 and 18, 1986, the day before the Employer and the Union reached an impasse in their negotiations over the terms for a possible successor to an expired agreement requiring such payment. On these facts, the line of cases just recited support the conclusion the Employer thereby violated the Act.

The Employer contends *O'Malley Lumber Co.*, 234 NLRB 1171 (1978), dictates a contrary conclusion. Although that case holds the employer did not violate the Act by discontinuing payments to a health fund established under an expired collective-bargaining agreement with the union representing its employees following the expiration of the agreement, the case is readily distinguishable from this one; the major issue litigated in *O'Malley* was whether the parties to the expired agreement ever reached a bargaining impasse prior to the employer's implementation of the health plan it proposed during negotiations, with the General Counsel contending no such impasse was reached, and the employer contending a bargaining impasse was reached 16 days after the agreement expiration. The employer's contention was sustained and on the basis: (1) prior to the expiration of

[3] Employees classified as "on-call employees" under the employer plan were covered by the agreement's plan.

[4] The fund representative explained she so commented because she was unsure at the time whether the Fund was legally entitled to payments for shifts worked by unit employees between December 1 and 18, 1986, and was awaiting an opinion on the question from counsel.

[5] Although the underlying charge alleges there were approximately 297 employees in the unit, no evidence was offered to identify additional unit employees eligible for the fund coverage and the number of shifts they worked for the Employer during the December 1–18, 1986 period.

[6] By virtue of their work during the entire month for employer-parties to agreements requiring the fund payments other than the Employer, Bernal and Medina were covered by the agreement's health plan for the month of January 1987.

[7] *NLRB v. Katz*, 369 U.S. 736 (1962); *Southwestern Steel & Supply*, 276 NLRB 1569 (1985), enfd. 806 F.2d 1111 (D.C. Cir. 1986); *Auto Fast Freight*, 272 NLRB 561 (1984), enfd. 122 LRRM 3058 (1986); *American Distributing Co.*, 264 NLRB 1413 (1982), enfd. 715 F.2d 446 (9th Cir. 1983), cert. denied 466 U.S. 958 (1984); *Stone Boat Yard*, 264 NLRB 981 (1982), enfd. 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984); *Cauthorne Trucking Co.*, 256 NLRB 721 (1981), enfd. 691 F.2d 1023 (D.C. Cir. 1982); *Antonino's Restaurant*, 246 NLRB 833 (1979), enfd. 648 F.2d 1206 (9th Cir. 1981); *Hen House Market*, 174 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970); *Emsing's Supermarket*, 284 NLRB 302 (1987); *M. J. Santulli Mail Services*, 281 NLRB 1288 (1986); *Buck Brown Contracting Co.*, 272 NLRB 951 (1984).

the O'Malley-union agreement, the fund adopted the policy of not accepting payments for any hours worked after the expiration of a collective-bargaining agreement requiring them[8] (a policy known by the employer by virtue of the service of one of its representatives as a fund trustee); (2) the employer nevertheless placed payments in an escrow account covering the 15 days its union-represented employees worked between the date the agreement expired and the date of impasse; (3) no evidence was developed that the fund ever requested the employer tender the escrowed funds or that the employer refused to remit them; (4) the fund provided extended coverage to the affected employees for a minimum of 4 and a maximum of 7 months after the agreement expired; (5) the employer did not institute the health plan it proposed during negotiations until the expiration of each affected employee's health coverage by the fund; (6) it was held that the General Counsel failed to establish employer conduct violative of the Act.

In this case, the Fund followed the policy of *accepting* payments from employers for all shifts worked between the date of agreement expiration and date of impasse, based on an opinion by its counsel it was legally entitled to such payments; the General Counsel *proved* the Fund *requested* payment for the shifts worked by the unit employees between those dates, and the Employer *refused* to comply with the request; the Employer failed to dovetail his plan to the agreement plan (implementation of employer plan coverage following the expiration of agreement plan coverage); the Employer plan differed in health plan coverage from the agreement's plan, and only by operation of the portability principle embodied in the agreement plan[9] did Bernal and Medina (and any other unit employees fortunate enough to be similarly situated) receive health coverage under the agreement plan for January 1987.[10]

Although the Employer did not argue the Fund waived (or was estopped from asserting) any right to receive the December 1–18, 1986 payments, by virtue of the fund representative's statement, the Fund probably would not seek those payments if the Employer placed its plan in effect in January 1987, it did cite that statement as one of its grounds for requesting dismissal of the complaint. A waiver (or estoppel) defense requires proof the waiving party knowingly, clearly, and unmistakably waived the right in question,[11] and that was not true here. Additionally, it is clear the fund representative had no authority to waive the right of the Union (and the affected employees on whose behalf the Union was bargaining) to the preservation of an economic status quo although the Union pursued continuation of their health benefits to impasse. I therefore reject any employer waiver or estoppel contention based on the fund representative's statement, and find and conclude by its refusal to comply with the Fund's request for a report of the number of shifts each unit employee worked between December 1 and 18, 1986, and by its refusal to pay $2 to the Fund for each of those shifts, the Employer violated Section 8(a)(1) and (5) of the Act.

[8] Based on an opinion by fund counsel, the Fund was not legally entitled to such payments.

[9] A provision crediting work for all and any participating employers—a valuable benefit within industries where it is common for employees to work for several employers within each month.

[10] It is further noted that although those payments qualified the two for health coverage by the Fund for January, the payments were insufficient to cover costs ($44 or 22 shifts worked).

[11] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708–710 (1983).

CONCLUSIONS OF LAW

1. At all pertinent times, the Employer was an employer engaged in commerce in a business affecting commerce, and the Union was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times, the following was an appropriate unit for collective-bargaining purposes within the meaning of Section 9 of the Act:

> All kitchen and stockroom employees, lunch and dining room employees, bartenders and cocktail lounge employees, special occasion bartenders, housekeeping and service department employees and cafeteria employees employed by the Employer; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

3. At all pertinent times the Union was the exclusive representative of the employees within the aforesaid unit for the purpose of bargaining collectively with the Employer with respect to their wages, rates of pay, hours and working conditions.

4. By refusing to comply with the Fund's request for a report showing the number of shifts the employees within the aforesaid unit worked between December 1 and 18, 1986, and for tender to the Fund of $2 for each such shift, the Employer violated Section 8(a)(1) and (5) of the Act.

5. The aforesaid unfair labor practices affected commerce as defined in the Act.

THE REMEDY

The normal remedy in cases of this type is a direction that the employer file with the entity designated by the expired agreement, the requisite report and payments, to make whole any losses its employees suffered by virtue of the nonpayment, and any interest, penalties, or other sums due affected employees and/or the entity.

Citing *Hassett Maintenance Co.*, 260 NLRB 1211 (1982), the Employer argues directing such a remedy in this case would "unjustly enrich" the Fund, and constitute a "windfall," citing the fact it provided health coverage in January 1987 to those unit employees classified as "key employees" under its plan who worked in excess of 25 hours each week of that month, thus its payment to the Fund for shifts worked by those employees between December 1 and 18, 1986, would provide those employees double health coverage for January at double cost to the Employer.

That contention fails to address the fact unit employees classified as "on-call" employees under its plan would have no health coverage whatsoever for January 1987, failing their working a sufficient number of shifts in

December 1986 for other employers and payment therefor, ignores the fact it required payment not for 12, but for *22* shifts to meet fund costs per employee, and ignores a basic purpose of the Fund is to provide portability, i.e., payments from each and every employer participating in the Fund for shifts worked by each and every covered employee, so the total receipts by the Fund are sufficient to meet the cost of providing health benefits to those qualified to receive them.

Due to these factors, the Fund neither would be "unjustly enriched" nor receive a "windfall" by receipt of payment for the shifts the Employer's unit employees worked between December 1 and 18, 1986. As the Ninth Circuit Court stated in *Stone Boat Yard*, supra:

> Even if Stone's substitute fringe benefit program met the present needs of its employees, the diversion of contributions from the union funds undercut the ability of the funds to provide for future needs. [715 F.2d 441, 446.][12]

I shall therefore recommend the Employer be ordered to file with the Fund a report reflecting the number of shifts each unit employee worked between December 1 and 18, 1986, to tender $2 to the Fund for each such shift, to make whole any unit employees who suffered any losses in health benefits due to the Employer's failure to timely tender to the Fund the payments just set forth, and to pay to those employees and to the Fund such interest, penalties, etc., as may appear warranted in the compliance phase of this proceeding.[13]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, San Diego Princess, San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to file with the San Diego Bartenders and Culinary Workers Insurance Trust Fund a report reflecting the number of shifts each of its employees within the following unit worked between the dates of December 1 and 18, 1986:

> All kitchen and stockroom employees, lunch and dining room employees, bartenders and cocktail lounge employees, special occasion bartenders, housekeeping and service department employees and cafeteria employees employed by the Employer; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Refusing to pay to the aforesaid Fund $2 for each such shift.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) File with the aforesaid Fund the report described above.

(b) Pay to the aforesaid Fund the amount or amounts described above.

(c) Make whole any employees within the aforesaid unit for any losses they may have suffered by virtue of San Diego Princess' nonpayment of the prescribed amount or amounts.

(d) Pay to such employees and to the aforesaid Fund any interest, penalties, or other payments adjudged due and payable in the compliance stage of this proceeding.

(e) Post at its facilities at San Diego, California, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[12] Also see *Antonino's Restaurant; Buck Brown Contracting Co.;* and *Southwestern Steel & Supply*, supra.

[13] See *Taurus Waste Disposal*, 263 NLRB 309 (1982), and *Merryweather Optical Co.*, 240 NLRB 1213 (1979), for guidance.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Hillhaven Corporation *and* General Drivers, Salesmen, Warehousemen's Local 984, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] Cases 26–CA–11873 and 26–CA–12045

July 29, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On October 19, 1987, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[2] findings, and conclusions and to adopt the recommended Order.

We agree with the judge's finding that the Respondent violated Section 8(a)(1) by interrogating its employees about union activity, threatening its employees with discharge for supporting the Union, informing its employees that benefits were lost in the past because of the Union, asking its employees to remove their names from the union petition, and informing its employees that wages would be frozen for up to a year if the Respondent negotiated with the Union.[3] However, we find it unnecessary to pass on whether these statements are also violative of Section 8(a)(5), as found by the judge.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hillhaven Corporation, Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The following case law supports the judge's finding that each of the above-described activities violates Sec. 8(a)(1). See, e.g., *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (totality of circumstances may indicate interrogations are coercive, e.g., where the interrogations, as here, were directed at employees not shown to be known union adherents, and involved another employee's union activity or were accompanied by a threat). See *Dutch Boy, Inc.*, 262 NLRB 4, 6–7 (1982), enfd. sub nom. *Artra Group, Inc. v. NLRB*, 730 F.2d 580 (10th Cir. 1984), and *Russell Stover Candies*, 221 NLRB 441, 443 (1975) (statements about adverse effects of unionization at other facilities found to amount to implied threats). See *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 119 (1979), and *L'Eggs Products*, 236 NLRB 354, 410–411 (1978), enfd. in pertinent part 619 F.2d 1337 (9th Cir. 1980) (violations found where employers' requests, as that made by Administrator Judy Ullery, to withdraw authorization for union representation exceeded mere information about procedure and amounted to appeals for the employees to undertake that action). See *Alpha Cellulose Corp.*, 265 NLRB 177, 177–178 (1982), enfd. mem. 718 F.2d 1088 (4th Cir. 1983), and *Gould, Inc.*, 260 NLRB 54, 59 (1982) (statements that negotiations would be protracted and wages frozen were found unlawful in context, as here, of regularly provided wage increases).

Member Cracraft agrees with the judge that under all the circumstances, the questioning of employees Annie Gray and Barbara McClure by Supervisor William Bunton was illegal interrogation in violation of Sec. 8(a)(1) of the Act. In so finding, however, she does not rely on *Sunnyvale Medical Clinic*, supra.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively in good faith with the General Drivers, Salesmen, Warehousemen's Local 984, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as the exclusive bargaining representative of our employees in the following appropriate unit:

All full-time and permanent part-time nurses' aides, housekeeping employees, dietary employees, and laundry employees employed at the Respondent's Care Inn Raleigh, Tennessee location, excluding all other employees including nurses, office clericals, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the above-named Union by refusing to process grievances.

WE WILL NOT threaten our employees with discharge if they support the Union.

WE WILL NOT interrogate our employees concerning their union activities or membership.

WE WILL NOT inform our employees that benefits were lost in the past because of the Union.

WE WILL NOT ask our employees to remove their names from a union petition.

WE WILL NOT inform our employees that wage increases could be frozen up to a year if we negotiate with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the above-named Union, as the exclusive bargaining representative of all the employees in the above-described appropriate unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an agreement is reached, embody such understanding, and sign any agreement reached.

WE WILL, on request, process the grievance of employee Paula Gaither that we refused to process on October 29, 1986.

HILLHAVEN CORPORATION

James Fuller, Esq., for the General Counsel.
Eric Nadworny, Esq., for the Respondent.
Jesse C. Sykes, for the Charging Party.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Memphis, Tennessee, on 11 March and 27 May 1987. The charge in Case 26-CA-1873 was filed on 31 October 1986. The complaint in that case issued on 16 December 1986. The charge in Case 26-CA-12045 was filed on 20 March 1987 and amended on 20 April 1987. Complaint issued in Case 26-CA-12045 on 21 April 1987. On 29 April 1987 an order issued consolidating the captioned cases and reopening the hearing.

The General Counsel alleges that Respondent violated Section 8(a)(1) and (5) by refusing to recognize and bargain with the Charging Party (Union) since 26 August 1986, by refusing to consider and discuss grievances since 22 October 1986, and by various statements by supervisors on 11 and 13 March 1987.

The Respondent in its answer to the complaint, admitted all the commerce allegations, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

I. THE WITHDRAWAL OF RECOGNITION

Through admissions and stipulations the General Counsel proved that Respondent has refused to recognize and bargain with the Union since August 1987. The Union was certified as the exclusive bargaining representative on 28 December 1982. A collective-bargaining agreement was in effect between the Union and the predecessor employer when Respondent purchased its Raleigh, Tennessee nursing home on 1 August 1986. That contract was to run from 15 July 1983 through 15 January 1987.

Respondent admitted that it is a successor employer to Care Inn Raleigh, and the record fully supports that admission.

The General Counsel also proved that the Union filed a grievance on behalf of employee Paula Gaither on 22 October 1986. By a 29 October 1986 letter Respondent advised the Union:

> As you were informed on August 26, 1986, Care Inn Raleigh had a good faith doubt that you continued to represent our employees in an appropriate bargaining unit. Therefore, we decline to accept or process this grievance.

Respondent, in its brief, defended the allegation on the grounds that it had a "reasonably grounded doubt, based upon objective considerations, for believing that its employees no longer desired to be represented by the Union." Respondent argues that its defense was proven by record evidence showing a "lack of union membership," a lack of contact with the union stewards from January through August 1986, and by expressions from employees during the period January through August 1986.

Regarding the lack of union membership, Judy Ullery, Respondent's and the predecessor Employer's administrator during 1986, testified that 14 or 15 employees were on union dues checkoff in 1986. From January to August 1986 no additional employees authorized checkoff deductions. Ullery testified that there were 140 to 150 employees in the bargaining unit.

Ullery also testified that she had no discussions with the union steward regarding grievances from January to August 1986. According to Ullery, she had only one such discussion before January 1986.

Regarding the expressions by employees, Ullery testified that in monthly staff meetings during the January through August 1986 period, employees "would ask how did I get rid of the Union." Ullery could not identify any of those employees.

Susan Morganeli, who was administrator in training in 1986, testified that questions were raised by employees concerning the Union during in-service training meetings. Morganeli recalled three employees by name. Employee Trudy Calhoun asked Morganeli what could be done to get rid of the Union, and employees Carol Pinner and Meg Hutchins stayed after the meeting "to reinforce the question as far as what could be done."

Housekeeping and Laundry Supervisor William Bunton testified that employee Tom Rivers asked him "how can we get rid of the Union." Employees Gregory Becton and Kenny Young asked Bunton how they could stop union dues from being deducted from their pay. Bunton testified that two or three other people asked him how to get rid of the Union, but Bunton could not recall the names of those employees. Bunton recalled that employees Inez Blance and Clarence Macklin were part of conversations involving getting rid of the Union.

Judy Ullery and Respondent's district director, Jimmy Crowe, testified about a meeting conducted at the nursing home by Respondent's regional vice president, Dick Ebersol, on 11 August 1986. Crowe recalled that over 100 employees attended the 11 August meeting. Ebersol explained to the employees that Respondent had purchased the nursing home. According to Crowe, an employee asked Ebersol, "Does this mean that we no longer have a union" and Ebersol replied, "to my knowledge, we don't." Ullery and Crowe testified that the employees applauded following Ebersol's response.

II. ANALYSIS OF EVIDENCE

A. *Union Membership*

Although Respondent argued that one of the objective factors they considered was a showing that union membership did not increase from January to August 1986, the evidence did not support that contention. What the testimony did illustrate was that no additional employees authorized Respondent to deduct union dues from their pay during the January to August period. Prior to January 1986 only 14 or 15 of the 140 to 150 employees in the unit had authorized Respondent to deduct union dues.

The collective-bargaining agreement contains the following language regarding deduction of union dues:

> The Company shall deduct monthly Union dues from the pay of all employees who are members of the Union and who hereafter voluntarily authorize such deductions in writing on a form approved by the Company and supplied by the Union to the Company. (Article I-C)

As shown above, the contract provides two conditions for dues deductions, (1) the employee must be a union member, and (2) the employee must authorize such deduction in writing. Because of that provision, it is apparent that union members that had not authorized such deductions in writing would not be included on Respondent's checkoff list. Therefore, showing of the number of employees that participated in deduction of dues may not accurately reflect the number of employees who were members of the Union.

The fact that no additional employees signed dues-checkoff authorizations from January through August 1986 is not illustrative of objective considerations. Dues checkoff does not discretely reflect union membership. In fact, testimony shows that before 1986 only 14 or 15 of the 140 to 150 employees in the unit were on dues checkoff.

Moreover, even if Respondent had successfully shown that all union members were on dues checkoff, the Board has consistently distinguished union membership from employee support of the Union:

> It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the Union may not choose to give it financial support or participate as members. [*Wald Transfer & Storage Co.*, 218 NLRB 592 (1975).]

See also *Atlanta Hilton & Towers*, 278 NLRB 474 (1986); *Hydro Conduit Corp.*, 278 NLRB 1124 (1986); *Thomas Industries*, 255 NLRB 646 (1981), enfd. as modified 687 F.2d 863 (6th Cir. 1982).

B. *Lack of Contact with the Union*

Administrator Judy Ullery testified that she had no contact with a union steward regarding grievances during the January to August 1986 period. However, in rebuttal the General Counsel offered evidence that a grievance was filed with the Respondent's predecessor by the Union regarding the discharge of employee Artricia Smith on 3 April 1986. Union Business Representative Jesse Sykes testified without rebuttal that he resolved Artricia Smith's grievance through discussions with Administrator Judy Ullery. Those discussions occurred between 3 and 8 April 1986.

On 1 June 1986 an arbitrator issued his decision regarding the Union's grievance over the discharge of 11 of Respondent's predecessor's employees. By letter from Administrator Judy Ullery dated 10 June 1986, Respondent's predecessor notified the Union of its compliance with the arbitrator's decision.

On 14 July 1986, the attorney for Respondent's predecessor wrote the Union advising of their agreement with the Union to resolve a dispute regarding the discharge of one of the bargaining unit employees.

On 17 July 1986 Respondent's predecessor advised the Union of its pending sale to Respondent and offering to bargain regarding the effects of the sale.

On 26 August 1986 the predecessor employer mailed the Union its settlement proposal in Case 26–CA–11199.

The General Counsel argues that the above evidence, which was unrebutted, clearly establishes that the Union remained active during the period alleged by Respondent. In fact, that evidence shows that despite Administrator Judy Ullery's testimony regarding her lack of contact with the Union's agent, she had several contacts with the Union during the January to August time period.

In view of the entire record, I find that the Union was not inactive. Nor did Respondent have a reasonable basis to believe that the Union was inactive, or that the Union had abandoned its role as bargaining representative. See *Cowles Publishing Co.*, 280 NLRB 903 (1986).

C. *Employee Expressions*

The General Counsel offered testimony from employees Belinda Young, Jessie Jackson, Clementine Posey, and Marjorie Fulton, and former employee Sharon Nash to rebut Respondent's argument that employees expressed a desire not to be represented by the Union.

Additionally, Judy Ullery testified that she could not identify any of the employees who allegedly stated they wanted to get rid of the Union in meetings before August 1986. Moreover, Supervisor William Bunton was unable to identify the two or three people, in addition to Tom Rivers, who allegedly asked him how to get rid of the Union.

As to the evidence regarding unidentified persons asking how the employees could get rid of the Union, that evidence cannot form the basis for objective considerations. In the first place that testimony is not credible. I cannot credit that Administrator Ullery would be unable to identify a single complaining employee, if employees were regularly voicing the same request in meetings from January through July 1986. Employees that testified disputed that those questions were asked.

Secondly, such testimony, if credited, would not show that unit employees or employees in addition to those named in other testimony, were asking to get rid of the Union. Only 140 to 150 of the total employee complement of 200 employees are in the bargaining unit. By her being unable to identify questioning employees, Administrator Ullery could not establish that the employee or employees were in the bargaining unit. Additionally, Ullery could not establish that the employee was not always the same person, and that that person was not one of the employees identified as complaining about the Union to Susan Morganeli or William Bunton. Additionally, that type of testimony provides insurance against full cross-examination and rebuttal. The alleged complaining employee cannot be identified and questioned. If that type of testimony was routinely accepted as probative, it would open an avenue for false testimony.

Respondent's evidence was unrebutted and is credited in the following respects.

Susan Morganeli testified that she was questioned by employee Trudy Calhoun during an in-service meeting in the spring of 1986. Calhoun asked what could be done to get rid of the Union. Morganeli testified that some of the nursing assistants stayed over "to reinforce the question as far as what cold be done." Morganeli identified two of those employees as being Carol Pinner and Meg Hutchins.

Supervisor William Bunton testified that employee Tom Rivers asked him how to get rid of the Union. Bunton also testified that employees Gregory Becton and Kenny Young asked him how they could stop their union dues deductions from being taken out of their paycheck every 2 weeks.[1] Bunton testified that he overheard other employees talking about getting rid of the Union. Bunton testified that he recalled the names of two employees who were involved in those conversations as being Inez Blance and Clarence Macklin.

[1] Neither Becton nor Young indicated a desire to get rid of the Union.

Additionally, Judy Ullery and Jimmy Crowe testified about an employee meeting on 11 August 1986. At that meeting Respondent announced to the employees that it had purchased the Raleigh, Tennessee nursing home. According to Crowe someone[2] asked Respondent's regional vice president, Dick Ebersol, "Does this mean we no longer have a union." Crowe testified that Ebersol replied, "to my knowledge, we don't." According to both Crowe and Ullery, the employees applauded Elbersol's reply.

In rebuttal the General Counsel called Brenda Young, Sharon Nash, Jessie Jackson, Clementine Posey, and Marjorie Fulton. All those employees agreed with Crowe and Ullery that someone did ask Ebersol about the Union. However, those employees testified that other statements were made in support of the Union, and all testified that no one applauded Ebersol's remarks.

Regarding the 11 August meeting, Brenda Young, who has been an employee at the Raleigh Nursing Home for 6 years, agreed with Crowe and Ullery that an employee asked Dick Ebersol if there was still a union in the facility. Young also agreed with Crowe's recollection of Ebersol's response. However, Young testified that the employees did not applaud. According to Young the meeting broke up because state inspectors arrived to inspect the nursing home.

Sharon Nash, a former employee,[3] testified that she heard an employee ask if union dues were "going to still be taken out of their checks." However, in disagreement with Crowe and Ullery, Nash testified that employees did not applaud.

Jesse Jackson recalled an employee asking Ebersol "was there a union in the facility." Jackson testified that after Ebersol replied the "building was union free," employee Marjorie Fulton asked "why are you still taking union dues if there is not a union." Ebersol replied that would be taken care of. Jackson testified that she spoke up and said there was a Union in the facility. Jackson testified that the employees did not applaud.

Clementine Posey, who has been employed at Respondent's nursing home for 3 years, testified in accord with the testimony of Jessie Jackson except Posey recalled it was Marjorie Fulton who said there is a union in the building. Posey testified that the employees did not applaud, rather they "looked at each other in shock because everybody thought there was a union."

Majorie Fulton, who has worked at Respondent's nursing home for 2 years, testified in accord with the testimony of Clementine Posey. Fulton testified that there was not a clapping of hands.

I am convinced from the testimony of Fulton, Posey, Jackson, Nash, and Young that there was not applause from a noticeable number of employees following Eber-

[2] As in earlier testimony, Respondent's witnesses were unable to identify the questioning employee. However, in this one instance the testimony was corroborated by several witnesses called by the General Counsel.

[3] Respondent argues that Nash and Jessie Jackson should be discredited since both were discharged by Respondent and were therefore biased. However, the General Counsel introduced an affidavit from Sharon Nash showing that she gave similar testimony before her discharge (see FRE 801 (d)(1)). I find that neither Nash nor Jackson was impeached. Their testimony is in accord with other evidence that I credit.

sol's comments that there was no union. Respondent produced no nonsupervisory employees to support the contention that the employees applauded. The above-mentioned witnesses called by the General Counsel, and especially employees Posey and Jackson, impressed me with their demeanor. Posey and Jackson demonstrated a better recollection of the details of the 11 August meeting than either Judy Ullery or Jimmy Crowe.

III. CONCLUSIONS

In situations when a union is the certified bargaining representative there exists a presumption of continuing majority status. Similarly, when a union has a collective-bargaining agreement, there is a presumption of continuing majority status even after the contract expires. *Wilder Construction*, 276 NLRB 977 (1985).

When a successorship is established, there is a presumption of continuing majority support. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Redok Enterprises*, 277 NLRB 1010 (1985); *Royal Vending Services*, 275 NLRB 1222 (1985).

In all the above-mentioned situations, an employer may overcome the presumptions by showing that either (1) the union has lost its majority support or (2) the employer has a reasonable doubt, based on objective considerations, that the union has majority support. In this case, there was no evidence showing that the Union had actually lost majority support.

Respondent offered evidence that it withdrew recognition on the basis of a reasonably based doubt of the Union's continued majority support. To pervail in its defense Respondent has the burden of proving that its doubt was reasonably based, by establishing that the doubt was grounded in objective considerations. *Wilder Construction*, supra.

Those objective considerations must rely, in the final analysis, on facts showing that the unit employees rejected the Union (*Wilder Construction*, supra), or alternatively, that the Union has abandoned the unit. As shown above, the credited evidence shows that the Union did not abandon the unit by inactivity.

Here, the outstanding query must deal with whether Respondent was led to believe that the employees rejected the Union.

By taking the credited evidence in the light most favorable to Respondent, the record shows the following: Three employees, Trudy Calhoun, Carol Pinner, and Meg Hutchins, may have demonstrated to Susan Morganeli that they wanted to withdraw from the Union. At most, five other employees expressed to William Bunton that they wanted to withdraw from the Union.[4] The above facts show that only 8 employees, at the most, in a unit of 140 or more, wanted to get rid of the Union.

Regarding the 11 August 1986 meeting, the credited evidence shows only that an employee asked if the Union continued to represent the unit employees. Jimmy Crowe's testimony shows that an unidentified employee asked, "Does this mean that we no longer have a Union."

As shown above, I reject Crowe's testimony that 60 to 70 percent of the employees applauded. Even if credited, however, that testimony would not establish a reasonable basis for believing that the Union did not maintain majority support. Testimony from Administrator Judy Ullery established that about 50 to 60 of Respondent's employees were not in the bargaining unit. The evidence did not show how many of the employees at the 11 August meeting were members of the bargaining unit. Therefore, Respondent failed to show that any 60 percent of the employees at the meeting necessarily constituted over 50 percent of the unit employees. Ullery testified there were about 140 to 150 employees in the unit. Respondent's evidence shows that there were at least 100 employees at the 11 August meeting. If 60 of those were nonunion employees, it is apparent that a possibility existed that only nonunit employees applauded.

Although the above analysis results in what may be an unlikely scenario, it is important to keep several thoughts in mind. It is Respondent's burden to show that it had an objective belief that the unit employees in substantial numbers expressed a desire to get rid of the Union. That belief must be shown to be based on objective factors. With that burden in mind, it is necessary to analyze the evidence in a critical light in order to consider the objectivity of the evidence. I cannot conclude, for example, that a question of whether the Union continues to represent the employees shows that the questioning employee is opposed to the Union. Moreover, I cannot conclude, for example, that applause in a room that included unit and nonunit employees represents the desires of unit employees, absent some proof that applauding unit employees constituted a substantial portion of the total bargaining unit. The record contains no such proof. See *Thomas Industries*, supra.

The credited evidence shows that, at most, only 8 employees out of a unit exceeding 140 expressed a desire to get rid of the Union. At least one other employee questioned whether they were still represented by the Union after Respondent purchased the nursing home. However, that employee did not express a desire to get rid of the Union. On the basis of that evidence it is clear, and I find, that Respondent did not have a reasonable basis to doubt the Union's majority status in August 1986.

A. *Refusal to Consider the Gaither Grievance*

As shown above, Respondent advised the Union on 29 October 1986 that it would not accept the Union's grievance regarding Paula Gaither. Respondent based that action on its "good-faith doubt that (the Union continued) to represent our employees."

Because of my findings that Respondent violated Section 8(a)(1) and (5) by refusing to recognize the Union in August 1986, it follows that Respondent had a continuing duty to bargain in good faith in October 1986.

Before August 1986 Respondent and the Union had an established procedure to process grievances. That procedure is outlined in the collective-bargaining agreement, which is in evidence. After Respondent took over the nursing home on 1 August 1986 it made only two changes in the employees' terms and conditions of em-

[4] As shown above, however, two of the five only requested of Bunton information on how to rescind their dues deduction.

ployment. Those changes involved insurance and meals for employees. No change was ever announced, and the evidence does not show that Respondent instituted any changes in the grievance procedure.

Since Respondent did not change the grievance procedure at a time before it began operations with a full complement of employees, its subsequent refusal to process the grievance because it had illegally withdrawn recognition also constitutes a violation of Section 8(a)(1) and (5). *Turnbull Enterprises*, 259 NLRB 934 (1982).

1. The March 11, 1987 speech

After the first day of hearing, Administrator Judy Ullery returned to the nursing home and addressed the employees. Ullery admittedly spoke to the employees regarding their efforts to organize for the Union. The General Counsel alleges that that speech violated the Act as follows:

> Informed its employees that the Union caused employees benefits to be eliminated and threatened to eliminate its employees benefits.

The General Counsel called five witnesses, all of whom were employed by Respondent on 11 March 1987 to testify regarding Judy Ullery's speech.

Former employee Deloris Woods testified that Ullery told the employees some of the disadvantages of having the Union, that "some of our benefits would be taken away from us." Annie Gray and Anita Parnell testified about the March 11 speech, but Gray's and Parnell's testimonies did not include anything about benefits being taken away. Betty McClure recalled that Ullery asked the employees if they could recall "when the benefits [were] taken away." McClure said Ullery told them the benefits were taken away because of the Union. Barbara Walker recalled that Ullery told the employees that the Union they had before had taken away "some of our vacation benefits and insurance benefits."

Judy Ullery testified as follows regarding her comments about loss of benefits:

> Q. Now, at the meeting you said you told the employees about benefits being lost in the past. Isn't it a fact that you told them that benefits could be lost again if the Union comes back in?
>
> A. I did not say that. All I said—because I knew that I would have to answer for what I said—was that my experience has been in the past, that this is what has happened. I did not say this is what would happen in the future, no.
>
> Q. Your experience had been in the past, that employees would lose benefits if the Union came in?
>
> A. My experience had been in the past, from the Union negotiations that I had been in at the Germantown facility, and I always used the Germantown facility, because I was in on every negotiation at that time—I said that, yes, indeed, they did lose benefits, and they did.

Respondent also called Assistant Director of Nursing Ruth Landers regarding Ullery's speech:

> Q. Do you have any recall of any statements that employees had lost benefits at Germantown?
>
> A. No, sir, I do not. We did have the statement that they did lose their insurance benefits.

2. Analysis

The bulk of the testimony illustrates that Ullery's remarks included comments that employees had lost benefits in the past because of the Union. I am convinced that Ullery did not specifically threaten that benefits would be taken away. Only Deloris Woods recalls such a threat. The General Counsel's witnesses, McClure and Walker, agreed with Ullery and Landers that Ullery mentioned only that benefits had been lost in the past.

a. *Solicited employees to repudiate their union membership and support*

Deloris Woods testified:

> A. Well, [Ullery] said that if anybody had signed forms, that she suggests that we get them, and tear them up, and if we had a friend, or knowed of anyone that had signed, to talk to them.
>
> Q. Okay. Did she say what kind of a form?
>
> A. Well, she was talking about the Union slip, the form for the Union.

Annie Gray testified:

> Q. Would you tell us what Ms. Ullery—what you recall Ms. Ullery saying at this meeting?
>
> A. That she knew about some employees passing around some slips of paper concerning the Union, and that they need to think twice before joining the Union.

Betty McClure recalled:

> Q. Would you tell us what you remember Ms. Ullery saying at this meeting?
>
> A. Well, she started out saying that the reason we wasn't getting—wasn't getting any nickel raises was because of the Union. Then she said, for those of us that had friends, that we ought to talk to them about the Union. Tell them that the Union, you know, wasn't no good, and that we'd better get out.

Barbara Walker testified:

> Q. Now, would you tell us what you remember Ms. Ullery saying during that meeting?
>
> A. She said that it was okay, for her lawyer—her lawyer said it was okay for her to give that meeting, and she said that she had heard that there was a Petition going around, that somebody had signed up for the Union, and if we had signed up, she would like for us to take our name off of the Petition.

Anita Parnell stated:

> Q. Would you tell us what you remember Ms. Ullery saying during that meeting?

A. I don't remember much, but I know—I know that she said that whoever was in the Union, it was best for them to get out of the Union, stuff. It wasn't very much that I remember though, because I really wasn't paying no attention.

Assistant Administrator Brenda Howell testified that Judy Ullery did not tell the employees that she would like them to get out of the Union. However, Judy Ullery admitted that she did ask the employees to take their names off the petition:

Q. Did you tell the employees not to—tell the employees to take their names off the Petition, or any card if they had signed?

A. I did. They asked me if they had signed it, and if they did not mean to sign it, and my suggestion was for them to call the Union, and see if there's any way they could have their name removed. That's the ones that called me and asked me about it.

3. Analysis

Although it is not absolutely clear from Ullery's testimony whether she asked employees to remove their names from the union petition while speaking to the employees on 11 March, I am convinced from her testimony and from the testimony mentioned above that Ullery did make that request during her 11 March speech. Ullery's testimony was in the context of a chain of questions regarding her 11 March speech and she did not say that those comments were not included in that meeting.

Informed employees that wage increases would be frozen and that the employees had not received a wage increase because of unfair labor practices filed with the board.

Regarding wage increases, Deloris Woods testified:

Q. Do you remember anything being said about raises?

A. Oh, yes. She said that the reason why we haven't gotten our nickel raise was because some girl had filed charges against the company.

Q. And was any question ask about the raise?

A. Yeah. It was some girl there, and she asked about, you know, was that the reason why we wasn't getting our nickel raise, because of this girl who had filed charges against the company. She really didn't answer her, you know, didn't give her an answer to the question.

Annie Gray:

Q. Did she say anything else?

A. Yes. She stated that the last time the Union was in, that they put a freeze on the wages, and whatever else that was concerning the Union, and it put a stop on things for about a year, and that if the Union came into force, that it would put a freeze on the raise you're supposed to get annually, for your year to year.

Q. Did she say how long the freeze would be?

A. She said it would take approximately a year, like it did last time.

Regarding the unfair labor practices and raises, Gray testified:

Q. Did she say anything about the unfair labor practice charge, and the raises?

A. I can't remember, because I wasn't paying too much attention to her.

Betty McClure recalled:

Q. Do you remember anything else she said?

A. And she said that the reason we wasn't getting the nickel raises was because of the Union, because they had, you know, had everything at a standstill.

Barbara Walker:

Q. Did she say anything else about a wage increase?

A. She said that we wouldn't get a increase in pay, because of the lawsuit that they had going, and that it would take a whole year before—if the Union came in, it would be a whole year, and then they had to sit down, and decide the benefits and everything. It would be a whole year before we'd get any benefits and raises.

Anita Parnell:

Q. Did she say anything else about the Union?

A. No. She said that if they did get a Union up in there, it would be on a freeze for a whole year.

Q. Did she say what would be on a freeze?

A. No, she didn't say. She just said everything would be on a freeze, but I don't remember if she said nothing.

Respondent's Administrator Judy Ullery testified:

Q. By Mr. Nadworny: Did you make any statements to employees that they would lose any wage increases, that they presently had?

A. Absolutely not.

Q. Did you say anything to employees, concerning what would happen during negotiations for a contract?

A. I don't remember.

Later, on cross-examination, Ullery testified:

Q. Now, you testified that you told the employees that the unfair labor practices—Well, I'm sorry, let me ask you again. What did you say about the unfair labor practices?

A. I told them, when they asked about the money, that at this point we were following the contract, because an employee from the kitchen had filed a grievance, and the Union—we had refused to

hear the grievance, and the Union had filed the unfair labor practice.

Q. And I believe, you testified you told the employees you were following the contract with regard to the raises?

A. That's right.

However, Assistant Administrator Brenda Howell testified regarding Ullery's 11 March address:

Q. Did she say anything to them about wages being frozen?

A. There were some questions from the floor, about 90 day increases, and she addressed it, that everything had been frozen, and would remain under the contract until the NLRB hearing was settled—the charges were settled.

Q. Did employees ask about the five cent increase?

A. No. They asked about a 90 day increase, which was not in their present contract.

Q. Did she ask them or tell them, that it could be a year without increases, or changes?

A. She told them if there was another Union election, elections could go on or the negotiations could go on for a period of a year, which she had seen that happen.

Q. Did she say that that had happened in the past?

A. Yes.

Assistant Director of Nursing Landers testified:

Q. Now, when Ms. Ullery talked aobut the Germantown facility, and what happened at that facility, exactly what did she say happened at that facility?

A. She only referred to the length of negotiations, that wages were frozen during that period, and that if anyone—she also encouraged anyone if they had any questions, they might talk to some of the employees that were at Germantown, at that time. Some that joined, and some that did not join.

4. Analysis

Although the above-mentioned testimony illustrates confusion, I am convinced that Judy Ullery did warn the employees that dealing with the Union would result in protracted negotiations, which in the past had lasted for a year, and that wages would be frozen during that time. I find the evidence unconvincing that Ullery threatened the employees that they had lost a wage increase because of unfair labor practice charges.

William Bunton: Two former employees testified about conversations with William Bunton. Bunton, like Judy Ullery, had testified in the 11 March hearing.

Annie Gray testified that a day or so after the 11 March hearing she talked with Supervisor Bunton in the dining room. Only the two of them were involved in that conversation:

Q. And would you tell us what Mr. Bunton said to you during that meeting?

A. He came to me, and said that Martha Ryan, he had asked Martha Ryan if she was going to join the Union, and she said that, no, she wasn't going to join it, and he asked me if I was going to join the Union, and I told him, No.

Q. Now, before Mr. Bunton asked you that question, had you ever told him anything about your feelings toward the Union?

A. No.

Barbara McClure recalled talking with Bunton in the breakroom on 13 March. Only McClure and Bunton were present:

Q. Tell us what Mr. Bunton said to you?

A. Well, he came in while I was smoking a cigarette, he lit up him a cigarette, and he asked me, you know, did I join the Union, so I told him, No. So, then he said, have I thought about it, or have I been thinking about it, so I told him, you know, I didn't tell him nothing. So then he said, well, I would join myself, but because, you know, I couldn't, because of his job. So, then he asked—then he said, well—So then I told him that I had, you know, I had thought about it, so then he said, you know that if Ms. Ullery finds out, you know, about those that join the Union, that she was going to get rid of them. So, then I told him, I said, well, I feel she shouldn't fire nobody beccause they join some Union, and if she's going, you know, to fire me, she'd better fire me for a reason, and not because, you know, I joined some Union. So then he said, well, she'll find out, and then he also said, and that's not hard for her to do.

Bunton denied talking with either Gray or McClure about the Union.

Bunton's testimony regarding the alleged conversations with Gray and McClure appears to conflict with testimony he gave on 11 March. On 27 May when Bunton was trying to minimize his contacts with employees to show that he did not make violative comments he testified:

Q. But I mean, you do sit in the breakroom from time to time?

A. No, I always sit in the dining room

Q. You never sit in the breakroom?

A. No, not really. Sometimes I'll go in there to eat my lunch, but there would be, you know, a room full of employees, or I might eat it in the dining room.

Q. But you do go in and talk to the employees in the breakroom, don't you?

A. I go inside, but I really don't talk to many employees there, unless they're working under my supervision.

Q. You've never talked to an employee in the breakroom?

A. Yeah, I've talked to employees.

Q. You've talked to employees about the Union, haven't you?

A. No, I have not.

Q. Employees have asked you questions about the Union, haven't they?

A. No, sir. They have not.

Q. Employees have never asked you a question about the Union?

A. No, sir. Excuse me, yes, one of my housekeepers did, but I told him that I couldn't—you know, that he would have to talk to Ms. Ullery about the Union. Any questions regarding the Union, they would have to go talk to her.

Q. And that was the only time?

A. That was the only time that anyone ever asked me concerning the Union.

Q. That one single time?

A. That I recall, sir.

On 11 March, however, when Bunton was trying to establish that he had contacts with employees to show that he had knowledge about employee efforts to get rid of the Union, Bunton testified that *he would be in the breakroom* "taking my break or smoking a cigarette" when he would overhear employees, in and out of his department, discussing getting rid of the Union. Additionally, on that occasion Bunton *recalled several conversations with employees about the Union*. On 27 May he testified he never had but one conversation with an employee about the Union. Bunton's conflicting testimony convinces me that he cannot be believed. I was impressed with the demeanor of Annie Gray and Betty McClure. Both appeared to testify truthfully. I credit their testimony. I find that their testimony establishes illegal interrogation and a threat of discharge.

5. Conclusions

As shown above, on or before March 1987 Respondent had an obligation to recognize the Union as bargaining representative for its unit employees. Once the Union becomes exclusive bargaining representative it is incumbent on an employer to avoid acting to undermine the Union. Obviously, an atmosphere of good-faith collective bargaining is impossible when the employer is working to undermine the Union.

In the instant situation Respondent obviously hoped to prevail in the allegation that it illegally withdrew recognition from the Union. If Respondent had been successful then the Ullery address on 11 March to employees would be considered in light of Section 8(a)(1) alone. However, as found on 11 March Respondent was obligated to recognize the Union and to avoid taking actions to undermine the Union in violation of Section 8(a)(1) and (5).

Against that background it is apparent that Respondent, by Bunton threatening its employees with discharge for supporting the Union and by interrogating employees about union activity (*Baton Rouge General Hospital*, 283 NLRB 192 (1987), and by Judy Ullery informing its employees that benefits were lost in the past because of the Union, asking its employees to remove their names from the union petition, and informing its employees that wage increases would be frozen for up to a year if Respondent negotiated with the Union, attempted to undermine the Union in violation of Section 8(a)(1) and (5) of the Act. *Bay Area-Los Angeles Express*, 275 NLRB 1063 (1985); *Marriott Corp.*, 258 NLRB 755 (1981); *Hedaya Bros., Inc.*, 277 NLRB 309 (1985).

CONCLUSIONS OF LAW

1. Respondent Hillhaven Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. General Drivers, Salesmen, Warehousemen's Local 984, AFL–CIO, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. From 1 August 1986, the Union was, and has been at all times since, the exclusive bargaining representative of Respondent's employees in the bargaining unit described below, within the meaning of Section 9(b) of the Act. The appropriate bargaining unit is

> All full-time and permanent part-time nurses' aides, housekeeping employees, dietary employees, and laundry employees employed at the Respondent's Care Inn Raleigh, Tennessee location, excluding all other employees including nurses, office clericals, professional employees, guards and supervisors as defined in the Act.

4. Respondent, by refusing to recognize and bargain with the Union since 26 August 1986, by refusing to consider and discuss grievances since 22 October 1986, by asking its employees to remove their names from the Union's petition, by telling its employees that benefits were lost in the past because of the Union, by threatening its employees with discharge for supporting the Union, by interrogating its employees about the Union, and by informing its employees that wage increases would be frozen for up to a year if Respondent negotiated with the Union violated Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Hillhaven Corporation, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain on request with General Drivers, Salesmen, Warehousemen's Local 984, AFL–CIO, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, in derogation to its bargaining obligation imposed by the Act.

(b) Refusing to consider and process grievances.

(c) Informing its employees that benefits were lost in the past because of the Union, asking its employees to remove their names from a union petition, threatening its employees with discharge for supporting the Union, interrogating its employees about the Union, and by informing its employees that wage increases would be frozen for up to a year if Respondent negotiated with the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) On request, bargain collectively with the above-named Union as exclusive bargaining representative of all the employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed agreement.

(b) On request process a grievance regarding employee Paula Gaither, which it refused to process on 29 October 1986.

(c) Post at its Care Inn Raleigh Nursing Home, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Braeburn Nursing Home, Inc. *and* Local 1475, Service Employees International Union, AFL–CIO–CIC, Petitioner. Case 1–RC–19000

July 29, 1988

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

The National Labor Relations Board, by a three-member panel, has considered objections to an election held January 28, 1988, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 22 for and 19 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions[1] and briefs, has adopted the Regional Director's findings and recommendations,[2] and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 1475, Service Employees International Union, AFL–CIO–CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full time and regular part time service and maintenance employees including nurses aides, housekeepers, laundry workers, kitchen workers, maintenance workers, activity aides, cooks and licensed practical nurses employed by the Employer at its Newton, Massachusetts location, but excluding all registered nurses, professional employees, confidential employees, department heads, business office clericals, guards and supervisors as defined in the Act.

MEMBER JOHANSEN, dissenting.

I would sustain the Employer's Objection B(2), set aside the election, and direct that a second election be held.[3] Objection B(2) alleges that "[t]he Region did not adequately guard the secrecy of the election because it failed to provide an adequate voting booth." I am not persuaded by the Employer's argument that the Haitian employees were peculiarly susceptible to apprehension regarding ballot secrecy, nor am I basing my dissent alone on the failure of the Region to furnish a booth when the Region had apparently promised that one would be used. Whether the Region promised that a booth would be available is not of primary concern, but it does weigh in here as the Employer had briefed its employees that a booth would be used. I am persuaded that the manner in which the election was conducted does not foster public trust in the Board's processes. All the circumstances present here just do not measure up to the standards the Board ought to require of itself in conducting elections.[4]

[1] We adopt, pro forma, those recommendations to which there were no exceptions. In adopting the Regional Director's recommendations that the objections be overruled in their entirety, we find that the alleged objectionable conduct, considered individually or cumulatively, does not warrant setting aside the election.

[2] Unlike our dissenting colleague, we find that the Employer's Objection B(2) does not justify setting aside the election. Objection B(2) alleges that "[t]he Region did not adequately guard the secrecy of the election because it failed to provide an adequate voting booth." In support of this objection, the Employer argues that its Haitian employees (roughly one-half of the electorate) were suspicious of the ballot secrecy when the Board agent conducting the morning election session did not provide an official voting booth. The Employer's contention falls short of articulating objective (as opposed to subjective) proof from which it can be concluded that the failure to provide an official voting booth interfered with the laboratory conditions of the election. See, e.g., *Newport News Shipbuilding & Dry Dock Co.*, 243 NLRB 99 (1979). Indeed, there is neither evidence nor a contention that the secrecy of the ballot was, in fact, violated.

[3] Accordingly, I need not consider the remaining exceptions raised by the Employer.

[4] The morning session of voting was done on a card table, with a sheet used to cover the voter at the table. The parties' endeavor to make use of available resources in the face of difficulties is commendable, but this does not relieve the Board of its responsibility to conduct elections properly.

Midessa Construction Company *and* United Brotherhood of Carpenters and Joiners of America, Local Union 1428. Cases 16–CA–10895 and 16–CA–10938

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On February 8, 1984, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, as modified below, and to adopt the recommended Order as modified.[3]

The judge found, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off two teams of sheetrock employees on February 11, 1983:[4] Thomas Gallegos Jr. and Cuahtemoc Anguiano; and Salvador Machuca and Anastacio Dominguez Jr.[5] We agree with the judge as to the Machuca-Dominguez team, but we disagree as to the Gallegos-Anguiano team.

The Respondent undisputedly knew that Gallegos and Machuca had been leaders of, and that Anguiano had participated in, the January 25, 1983 protected strike protesting the Respondent's wage policies. It also demonstrated strong animus against these and other strikers by the various unfair labor practices described in the judge's decision, including the temporary firing of all strikers on January 25 and the demotion on rehiring of Machuca after the strike.

On the other hand, the Respondent laid off employees on February 11 for undisputedly legitimate economic reasons and contends that it selected employees for layoff based on poor productivity, rather than seniority, a legitimate factor that had been consistently relied on in past economic layoffs. The General Counsel has not excepted to the judge's finding that no inference of unlawful discriminatory motive can be drawn merely from the percentage of former strikers among those laid off.[6] Consequently, as found by the judge, a critical factor both in the evaluation of the General Counsel's prima facie case and in subsequent consideration of whether the Respondent would have taken the same action in the absence of union activities is whether the Respondent's reasons for selecting the individual employees for layoff withstand scrutiny and, if not, whether an unlawful motive can be inferred.

The judge's drawing of an inference of unlawful motive from rejection of the Respondent's poor productivity allegations regarding the Gallegos-Anguiano team directly contradicts his own revised finding that: (1) this team was unacceptably slow in taking 3 days to complete a furrdown assignment on February 8 to 10; and (2) a representative of the Respondent's chief customer had specifically complained about this situation. Even assuming a prima facie case of unlawful motivation and the validity of the judge's rejection of the Respondent's three other criticisms of this employee team's poststrike work, we find that the foregoing evidence of legitimate criticism and lack of evidence of disparate treatment negates the inference of unlawful motive. We, therefore, find that the Respondent has shown that it would have selected Gallegos and Anguiano for layoff even in the absence of their union activities.[7] The complaint regarding these two employees is dismissed.

On the other hand, relying particularly on Machuca's prior unlawful demotion, we agree with the judge's credibility-based rejection of the Respondent's criticism of work by Machuca and Dominguez and with his conclusion that their layoff was unlawful. The Respondent has argued that this team took too much time on a poststrike assignment of framing and sheetrocking a ClayDesta Bank elevator penthouse compared to the time spent prior to the strike by another sheetrock team

[1] In light of the General Counsel's withdrawal from consideration of certain portions of the answering brief, we deny the Respondent's motion to strike the brief in its entirety.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

We shall modify the recommended Order to conform to the violations found and to include a general cease-and-desist provision.

[4] All dates are in 1983 unless otherwise indicated.

[5] The judge dismissed the complaint allegations regarding the other 12 employees laid off that day.

[6] Twelve of the sixteen laid-off employees participated in the January 25 strike.

[7] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

working on another identical penthouse. The judge, however, discredited the testimony of the Respondent's Foreman Brown and found that Machuca-Dominguez worked 6 days (rather than 9, as alleged by Brown) and that the other team worked 7-1/2 days (rather than 5, as alleged by Brown). Furthermore, the judge credited Machuca's testimony that Brown had said that the Machuca-Dominguez team's work on the penthouse was "looking real good." Finally, it is undisputed that Machuca was regarded by the Respondent as a good worker prior to the strike, and the judge again credited Machuca's testimony that he worked even harder after the strike. In light of the above and the absence of any credible evidence in support of the Respondent's criticism of the penthouse work, we agree with the judge that the General Counsel has proved the 8(a)(3) and (1) complaint allegations regarding the February 11 layoff of Machuca and Dominguez.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Midessa Construction Company, Midland, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 1(g) and (h).

"(g) Selecting employees for layoff because they engaged in union or other protected activities.

"(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Delete the names of Thomas B. Gallegos Jr. and Cuahtemoc Anguiano from paragraph 2(b).

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you concerning your union or other protected activities.

WE WILL NOT threaten to discharge you if you engage in activities on behalf of United Brotherhood of Carpenters and Joiners of America, Local Union 1428, or any other labor organization, or if you engage in other group action protected by the National Labor Relations Act.

WE WILL NOT discharge you if you engage in a strike over wages or other economic matters.

WE WILL NOT require discharged economic strikers to fill out new employment applications and be reevaluated at the time of rehire, as if they were new employees.

WE WILL NOT demote you because you engage in union or other activities protected by the Act.

WE WILL NOT select you for layoff because you engage in union or other activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole the below-named employees because it has been found that we unlawfully discharged them on January 25, 1983:

Cuahtemoc Anguiano	Ezequiel Mata
Avitio A. Carrillo	Mario Matta
Jesse R. Dominquez	Kevin Nichols
Anastacio Dominquez Jr.	Derrill Pope
Alvaro Fuentes	James Pope
Thomas B. Gallegos Jr.	Louis Rodriguez
Joe Gaitan	James Rowe
Bill Gleason	Dale Smith
Bill Leasure	Elivorio Soto
Victor Leija	Orvie Springs
Salvador Machuca	Mike Tapia

WE WILL offer Anastacio Dominguez Jr. and Salvador Machuca immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment or, if no work is available or if they would have been included in any subsequent layoffs, then WE WILL establish a preferential hiring

list for the employees and offer them reinstatement before hiring or recalling others when we resume hiring, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make Anastacio Dominguez Jr. and Salvador Machuca whole for any loss of earnings or other benefits resulting from their unlawful layoff on February 11, 1983, less any net interim earnings, plus interest.

WE WILL remove from the personnel files of the above employees any reference to the terminations on January 25, 1983, and layoffs on February 11, 1983, and WE WILL notify each of them in writing that we have done so and that evidence of the unlawful discriminatory actions will not be used against them in any way in the future.

MIDESSA CONSTRUCTION COMPANY

Ruth Small and *Olivia Garcia, Esqs.*, for the General Counsel.
Charles C. High Jr. and *Michael D. McQueen, Esqs. (Kimp, Smith, Duncan & Hammond)*, of El Paso, Texas, for the Respondent.
Jim Purcell, of Midland, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This case was tried before me in Midland, Texas, on eight dates beginning June 6 and closing July 27, 1983, pursuant to the April 6, 1983 consolidated complaint (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board. The complaint is based on charges filed January 31 and March 2, 1983, in Cases 16–CA–10895 and 16–CA–10938, respectively, by United Brotherhood of Carpenters and Joiners of America, Local Union 1428 (the Union or Local 1428) against Midessa Construction Company (Respondent or Midessa).[1]

Did Midessa Construction Company discriminate against its former striking employees by selecting 12 of them for layoff on February 11, 1983, because of their protected strike and union activities (as the General Counsel alleges), or was Midessa motivated by a desire to correct work deficiencies and eliminate its least productive workers as it struggled to survive an economic crisis (as the Company contends)? That general question, plus subsidiary issues, is presented for resolution here.

In the complaint the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by interrogating employees, harassing them, threatening them with discharge, and disparately enforcing work rules relating to production, breaks, and lunch periods, and Section 8(a)(3) of the Act by terminating certain employees on January 25, 1983, requiring them to fill out new applications when recalled, and terminating certain employees on February 11, 1983.

By its answer Respondent admits certain factual matters but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Midessa Construction Company, a Texas corporation with its principal office and place of business in Midland, Texas, does acoustical and drywall work as a subcontractor in the building and construction industry. During the past 12 months Midessa purchased and received, at its Texas facility, goods and materials valued in excess of $50,000 directly from points outside the State of Texas. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that United Brotherhood of Carpenters and Joiners of America, Local Union 1428 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Overview*

On the morning of January 25, 1983, some 25 to 30 employees of Respondent gathered at the gate to one of Midessa's jobsites and refused to go to work. They wanted higher pay. Timing of the strike was unfortunate, for Midessa was experiencing a double whammy of (1) cost overruns and (2) customer dissatisfaction with quality and progress on Midessa's construction jobs. Whether Respondent fired the strikers on January 25 is one of our first issues. In any event, Midessa rehired them a few days later to lay off 16 employees 12 of whom were recalled strikers) on February 11, assertedly for economic reasons.

Although the General Counsel does not allege that the layoff itself was illegal, he does contend, through his trial attorneys, that Respondent was unlawfully motivated in the selection it made for the layoff. Of the 16 employees so terminated, 12 had been strikers. Moreover, the General Counsel's argument continues, Respondent demonstrated animus against the strikers after they returned to work by, among other conduct, burdening them with higher production standards and disparately enforcing work rules against them.

Countering the General Counsel's animus and harassment contentions, Midessa argues that its tighter enforcement of preexisting work rules and imposition of increased productivity standards were steps adopted to help save the Company from economic disaster. Respondent defends its layoff selection on the ground that the employees were picked in the usual fashion—the

[1] All dates are for 1983 unless otherwise indicated.

least productive were elected for separation. In this selection process, a point Midessa considered was the (disputed) fact that some of the strikers selected had engaged in a slowdown after their return to work.

B. *Background*

1. Midessa and its construction jobs

Respondent is a commercial drywall and acoustical subcontractor. Max H. DeVilbiss, president of Midessa, established the firm in June 1978 (Tr. 274, 932). DeVilbiss explained that drywall work consists of installing the metal stud framing, plus any insulation, and hanging the sheetrock on the metal studs. The acoustical work involves installing ceiling frames in the form of metal grids, placing the insulation above that, and applying the acoustical pads (Tr. 275). Assisting DeVilbiss in the management of his firm are General Superintendent Joe Beasley, Office Manager Warren Brown, and a job foreman in charge of each job (Tr. 294, 933).

Around January-February 1983 Respondent had about a dozen jobs under construction in the Midland-Odessa, Texas area. Nearly all the jobs were in Midland, with one being in Odessa, and another job (First State Bank) being in Abilene, Texas. There were about 100 drywall employees on Respondent's payroll at this time. The names of some of the Midland jobs appear frequently in the record. The more prominent ones are: Gulf Building, Dinero Plaza, Petroleum Center North (Petro North), and ClayDesta Bank Building (Tr. 277–278, 281, 938).

2. Unfavorable conditions develop

Around mid-January 1983 Respondent became aware of two developments. First, the financial condition of Midessa was starting to deteriorate "rapidly," and second, Area Builders Inc., Midessa's chief customer, wrote DeVilbiss a strongly worded letter complaining of poor quality (Tr. 933, 943). Although DeVilbiss never specified which of the two conditions came to his attention first, it appears that the letter, dated (Wednesday) January 12, probably did, for DeVilbiss testified it was about the third week of January that he began preparing a list of the jobs he was concerned about (Tr. 934, 990, 994).

The letter of January 12, 1983, if from Ray Dunlap, Area Builders' general superintendent, to Midessa regarding the Dinero Plaza job (R. Exh. 13).[2] The text reads:

> Dear Max,
>
> Attached hereto are 5 invoices from T & M Paint Co. for corrective work done due to your work not being done correctly.
>
> I suggest you get with Ralph Madry and resolve this directly with him and advise me accordingly.
>
> Max, I know personally that Kenneth Key has many times complained about your quality of work and lack of supervision. My personal contact with the job verifies that this condition has existed. You cannot afford this kind of operation and cannot tolerate it. The workmanship and supervision on this job is the worst I have seen in all your work done for us; however your quality has been poor in other instances.
>
> As you know, several proposed lease areas are now being considered. If you are not prepared to correct the problems above described, there is no need to start. We absolutely and positively will not accept or tolerate continuation of this situation.
>
> I was also at the Parker Building yesterday and instructed Kevan Amonett to refuse to let you install sheetrock on this job until you have straightened the walls. By copy of this letter, I am also advising him to check all your future walls *before* they are sheetrocked, bedded and taped.
>
> I do not see how you can keep from insisting and demanding that your people provide a straight wall, but if you can't—I can!
>
> There are times on various jobs where work is required to be done on Saturday. This sometimes occurs due to your lack of progress, ours, nature of the job or other conditions. In the past you have refused to do so. Certainly I want you to know that I honor and respect your belief and in no way would I discriminate against it; however there are just simply times that work must be performed on Saturday. My personal belief is Sunday as being the Lord's Day, however if necessity demands, I personally will work on Sunday and will ask others to do so. I am not asking you to do anything that I myself would not do.
>
> I regret the necessity of having to write a letter of this nature of criticism. I hope you will accept it as being constructive—for your benefit and for ours.
>
> Sincerely yours,
> AREA BUILDERS, INC.
> Ray Dunlap
> General Superintendent

After receiving this letter, DeVilbiss, I find, compiled his job list.[3] The list contains the names of 20 jobs (R. Exh. 9). DeVilbiss discovered that labor costs were a major problem, for Midessa was spending about $1.50 to get $1 worth of production (Tr. 933). Midessa lost about $100,000 on the Dinero Plaza job. Expressing the obvious, DeVilbiss testified that Respondent would be bankrupt if all its jobs ended as Dinero (Tr. 939).

DeVilbiss testified that of the 20 jobs shown on the list he compiled, 17 were either complete or substantially so (Tr. 934, 979). The jobs with significant work left were the Gulf Building, ClayDesta, and Petro North (Tr. 978, 1000). Although Dinero was not completed until late May, and not accepted by the owner until July, that was because Midessa had to do a lot of corrective work on

[2] DeVilbiss testified that Area Builders is Midessa's biggest customer. In addition to the Dinero Plaza project, Area Builders was the general contractor on the Petroleum North and ClayDesta Plaza jobs, plus others, where Midessa was working (Tr. 944)

[3] It is clear that Dunlap's letter set off alarm bells at Midessa. Respondent could not afford to lose its position as a subcontractor for Area Builders.

the job (Tr. 939, 992, 999). DeVilbiss testified that a subcontractor has to absorb the cost of his own mistakes (Tr. 996).

The job list contains five columns of data: name of each job, the budgeted cost figure, the amount of budget dollars remaining (or exceeding budget), and the cost as a percentage of the budgeted figure.[4] Thus, DeVilbiss testified, 100 percent means that the job, if complete, is right on line with the budget target (Tr. 935). However, the list does not reflect the stage of each job (Tr. 991). The percentage figure of ClayDesta at 68, being 32 percent under the budget target, would be reason to celebrate if the job were 98 percent complete, but cause for gloom if the job were at only the 25-percent completion stage. In fact, testified ClayDesta Job Foreman Marvin Brown, the ClayDesta job was about 50-percent complete, yet 68 percent of the budgeted cost had been used (Tr. 1034).[5] DeVilbiss testified that ClayDesta was a little behind, "but not so much that we, couldn't catch up." His concern was that if the job exceeded budget, as Northwest Elementary or Dinero Plaza had done, then Midessa was "in a heap of trouble." (Tr. 992.) Dinero, basically complete (Tr. 992), is listed at 155 percent of budget; Northwest Elementary, complete or substantially so, at 311 percent.

Perhaps it should be noted that the last four jobs on the list, Dinero, Gulf, ClayDesta, and Petro North, were also Midessa's biggest in terms of budget dollars.[6] Gulf is the largest, at over $313,000, ClayDesta second, at over $196,000, Dinero third, at just over $100,000, and Petro North fourth, at over $69,000. Ten of the other sixteen weigh in at less than $5500 each. The remaining six average about $30,000 each. Excluding Gulf, ClayDesta, and Petro North only three of the other jobs finished within the budgeted labor cost. The largest of those three was for $17,486, the smallest was for $291, and the third was for $1064.

Because of DeVilbiss' testimony that Midessa keeps a running total for its labor costs on these jobs (Tr. 942, 993), his assertion that the Company's financial condition began to "deteriorate rapidly" in January 1983 is not to be understood as something that happened over a weekend. Rather, it seems clear that DeVilbiss suddenly realized, on compiling his running totals into a chart, that Midessa's financial condition was on a downhill slide. This financial analysis by DeVilbiss was preceded, I have found, by the letter from Ray Dunlap, the general superintendent of Area Builders, Inc.

DeVilbiss, faced with the economic threat to Respondent inherent in both Dunlap's letter and the job cost figures, addressed his own letter, dated January 24, to Midessa's employees. He personally posted a copy at ClayDesta and Petro North on that same day, and at the other jobsites the next morning. He showed the job foremen the job cost tabulations, told the foremen to read the letter to the employees, and to get more productivity and quality from the (Tr. 944a–945). The January 24 letter (with two typographical misspellings corrected) reads (R. Exh. 8):

> To All Employees of Midessa Construction Co.
>
> We have been receiving in the office many complaints about a lack of quality workmanship on our various jobs. I have personally inspected many jobs and found poor quality. I have also noticed in many cases there was hardly any forward production because most of the crew was fixing walls, ceilings and other components that should have been done right the first time.
>
> The poor quality mentioned above has been showing up in the production figures. In the past six months there has been no job, save one, that did not go over the budget for labor. I believe this is due to a bad work attitude for a lot of you plus the fact that we are doing the same job over and over because of poor workmanship.
>
> The sum of the matter is that neither of these conditions can be tolerated any more as this can lead to the death of the company and/or your jobs.
>
> Take responsibility for your work and put out a finished product that you can be proud of. Remember, if you don't have time to do a job right you certainly do not have time to do it over.
>
> I regret the necessity of having to write a letter of this nature. I hope you all will accept it as being constructive for your benefit and for the company.
>
> Sincerely
> Max H. DeVilbiss
> President

The memo from DeVilbiss sparked a reaction he did not expect.

C. *The January 1983 Strike*

1. Strikers terminated, then reinstated

There is no dispute that the morning of January 25, the day after DeVilbiss posted his memo to employees, some 25 to 60 employees gathered in a parking lot at the gate to the ClayDesta jobsite and declined to go to work.[7] Most of the ClayDesta employees were so gathered, and some employees from the Petro North jobsite joined them. Drywaller Thomas B. "Tommy" Gallegos Jr. was among the employees present.

Gallegos is very experienced in the work of commercial drywalling. At this time both he and Salvador Machuca (a disputed issue is whether Machuca was a leadman at this time) were working at ClayDesta. The testi-

[4] DeVilbiss testified that the budget figure does not include profit or overhead (Tr. 935). It appears that the figures are in terms of direct labor costs only (Tr. 934–935, 942).

[5] Foreman Brown confirmed that his estimate of the completion stage of the job came from his knowledge of the job, and not from anything on the tabulated list (Tr. 1094).

[6] As earlier noted, the budget figures relate only to direct labor costs, or, as DeVilbiss phrased it, "raw" labor costs (Tr. 934, 935, 942). The listed budget is not an accounting budget. DeVilbiss testified that he bids a job by first listing the "raw" cost of labor and material (the list here apparently does not include the cost of material), and then adds "taxes, insurance, overhead, profit, and that gives us our total for us to bid the job at." (Tr. 942.)

[7] Estimates of the numbers vary. One explanation for the difference may be that other employees, not present at the beginning, arrived later.

mony of Gallegos and Machuca, key witnesses for the General Counsel, disclose that employees became upset over the memo from DeVilbiss in light of the fact that they had been expecting a pay increase since January 1, 1983. Gallegos testified that the pay increase expectation was based on the fact that area unions had received a pay increase then, and that Midessa's practice, when Gallegos previously worked for the Company, was to follow the pattern set by the union contracts in the area (Tr. 437, 598). Either Gallegos (Tr. 344, 432–440, 566–568) or Machuca (Tr. 604–606, 655–664), or both (each describes doing so himself), told Marvin Brown on January 24 that the employees wanted to meet with Superintendent Joe Beasley, or President Max DeVilbiss, about getting a raise for the employees. They testified that Brown called the office to arrange the meeting. Brown confirms that he was requested and that he did call the office and arrange for a meeting (Tr. 1035). After his call, Brown told Gallegos and the whole crew, which had gathered, that both DeVilbiss and Beasley would be at the job shack (located on the second floor of ClayDesta Bank) at 8 a.m. the next day to talk with them (Tr. 1036).

Around 8 a.m. on January 25, 1983, DeVilbiss, Beasley, and Brown went to the gate to talk to the employees. It seems that Gallegos served as the spokesman for the employees. DeVilbiss spoke with Gallegos, to the group, and with some individual employees. Gallegos told DeVilbiss that the employees were on a walkout, and that they wanted to discuss wages (Tr. 444). It is clear that they were striking for a pay increase. DeVilbiss offered to meet with four or five of the employees if the others would return to work, but that was rejected. DeVilbiss showed Gallegos the chart of labor cost tabulations for the various jobs. They also discussed the memo from DeVilbiss about poor quality and low productivity. The end result was a standoff. DeVilbiss declined to grant a pay increase, and the employees declined to go to work without one.

The parties stipulated that when the employees told DeVilbiss that they were leaving to go to the union hall, DeVilbiss told the group that if they were not back (at work) by 10 a.m. they no longer had jobs with Midessa (Tr. 9–11). At trial DeVilbiss confirmed that those employees who had not returned to work by 10 a.m. no longer had jobs with Midessa (Tr. 326–327).[8] It seems clear that he also told the group that if they were not back by 10 a.m. they could pick up their checks at 2 p.m. Indeed, DeVilbiss testified that he paid the people later that day who had not returned by 10 a.m., and that he had prepared a list of their names (Tr. 953–954). This list, containing 25 names, is in evidence as Respondent's Exhibit 14 (Tr. 975). Paragraph 8 of the complaint alleges that on or about January 25 Respondent terminated 24 named employees. The complaint also contains an allegation that Respondent violated Section 8(a)(1) and (3) of the Act by terminating the employees named in paragraph 8. Most of the individuals named in paragraph 8 and the paycheck list (R. Exh. 14) are the same employees, but there are a few differences.[9]

Returning for a moment to the remarks DeVilbiss made to the group on January 25, I note that at one point in his testimony he asserted that his reference to returning by 10 a.m. included the additional statement that he would hire people to put on the job because he had to man the job (Tr. 330). He later testified that he set a 10 a.m. deadline because he had to man the job (Tr. 947). I observed DeVilbiss closely as he testified and, on the basis of demeanor, I find that he attempted to embellish his 10 a.m. deadline statement. I do not believe him regarding his add-on clause about manning the job. He may very well have intended to man the job. It is just that I find he did not say anything about manning the job in his remarks to the group.

It was apparently shortly after 9 a.m. on January 25 that the strikers went to the union hall of Carpenters Local 1428 at the invitation of Dick Sampson, president of Local 1428, who was present at the scene (Tr. 576, 780).[10]

About 30 of Midessa's employees went to the union hall that morning where they conferred with representatives of the Union. DeVilbiss testified that around 10 a.m. Union Representative Al Spring telephone him and said he had approximately 30 of Midessa's employees there (Tr. 282, 952). DeVilbiss replied that if it was after 10 a.m. Spring did not have any employees of Midessa (Tr. 282). Spring replied that the NLRB might take a different view. He then informed DeVilbiss that he had advised the employees to return to work, and that the employees had elected a negotiating committee of about seven employees plus two union representatives to meet with DeVilbiss to negotiate. DeVilbiss at first rejected the request to meet, but then told Spring that he would think about it and call him back (Tr. 283, 953). Later that day, around 1 to 1:30 p.m., DeVilbiss called Spring back and told him that there would be no meeting, but that the men could pick up their paychecks at 2 p.m. (Tr. 283).

Still later on January 25 DeVilbiss, as he testified (Tr. 284, 953), received the following mailgram from Spring (G.C. Exh. 3):

> PER OUR TELEPHONE CONVERSATION 10:15 AM TUESDAY, JANUARY 25, 1983, BE ADVISED THAT A MAJORITY OF YOUR EMPLOYEES HAVE DESIGNED [DESIGNATED] CARPENTERS LOCAL UNION 1428, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AFL–CIO AS THEIR BARGAINING REPRESENTATIVE IN MATTERS CONCERNING THEIR WAGES, HOURS OF WORK, AND WORKING CONDITIONS WHICH IS IN ACCORDANCE WITH THEIR

[8] At trial DeVilbiss, although declining to say that the strikers had been fired, stated that as of 10 a.m. the strikers no longer had jobs with Midessa, and that they were no longer his employees after 10 a.m. (Tr. 326, 327, 331–332).

[9] Ernesto Armendariz and Eliseo Ibarbo are named in par. 8, but not in the paycheck list. on the other hand, paychecks were issued to Abraham Hermiz, Tony Hermiz, and Thomas Donica, but their names are not included in par. 8.

[10] Gallegos testified that he saw Jim Purcell, business representative of Local 1428, as Purcell sat in his automobile in front of ClayDesta bank that morning (Tr. 576). The night before Gallegos had called the Union for advice (Tr. 576).

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RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT AS AMENDED.

THE UNION HAS ADVISED YOUR EMPLOYEES TO RETURN TO WORK IMMEDIATELY AT THE RATE OF WAGES THEY WERE RECEIVING PRIOR TO THE STOPPAGE AND THEY HAVE AGREED; PROVIDED THE COMPANY WILL AGREE TO MEET AND NEGOTIATE A COLLECTIVE BARGAINING AGREEMENT WITH THE UNION REPRESENTATIVES AND A COMMITTEE COMPRISED OF THE FOLLOWING MIDESSA CONSTRUCTION CO EMPLOYEES: TOM GALLEGOS, JIM POPE, SALVADOR MACHUCA, JOE GAITON, AND DAVID WILLIAMS.

THIS OFFER STANDS.

THE UNION CAN ADVISE ALL EMPLOYEES TO RETURN TO WORK BY 8 AM THURSDAY, JANUARY 27, 1983, PROVIDED YOU CAN AGREE TO MEET.

THE UNION AND COMMITTEE CAN MEET WEDNESDAY, JANUARY 26, 1983, on a two hour notice. your immediate reply is urgently requested.

Midessa did not respond to the mailgram. Respondent prepared the list of those to whom checks were issued (Tr. 954). The list contains the names of 25 individuals (R. Exh. 14). DeVilbiss testified that most of the group came to Midessa's office around 3 p.m. and picked up their paychecks (Tr. 954). As already noted, these 25 are substantially the same as the 24 employees the General Counsel names in complaint paragraph 8 as having been terminated by Respondent on January 25, 1983.[11]

Although the strikers were at the union hall they worked with Union Representative Al Spring in preparing an offer to return to work. On Thursday, January 27, 1983, four members of the committee (Joe Gaiton, Thomas Gallegos, Salvador Machuca, and David Williams) hand delivered the written offer to Midessa by Gallegos, presenting it to Superintendent Beasley (Tr. 287, 352, 459, 672, 958). The handwritten offer, addressed to DeVilbiss and signed by 15 of the strikers, reads (G.C. Exh. 4):

> We the undersigned employees of Midessa Construction Co. unconditionally agree to return to work at the same classification and rate of pay we were receiving prior to the current dispute on January 25, 1983.

DeVilbiss testified that he was telephonically notified about the delivery of the offer and he gave instructions (to Beasley, apparently) that the strikers should fill out new employment applications. This was a means, DeVilbiss admits, of stalling for time until he could obtain legal counsel (Tr. 958–959).

Paragraph 7(d) of the complaint asserts that on or about January 27, 1983, Respondent, through Beasley, "orally stated that employees who were to be rehired had to fill out new applications and be reevaluated following their engaging in protected activity." The complaint alleges that Respondent violated Section 8(a)(1) of the Act by such conduct. The parties stipulated to the factual accuracy of paragraph 7(d) of the complaint (Tr. 9–10). Midessa, noting that such conduct occurred before it obtained legal counsel, expressly declines to contest the allegation of a violation in this respect (Br. 9). Journeymen drywallers Tommy Gallegos and Ezequiel Mata confirmed the facts. Gallegos testified that when he presented the return-to-work offer to Beasley on January 27 Beasley informed him that he would have to reapply and he gave Gallegos a stack of applications. Beasley said that Midessa would reevaluate them and notify them at a later date whether they would return (Tr. 353). When Gallegos returned to the union hall, Union Representative Al Spring advised him to complete the application and submit it to Midessa. Gallegos and some others did so that very day. Mata credibly testified that when he returned around February 1, Beasley required him to fill out a new application (Tr. 163).

On Friday, January 28, 1983, DeVilbliss met with an attorney (Tr. 959). That meeting resulted in DeVilbiss sending the following letter, dated January 28, 1983, to all the individuals for whom checks had been issued on January 25 (Tr. 289, 959–960). The text of the letter reads (G.C. Exh. 5):

> On Tuesday, January 25, 1983, you were among the employees who engaged in a strike against the Company and failed to return to work when requested to do so. The newspaper accounts of this incident reported you were "fired" by the Company for engaging in such activity.
>
> I have reviewed this entire matter and understand that the National Labor Relations Act prohibits an employer from discharging employees who go on strike for higher wages or because of complaints over wage increases. In such cases, an employer can lawfully hire permanent replacements for the strikers but cannot "fire" them.
>
> The Company did hire replacements for many of the employees who failed to return to work last Tuesday. However, because of some of the things that were said, it may appear to you that you were actually fired for going on strike against us. That would be unlawful.
>
> It is not my intention to violate the law. I likewise do not want to give you or anyone the impression that you were "fired" for engaging in such activities. Accordingly, and to remove any doubt you or anyone else may have concerning this matter, we are offering you immediate and unconditional reinstatement to the job and pay rate you held on Tuesday, January 25, 1983. You should report to the foreman on the project where you were working at the normal starting time on the day following receipt of this letter.
>
> The issues that prompted this strike have been turned over to our lawyers. However, we want you to know that neither you nor any other employee will be disciplined or discharged for engaging in any conduct protected by the National Labor Rela-

[11] Complaint par. 8 does not list the names of Thomas Donica, Abraham Hermiz, or Tony Hermiz, but they are included among the names on R. Exh. 14. On the other hand, par. 8 also includes Ernesto Armendariz and Eliseo Ibarbo, but they are not named on R. Exh. 14. The reason for the difference regarding Armendariz and Ibarbo will be discussed shortly.

> tions Act. We will comply with the law as we know you will.

Midessa also notified as many of the strikers as it could to attend a meeting held at the company office on January 30 so that copies of the letters could be hand delivered. Gallegos testified that about 16 employees attended the meeting (Tr. 354). DeVilbiss testified that about one-half the group of 25 reported to work Monday, January 31, that most of the others returned Tuesday, February 1, and that there were a couple of others who came in a day or two later. All but five returned, he testified (Tr. 290). Although DeVilbiss testified that all the replacements who had been hired were laid off to accommodate the reinstatement of the strikers (Tr. 961), Job Foreman Marvin Brown, as we shall see later, identified at least three that he retained (Tr. 1049).

2. Other events during the strike

a. *DeVilbiss' conversation with James Pope*

James Pope was one of the strikers gathered outside the fence the morning of January 25. Pope recently had been demoted from his position as job foreman of the Dinero Plaza job, and he was displeased with that action. After DeVilbiss arrived, Pope asked how DeVilbiss was doing (Tr. 718). The latter, apparently surprised at the presence of Pope, concedes that he asked what Pope was doing there involved "in this." (Tr. 318.) Pope replied that he was upset over his demotion and the fact that his brother, striker Derrill Pope, had not received a pay raise. Counsel for the General Counsel argues that the question by DeVilbiss tends to be coercive and constitutes a violation of Section 8(a)(1) of the Act, as alleged in paragraph 7(a) of the complaint. I find that DeVilbiss' question was more in the nature of a surprise reaction on seeing his former job foreman. Pope initiated the conversation, DeVilbiss' question was not followed by any other remarks alleged to be coercive, and the circumstances fall short of showing that the bare question was violative of Section 8(a)(1) of the Act.

On the other hand, the question by DeVilbiss will be considered and weighed when the issue of motivation is discussed later. This is so chiefly because there is other conduct by DeVilbiss, as discussed below.

b. *Conduct by Max DeVilbiss and Joe Beasley*

There remains other conduct to be considered in relation to complaint paragraph 7(a). On the morning of January 25 a few of the employees were concerned about the safety of their automobiles if they did not participate in the strike. These employees included Ernesto Armendariz, Eliseo Ibarbo, and Ezequiel Mata. There is a dispute in the record over whether they asked for or were given the day off. I resolve that particular point of contention later. The fact is that all three were among those going to the union hall on January 25. Each of the three returned to work the next day.

Before the strikers left for the union hall on January 25, Mata walked over to DeVilbiss, apparently to express concern about damage to his car if he remained. When Mata approached, DeVilbiss asked, "Mata, who started all this?" (Tr. 160.) Mata said he did not know. He expressed fear about the safety of his vehicle. DeVilbiss said that Mata could park it inside the fence, but Mata declined the offer on the basis that DeVilbiss could not guarantee the car's safety after work. As a witness, DeVilbiss did not deny that he had so questioned Mata. I find that such question, asking for the identity of the person or persons responsible for leading the walkout, tends to be coercive and violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 7(a).

The following day, January 26, Mata reported to DeVilbiss at the ClayDesta jobsite for the purpose of going to work or getting his job back.[12] Mata testified that on this occasion DeVilbiss asked whether Mata had gone to the union hall. When Mata replied in the affirmative, DeVilbiss stated (Tr. 163):

> Well I can't put you back to work Mata.

On cross-examination Mata repeated his testimony (Tr. 186, 188). Mata's pretrial affidavit apparently has no description of this conversation. Indeed, the affidavit apparently contains the following statement (Tr. 191):

> No supervisor ever talked to me personally about the walkout or about the union.

Mata testified that he did not think he had made such a statement to the Board agent, that he had reported the conversation to the Board agent and that, as he does not read much English, the Board agent read the affidavit to him (Tr. 191–192). The affidavit (R. Exh. 2) was not offered in evidence, and DeVilbiss did not address this subject in his testimony. Counsel for the General Counsel does not rely on this conversation in the brief. Nevertheless, the testimony is before me.

I observed the demeanor of Mata as he testified, and I observed that he testified in a persuasive fashion. Although Mata can read enough English to get by, such as with a job application, he is far from fluent in the language. Whatever the actual explanation for the mixup between Mata and the Board agent taking his pretrial statement, I credit the testimony given by Mata before me. Because there is no complaint allegation covering DeVilbiss' coercive statement, because Respondent did not seek to litigate the matter in its own case-in-chief, and as the General Counsel does not seek a finding of a violation on the fully litigated theory, I shall not find that Respondent violated Section 8(a)(1) or (3) of the Act by the refusal of DeVilbiss to allow Mata to return to work on January 26, 1983. However, I shall consider this conduct when I evaluate the motivation issue discussed later.

In paragraph 7(b) of the complaint, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act when Superintendent Joe Beasley "On or about January 26 . . . orally interrogated its employees regarding their union activities and threatened them with dis-

[12] I need not decide whether Mata considered himself as returning to work after being granted a day off, or whether he was seeking to get his job back after deeming himself fired the day before.

charge should they be found to have engaged in such activities." The parties stipulated to the facts of this allegation (Tr. 9–10). The testimony of Ernesto Armendariz and Eliseo Ibarbo[13] reflects that this occurred when they returned to the jobsite on January 26. Armendariz testified that he asked Beasley about getting their (Armendariz and Ibarbo) jobs back. Beasley asked whether he had gone to the union hall the day before, and Armendariz replied that he had not (Tr. 92, 93). He was untruthful because he feared he would not get the job, which he needed to support his family (Tr. 116). Armendariz acted as the interpreter for Ibarbo, and it appears that Beasley either asked about both or Armendariz conveyed Ibarbo's statement that he also did not go to the union hall (Tr. 130, 146). Ibarbo was untruthful because, he testified, he has eight children to support (Tr. 146). DeVilbiss testified that Respondent regularly communicates with its employees, who cannot converse in English, by utilizing the services of their bilingual coworkers (Tr. 319–320). Job Foreman Marvin Brown confirmed that such was the standard method of communication (Tr. 1097–1098). In that situation, Respondent made the employee-interpreter its agent for such communication. Ibarbo's testimony, therefore, concerning what Superintendent Beasley conveyed to him through interpreter Armendariz, is not hearsay. Armendariz and Ibarbo were put to work and continued working until laid off on February 11, 1983. Mata was not given work until reinstated with the others on February 1, 1983.

Beasley was not a witness, and in light of the stipulation regarding the accuracy of paragraph 7(b) of the complaint (Tr. 9–10), Respondent does not contest that allegation. I therefore find that Respondent, by Beasley's conduct, violated Section 8(a)(1) of the Act as alleged.

3. Conclusions regarding termination of the strikers

The General Counsel contends that Respondent fired the strikers, in fact, on January 25, 1983, and that Midessa violated Section 8(a)(1) and (3) of the Act in so doing. Respondent argues that the total circumstances reflect that there is no violation because the strikers would have understood that DeVilbiss was simply informing them that they could be replaced if they did not return to work by 10 a.m. on January 25.[14] Indeed, Respondent points to elements of the testimony by which various strikers assert that they considered themselves as being on strike for 2 or 3 days. Others, however, testified that they considered themselves fired as of 10 a.m. on January 25.

I find that DeVilbiss in fact fired the strikers effective at 10 a.m. Tuesday, January 25, 1983, and that his words and actions reasonably conveyed such a message. As Respondent admittedly knew that the concerted walkout was to protest wages, it is clear that Respondent's threat to terminate the strikers violated Section 8(a)(1) of the Act as did the actual discharge.[15]

But complaint paragraph 8 alleges that Respondent violated Section 8(a)(3) of the Act as well by terminating the strikers on January 25. That is a much closer question. So far as the record reflects, DeVilbiss became aware of the union aspect only when the employees stated they were going to the union hall. But this was only a moment before DeVilbiss set his 10 a.m. deadline. It is not clear that the deadline was related to the union issue rather than solely to the matter of setting a 10 a.m. deadline for a return to work or be terminated.

As any remedial order under Section 8(a)(3) would be cumulative, I shall dismiss the complaint to the extent it alleges a violation of Section 8(a)(3) of the Act by the January 25 termination of the strikers.

In citing and discussing *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979), brief at 20, the General Counsel apparently seeks backpay for the discharged strikers from January 25 to 28, 1983. My recommended Order will include a provision to that effect.

D. *Events Leading to Layoff of February 11, 1983*

1. Allegation that Salvador Machuca was demoted

Paragraph 7(c) of the complaint alleges that Respondent violated Section 8(a)(1) of the Act on or about January 27 when it, through Superintendent Beasley, "rehired an employee following his engaging in protected activity in a reduced classification."[16] Salvador Machuca is the subject of this allegation.

The General Counsel's allegation is grounded on the contention that Machuca was a leadman prior to the strike. Whether Machuca was in fact a leadman immediately before the strike commenced is a contested issue. Machuca testified that he was (Tr. 605, 649, 682), and Marvin Brown, job foreman at the ClayDesta Bank job, testified that Machuca was not.

According to Brown, Machuca had been a leadman until a layoff in December 1982. Before the layoff Brown had promoted Machuca to a leadman position when Brown had 44 men on the ClayDesta job.[17] Machuca joined Carlos Carrillo, already a leadman, in giving Brown a total of two leadmen on the job (Tr. 1043). As the layoff, shortly before Christmas 1982, reduced Brown's need for leadmen, he cut back by one. The one he reduced to journeyman status was Machuca (Tr. 1043, 1076). He apparently made this reduction, however, without informing Machuca.

The practical distinction between a leadman and a journeyman at Midessa is not great. Machuca testified that he received no extra pay as a leadman (Tr. 648).[18]

[13] Because Ibarbo does not speak English, he could only corroborate regarding events and what Armendariz said to him as interpreter.

[14] DeVilbiss admits that he "may have" told a newspaper reporter at the jobsite on January 25 that as far as he was concerned the striking employees were fired (Tr. 997).

[15] The threat to terminate, although not alleged, was litigated.

[16] The complaint does not allege that the demotion violated Section 8(a)(3) of the Act.

[17] Machuca testified that he was hired in late September 1982 (Tr. 601, 643), and promoted to leadman status in November, 2 months later (Tr. 603, 648).

[18] This may well be because Machuca already was receiving a foreman's rate of $13.63 per hour. Machuca was hired on that basis, but because there was no opening for a foreman he was assigned to work as a journeyman (Tr. 601, 643–645). Former foreman James Pope testified that his hourly rate as a foreman was $13.63, and that the journeyman's rate was $12.88 (Tr. 724, 746, 778).

Foreman Brown testified that a leadman works about 80 percent of the time with his tools and the other 20 percent conferring with his crew and with Brown (Tr. 1097). It also is clear that normally a leadman, unlike a journeyman, carries a 2-way radio so Brown can reach him from a distance.

Machuca testified that in the last days before the strike he had a radio and was functioning as a leadman (Tr. 604–605, 654–655).[19] I observed Machuca's demeanor. He testified in a convincing fashion, and I credit him. By contrast, Brown's demeanor was unconvincing, and I generally do not credit him.[20] I therefore find that when the strike began Machuca was functioning as a leadman and that Brown was aware of that fact.

It is undisputed that from his return on January 31 to his layoff on February 11, Machuca worked as a journeyman. Regardless of whether Brown needed a second leadman when the strikers returned, as Machuca was a leadman at the time of his discharge on January 25, Respondent had no choice but to reinstate him to that position if the position existed. Respondent failed to establish that conditions were changed on the return of the strikers. Brown testified that at the layoff of February 11 he was left with 18 hands after laying off 10 (Tr. 1090–1091), and that around February 1 leadman Carillo had a crew of 10 to 15 employees. Thus, essentially the same employee work force existed when the strikers returned as before they were fired. In these circumstances, Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 7(c), by demoting Machuca.[21]

There is no monetary remedy to be ordered. Moreover, it seems clear that Machuca would have been reduced to journeyman (although apparently retaining his $13.63 pay rate) even if the Respondent had retained him on February 11. The ClayDesta staff was cut way back, and it appears that Respondent's jobs overall were at a reduced level. A preferential return to leadman position would appear to be the only remedy, plus the usual notice, if it is found, that Machuca was improperly terminated on February 11, 1983.

2. Work rule allegations

a. *Introduction*

We recall from the discussion earlier that shortly before the walkout DeVilbiss had launched what may be described as a "lean" and "mean" program designed to avoid bankruptcy. The "lean" portion relates to layoffs, and that subject is discussed later. The other half pertains to a tighter enforcement of work rules.

Previously we saw that in late January 1983 DeVilbiss posted a letter at the jobsites complaining of poor quality and low productivity (R. Exh. 8). DeVilbiss directed his job foremen to turn things around. As we have seen, the walkout occurred the next morning.

Foreman Brown testified that DeVilbiss told him to get more quality, more production, and to cut dead weight (Tr. 1032). When the strikers returned, Superintendent Beasley told Brown to treat the strikers the same as the nonstrikers (Tr. 1041). According to Brown, some of the returning strikers exhibited an attitude suggesting that they felt they could not be laid off and did not have to produce (Tr. 1041). Brown concedes that he told each employee to pick up the pace, and to hurry up (Tr. 1041). He asserts, however, that he had said as much before the strike (Tr. 1061), and other witnesses attest to that.

Cecil Patterson was the foreman at Petro North. Patterson testified that in order to protect his own job he tightened up to stop employees taking more time than was permissible at breaks and lunch (Tr. 1006, 1015). The Petro North job was winding down in February 1983 and was close to completion (Tr. 1006).

b. *Prohibition against union talk*

Paragraph 7(f) of the complaint alleges that on or about February 1, Respondent, by Foreman Brown, "intimidated and threatened its employees by denying their right to discuss the Union upon threat of discharge." At 33–34 of their brief, the General Counsel moved to withdraw the allegation for lack of supporting evidence.

Tommy Gallegos testified that on February 1 Foreman Brown read a set of rules. He recalled that Brown said that if any employees were caught talking about the Union other than during breaks and at lunch that such employees would be terminated on the spot (Tr. 363, 491). Brown denies referring to this subject when he read the rules, but concedes that later that week he was told to tell the men, and did tell them, not to discuss the Union on worktime, but to carry on any such discussion before work, during breaks, at lunch, or after work (Tr. 1053–1054). Brown testified that during this period he observed people stopping work and congregating to have a discussion (Tr. 1054).

Gallegos testified that he was not aware that after the strikers returned employees stood around talking about the strike and union matters (Tr. 491). He also testified, on cross-examination, that Brown did not want employees "congregating around talking about the union or anything else" during worktime (Tr. 490).[22]

A rule that restricts only conversation related to unions is discriminatory and therefore unlawful. *Olympia Plastics Corp.*, 266 NLRB 519 (1983); *Liberty Nursing Homes*, 245 NLRB 1194 (1979). None of Respondent's written work rules received in evidence seeks to govern the topics of employees' conversations during worktime (G.C. Exhs. 6, 7; R. Exhs. 1, 7), and no such unwritten

[19] For over a week in early January Machuca worked on a job in Odessa, Texas. It is unclear whether on that job he functioned as a leadman, but that is a point I need not reach.

[20] This is not to overlook that regarding some matters, mostly when he is supported by documents or other credited testimony, I do credit Brown.

[21] The complaint does not allege that the demotion violated Sec. 8(a)(3).

[22] It appears that at this point Gallegos was describing his understanding of what Brown meant rather than what Brown expressly said, for moments later when Gallegos quoted Brown there was nothing about employees congregating and nothing about a prohibition on subjects other than the Union.

rule is described in the evidence.[23] As noted above, I interpret Gallegos' testimony that "Brown did not want" people congregating to be a description of Gallegos' understanding of what Brown meant. But Brown's actual words amounted to a gag rule on union talk at any time during worktime. That is far more extensive than a "no congregating" rule.

However, the complaint allegation goes beyond what Brown did say. In the absence of any evidence that Respondent sought to enforce the gag rule on the Union as a topic of worktime conversation, and because of the pending motion, I shall grant the General Counsel's motion to withdraw complaint paragraph 7(f).

c. *Rules on productivity and breaks*

(1) Production speed

Complaint paragraph 7(g) alleges that on or about February 1, 1983, Respondent, by Foreman Marvin Brown, "announced and thereafter disparately enforced its work rules relating to the amount of work to be performed and the length of break and lunch periods."

By February 1 most of the discharged strikers had returned to work. The General Counsel contends that from that point until the layoff of February 11 the former strikers were harassed about their production speed. The General Counsel, in its brief, points to testimony of certain strikers that before the strike there were no production quotas, but after the strike quotas were set. For example, Ernesto Armedariz testified that before the strike he normally would hang 50 to 60 sections of sheetrock a day when working on straight walls[24] and that he considers that number to be a good day's work (Tr. 81–82, 104). But after the strikers returned, Armendariz testified, he was told by Foreman Brown that he had to hang 75 sheets a day (Tr. 27–28). He did so by pushing himself under Brown's pressuring "hurry up" (Tr. 104). On achieving an output of 86 sheets the final day he hung straight walls, Armendariz proudly reported that fact to Brown. Foreman Brown responded (Tr. 38), "It is nothing now. You need to hang more."

Brown testified that he had crews hanging from 75 to 120 sheets a day (Tr. 1072, 1114). No employee from such crews testified. However, David Williams, who joined the strike and is named among those on the Union's proposed negotiating committee, testified that a two-man team could hang from 80 to 110 sheets a day (Tr. 887). Tommy Gallegos testified that 65 to 80 sheets would be a good day, and that while it is possible to hang 100, that achievement could not be sustained over any period of time (Tr. 413).

The General Counsel called C. J. Clifton as a rebuttal witness. At the time of his testimony on July 27, 1983, Clifton was the superintendent for Rose and Sons, Inc., the general contractor for the First State Tower[25] in Abilene, Texas. He testified that the job began in the late fall of 1982, that Midessa is the drywall subcontractor on the job, and that in the January-February 1983 period Midessa had about 15 employees on the job (Tr. 1128–1129). He further testified that in the Abilene area a good two-man drywall crew should hang 50 sheets a day on straight walls and that area firms find that pace to be economically feasible (Tr. 1131, 1137). Midessa's drywall crew on that job, Clifton testified, hangs about 30 to 40 sheets a day on straight walls, and about 20 sheets a day on core work (Tr. 1131, 1138). Clifton testified with a very convincing and impressive demeanor, and I credit him completely.

Of course, while crediting Clifton may assist in resolving credibility here, it does not necessarily establish that Midessa was unlawfully motivated in pushing for higher productivity after the strikers returned. It must be remembered that DeVilbiss posted his letter of January 24 before the strike. Indeed, so far as the record shows, it was DeVilbiss' letter that sparked the strike. The General Counsel makes no contention that Midessa's economic plight was an illusion. Therefore, DeVilbiss still had to address the factors of quality and speed of production when the strikers returned. The strike changed none of that.

(2) Reading of the rules

Midessa gives a set of company rules to each of its foremen. A copy of such rules and work policies, in evidence as General Exhibit 7, consists of six double-spaced pages. The document covers such matters as starting times, breaks, timesheets, hiring policies, terminations, equipment, material, safety, and change orders. Although many of the provisions would be of direct interest to the employees a few provisions might be of interest only to a foreman. DeVilbiss credibly testified that such rules and policies have been in effect at all times since their formulation in 1979 or 1980 (Tr. 303, 963). Section 2 pertains to breaks. Section 2.1 provides for a 10-minute break in the morning and another in the afternoon. "In no case will they be longer than 10 minutes." Section 2.2 allows 30 minutes for lunch, and it states that each employee should be back at his work station "at the end of the 30 minutes." Section 4.2 announces that Midessa hires on a "merit shop" basis and "employs both union and non-union members."

Under section 5.B1 foremen are to warn employees of rules infractions "in order to give the employee a chance to correct themselves." On repeated infractions, the foreman is to warn the employee that he is subject to dismissal. Section 5.B2 provides that if an employee is "not producing the quantity or quality of work required," the foreman will warn that employee that he is subject to dismissal or a drop in pay scale. Employees frequently tardy are to be warned, under section 5.B3, that they are "subject to dismissal."

[23] It can be presumed that employees at work occasionally are able to discuss the weather, sports, and other topics without stopping work and congregating.

[24] There is no dispute that a drywaller can hang more sheets working straight walls than when he must hang sheets in a stairwell or a bathroom ("core" work), which have frequent turns and cuts. Bathrooms particularly are slower because of the cuts a worker must make to accommodate the various fixtures.

[25] Clifton seemingly meant the First State Bank Tower, which DeVilbiss had earlier identified (Tr. 278). DeVilbiss himself served as the superintendent on that job (Tr. 298).

Until about late May Joe Alvarado worked for Midessa, sometimes as a foreman. The last period he worked as a foreman for Midessa was in August 1982. He testified that he read the rules to the employees about once or twice a month, whenever they became a little lazy or began taking advantage of the breaks (Tr. 1025).[26]

DeVilbiss testified that the rules were not enforced as they should have been or he would not have been required to issue a rules notice on August 10, 1982 (Tr. 303). There is very little question that around that date Midessa posted on its jobs, and distributed to all employees, a memo from DeVilbiss to all employees (Tr. 292, 963, 1030–1031):

TO ALL EMPLOYEES

It has come to my attention that many employees and foremen have been taking advantage of the morning and afternoon breaks. Due to this the following schedule for breaks and lunch will be strictly adhered to.

Morning Break—10:00 A.M. to 10:10 *10 Minutes*

Lunch Break—12:00 Noon to 12:30 P.M. *30 Minutes*

Afternoon Break—2:30 P.M. to 2:40 P.M. *10 Minutes*

Any person or crew taking a break or lunch at other times will be docked on their pay one hour. If the infraction continues then morning and afternoon breaks will be eliminated altogether.

To those who have adhered to the 10 minute break & 30 minute lunch I wish to thank you for your honesty, dedication and concern for the company. To those that have been abusing this privilege I admonish to get with the program.

Another practice which must stop is sending a man to a store to buy cokes and candy. This is all right if the store is close and the man is not gone for more than 10 minutes, otherwise bring what you want for break with you in the morning.

Max H. DeVilbiss

DeVilbiss testified that most of the prestrike job application also carried on the reverse side a summary of some of the rules (Tr. 291). The application of striker Jesse Dominguez is in evidence and it reflects this summary (G.C. Exh. 6). The same is true for striker Tommy Gallegos. Gallegos testified that he only filled out the front side and did not look at the reverse side and did not see the written rules (Tr. 421–423). However, to the left of Gallegos' signature on the obverse side of his June 2, 1981 application appears the following statement (R. Exh. 7):

I have read the rules and conditions on the back of this application and promise to abide by these and all other company rules.

Gallegos' protestation of ignorance of the presence of the rules on the reverse side of his application was singularly unconvincing, and I do not credit him on this point. Lest his surname mislead the reader to wonder whether Gallegos is not fully capable in English, I should note that Gallegos is quite the contrary. The son of an El Paso, Texas contractor, Gallegos made a very personable, intelligent, and articulate witness. In many respects, his demeanor seemed persuasive on the surface. But Gallegos can also be crafty. Thus, he was the General Counsel's source of a copy of the six-page set of company rules (G.C. Exh. 7). Although Gallegos, in a pretrial affidavit of February 14, 1983, told the investigating Board agent that he had obtained the set of rules by removing the copy posted on the toolroom shack (R. Exh. 10 at 4), he admitted on cross-examination that he had obtained the set from Anastacio Dominguez Jr., who told Gallegos he had stolen the copy (Tr. 483). He testified that he gave the incorrect version in his affidavit in order to protect Dominguez (Tr. 597). In effect, Gallegos concedes that he misrepresented the facts in his sworn pretrial statement given to a Board agent in order to protect another employee, but, he testified, he would not make a misrepresentation to protect his own interests (Tr. 599).

It might be said that the source of a set of the rules is not really a material point in the case, and that a lie by Gallegos concerning the process by which he obtained the set is a misrepresentation regarding an ancillary matter on which we should not dwell. What makes the matter important is not the relationship of the source to the allegations of the complaint, but the impact Gallegos' conduct has on his credibility. If Gallegos would lie in a statement sworn before a Board agent, even on an immaterial point, can I really trust him on the significant issues? Can I believe him when, in answer to Respondent's question, he testified that he would not misrepresent the facts to advance his own cause? Although Gallegos' pretrial prevarication may not rise to the level of an abuse of the Board's processes calling for some sanction, such as a denial of any remedial relief for him, it is a matter that adversely affects his general credibility.

Returning now to the rules contained on the reverse side of Gallegos' job application, I observe that they include, "If you do not turn out the quantity or quality of work expected of you, you may be dismissed, or your pay scale lowered." They also contain an underscored warning that any infraction "*is cause for dismissal.*" Finally, and bearing on the expectation of the employees concerning a pay increase on January 1, 1983, the rules also include, "All employees are eligible for a raise on the 1st of January and the 1st of July. Raises are given on an individual basis and do not necessarily correspond to union scale."

Around November 1982 Midessa eliminated the breaks at Dinero Plaza because employees, in order to go to the first floor, were taking breaks of 20 minutes rather than 10. James Pope, who was the job foreman there at the time, testified that he eliminated the breaks on instruction from Superintendent Beasley (Tr. 752–753).

As the testimony reflects, before the strike, Foreman Brown was not strictly enforcing the rules pertaining to

[26] I do not believe Alvarado read the entire six pages to his employees on these occasions. It is far more probable that he selected the rules pertaining to breaks and productivity and read them. Despite Alvarado's exaggeration on this point, I find him to be a generally credible witness.

breaks. On February 1 Brown read the Company's work rules and policies to the assembled employees at the ClayDesta job. Both strikers and nonstrikers were present. Although DeVilbiss testified that he did not tell Brown to read the rules (Tr. 962), Brown testified that he was told, by someone unnamed in the record, to read the rules (Tr. 1047). As DeVilbiss did not so instruct Brown, presumably it was Beasley. In any event, Brown read the rules.[27] Some of the employees became upset. Brown testified without contradiction that former striker Jesse Dominguez looked straight at him and stated, "We're going to make some rules of our own." (Tr. 1049, 1051) Brown wrote the comment on the timecard (R. Exh. 19) of Dominquez in order to alert the office of the matter (Tr. 1051, 1098).

(3) Conclusions

As DeVilbiss' crackdown letter of January 24 predated the strike, it is largely irrelevant to compare practices before and after the strike, for the General Counsel does not allege or contend that the tightening up policy was unlawfully motivated. It is alleged, however, that the rules were disparately enforced by Foreman Brown at ClayDesta against the returned strikers.[28]

Disparity is the key point. In support of the disparity allegation, the General Counsel points to the testimony of Ernesto Armendariz and Ezequiel Mata. Armendariz testified that on one occasion after the strike, when he had occasion to go to where some nonstrikers and replacements were working, he observed that Brown was not pushing them (Tr. 36–37). The testimony is rather vague, and the record unfortunately has an "inaudible" at a material point (Tr. 36).[29]

Mata described an occasion when nonstrikers Rick Daugherty,[30] David McKinney,[31] and two strike replacements took a break of over 15 minutes, and that Brown passed by and observed the fact but said nothing (Tr. 166–167, 207). Breaks are not staggered (Tr. 208). Although not specifically addressing the long break mentioned by Mata, Brown testified, without contradiction, that he did not discipline anyone during this period for exceeding the allowed time for breaks or lunch and that everyone "pretty well" complied with the rules (Tr. 1061).

On the other hand, Gallegos and his apprentice, Cuahtemoc "Temo" Anguiano, were docked 30 minutes' pay (by not being permitted to start working until a half-hour waiting period expired) because they were late for work by 1 minute 1 day after returning from the strike. It appears, however, that Respondent also docked employees before the strike for being late. Foreman Brown testified that it was his practice to require the tardy employee to wait until the nearest hour or half hour before they could clock in or begin work (Tr. 1056). David Williams, a member of the Union's proposed negotiating committee, but called as a witness by Respondent, testified that he was docked both before and after the strike for arriving for work 2 minutes' tardy (Tr. 896, 909–910). I do not credit Williams. His demeanor was such as to convey the distinct impression that he was seeking to advance his own cause with Respondent by testifying favorably to Midessa. He approached being hostile to the General Counsel, and he generally exhibited a highly unfavorable demeanor. I do not believe Williams on this or any disputed point. Moreover, it seems strange that Respondent did not offer any documentary payroll evidence to support Williams' story, yet it offered prestrike timecards of other employees on this general topic.

The General Counsel also observed that Respondent offered no evidence that it, too, read the rules to the nonstrikers and strike replacements during the days intervening between the beginning of the strike and the return of the strikers. Of course, not many workdays are involved. Discounting the Tuesday the strike began, there were only 3 workdays left before the discharged strikers began returning on Monday January 31, 1983. Brown testified that he had been told "several days" before February 1 that he would get a copy of the rules and to read them to the entire crew and answer any questions (Tr. 1047). Even if this instruction came to Brown on January 27 or 28, the record does not reflect when he received a copy of the rules.[32] In short, the timeframe here is too compressed to draw inferences regarding a failure to read the rules during the first 3 days after January 25.

In its brief Respondent does not address the testimony of C. J. Clifton, the general contractor's superintendent of the Abilene bank job. Why would Midessa be pushing employees at ClayDesta, even to the point of a callous rejection of Armendariz' prideful announcement that he had achieved 86 sheets, when DeVilbiss himself, as Midessa's job superintendent at Abilene, was content with his Abilene crew hanging a mere 30 to 40 sheets a day? Moreover, why would Beasley (if not DeVilbiss) instruct only the ClayDesta foreman to read the rules? Why were the rules not read at the other jobsites? These are interesting questions, but apparently they are immaterial.

The complaint alleges disparity by Respondent, through Brown. Foreman Brown was in charge of the ClayDesta project. There is some evidence to support an argument that Midessa aimed its resentment at ClayDesta

[27] That evening Business Representative Jim Purcell of the Union sent Midessa a mailgram protesting Brown's reading of the rules as a coercive action violative of Sec. 8(a)(1) of the Act (R. Exh. 16).

[28] The allegation, quoted earlier, also attacks the *announcement* of the rules on February 1, 1983. This portion of the allegation appears to be based on the contention that the rules were read to the returned strikers only. As others besides strikers were present, I shall dismiss the announcement portion of complaint par. 7(g).

[29] Armendariz testified that "these people [inaudible] all the time, so Marvin and that tells them nothing, and they—so—but I never saw him push the others, you know, the few guys." Arguably Armendariz testified that the others were loafing, or some similar word, in the presence of Brown, but that is not certain. On cross-examination, he testified that he did not know whether Brown was pushing the other (nonstrikers and replacements) employees (Tr. 109).

[30] Foreman Brown testified that Rick Daugherty and Ron Daugherty are two names for the same person (Tr. 1039).

[31] Although Mata said "McKenzie," it appears he was referring to McKinney, who apparently worked with Daugherty. Brown, for example, describing working with both the day the strike began (Tr. 1039).

[32] Although Brown ostensibly received a set when he became a foreman, that does not necessarily mean he still had the copy in late January.

because most of the leaders of the January walkout and the union movement worked at ClayDesta. However, the weight of the evidence favors a finding, which I make, that Foreman Brown acted in accordance with his understanding of the instructions to read the rules to his crew and to turn things around on the matters of quality and productivity. Evidence of disparity regarding more leniency on breaks favoring nonstrikers is only slight. As discussed later, the General Counsel failed to show any disparity regarding the new productivity standards, such as hanging at least 75 sheets of sheetrock a day. I therefore shall dismiss complaint paragraph 7g.

E. *The February 11, 1983 Layoff*

1. Introduction

As amended at trial, paragraph 10, in conjunction with paragraph 11 of the complaint, alleges that Respondent violated Section 8(a)(1) and (3) of the Act by terminating the following 12 named employees on February 11, 1983, because they participated in the January 25 strike or because they assisted the Union:

Cuahtemoc Anguiano	Victor Leija
Ernesto Armendariz	Salvador Machuca
Anastacio Dominguez Jr.	Ezequiel Mata
Alvaro Fuentes	James Pope
Tommy Gallegos	Louis Rodriguez
Eliseo Ibarbo	Mike Tapia

The names of Armendariz and Ibarbo were added the first day of the hearing (Tr. 5–8). On resting their case-in-chief, the General Counsel moved to delete Tapia's name for lack of supporting evidence, and I granted the motion (Tr. 796–797). After Respondent opened its case-in-chief with three witnesses on Friday, June 10, the hearing was adjourned and resumed on Monday, July 28. On July 20 the General Counsel mailed her motion to reopen the General Counsel's case in order to adduce additional evidence regarding Dominguez, Fuentes, Leija, and Rodriguez and their inclusion in the layoff/-termination of February 11, 1983 (G.C. Exh. 8). Counsel expressed her intention to call three witnesses for about an hour or so of testimony (Tr. 862–863). Respondent opposed the motion on various grounds. As Respondent's counsel had not learned of the motion until the day before the resumption, and because Respondent's witnesses were present and ready to testify, and to avoid further delay, I denied the motion to reopen. However, the General Counsel was permitted to offer certain timecards in evidence, and to make an offer of proof regarding the testimony she expected to elicit regarding Dominguez, Fuentes, and Rodriguez (Tr. 871–878).[33] Finally, I denied Respondent's motion to dismiss paragraph 10 regarding certain individuals.

2. The jobs and employees affected

President DeVilbiss testified that Midessa had about 12 jobs operating in the Midland area in January–February 1983, employing about 100 drywallers. (Tr. 277, 281.)[34] He further testified that those jobs were "winding down," with the exception of Gulf and ClayDesta, during the period (Tr. 967, 100). Respondent laid off employees on February 11, 1983, because, DeVilbiss testified, (1) Midessa was experiencing a cash flow problem with attendant economic problems, and (2) Midessa was overstaffed by 15 to 20 employees (Tr. 339, 967, 1000). Foreman Brown testified that a layoff had been planned for Friday, January 28, but the strike intervened (Tr. 1083), and DeVilbiss testified that a layoff had been planned (Tr. 945, 951).

As the record reflects, it was normal for Respondent to have a layoff every few months. Salvador Machuca (Tr. 704, 706) and former Foreman James Pope (Tr. 771) testified that Midessa did not lay off by seniority. DeVilbiss testified that in a layoff Midessa seeks to release its "worst" work performers, and only if all else is equal will the senior person be retained (Tr. 305–306).[35] Leadman Salvador Machuca confirmed that in prior layoffs Foreman Marvin Brown had selected the employees who were not producing (the "worst" workers) for layoff (Tr. 633, 703–704). Former Foreman James Pope testified that the Company sought to retain the employees it felt were doing the best job (Tr. 770).

DeVilbiss described the procedure Midessa utilizes in selecting employees for layoff. First, each foreman makes a list of his worst producers. These lists go to Superintendent Beasley, who confers with each foreman before adding his approval, and then the lists come to DeVilbiss, who makes the final decision on the selection. Although DeVilbiss reserves the right to delete or add names to a list, he usually approves the list as submitted because Beasley and the foremen are the ones who have observed the performance of the workers (Tr. 333, 965, 1000).

DeVilbiss testified that Midessa compares and selects from its overall pool of employees, in layoffs rather than from each jobsite crew independently. If Respondent did not follow that procedure, it could end up retaining some hands who are not as productive as others being laid off from different jobs (Tr. 280–281). Presumably Superintendent Beasley coordinates the layoff selection to achieve the goal DeVilbiss described. When one job is winding down, but vacancies exist on other jobs, employees will be transferred to fill the vacancies, DeVilbiss testified. When there are no vacancies to accommodate transfers, then a layoff must occur (Tr. 280).

Respondent laid off 16 employees on February 11, 1983 (Tr. 281, 968). The General Counsel does not contend that the layoff itself was unlawfully motivated. Rather, the General Counsel argues that Respondent, in selecting the 16 to be laid off, acted unlawfully by select-

[33] Earlier, counsel advised that her proposed evidence would not include the testimony of Leija because she could not locate him (Tr. 863).

[34] It appears from the record that DeVilbiss included laborers in the count of 100. Respondent was about finished with the one job it had in Odessa and had no employees there (Tr. 278, 280). Discussed earlier was the fact that Respondent was working on the First State Bank job in Abilene (Tr. 278, 298). C. J. Clifton, superintendent for the general contractor, testified that Midessa had about 15 employees on the job with, apparently, about 2 of that number hanging sheetrock (Tr. 1129, 1131).

[35] DeVilbiss testified that Midessa looks only to the last-hire date in determining seniority (Tr. 308).

ing from those who participated in the strike of January 25 or assisted the Union (Tr. 1143; Br. 39). Thus, the evidence does not develop how DeVilbiss determined that 16 employees had to be laid off.

Of the 16, 10 worked at ClayDesta (Tr. 282, 969, 973, 1090), and 2 each were laid off from Dinero Plaza (Tr. 282, 969), Petro North (Tr. 282, 979), and 401 Illinois (Tr. 969). Although the evidence reflects how Foreman Brown made his selections from ClayDesta, and Foreman Cecil Patterson at Petro North, there is no testimonial overview by DeVilbiss or Beasley[36] concerning comparisons, if any were made, between those laid off and those retained on all jobs. For that matter, the bulk of the evidence focuses on the individuals laid off, and there is but slight comparison with others retained on the same job, such as at ClayDesta. In this connection, the thrust of the General Counsel's case is that an unlawful motive is revealed by the high percentage of strikers among those laid off. That is, of 16 laid off, 12, or 75 percent, participated in the strike. An ancillary argument relies on the theory that as Respondent's reasons for selecting the individual employees do not withstand scrutiny, an unlawful motive may be inferred.

At this point it may be helpful to look at Respondent's jobs affected by the layoff. All the jobs were in Midland, Texas. The following chart is based on the description given by DeVilbiss.[37]

Job	*Stage*	*Employees*	*Laid off*
Griffin-Burnett	SC[38]	4	0
Clayjon	SC	2	0
401 Illinois	SC	10	2
Dinero Plaza	SC	20	2
Petro North	SC	20	2
Gulf Building		25	0
ClayDesta Bank		25	10
		106	16

As previously discussed, DeVilbiss testified that all the jobs were winding down with the exception of Gulf and ClayDesta (Tr. 967, 1000). Foreman Marvin Brown testified that after the strike he was seriously overstaffed at ClayDesta. According to Brown, this situation developed because (1) Midessa was catching up with the general contractor (Area Builders) and (2) several employees had been transferred to ClayDesta from other jobs (Tr. 1062). Brown testified that he therefore asked Superintendent Beasley when there was going to be a layoff because he could not keep his hands busy (Tr. 1062).

The evidence is conflicting. The record evidence reflects, and Brown concedes, that after the strike Brown continued pushing employees to "hurry up." Some employees dispute that Brown did much pushing before the strike. Witnesses from Area Builders, rather than testifying that Midessa was "catching up," described their concern with the slow progress of Midessa's employees. For example, Rod Black, the carpenter foreman for Area Builders, testified that after the strike he complained to Brown that the slow progress of Midessa's workers was starting to hold up Area Builders and that Brown said he was doing the best he could (Tr. 834–835, 840). DeVilbiss includes ClayDesta as one of his two jobs with a substantial amount of work remaining. Indeed, DeVilbiss testified that during the strike, employees were transferred from their jobs to bring ClayDesta "up to the previous strength to show the general contractor that we were doing what we needed to do" (Tr. 951). Yet Brown describes the ClayDesta job as needing a layoff of employees, and most of those laid off February 11 came from the ClayDesta job.

This brings us to the point of listing the names of the 16 employees actually laid off. The following chart may be helpful. Of the 16 employees named below, 4 are not named on the list of strikers DeVilbiss made checks for on January 25 (R. Exh. 14). The four are: Jorge Lozoya, Ramon Lozoya, Miguel Mendoza, and Jaime Lopez. The other 12 are named on Respondent's list of strikers. Actually, all or nearly all the 16 waited outside the gate the morning of January 25. For considering Respondent's motives, it is appropriate at this point to observe who, in Respondent's view, were strikers. Essentially they are those who failed to return to work at 10 a.m. on January 25. With the exception of Ernesto Armendariz and Eliseo Ibarbo, the General Counsel's list is the same. In the chart below, I therefore have labeled the 16 laid off as striker (S), nonstriker (NS), and status in question (Q). As we will soon see, I find below that Respondent in fact did not consider Armendariz and Ibarbo as strikers who went to the union hall and did not return to work at 10 a.m. on January 25. In Respondent's view, therefore, 62.5 percent, not 75 percent, of those laid off were strikers who had gone to the union hall and, I have found, were fired at 10 a.m. on January 25.

[36] Superintendent Beasley did not appear as a witness.

[37] DeVilbiss testified twice. He first was called as an adverse witness by the General Counsel, and he also testified during Respondent's case.

[38] Substantially complete. Foreman Cecil Patterson testified that Petro North was winding down at the time of the layoff (Tr. 1006). DeVilbiss intimated that there was still some work to be done there, but that Midessa had to hold off until certain other work, including windows, could be finished by other contractors (Tr. 992-993, 1000).

Job[39]	*Laid Off*	*Classification*[40]	*Strike*
Petro North	James Pope	J-SR	S
	Louis Rodriguez	A-SR	S
Dinero Plaza	Miguel Mendoza	[41]A-SR	NS
	Mike Tapia	J-SR	S
401 Illinois	Jorge Lozoya	J-SR	NS
	Ramon Lozoya	J-SR	NS
ClayDesta	Cuahteomc Anguiano	J-SR	S
	Ernesto Armendariz	J-SR	Q
	Anastacio Dominguez, Jr.	A-SR	Q
	Alvaro Fuentes	J-SR	S
	Tommy Gallegos	J-SR	S
	Eliseo Ibarbo	[42]J-SR	S
	Jaime Lopez	L	NS
	Victor Leija	A-SR	S
	Salvador Machuca	J-SR	S
	Ezequiel Mata	J-SR	S

As we can see, the 16 constituted about 15 percent of Midessa's 106-man work force. Between February 11 and the time of the instant hearing, Midessa's business apparently languished in the doldrums. DeVilbiss testified that Midessa has not started many projects since February 11, and it employs very few men on the ones it has commenced (Tr. 976). When DeVilbiss testified on July 26, he explained that Midessa then had about 20 to 25 workers on its Midland jobs, with about half being drywallers and the other half laborers (Tr. 977). These 20 to 25 were working at Gulf and ClayDesta, with about 8 employees plus the foreman at ClayDesta and the balance at the Gulf Building.[43]

3. Selection of the 16

a. *Petro North, Dinero Plaza, and 401 Illinois*

DeVilbiss testified that he personally added James Pope's name to the layoff list (Tr. 333, 967–968, 1000). Not because of anything Pope did or failed to do as a journeyman but, DeVilbiss testified, because of the poor quality of work done on Dinero Plaza when Pope was foreman (Tr. 968). DeVilbiss testified that he had just received a severe "chewing-out" by Kenneth Key, the general contractor's foreman at Dinero, that very day over the mistakes at Dinero, that he therefore was angry, and on returning to his office he added Pope's name to the list. Although DeVilbiss no doubt did not then know that his loss on the Dinero job would reach the $100,000 he testimonially described (Tr. 939),[44] by February 11 it seems clear that he was reasonably aware that his loss would be very substantial.

Pope disputes the extent of his responsibility for the losses at Dinero. Although it is true that he was only one of four different foremen at Dinero, there is no dispute that Pope was demoted to journeyman before the strike. This apparently occurred in early January, for he testified that he was assigned to Petro North about 3 weeks before the strike (Tr. 746).

Prior to the meeting with Kenneth Key, DeVilbiss had received the letter from Ray Dunlap of Area Builders in which, as quoted earlier, the general contractor criticized Midessa's quality of work "and supervision" as being the "worst" Dunlap had ever seen by Midessa (R. Exh. 13).

I shall dismiss the complaint regarding James Pope.

Cecil Patterson, the foreman at Petro North at the February 11 layoff, testified that he placed the name of Louis Rodriguez on the layoff list because Rodriguez did work of poor quality (Tr. 1007–1010).[45] Former Foreman James Pope testified that apprentice Rodriguez, before the strike, was a good follower but would have to improve his skills to become a journeyman (Tr. 732). Such faint praise is a bit beside the point. Rodriguez did not testify. As discussed earlier, I denied counsel for the General Counsel's motion to reopen her case-in-chief so that Rodriguez and two others could testify.

In passing it should be recalled that the timecards and Midessa's list of strikers reflect that a least four strikers were from Petro North: Bill Leasure, Mario Matta, Kevin Nichols, and Dale Smith. Presumably they returned to Petro North on being recalled. They were not

[39] As we have seen, Marvin Brown was the foreman at ClayDesta and Cecil Patterson at Petro North, and both testified. Timesheets in evidence reflect that in mid-February Tony Warrick was the foreman at 401 Illinois. The foreman for Dinero Plaza on February 11 apparently was Homer Gonzalez (Tr. 295, 986). Neither Warrick nor Gonzales testified.

[40] J-SR: journeyman sheetrocker; A-SR: apprentice sheetrocker; L: laborer.

[41] Although Mendoza's timesheet is not marked as to classification, his hourly pay rate of $8 is that of an apprentice (R. Exh. 17a).

[42] Although Ibarbo's last assignment was helping Ernesto Armendariz, Brown testified that Ibarbo is a journeyman (Tr. 1110).

[43] Foreman Brown's figure is a total 10 for ClayDesta (Tr. 1091).

[44] The final retainer check for the Dinero job was not released to Midessa until July 1983 (Tr. 999).

[45] Patterson testified that he also included the name of Mike Tapia, shown elsewhere in the record as having been laid off from Dinero Plaza. In any event, Tapia's name was deleted from the complaint (Tr. 797). Patterson gave specific examples of poor quality work by Rodriguez.

laid off on February 11.[46] I shall dismiss the complaint as to Louis Rodriguez.

There are no names to discuss regarding Dinero Plaza, for of the two laid off from there, Tapia's name has been deleted from the complaint and Miguel Mendoza was not a striker.

From 401 Illinois the Lozoya brothers, Jorge and Ramon, were laid off. As with Mendoza, they did not strike and are not named in the complaint.

b. *ClayDesta Bank*

(1) Preliminary

The ClayDesta Bank job bore the weight of the layoff (10 of 16). It also was the center of the strike activity, and 70 to 90 percent of the 10 laid off from ClayDesta had participated in the strike.[47]

Foreman Brown testified that he made a layoff list on which he placed the names of 10 employees, and that such layoff reduced his crew to about 18 (Tr. 1062, 1090–1091). According to Brown, he selected his lowest producers, and he retained those he felt wanted to work (Tr. 1090, 1092). He testified that about 5 of the 18 retained were laborers (Tr. 1122). Of the 18 retained, the evidence identifies only the following 10:

Name	*Classification*	*Strike*
Carlos Carrillo	Leadman[48] SR	[49]NS
Ron "Rick" Daugherty	J-SR	NS
Abraham Hermiz	L	S
Tony Hermiz	L	S
David McKinney	A-SR	NS
Norman McNeese	J-SR	R
Matt Richardson	SR	R
Jose Louis Sotelo	SR	NS
David Williams	J-S	S
Paul Young	A-SR	R

Although the testimony of Foreman Brown clearly suggests that he retained Thomas "Butch" Donica and Bill Gleason at ClayDesta (Tr. 1123), DeVilbiss identified their timecards showing that they were working at 401 Illinois the week of the layoff and reflecting that they were retained (Tr. 974). Gleason, a journeyman sheetrocker, and Donica, an apprentice sheetrocker who assisted Gleason, were both strikers. Apparently they were transferred to 401 Illinois the week of the layoff, for the preceding week they, according to Brown, returned to ClayDesta from the strike and worked slower than before. Brown testified that when he told Gleason and Donica that he needed at least 75 sheets, and preferably 100 sheets a day from them, they told him they were not paid enough money to produce that much work (Tr. 1087). Brown testified that after they observed that the teams of Ron Daugherty-Matt Richardson and Norman McNeese-Paul Young were installing between 100 and 115 sheets to their 45 to 65, Gleason and Donica began hanging 75 to 80 sheets a day (Tr. 1087–1088). Brown testified that Gleason and Donica were not laid off on February 11 (Tr. 1086).

The implication is that Gleason and Donica were retained because they increased their output to the 75 to 100 sheets Brown told them he needed. If Brown "retained" Gleason and Donica by transferring them before the layoff, he failed to express that in clear terms.

(2) Ernesto Armendariz and Eliseo Ibarbo

Ernesto Armendariz and Eliseo Ibarbo apparently tried to straddle the fence on January 25. Although desiring to uphold the strike, they needed to work. They, in fact, went with the group to the union hall on January 25. However, they returned to work on January 26.

I credit DeVilbiss and find that he gave Armendariz and Ibarbo the day of January 25 off from work. Just how this came about is immaterial, for I find that it was the understanding of DeVilbiss that the two wanted to work but were afraid their automobile would be damaged if they did. Neither Armendariz nor Ibarbo is named on the list of 25 strikers DeVilbiss issued checks to the afternoon of January 25 (R. Exh. 14). I therefore find that Respondent did not consider them to be strikers, and that it treated them as having been granted permission to take off work January 25, 1983.

Brown testified that he included Armendariz and Ibarbo on the layoff list because they were slow, hanging only 60 to 65 sheets a day even though both were journeymen (Tr. 1085).

Because of his superior demeanor, I credit Armendariz that he and Ibarbo improved under Brown's pushing so that they began hanging 75 sheets a day and even reached 86 sheets the last day they did such work (Tr. 28, 38). When Brown laid them off he told them, as he did the others, that work was slow. Those laid off were not told they were slow or that their work was otherwise unsatisfactory.

In contrast to Armendariz and Ibarbo, Bill Gleason and Thomas "Butch" Donica, whom Respondent named on its list of strikers (R. Exh. 14), were retained. Brown testified that they increased their productivity to 75 or 80 sheets a day (Tr. 1088). There is no evidence that any nonstrikers or replacements who were retained did less work than Armendariz and Ibarbo. And even if there were such disparity evidence, knowledge by Respondent of the visit by Armendariz and Ibarbo to the union hall on January 25 would have to be inferred, for there is no direct evidence that Midessa was aware of their visit there.

On these facts I shall dismiss the complaint allegations that Respondent unlawfully terminated Ernesto Armendariz and Eliseo Ibarbo on February 11, 1983.

[46] Of these four, only Nichols testified. Called as a witness by Respondent, apprentice Nichols testified that he was treated no differently after being recalled to Petro North (Tr. 921–922).

[47] There is a dispute concerning whether Ernesto Armendariz and Eliseo Ibarbo should be considered strikers or whether they asked for and received permission to take off work January 25. If they are counted as strikers, then 9 of the 10 laid off were strikers.

[48] SR: sheetrocker; J-SR: journeyman sheetrocker; A-SR: apprentice sheetrocker; L: laborer.

[49] S: striker; NS: nonstriker; R: strike replacement.

(3) Alvaro Fuentes and Victor Leija

Neither Alvaro Fuentes nor Victor Leija testified, and the General Counsel's evidence does not cover them. As earlier mentioned, I denied the General Counsel's motion to reopen her case to allow these two to testify.

Brown testified that he included the names of Alvaro Fuentes (Tr. 1083) and Victor Leija (Tr. 1081) on his layoff list. He testified that both worked slowly, and that he had planned to lay off Fuentes on Friday, January 28, but the strike intervened.

Fuentes is the fifth name on the list of strikers to whom Respondent issued checks on January 25. Leija is the 11th name on the list. The presence of their names on the list, however, does not demonstrate that they were unlawfully terminated on February 11, for there are about 10 others named on the list who also returned to work and who were not laid off on February 11.

I therefore shall dismiss the complaint allegations that Respondent unlawfully terminated Alvaro Fuentes and Victor Leija on February 11, 1983.

(4) Ezequiel Mata

Ezequiel Mata is the 25th and last name on Midessa's list of strikers (R. Exh. 14). Testifying at the trial, Mata acknowledged that he had been laid off by Midessa on three occasions prior to February 11, 1983 (Tr. 174–175). He testified that on February 11 Brown gave him two checks and told him work was slow and that he was being laid off because there was not enough work (Tr. 172). He also testified that he was never told that his work was too slow, and that he worked as fast after the strike as he had done before it (Tr. 172). He concedes, however, that after the strike Brown told him he wanted Mata and the others to hang 90 sheets a day (Tr. 166, 172, 206, 210). Mata said nothing because he considered this an impossible goal. He testified that on a good day he can hang 60 to 65 sheets on straight walls (Tr. 196). Former Foreman James Pope testified that Mata worked for him at one time at Dinero Plaza and that Mata is a "good worker" who "knows his job," and that Mata hustled (Tr. 731–732).

In its brief Respondent does not take issue with Mata's testimony that he worked as fast after the strike as before. It contends that Mata is a "plodder" who, when the job is running full, can be used as "filler" help, but when work gets slow he will be among the first to be laid off. Indeed, Respondent points to the fact that Meta admittedly had been laid off three times before this layoff in his 3 years of off and on work with Midessa. Respondent relies on the testimony of Foremen Cecil Patterson (Tr. 1011) and Marvin Brown (Tr. 1082) that Mata was not fast enough. Brown testified that Mata was neither fast nor slow, and that he "filled space" when Midessa needed to show (a general contractor) that it had a sufficient number of employees on the job (Tr. 1082–1083).[50] Patterson concedes that he and Mata, when Mata worked at Petro North, got into an argument and Mata called him some names (Tr. 1010, 1011). Based on that concession, particular care must be taken to weigh his testimony in light of the other evidence.

Actually, very little of Mata's time after the strike was spent hanging sheetrock on straight walls. Much of his time was spent on framing. The difficulty with evaluating Mata's case, as with most of the others, is that there is very little evidence for comparison. That is, who was retained and how did Mata compare with them? It is true that there is some evidence to support the General Counsel's argument that Respondent sought to punish the strikers and therefore imposed artifically high work standards in order to use their inability to meet them as an excuse to terminate the strikers. Statements by DeVilbiss and Beasley on January 26 that employees who went to the union hall on January 25 could not return to work certainly reflect animus. And Midessa's toleration of 30 or 40 sheets a day at the bank job in Abilene, Texas, arguably tends to reflect disparity.

Foreman Brown testified that there were nonstrikers and replacements hanging 100 or more sheets a day. Brown's demeanor generally was unpersuasive, and I do not believe him to the extent he suggests that such was being done as a daily average even on straight walls.

David Williams testified that he considered a good day's work to be 80 to 110 sheets a day (Tr. 887).[51] On the other hand, Williams testified with an unfavorable and unpersuasive demeanor. He also tended not to cooperate when being questioned by the General Counsel, even approaching the point of exhibiting hostility. Moreover, his testimony that installing sheetrock on RACO would take no longer than hanging sheetrock on the usual framing conflicts with the credible evidence (Tr. 888). It appears that much of the sheetrocking to be done in the lease area (tenant space) of the ClayDesta Bank building involved RACO.

Other witnesses credibly testified that RACO slows down the hanging process. Thus, Tommy Gallegos described it as a "drown out" process that he does not consider the same as sheetrocking straight walls (Tr. 411–412, 521). C. J. Clifton, job superintendent for Rose and Sons, Inc., in Abilene, Texas, so testified (Tr. 1130, 1136). DeVilbiss explained that RACO, an abbreviation for a Houston firm named Ragland Industries, consists of a suspended grid ceiling with metal tracks into which the sheetrock is slipped (Tr. 275–276). Clifton gave a similar explanation (Tr. 1137). Salvador Machuca explained that precut metal studs are inserted into the top and bottom tracks and screwed off (Tr. 612).[52] That constitutes the metal framing to which the sheetrock is screwed.

Machuca best described why sheetrocking on RACO slows one when he explained that the worker must measure each sheet and adjust its height to the RACO fram-

[50] Patterson explained that a general contractor sometimes wants to see more employees working on a job (Tr. 1019).

[51] Williams had not been at work for several days before January 25, and DeVilbiss considered him as having quit. Williams is not named on Respondent's list of strikers (R. Exh. 14). However, Williams did go to the union hall, was named to the Union's negotiating committee, and is named on the Union's telegram of January 25 to Midessa (G.C. Exh. 3). He was not laid off on February 11 and he testified he worked until being laid off around late May 1983 (Tr. 881).

[52] Photographs are in evidence of the RACO system (R. Exhs. 26, 27).

ing because the floor may be uneven (Tr. 614). If there is a high spot in the floor, and a sheet, cut the same size as the others, is installed over that high spot, that sheet will lift up the grid ceiling. Finally, to facilitate sliding the sheets into the RACO tracks, the drywaller must bevel the tops at a 45 degree angle (Tr. 614). By contrast, as Clifton testified, when the sheetrocking is installed on regular straight walls, the worker merely slaps the sheet to the wall and screws it tight (Tr. 1137). Williams did not mention the measuring process, and on cross-examination he conceded that he must bevel the sheetrock before installing it in the RACO system (Tr. 904).

Even though I find Brown and Williams to be generally unpersuasive based mainly on demeanor,[53] there still is some evidence, as Respondent observes at 41 of its brief, that a good day's work can consist of hanging at least 75 sheets a day. Thus, Salvador Machuca, a witness called by the General Counsel, testified that he and a good journeyman would average 80 sheets a day even though they might reach 100 on occasion (Tr. 611).[54] However, DeVilbiss testified that Midessa normally tries to team a journeyman with an apprentice (Tr. 316). Former Foreman James Pope appears to have testified that in hanging on straight walls only, a responsible figure would be at least 75 sheets for a journeyman with a helper (Tr. 775–777). The last sentence of his mid-February pretrial affidavit (R. Exh. 12) states, "75 would be a real good average."

Tommy Gallegos testified that although a figure of 100 sheets a day could be reached, it could not be sustained, and 65 to 80 sheets would constitute a good day's work (Tr. 413). This is in line with one of his pretrial affidavits, described shortly, in which Gallegos, apparently describing RACO, asserts that on a "good day" he could hang 100 to 110 sheets with a helper (R. Exh. 11 at 5). At another point Gallegos testified that 35 sheets would be a good half-day's work on RACO (Tr. 426). That computes to 70 sheets on RACO for a full day.

I also have considered the rebuttal testimony of C. J. Clifton that 50 sheets a day is a good day's work for a 2-man crew (Tr. 1131). Although Clifton testified with a very persuasive demeanor, it must not be overlooked that *ostensibly* Midessa needed to increase its productivity.[55] I note that DeVilbiss acknowledged telling the investigating Board agent that 50 sheets would be the standard average for a team (Tr. 338). Unfortunately, the testimony is uncertain concerning whether DeVilbiss was speaking of straight walls or an average for all types of work. His testimony can be interpreted in different ways. If he meant it as an average of all, both straight walls and core work (bathrooms and stairwells), then that would be consistent with Respondent's seeking an average of 75 or more sheets on straight walls on RACO. On the face of this record, an effort to push employees from an average of 50 to an average of 75 sheets on straight walls of RACO would be within the realm of the reasonably possible. However, the strikers, such as Ernesto Armendariz, when pushed hard by Brown, were hanging 75 to 85 sheets of RACO a day. As we see below in the discussion of Gallegos' work in the lease area, 75 sheets a day on RACO, as an average, apparently is not a number beyond the reasonably possible.

I find that the figure for a "good day's work," "that is, one of substantially high production, for a journeyman-apprentice team would be 75 to 80 sheets a day as a consistent average hanging on straight walls of RACO.[56] To the extent the testimony of Brown and Williams is inconsistent with this, I do not credit them. It is to be noted that with the possible exception of David Williams, none of the employees Brown referred to as hanging 100 to 115 sheets a day testified.

In light of all the record, it cannot be said that the General Counsel has demonstrated that Respondent discriminatorily selected Mata for layoff on February 11, 1983. I therefore shall dismiss that allegation regarding Ezequiel Mata.

(5) Thomas Gallegos and Cuahtemoc Anguiano

(a) *Introduction*

Journeyman Thomas B. Gallegos Jr.[57] and apprentices Cuahtemoc "Temo" Anguiano worked as a team. Both were strikers. Anguiano returned to work on January 31 and Gallegos returned on February 1. On February 11 Foreman Brown told them that they were being laid off because work was slow and that he would call them back later (Tr. 240–241, 410). Gallegos testified that he thought Brown's reason was a lie (Tr. 563). Although Brown said nothing to them on that occasion about their work being slow, poor, or otherwise unsatisfactory, Anguiano testified that on that February 11 he heard from someone, he could not recall from whom, that he was being laid off because he was working slowly, an accusation he rejected at the trial (Tr. 241). Gallegos testified that although there were rumors of an impending layoff, the rumors said nothing about poor productivity as the basis (Tr. 411). Indeed, Gallegos testified that it was mainly the identity of those selected for the layoff that surprised him; although he testified, the job had not peaked so as to call for a layoff at that time (Tr. 418–419).

Foreman Brown, while not addressing the subject of what reason he gave Gallegos or any of the employees on February 11, testified that he named Gallegos and Anguiano to the layoff list (Tr. 10630):

[53] This is not to overlook Williams' incredible testimony regarding the RACO, nor the fact that Brown's testimony is inconsistent with that of DeVilbiss in certain respects as previously noted.

[54] His testimony that two journeymen might possibly hang 200 sheets in 1 day is not of much value because he qualified that by saying it could only be for 1 day and would involve using fewer screws than normally required for proper installation (Tr. 637).

[55] Respondent did not offer any surrebuttal evidence showing why DeVilbiss would have Midessa pushing for at least 75 sheets a day in Midland while tolerating 30 to 40 a day in Abilene.

[56] There seems to be a clear difference between a "good day's" work and work done on a "good day" within the meaning of the testimony. With the first term the witnesses seemed to be referring to a good average, whereas with the latter they appear to have been describing days when they approached their highest production figures.

[57] Also referred to in the record as Tommy Gallegos.

> Because they did not work. What work they did was in bad shape. I had to send people to redo the work—take it down and start over.

As a witness, Brown principally criticized three specific projects Gallegos and Anguiano worked on (Tr. 1063–1075, 1020–1021):

> 1. Poor productivity in hanging sheetrock, and incorrectly cutting holes in the sheets for the electrical boxes, in a lease (tenant) area one morning.
>
> 2. Poor productivity in building two furrdowns 30 feet long on the east side of the bank building the week of the layoff.
>
> 3. Incorrectly installing some CH studs in the stairwell on the north side of the bank building on February 9, 10, and 11.

In addition to these principal items, Brown also testified that when Gallegos returned from the strike he assigned him back to the south side restrooms where Gallegos had been working before the strike. Brown testimonially complained that Gallegos seemed to take "forever" to sheetrock one of the restrooms after the strike (Tr. 1071).

(b) *The restrooms*

Before we begin a discussion of the principal work projects Brown criticized, a look at the initial assignment Brown made is in order. When Gallegos returned from the strike on Tuesday, February 1, 1983, Brown returned him to the south side restrooms. Returning on Tuesday, February 1, Gallegos was back 9 working days before being laid off at the end of the day on Friday, February 11.[58] Four days his first week back, and 5 days his second and final week. In his testimony on direct and cross-examination, Gallegos covered these 9 days in extensive detail. That recitation, a remarkable feat in itself, not only provides support for Gallegos' credibility, but also in conjunction with his two pretrial affidavits, contains certain discrepancies that Respondent argues destroy Gallegos' credibility.

Resolving credibility in this case is quite difficult. As earlier observed, Gallegos, personable, intelligent, and articulate, testified with a demeanor that had surface appeal. Anguiano testified through an interpreter and seemed sincere. The demeanor of Foreman Brown was very unfavorable and unpersuasive. On the other hand, although there are some discrepancies in Brown's testimony, there are numerous inconsistencies between Gallegos' testimony and his pretrial statements or the balance of the record. These include, as we have seen, the misrepresentation made by Gallegos to the investigating Board agent.[59] Naturally a witness must be granted a certain margin for minor errors in attempting to describe past events. The question to be resolved is whether the several discrepancies of Gallegos go beyond a reasonable margin as to number or significance.

Turning now to Tuesday, February 1, see that Gallegos agrees that he was assigned to the south side restrooms. Specifically, it was a fourth floor restroom. He worked there all day with Anguiano without finishing it (Tr. 360, 362, 475). Gallegos testified that the framing there was out of plumb and he pointed this out to Brown, who said he was going to fire the person responsible for it (Tr. 361, 489). Gallegos Anguiano had to reframe some of the area before they could begin sheetrocking.

On Wednesday, February 2, Anguiano had car trouble and did not arrive until noon (Tr. 234, 362, 494). Brown had Gallegos on assignments with Salvador Machuca other than the restrooms that morning.[60] After lunch Gallegos and Anguiano teamed up and again were assigned to the fourth floor restrooms (Tr. 377, 516). Gallegos testified in some detail concerning their having to go to the north end of the building to obtain the green liner board to be used, which they worked on installing the rest of the day (Tr. 378, 517–519).

The next morning, Thursday, February 3, Gallegos and Anguiano were assigned to install sheetrock in the lease area of the fifth floor. Their work there is discussed below in a separate section. After lunch, however, they were reassigned to the fourth floor restroom again (Tr. 382, 531–532).

On the morning of Friday, February 4, Gallegos-Anguiano were assigned to the same fourth floor restroom, where they worked until lunchtime (Tr. 382, 532). Around 1 p.m. Brown and Carrillo pulled Gallegos-Anguiano from their work in the restroom and assigned them to sheetrock a furrdown on the fifth floor (Tr. 383, 532–533). It developed that there was a construction misalignment between the bottom of the furrdown and the top of a window, so after about 30 minutes Gallegos and Anguiano were reassigned back to the fourth floor restroom where they worked the rest of the day (Tr. 385, 536).[61] At no time, Gallegos testified, did Brown complain about his work (Tr. 385).

In contrast to Brown's generalized criticism of the work by Gallegos-Anguiano, Gallegos testified in detail. Although there is some discrepancy between Gallegos and Machuca regarding the last hour and a half of that Wednesday morning, it is clear that Gallegos was not reassigned to the restrooms until after lunch, when Anguiano returned. As seen from the foregoing summary, Gallegos and Anguiano were frequently pulled off their work in the restrooms and reassigned elsewhere.

In light of the foregoing, and in view of Brown's unpersuasive demeanor, I do not credit Brown regarding his generalized criticism that the Gallegos-Anguiano

[58] There is an issue concerning whether Gallegos was off sick 1 day about Wednesday, February 9, 1983, but that will be discussed later.

[59] The misrepresentation, pertaining to the source of a copy of Respondent's rules, was not about a substantive matter regarding Gallegos' case. Nevertheless, because it was made in a Board affidavit, the deliberate misrepresentation seems to assume an importance that exceeds its intrinsic materiality.

[60] The accounts of Gallegos and Machuca differ regarding the last part of the morning, but the significant point here is that Gallegos was not assigned to the restrooms the entire morning of February 2, 1983.

[61] There is more than one restroom on each floor. Anguiano credibly testified that they worked in three restrooms (Tr. 4049).

team was slow in the work the team did on the south side restrooms.

(c) *The lease area*

Respecting the fifth floor lease area (space of the bank tenants), Brown testified that during one half-day period the Gallegos-Anguiano team installed only 21 to 23 sheets. That would be "42 in a day" which, Brown testified, is not acceptable work productivity. According to Brown, during this same timeframe he had another two-man team on the fourth floor hanging 75 sheets a day, and two other groups on different floors doing identical work who were hanging 100 to 115 sheets a day. Moreover, not only were Gallegos-Arguiano working slowly, they ruined four to eight sheets by cutting 4 to 6 inch holes for the electric boxes rather than the required 2 to 3 inches (Tr. 1072). According to Brown, when he confronted Gallegos about the oversize cuts, Gallegos asserted that there was no problem because the person doing the taping and bedding would fix it.[62] Rather than having Gallegos install replacement sheets, Brown, testifying that he was at rope's end with the poor quality and speed of the Gallegos-Anguiano team, allegedly sent Norman McNesse to redo the work (Tr. 1073).[63]

Gallegos (Tr. 381, 526) and Anguiano (Tr. 226) place the number of sheets hung at approximately 35. They testified that the electrical power was off that morning until the 10 a.m. break.[64] Gallegos testified that during the power outage he precut 15 sheets for installing in the RACO system, and that after the morning break he and Anguiano precut an additional 20 sheets in the process of hanging about 35 sheets by noon (Tr. 380, 526). He explained on cross-examination that the 35 was not the equivalent of hanging 140 sheets in an 8-hour day (four 2-hour segments x 35 sheets because he had been able to precut 15 sheets during the power outage. Respondent, in its brief at 50, asserts that Gallegos either dragged his feet during the (alleged) morning power outage, or lied about the amount of work he did betwen 10:15 a.m. and noon. However, it appears that Gallegos was a minute late that morning and therefore had to wait 30 minutes before he could go on the clock, or to work (Tr. 378, 519, 522). The available worktime was therefore about an hour and a half before the 10 a.m. break.

Although Respondent points to Gallegos' testimony that 65 to 80 sheets would be a good day (Tr. 413), Gallegos apparently was describing regular straight wall work at that point, not hanging sheetrock in the RACO system. Elsewhere, however, Gallegos did testify that 35 sheets would be a good half day's work on RACO (Tr. 426). That would work out to be about 70 sheets a day on RACO. At page 5 of his supplemental pretrial affidavit of March 15, 1983, Gallegos asserts:

> On a good day I could hang 100–110 with a helper. It depends on the work assignment.

Although it is not entirely clear that Gallegos was there referring to 100–110 on RACO, he in fact had just finished describing other employees installing sheetrock on lease area walls with the RACO system (R. Exh. 11).

Anguiano denied that they ruined any sheets by cutting oversize holes for the electrical boxes (Tr. 254–255), and Gallegos testified that the holes he cut were correct fits and that no one ever said otherwise (Tr. 532). In fact, Gallegos testified, Brown and leadman Carlos Carrillo checked the work after lunch, and Brown declared it "okay" before they reassigned Gallegos-Anguiano back to the fourth floor restroom for the balance of the day (Tr. 382, 531–532).[65] As Gallegos was not called during the rebuttal stage, Brown's statement that Gallegos said the person doing taping and bedding would cover the extra gaps is only impliedly denied by Gallegos.

Because of Brown's unpersuasive demeanor, and the combined testimony of Gallegos and Anguiano, I do not accept the version given by Brown, and I credit the account by Gallegos and Anguiano.

(d) *The two furrdowns*

Gallegos testified that the morning of Tuesday, February 8, he and Anguiano were assigned to build two parallel furrdowns 30 feet in length at the east entrance to the bank building (Tr. 387, 537).[66] The testimony on this subject, covering many pages by several witnesses, is very conflicting. The basic dispute centers on (1) whether Gallegos and Anguiano had to take the time to finish building a scaffold, or whether one was already in place and (2) whether Gallegos and Anguiano took too long in building the furrdowns.

A significant subsidiary question is whether Gallegos was out sick on Wednesday, February 9. It is significant because it bears on the credibility of Gallegos, who testified that on that day his wife called to report his absence because of sickness (Tr. 405, 467, 555). On cross-examination he acknowledged that in his pretrial affidavit at 6, February 14, 1983, he reported working on February 9 (Tr. 469; R. Exh. 10). He then seemed undecided whether to assert that it was February 9 or 10 that he was out ill (Tr. 469–470). It is worthy of note that Anguiano never mentions Gallegos as having been absent. To compound the confusion, Gallegos thereafter testified that he was paid for the missed day through Midessa's oversight (Tr. 591). Such an oversight, of course, would explain why his timecard might not reflect any absence. Respondent never produced the timecard for that week.

It is clear that work on the two furrdowns stretched over the 3-day period of Tuesday, February 8, through Thursday, February 10, even without regard to the question whether Gallegos missed a day. This is not to say

[62] Brown erroneously places this conversation "2 to 3 days before the layoff" (Tr. 1074). As we shall see, the last 4 days of the second week devoted to the two furrdowns and the stairwell. The lease area work clearly occurred in the first week that the strikers returned.

[63] Brown elsewhere named McNeese as one of the strike replacements he had not released when the strikers returned (Tr. 1049)

[64] Gallegos testified without contradiction that Ron "Rick" Daugherty informed Brown that the power was out (Tr. 523).

[65] Although Gallegos testified that he thought the reassignment was unusual (Tr. 531), it certainly was in keeping with all the switching Brown was making in Gallegos' assignments.

[66] On Monday, February 7, Gallegos and Anguiano worked 1 hour in a restroom on the fifth floor, and then enclosed an elevator mechanical room during the balance of the day (Tr. 386, 536).

that Gallegos and Anguiano worked the entire time on the furrdowns. Indeed, Gallegos testified that the weather was so cold, around 15 degrees Fahrenheit, on Tuesday, February 8, that he persuaded Brown/Carrillo to move Anguiano and himself inside, where they worked that afternoon enclosing windows on either the third or fourth floor (Tr. 389, 404, 550, 551, 553).

This brings us back to the two pretrial affidavits of Gallegos. The first affiddavit (R. Exh. 10) is dated February 14—just 3 days after the February 11 layoff. The supplemental affidavit is dated March 15 (R. Exh. 11). Although both statements refer to the cold weather on the furrdown job, neither refers to Gallegos as having been off work 1 day. At 6 of his February 14 affidavit, Gallegos states

> Prior to the walk out, when it was cold, the Company would send us home; even if it was in the 30 degrees. On [a date is crossed out at this point] 2/9 it may have been 15 degrees and we were required to work outside—on 40 feet of scaffolding. The scaffolding was frozen, due to the sleet and rain and there were no hand rails, no safety belts and wooden planks for metal foot rails. I requested a safety belt from Carlos Carrillo and he told me the belt was in more need at another job detail. I asked why we weren't being sent home and Marvin Brown told us that it was entirely up to Joe Beasley. After lunch I asked Brown for myself and my partner to be assigned some other work, as I thought it was dangerous working on the scaffolding. He sent us to the fourth floor to work—this is inside work. No one else was sent on the scaffolding. It was still freezing working on the fourth floor.

The supplemental affidavit, at 3, refers to the cold weather as being on "one of the days" they worked on the furrdown, but does specify that it was the date that Gallegos made a request for Anguiano and himself to be assigned inside because it was sleeting and the scaffold's walk boards were frozen. It states they were assigned to the third floor.

By Gallegos' count, he and Anguiano worked 1-1/2 on this assignment: the morning of Tuesday, February 8, finishing building the scaffolding and performing certain other odds and ends, and all day Thursday, February 9, building the two furrdowns. Gallegos concedes that they did not get the second one braced, but did get the first one built and braced and the second one built.

Rod Black was the carpenter foreman for Area Builders on the ClayDesta project. Called by Respondent as a witness, Black testified that when the strikers came back to work he complained to Brown about Midessa's slow production speed, and that Brown replied that he would get to it and was doing the best he could (Tr. 835, 840). Brown did not describe to Black what he considered the problem to be. Black testified that his laborers for Area Builders constructed a scaffold that was there for Midessa to use in building the furrdowns at the east entry to the bank (Tr. 835, 840, 848). He described the scaffold as being in three sections, 24 feet high (Tr. 835), and that the furrdowns were to be attached to the bottom of the third floor, some 28 feet above the ground floor (Tr. 843). He did not stand and watch the Midessa employees building the furrdowns, and he concedes that he does not know what kinds of problems they may have encountered in building the furrdowns (Tr. 841).

William Chandler Simonds worked on the ClayDesta project as a layout carpenter for Area Builders. After the strike, he testified, Simonds observed that Gallegos was working "quite slowly" in building the furrdown[67] and "was standing around a lot." (Tr. 813) Because Simonds needed Midessa to finish so the stucco workers and then the glaziers could do their work in the east entry, he kept coming back to check on Midessa's progress.

Simonds testified that the scaffolding, 8 feet in length, was already in place, did not have to be built, and would only have to be moved four times in the process of building the 30-foot curtain wall (Tr. 814, 815, 820).[68] Acknowledging that there were two curtain walls, or furrdowns, to be constructed (Tr. 815), Simonds expressly limited his estimate of construction time for the first furrdown to 1 day (Tr. 813, 823).[69] This presumes that the scaffolding was in place and ready to use. Simonds concedes that if Gallegos had to get his own materials that would add more time to his estimate of the necessary time (Tr. 821). Simonds admits that he has never built any curtain wall himself (Tr. 819).

Simonds asserts that it took Gallegos and his helper 3 days to do this 1-day job (Tr. 813, 820, 823). We know, of course, that Gallegos and Anguiano worked on both furrdowns, not just the one Simonds described in his testimony.

Simonds testified that about the second day of this work he complained to Brown that the workers were taking way too long (Tr. 813, 830). He did not recall whether he registered his complaint in the morning or afternoon. Brown, according to Simonds, replied, "Yeah, I know, but there is nothing that I can do about it." Either later that day or on the third day Simonds complained in stronger terms, but he received essentially the same answer from Brown (Tr. 830).[70] Simonds concedes that while he did not stand around observing the work for the 3 days, he was on the scene frequently enough to know that if the Gallegos-Arguiano team received any other job assignments during the furrdown job, such assignments could not have been for very long (Tr. 819-820).

Simonds explained that the slow work he observed consisted in Gallegos and Anguiano not working together. That is, "You would generally have one guy on the

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[67] Simonds expressly referred only to the one furrdown needing insulation to be scraped from the bottom of the third floor before installation (Tr. 815, 817, 818, 823).

[68] A certain wall is also known as a furrdown (Tr. 812).

[69] Thus, the two furrdowns would have taken roughly 2 days, or possibly slightly less than a full 2 days.

[70] Foreman Marvin Brown named only Rod Black as complaining to him and, Brown testified, he went and told Gallegos to hurry (Tr. 1065). Gallegos denies this (Tr. 406). Brown testified that he complained to Superintendent Beasley and requested permission to get rid of Gallegos and Anguiano because they had been "up there 3 days" and only had one (furrdown) halfway built. Beasley denied permission on the basis that Midessa first had to check with its lawyer (Tr. 1069).

floor either cutting things to length or whatever, turn the laser on or what have you, and the other guy doing whatever he needs to do, shooting up, screwing up, or whatever he is doing—working together so they can both be working at the same time." What Simonds observed, he testified, was one man working on the scaffold while the other watched (Tr. 831). Simonds apparently was not aware that Anguiano was not a journeyman, but an apprentice. Gallegos testified that it was very unusual to work nearly 30 feet up on a scaffold with only 2 employees (Tr. 556). In his supplemental pretrial affidavit of March 15, 1983, Gallegos explained that on such a high job there are normally two journeymen and a helper (R. Exh. 11 at 4). As Gallegos further explained there, the helper (Arguiano) operates the chop saw to cut the heavy gauge metal used and keeps the journeymen supplied with the pieces for the framing so that the journeymen do not have to come down from the scaffolding. Here the chop saw and materials were on the second floor level (Tr. 557). Moreover, Anguiano credibly testified that he did some of the installation work using the screw gun.

Elaborating on his description of slow progress, Simonds testified that he observed Gallegos and Anguiano standing around talking about nonwork matters as he walked by (Tr. 827). He then admitted that he does not understand Spanish and would not have understood a conversation in Spanish (Tr. 827).[71] However, Simonds then testified that they were not necessarily talking to each other when he walked by, for there were other employees there. Thus (Tr. 828):

> If I were to walk by and start talking to them, *they* would speak to me in English. If another person who didn't speak Spanish [came by] and they were wanting to converse on some subject, *they* would speak in English. [Emphasis added.]

Simonds followed this by testifying that on occasion he stopped to talk with them to see how the work was progressing and what problems they were having (Tr. 828). He never described any specific problems at the trial. It is difficult to believe that had Simonds asked Gallegos about any problems,[72] the latter would not have mentioned the severe cold weather at the very least. Anguiano testified that it took them longer than normal on the job because of, in part, the fact that the weather was so cold it hurt his hands and he could not hold the screw gun (Tr. 132, 252, 269). As we already have seen, Gallegos testified that it was so cold on that first day (Tuesday, February 8) that he requested Brown/Carrillo to reassign Anguiano and himself to work inside.[73] In his pretrial affidavit of February 14, 1983, Gallegos estimated the temperature that first day of the furrdown assignment to be about 15 degrees. His request was granted.

Finally, Simonds testified that after he, Simonds, placed the marks for locating the curtain walls, it was Gallegos who used a laser beam device to set the marks for drawing the chalk lines they would make and follow (Tr. 814, 818, 823). Yet David Williams testified that it was he who set line marks with the laser and did the layout of chalk lines for the furrdown in the east entrance (Tr. 891–892, 907–908). Aside from that testimony conflicting with Simonds' regarding Gallegos having used the laser, it also conflicts with Simonds' testimony that the laser would not be used until the stucco or blown insulation material had been scraped from the first beam and then the lines marked and chalked (Tr. 822).

Gallegos, indicating that someone had been there first with a laser to set pencil lines, testified that leadman Carlos Carillo set the chalk lines on the floor and aserted that he, Gallegos, set the chalk lines on the "deck" (bottom of the third floor) where the furrdowns were to be attached (Tr. 537–540, 550). It is quite possible that Gallegos used the laser device to match the lines on the deck with the chalk lines already on the floor.[74] Finally, it appears that the pencil lines were drawn by Simonds who testified that he made lines with either a pencil or soap stone, he could not recall which (Tr. 825).

Returning for the moment to the time estimate, we may recall that Simonds called the one furrdown a 1-day job. With two furrdowns, the job would take roughly 2 days, or a little less, even under Simonds' estimate. Foreman Brown testified that the job of building *both* furrdowns should have been completed in 4 to 6 hours (Tr. 1064–1065). That figure is based, he testified, on the scaffolding being in place and ready to use. And David Williams testified that he could do the job in a mere 2 to 3 hours (Tr. 890). I do not credit Williams. In his zeal to portray himself as a superfast worker, Williams reinforces the disbelief engendered by his unfavorable demeanor.

Respondent asserts in its brief at 51, that "Anguiano himself testified it should be a half day's work." (Tr. 251.) This overlooks the fact that Anguiano testified it took Gallegos and him 1-1/2–2 days to do the job because of (1) the severely cold weather, (2) they had to get off and on the scaffolding to get the necessary equipment and materials, and (3) they twice had to disassemble the scaffolding and move it, and even then they did not quite finish the work (Tr. 231, 252–253).

Although Brown testified that Gallegos and Anguiano worked 3 days on the project without finishing it (Tr. 1063, 1069, 1116), he acknowledged that in his pretrial affidavit, which he gave to the investigating Board agent, he said it took them 2 days (Tr. 1116).[75]

Preliminary Conclusions

Brown's March 14 pretrial version of 2 days matches not only Anguiano's recollection, but also that of Galle-

[71] Anguiano, it will be recalled, had to testify through an interpreter.

[72] Notwithstanding the "they" in his testimony, it is clear that Simonds never conversed with Anguiano beyond a smile and a hello. Simonds does not speak Spanish, and Gallegos would have had to speak for Anguiano in English.

[73] At 3 of his supplemental pretrial affidavit of 3–15–83, Gallegos asserts that everyone else was working on the inside (R. Exh. 11).

[74] I do not credit Williams regarding his testimony about setting lines here. His demeanor was generally unconvincing, and his testimony conflicts with both that of Gallegos and Simonds.

[75] He threw this difference off at trial with a flippant, "It took them actually 3 days, so I made them sound better than they were." The affidavit is dated 3–14–83 (Tr. 1117).

gos who testified, as earlier noted, to a day and a half.[76] One kink in Gallegos' line of testimony is his asserted absence on Wednesday, February 9 (which would have been the second day), and further complicating story that Respondent, through oversight, even paid him for the day of absence.

Another kink in Gallegos story line is the building of the scaffolding. According to Gallegos, he and Anguiano spent from early morning to 11 a.m. on (1) conferring with Carrillo about the layout lines; (2) searching for the extra parts needed for the scaffolding; and (3) building the rest of the scaffold. Gallegos never asserted there was no scaffolding there; it is just that it was incomplete.

Anguiano seemed to testify that the scaffolding did not have to be built, but had to be moved twice, with each move requiring 10 to 15 minutes (Tr. 231). On the other hand, Simonds, as we have seen, testified that the scaffold he referred to was 8 feet in length and therefore would have to be moved four times to cover the distance of the first 30-foot furrdown. Gallegos testified that not only he did he and Anguiano add a top section, but they also added three other sections—apparently lengthening the scaffolding (Tr. 542, 546–547). Although Gallegos' Testimony certainly is not a model of clarity, it dovetails with Anguiano's testimony, which I credit, that they moved the scaffolding only twice. Even this leaves open the question of whether they moved it once to reach the starting place, or whether they moved it twice from the starting point. That question probably cuts too fine. Anguiano was not examined closely regarding this point. He did testify that the scaffolding was long enough (Tr. 253).[77] Thus, it would appear that the 8-foot-long scaffold described by Simonds had been extended by Gallegos and Anguiano.

I am persuaded preliminarily that Simonds' faulty recollection of events is the product of the passage of time before he was called on to testify. Apparently unaided by having recorded in February or March his observation of the events in question, the details of those events appear to have eluded him by the time of trail. As for Brown, his demeanor was unfavorable, and I preliminarily do not credit him when he disputes Gallegos or Anguiano.

Arguably Gallegos and Anguiano worked on this project for 1-1/2 days, as they described. Whether Gallegos actually was absent on February 9, or February 8, or February 10 is immaterial. It is just possible that he was not absent at all, and he started the curtain wall project on Wednesday, February 9 rather than Tuesday, February 8. But I need not speculate if I credit them in their testimony that they worked only 1-1/2 days on the project.

When the severely cold weather is considered, along with the fact that Gallegos and Anguiano built most of two furrdowns, and not one, as well as assembling the additional scaffolding, it is quite clear that 1-1/2 was well within Simonds' estimate for roughly 2 days to build the two furrdowns (even without counting the scaffolding).

And even if Rod Black and Simonds complained to Brown about the progress, Brown would know that it was not any fault of Gallegos and Anguiano. Brown would know that it took time to build the balance of the scaffolding, and he would be aware that he had allowed Gallegos and Anguiano to join all other employees working inside on that bitterly cold first day. Even the second day was no doubt still cold. If, therefore, Simonds walked by on the second day and observed, he may very well have seen Gallegos standing on the ground—trying to get warm. Certainly the fact that Gallegos and Anguiano nearly completed both furrdowns on the second day would not have left them any time to be standing around loafing. Finally, Simonds described his visits to the east entry without any mention of the weather. One would think that he was describing a stroll on a delightful spring day, and that he found Gallegos and Anguiano enjoying the beautiful weather by standing around on the ground floor conversing (in English, no less) with whoever happened to be passing by.

Simonds appeared to be a sincere witness. It seems, however, that he was unsuccessful in attempting to recall on June 10 events that had occurred 4 months earlier.

(e) *CH studs in the stairwell*

In the stairwells at the ClayDesta Bank Building, Midessa installed liner board (a type of sheetrock) in what is called CH channel or studs. The studs are so called because in their double configuration the face of each end has one half shaped like a "C" while the other is in the form of an "H." (Tr. 266.) The liner board has a green water resistent covering (Tr. 270–271). At the trial Anguiano demonstrated how the liner board fits into the CH studs (Tr. 259–260). There is no dispute that the only method by which this material can be installed is by screwing one stud to the wall, then sliding the first end of the liner board into the track of that stud, then fitting the second stud over the remaining end of the liner board, and, finally, attaching the liner board and second stud to the walls with screws. If both studs were to be installed first, there is no way the liner board can be inserted. The only sequence is: stud, liner board, stud.

Brown, as noted, testified that one of the principal reasons he included Gallegos and Anguiano on the layoff list was because they incorrectly installed some CH studs in three floors of the north stairwell (Tr. 1065–1066). According to Brown, not only were the studs screwed off without the liner board being inserted, but the studs were even installed backwards (Tr. 1066).

Brown testified that Gallegos and Anguiano began the stairwell project about noon on the Wednesday before the layoff of Friday, February 11, and worked on it all day Thursday and Friday (Tr. 1067). In short, it was the last 2-1/2 days of the week of the layoff.[78]

[76] Gallegos also set the time at 1-1/2 days at 3 of his supplemental pretrial affidavit of 3–15–83 (R. Exh. 11).

[77] As the furrdowns were about 10 to 15 feet apart (Tr. 387), the scaffold had to be moved over to the second one (Tr. 269).

[78] Already, as we can see, there is a problem regarding time. The two furrdowns were built this same week. Brown testified the furrdowns took 3 days. Now the stairwell, in the same week, takes 2-1/2 days.

Asked when he discovered this, Brown testified that he discovered "shortly after they started" that the work was being done incorrectly (Tr. 1067). However, he thought he might learn a new trick on speeding things up, so he asked some other (unidentified) people to walk by and let him know what they thought. They reported that "they" had never seen the work done that way. Brown even confronted Gallegos, asking whether Gallegos had ever hung CH before. Gallegos responded that he was an interior mechanic and knew what he was doing and did not need Brown's advice. Brown said he did not think it would work that way. To this remark Gallegos, Brown testified, repeated his statement that he was an interior mechanic and knew what he was doing. Brown left and on Thursday (February 10) Brown brought Superintendent Beasley to the stairwell around 10 a.m. when Gallegos was two floors above. He showed the work to Beasley, who just shook his head. Brown told Beasley that the work would have to be redone, and asked permission to get rid of Gallegos and Anguiano because, "They are killing my payroll." Beasley said that the "lawyer" said Midessa had to keep them. Beasley said just to let it go, to let them keep going and "we will find out if we can get rid of them." (Tr. 1067–1070, 1074–1075). Brown testified that this was the first time Gallegos had been assigned to install CH studs on that job (Tr. 1121). Brown testified that on Monday, February 14 (after the Friday layoff) he assigned leadman Carlos Carrillo to correct the work (Tr. 1067, 1075).

In very brief testimony, Carrilo testified that he observed that on the second floor level on the north side the CH studs had been screwed "off" (meaning screwed in) backwards without liner board. Although Carrillo did not specify exactly when he saw this, other than that it was after the strike, nor assert that he corrected the problem, he did testify that it was Gallegos and Anguiano who had installed the studs (Tr. 805–806).

Carrillo's testimony is rather ambiguous concerning whether he observed Gallegos in the act of the installation process. The testmony is subject to the interpretation that Carrillo knew that Gallegos and Anguiano were working in the stairwell, or was so told, and when he went there (presumably on Monday, February 14) to correct the work he found it as he described and assumed that Gallegos and Anguiano had done it that way. Of course, his testimony can also be interpreted as meaning that he personally observed them installing the studs incorrectly.

Gallegos testified that on Friday, February 11, he and Anguiano were assigned by Carrillo to enclose the north stairwell using CH studs and 1-inch liner board; that they did this for five floors, going from the second through the sixth floors; and that it was done properly, with the liner board inside the CH studs (Tr. 406–408, 558–560). Anguiano also testified that they worked on this the day of the layoff, although he recalled that they worked on three floors (Tr. 258, 261).

Gallegos testified that he has performed this work for many years and he denied screwing off the CH studs without installing the liner board (Tr. 409, 559). Bringing the issue into sharp focus, Gallegos, in a straightforward fashion, testified that if he had screwed off (i.e., screwed in) the CH studs without the liner board, then it could not have been a mistake and it would have had to have been intentional on his part (Tr. 561). In short, if he did it that way, Gallegos admits that such would have been sabotage by him.

Anguiano testified that he was aware the liner board (which he knew as core board) could not be installed if the CH studs were both screwed in first (Tr. 260). That knowledge, plus his demonstrated assembly during cross-examination, shows that Anguiano could not have been mistaken either.[79] Anguiano denied that he installed the studs without the liner board (Tr. 261).[80]

Conclusions

Gallegos and Anguiano testified with a fully believable demeanor on this point, and Brown's demeanor was completely unfavorable. Moreover, Brown's entire account of this subject, aside from being delivered in an unbelievable manner, has no internal logic. He was totally unconvincing in his testimony that the same afternoon Gallegos and Anguiano started, Brown knew they were doing it wrong but did not correct them because he thought they might teach him a new trick. Yet Brown still knew it was wrong and that is why he supposedly brought Superintendent Beasley (who did not testify) over the next morning, showed him the work, and requested permission to "get rid of" Gallegos and Anguiano.[81] I am to believe that Foreman Brown knew on Wednesday that the work was being done wrong (and backwards at that), that Superintendent Beasley knew it by 10 a.m. on Thursday, February 10, yet neither of them instructed Gallegos and Anguiano to begin doing it correctly. That tale is unworthy of belief. Even if they wanted to check with Midessa's lawyer, one cannot imagine that Midessa would permit Gallegos to continue installing the material incorrectly. Brown's account would have had a more believable logic had Gallegos been ordered to change methods, or if Midessa had fired Gallegos on the spot. Midessa did neither.

But what of the testimony of Carrillo? As Respondent observes at 54 of its brief, Gallegos admitted that he and Carrillo were good friends in their working relationship both before and after the strike (Tr. 395). Carrillo never clearly testified that he saw Gallegos and Anguiano in the process of doing the incorrect installation. If he so intended to testify, then we have one more experienced leader walking away from work being done incorrectly. That story has no more logic or conviction coming from Carrillo than it does from Brown.

To the extent Carrillo testified that he really did not see what had occurred until he arrived at the second

[79] Anguiano testified that leadman Carlos Carrillo showed him how to asemble the CH studs and liner board (Tr. 259). He did not say whether this instruction was the day of the stairwell assignment or at some earlier time.

[80] Anguiano testified through an interpreter. At some points he had some difficulty understanding the precise question. However, he testified very clearly and credibly that he inserted the liner board inside the studs (Tr. 261).

[81] I draw the inference that had Superintendent Beasely testified, his testimony would not have supported Brown.

floor on Monday, February 14, to correct the problem on assignment by Brown, at which time he found the stairwell at the second floor level in the mess described, I do not credit him.[82] Brown's testimony is to the effect that Gallegos and Anguiano were allowed to continue on their merry way goofing up the entire stairwell (or at least the three floors Brown mentioned the assignment consisted of). Yet Carrillo strangely describes only the stairwell at the second level. Carrillo did not testify convincingly, and I do not credit him.

In light of the foregoing, I find that no problem existed with the stairwell work of Gallegos and Anguiano.

(f) *Preliminary conclusions regarding Gallegos-Anguiano*

At this point it would seem that Midessa, through Foreman Brown, placed the names of Gallegos and Anguiano on the February 11 layoff list to punish them, particularly Gallegos, for their union and other protected activities in violation of Section 8(a)(1) and (3) of the Act. This is especially true regarding Gallegos, who was a principal leader in the activity by the employees. In light of the demonstrated union animus of both President DeVilbiss and Superintendent Beasley, it is immaterial that the General Counsel did not allege or prove any unlawful threats or interrogation by Foreman Brown. If Brown gave false reasons for selecting Gallegos-Anguiano for layoff, I may infer from such contrived pretexts that his motivation, and that of Respondent, was to get rid of Gallegos because of his union and other protected activities. It is well settled that when the asserted reasons for a discharge fail to withstand examination, the Board can infer that there is another reason—an unlawful one that the employer seeks to conceal—for the discharge. *Louisiana Council No. 17, AFSCME, AFL-CIO*, 250 NLRB 880, 886 fn. 38 (1980). As Anguiano was the apprentice assigned to Gallegos, Anguiano also was severed from employment as a natural consequence of the reasons Brown assigned for terminating Gallegos.

Although Respondent has not raised the point, consideration should be given to the fact that Gallegos admits that he made a false statement in a pretrial affidavit, which he gave to the investigating Board agent in conjunction with consideration of the remedy. In recommending a remedy here, should reinstatement and backpay be denied to Gallegos? I think not. The misrepresentation by Gallegos was on an ancillary matter pertaining to the source of a copy of Respondent's rules. It was not a misrepresentation of a material link in the chain of evidence necessary to establish a cause of action on his layoff. Stated differently, Gallegos did not mispresent in order to establish, by fraud, a cause of action by which he could persuade the Agency to order Respondent to pay him backpay or offer him reinstatement. His misrepresentation was made to protect another, not to obtain, by fraud, a gain for himself. I therefore find that his misrepresentation, while improper, does not constitute a sufficient basis for denying the usual public remedy of ordering Respondent to offer reinstatement with backpay.

(g) *Salvador Machuca and Anastacio Dominguez Jr.*

Foreman Marvin Brown testified that Salvador Machuca and Anastacio Dominguez Jr., worked together as a team (Tr. 1075, 1079).[83] Machuca testified he returned to work on February 1 (Tr. 616, 618). Brown testified that Machuca (and Dominguez) spent the entire 9 days from Tuesday, February 1, through Friday, February 11, framing the north penthouse, but did not finish the job (Tr. 1075, 1078–1081, 1108). According to Brown, he told Machuca (apparently on February 10) that Midessa was hurting and that Machuca was taking longer than the team of Carlos Carrillo and Louis Sotelo did on framing the (identical) south penthouse (Tr. 1081).[84]

Brown testified that Machuca and Anastacio Dominguez made a little more progress on February 10 and 11, "but they still never really picked up." (Tr. 1081.) He included them on the layoff list for taking so long on the penthouse (Tr. 1075). Before the strike, Brown testified, Machuca was a good, productive worker, and a leadman when there was a large crew, but he was not a good worker after he returned from the strike (Tr. 1076). Kevin Nichols, a striker and a witness called by Respondent, testified that after the strike Machuca still felt he was being paid unfairly (Tr. 923). Nichols, who worked at Petro North rather than at ClayDesta where Machuca was, never explained how he knew that this was Machuca's attitude after the strike. During the strike, such as when both were at the union hall, Nicols no doubt had an opportunity to hear Machuca express his opinion. It appears that Nichols actually was describing an opinion that he possibly heard during the strike rather than afterwards.

Machuca and Tommy Gallegos testified that on either February 1 or 2 Machuca, Dominguez, Gallegos, and leadman Carlos Carrillo spent most of the morning assembling a scaffold for a curtain wall they were to build.[85]

As we have seen, they could not proceed with the furrdown because of an alignment problem, so Brown took them to frame one of four penthouses, which Machuca described as the south penthouse (Tr. 622, 691).[86] The weather was cold and wet, the roof surface was frozen, and Brown and Machuca slipped and almost fell on the frozen surface. Brown soon decided that it was too cold for anyone to work there, so he sent them on different assignments. Machuca (and Dominguez) worked the balance of that day with Carrillo framing walls underneath windows on the fourth floor (Tr. 623–624, 629, 695).

[82] The General Counsel makes no contention that someone sabotaged the second level stairwell over the weekend to leave the appearance that Gallegos and Anguiano had done the work incorrectly.

[83] Known as "Junior" Dominguez (Tr. 650, 695), Anastacio Dominguez Jr., is not to be confused with his father, Jesse Dominguez.

[84] Brown testified that the Carrillo-Sotelo team not only framed the south penthouse, but also sheetrocked most of it, all in 5 days the week before the walkout (Tr. 1080, 1109).

[85] Machuca places the event on the 1st day of his return (Tr. 618, 687), whereas Gallegos, as already discussed, dated the event as February 2, the morning Anguiano did not come in because of car trouble.

[86] Tommy Gallegos, however, described it as the penthouse at the top of the west stairwell (Tr. 375, 508).

The second day (February 2, according to Machuca), and into the third, he and Dominquez were assigned to install double walls of sheetrock (one being the green covered weather board) in rest rooms (Tr. 624, 629). At one point Machuca recalled the time spent on the restrooms as being 2 or 2-1/2 days (Tr. 696). In any event it is clear that the first 3 days Machuca was back he and Dominguez worked on assignments other than the penthouse. Machuca testified with a persuasive demeanor.

Machuca testified that his next assignment was to frame and sheetrock a penthouse where he worked for 5 days (Tr. 624, 629, 696). He and Dominguez had not completed it by the time of their layoff (Tr. 702). He testified that under the prevailing conditions it would have taken the two of them a whole week, even more, to frame and sheetrock it (Tr. 696–697). The conditions included having to devote one entire afternoon to some special welding on a top track (Tr. 628, 698). About the third day of the penthouse work Brown came by and asked how they were doing. Machuca replied okay, and inquired why Brown had not sent Carrillo to check on the work. Brown, Machuca credibly testified, said he had faith in Machuca, knew that he could do the job, and that their work was "looking real good." (Tr. 628, 630).

There is no point outlining the work performed on the penthouse, for other than the welding mentioned, there is no showing that the framing work on the north penthouse was any different from that done on the south penthouse by Carrillo and Sotelo the week before the strike.

Preliminary Conclusions

Machuca testified with a convincing demeanor, but Brown did not. I therefore find that Machuca and Dominguez worked as many as 6 days on the north penthouse,[87] and not the 9 days Brown asserted. Brown's overstatement, I am convinced, was not the product of a faulty memory. Rather, I find that Brown deliberately overstated the penthouse time by some 50 percent to cast as unfavorable a light as possible on Machuca and Dominguez. Similarly, I find, he understated by 50 percent the time it took Carrillo and Sotelo to both frame and (nearly) sheetrock the south penthouse. Thus, I find that the actual time Carrillo and Sotelo worked on the south penthouse approximated 7-1/2 days—not 5 days. In that light, the 6 days spent by Machuca and Dominguez were well within reason. Indeed, Machuca credibly testified that on returning from the strike he worked even more diligently than before to avoid any suspicion that he would slack off after having been in the walkout (Tr. 635).

I find that Midessa's reasons regarding Machuca and Dominguez are pretexts contrived to justify laying off the previously highly regarded Machuca. The motive for this contrived action was to punish Machuca for his union and other protected activities. Dominguez was a victim of this illegal punishment. I therefore find that by terminating Machuca and Dominquez on February 11, 1983, Respondent violated Section 8(a)(1) and (3) of the Act. Although Dominguez did not testify, he worked as a team with Machuca and they were laid off on that basis. His situation is therefore covered by the testimony of Machuca, Gallegos, and Brown.

Finally, it matters not that Respondent chose to terminate some, but not all, of the strikers. It is well settled that an employer need not discriminate against all union activists or supporters for the General Counsel to establish discriminatory intent regarding those terminated. Respondent has rebutted the showing of discriminatory intent as to Machuca and Dominguez. Nor has Respondent shown that they would not have been retained on February 11 in any event. Accordingly, it preliminarily appears Respondent must be ordered to offer them reinstatement.

F. *Further Analysis and Conclusions*

A question arises regarding the two furrdowns when comparing the testimony of Gallegos and Machuca.

Tuesday, February 8, 1983, is the date that Gallegos described as the first day on the east entry furrdowns. He testified that as late as noon the weather was so cold there was ice on the scaffold (Tr. 389, 550). At 6 of his pretrial affidavit of February 14, less than a week after the event, Gallegos was more specific. He asserted that the temperature was perhaps 15 degrees when they were working outside (R. Exh. 10).[88] Following lunch he successfully obtained a reassignment for Anguiano and himself to work inside the bank building. According to his supplemental affidavit of March 15, this left no one outside. Even inside, according to his affidavit of February 14, it was "still freezing."

Salvador Machuca worked all that second week framing the north penthouse on the roof. On February 8, Machuca testified, Brown came by and complimented the work (Tr. 630). Machuca described several problems that he and Dominguez encountered on that assignment, but he did not mention weather—yet he had mentioned it when describing the frozen condition of the roof on February 1, his first day back from the strike.

Strange. If, as described by Gallegos, it was about 15 degrees and sleeting downstairs on February 8, why would it not be at least that cold on the roof? Was it an oversight by Machuca in his testimony? Neither Brown nor William C. Simonds contradicted Gallegos regarding the conditions of subfreezing weather.[89] Perhaps weath-

[87] Although Machuca testified that he worked 5 days on the penthouse, the other workdays accounted for number about 3. That leaves approximately 1 day of work not described.

[88] As earlier discussed, he also placed the date as 2-9-83. Although completely clear in his affidavit, Gallegos did seem to be describing the first day of his assignment to the east entry location. At 3 of his supplemental affidavit of 3-15-83, Gallegos asserts that on "one of the days" he worked on the assignment it was *sleeting* (R. Exh. 11). His pretrial affidavits do not contain a day-by-day account as was given in his trial testimony.

[89] Simonds appeared to be a sincere witness. But in describing the occasions of his walking by where Gallegos was standing around, he impliedly was describing a balmy day. Apparently, I initially drafted, the passage of time had caused Simonds' memory to confuse dates and events.

er reports would shed light on the matter. And there are weather reports.

The National Climatic Center of the U.S. Department of Commerce is located at Asheville, North Carolina.[90] Pursuant to FRE 201, 803(8), and 902(4), I take official notice of the following Climatological Data Reports (CDR), and I include them in the record as follows:

	January 1983 Vol. 88, No. 1	*February 1983 Vol. 88, No. 2*
Climatological Data, Texas, Vol. 88	ALJ Exhibit 1	ALJ Exhibit 2

Contemporaneous with my release of this decision, I shall mail copies of the foregoing documents, certified on their faces as official, to the parties' attorneys.

For the 2 weeks between the return of the strikers and the February 11 layoff, the following weather conditions prevailed, begining Monday, January 31 (skipping the weekend of February 5–6):

	Temperature									
	1-31	*2-1*	*2-2*	*2-3*	*2-4*	*2-7*	*2-8*	*2-9*	*2-10*	*2-11*
Max	57	48	53	55	36	64	68	69	70	62
Min	35	34	31	26	32	26	34	39	36	36
Max	65	61	52	54	50	63	68	68	70	70
Min	40	32	31	25	30	27	35	41	36	38

The first set of figures (maximum and minimum across) is for the National Weather Service at the Midland-Odessa Airport (ALJ Exh. at 62). The second set was recorded at Gulf Refining Company, located 4 miles north by northeast of downtown Midland (ALJ Exh. 2 at 62, 67). The airport is midway between Midland and Odessa, or 10 miles west of downtown Midland. The ClayDesta project is on the near northside of Midland.

Precipitation									
1-31	*2-1*	*2-2*	*2-3*	*2-4*	*2-7*	*2-8*	*2-9*	*2-10*	*2-11*
.04	0	T	0	.03	0	0	.05	0	0
0	0	0	0	0	0	0	0	0	0

Once again, the first line of figures was recorded at the airport, and the second line at Gulf Refining Company.

We see, therefore, that on Tuesday, February 8, 1983, the morning hours would have been a bit cold at ClayDesta Bank on the near north side of downtown Midland. Although brisk wind would have made it seem colder (the wind chill factor), Gallegos made no reference to the wind. Accordingly, I presume that there was no more than a slight wind on these mornings. Even allowing some room to Gallegos for a margin of error, it seems that the temperature was more than double his 15 degrees even at 8 a.m., when he would have arrived for work. But after lunch, how can a temperature of at least 60 degrees be described as too cold to work outside? Sleeting? Even if there were a small shower over the ClayDesta project (while dry at both the airport on the west and at the Gulf Refinery on the east), the temperature was far too warm for ice to form on a scaffold. Indeed, the weather apparently was quite pleasant that afternoon. February 9 was even warmer in the morning, and on Thursday afternoon, February 10, the temperature reached a balmy 70 degrees.

The weather discrepancy is too large a difference to be considered a minor variance. Gallegos simply cannot be credited regarding the furrdown assignment. Although that fact does not serve to verify all of Brown's testimony on the subject, it is enough that Simonds now stands as a credible witness. Gallegos apparently worked February 9 on the furrdowns and the next day as well. Counting the first day of February 8, that totals 3 days. Simonds complained to Brown about Gallegos. The complaint of Respondent's chief customer complaining about the slow progress of Gallegos would constitute a legitimate ground for including Tommy Gallegos and "Temo" Anguiano in the layoff of February 11, 1983.

In view of all findings regarding Gallegos, it seems clear that the termination of the Gallegos-Anguiano team

[90] The complete name is U.S. Department of Commerce, National Oceanic and Atmospheric Administration [NOAA], National Climatic Data Center.

falls in the dual-motive category. Thus, one termination motive was the legitimate one based on the complaint of Area Builders. The other motive, as revealed by the pretexts involving the other grounds, was the illegal one of desiring to eliminate a union agitator from its payroll. It is now well established that in such a situation, Respondent had the burden of going forward with evidence showing that it would have selected Gallegos and Anguiano for layoff in any event because of the one legitimate ground notwithstanding the existence of the unlawful motive. This, Respondent failed to do. Accordingly, I shall order Respondent to reinstatement to Gallegos and Anguiano and to make them whole, with interest.

The weather reports also have a bearing on Machuca's case. Did the Carrillo-Sotelo team really do as much work on the south penthouse the week of January 17 as Foreman Brown described?[91] Perhaps the weather was warm and they were able to fly. But what if the weather was cold the week of January 17? Could they still have made that much progress? No witness said they did not nor could not have made such progress. But Brown did not testify with a persuasive demeanor.

The January CDR shows that the week of January 17 started mild, with the low around 40 and the high about 60 (ALJ Exh. 1 at 12). By midweek conditions became colder, and by Thursday morning the low temperature was at freezing, with the high from 42 to 46 degrees. On Friday, January 21, the low was about 28 and the high was between 32 (at the airport) and 38 (at the Gulf Refinery). It was slightly wet that week, with a trace of rain recorded at the airport on Monday and Tuesday, .74 on Thursday (but none recorded at the Gulf refinery), and .05 on Friday (but again none at the gulf refinery). Thus, weather conditions on the roof the last 2 days of that week were rather unpleasant—near freezing temperature readings and moisture in the air. A brisk wind would have made working conditions downright miserable.

The weather report does not support Foreman Brown. This is not to say that the Carrillo-Sotelo team could not have accomplished all the work attributed to them by Brown, but Brown was not a credible witness. Carrillo's testimony was limited to a specific item relating to work Gallegos allegedly did in the north stairwell, and Respondent successfully objected when the General Counsel sought to examine beyond the scope of the direct examination. As Sotelo was not a witness, neither Carrillo nor Sotelo testimonially described framing the south penthouse or how much they accomplished. I do not credit Brown; I do credit Machuca. I therefore find, in accordance with my preliminary conclusion outlined earlier, that Brown overestimated by 50 percent the time Machuca spent, and underestimated by an equal 50 percent the time Carrillo and Sotelo spent on the south penthouse. Brown did so, I find, for the unlawful purpose of eliminating Machuca and Dominguez from the payroll because of their union and other protected activities. This is particularly so regarding Machuca, who is acknowledged to have been a leadman when there were more employees on the job. I specifically do not credit Brown in his testimony that Machuca, admittedly a good employee before the strike, was not a good worker after the strike (Tr. 1076). Thus, I find that Brown valued Machuca's skills, ability, and performance at all times.

As also discussed earlier, Machuca credibly testified that on February 8 Foreman Brown told him that the work was looking "real good," and Machuca credibly denied that Brown complained about the progress (Tr. 630). Because of Machuca's superior demeanor, I credit him over Brown.

As previously noted, it is well settled that when the asserted reasons for a discharge fail to withstand examination, the Board can infer that there is another reason—an unlawful one, that the employer seeks to conceal—for the discharge. *Louisiana Council No. 17, AFSCME, AFL-CIO*, 250 NLRB 880, 886 fn. 38 (1980). As the reasons Foreman Brown gave for including Machuca on the layoff list have been determined to be false, I find that the true motive, which Respondent sought to conceal behind pretexts, was the unlawful one of terminating him because of his union and other protected activities. Dominguez, Machuca's working partner,[92] was terminated as a consequence of Brown's pretextual reasons for laying off Machuca.

In light of the foregoing, I shall order Respondent to offer reinstatement to Machuca and Dominguez and to make them whole, with interest.

Respecting the allegations I have dismissed, one final note should be made. As earlier noted, one of the General Counsel's principal contentions is that because the February 11 layoff "affected almost exclusively union adherents," that fact supports an inference of illegal motivation. Counsel for the General Counsel, at 45 of the brief, cites and relies on cases such as *Camco, Inc.*, 140 NLRB 361 (1962), enfd. in pertinent part 340 F.2d 803 (5th Cir. 1965), for this proposition.

When the factual pattern is appropriate, the *Camco* rule is established authority for drawing the inference sought by the General Counsel in this case. The problem is that here the factual pattern does not appear to fall into the *Camco* category. In *Camco* 16 of 95 employees in one department attended a union meeting. Shortly thereafter, 11 of the 16 were terminated. Not one of the nonunion employees was terminated. Through such means as interrogation, Camco had identified the union adherents. Thus, of the 11 terminated, 100 percent were known union supporters. By contrast, 62.5 percent of the group terminated on February 11 were deemed by Midessa to be union supporters.

There are other differences between *Camco* and this case, but the percentage factor is perhaps the most prominent distinction. Where the percentage factor drops as low as 62.5 percent, it does not seem reasonable to say it is a great enough factor in itself to support an infer-

[91] As earlier noted, even though Machuca testified that as of February 1 the south penthouse remained unframed (Tr. 622, 691, 693), Gallegos described the penthouse they went to as the one on the west side (Tr. 375, 508). Such a disagreement between two key witnesses of the General Counsel leaves intact Brown's testimony that Carrillo-Sotelo framed a penthouse, and that it was the *south* penthouse.

[92] Brown testified that Dominguez also is a brother-in-law of Machuca (Tr. 1111).

ence of unlawful motivation. And in our case, the other factors usually considered, such as timing, reasons given for the terminations, comparisons with workers retained, and the like, do not seem to justify according much weight to the fact that over half those terminated were known by Midessa to be union supporters.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Carpenters Local Union 1428 is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees about their union and other protected activities, by threatening employees with discharge for such activities, by discharging economic strikers on January 25, 1983, and by requiring such discharged strikers to fill out new applications and be reevaluated prior to being rehired around January 31, 1983, and by demoting Salvador Machuca on February 1, 1983, when it rehired him, Respondent has violated Section 8(a)(1) of the Act.

4. By terminating the below named employees on February 11, 1983, because they engaged in union or other protected activities, Respondent has violated Section 8(a)(3) and (1) of the Act:

Cuahtemoc Anguiano
Anastacio Dominguez, Jr.
Thomas B. Gallegos, Jr.
Salvador Machuca

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall be ordered to make whole the following 22 named employees by reason of its unlawful discharge of them on January 25, 1983, when they were engaging in a lawful economic strike:[93]

Cuahtemoc Anguiano	Ezequiel Mata
Avitio A. Carrillo	Mario Matta
Jesse R. Dominguez	Kevin Nichols
Anastacio Dominguez Jr.	Derrill Pope
Alvaro Fuentes	James Pope
Thomas B. Gallegos Jr.	Louis Rodriguez
Joe Gaitan	James Rowe
Bill Gleason	Dale Smith
Bill Leasure	Elivorio Soto
Victor Leija	Orvie Springs
Salvador Machuca	Mike Tapia

[93] The 22 names, plus those of E. Armendariz and E. Ibarbo, are listed in par. 8 of the complaint. Armendariz and Ibarbo are not entitled to any backpay because Respondent, I have found, treated them as having been granted time off from work on January 25, 1983.

Respondent's backpay obligation to them is limited to no more than 4 days, plus interest and any fringe benefits, such as medical expenses, they would have been entitled to receive during the period of January 25–28, 1983.

Respondent shall be ordered to offer immediate and full reinstatement to the below named employees to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions[94] and to make them whole with interest, because of their unlawful termination on February 11, 1983.

Cuahtemoc Anguiano
Anastacio Dominguez, Jr.
Thomas B. Gallegos, Jr.
Salvador Machuca

Reinstatement is appropriately ordered notwithstanding there was no allegation that the layoff of February 11, 1983, was itself unlawful. The General Counsel proved that Respondent selected the four employees named above for layoff, and Respondent failed to show that the four would have been included in the layoff of February 11, 1983, in any event. Whether any or all four of the discriminatees would have been included in subsequent nondiscriminatory layoffs, that factor, relevant to both reinstatement and the amount of backpay, must be determined at the compliance stage.

In the event it is determined at the compliance stage that any or all four discriminatees would have been included in a subsequent economic layoff, then Respondent shall be ordered to place such discriminatee on a preferential hiring list to be the first employee rehired in his former or substantially equivalent position.

Backpay shall be computed in the manner established by the Board in *F. W Woolworth Co.*, 90 NLRB 289 (1950), with interest calculated in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Removal of any references to the terminations of both January 25, 1983, and regarding Gallegos, Anguiano, Machuca, and Dominguez, as to February 11, 1983, from personnel records shall be ordered in accordance with *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[95]

ORDER

Respondent Midessa Construction Co., Midland, Texas, its officers, agent, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union or other protected activities.

[94] The former position to which Salvador Machuca is to be reinstated is that of leadman if such position is in existence in light of the number of employees on Respondent's jobsites.

[95] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Threatening its employees with discharge if they engage in union activities.

(c) Discharging its employees who engage in an economic strike.

(d) Requiring discharged economic strikers to fill out new employment applications and be reevaluated on being recalled as if they were new employees.

(e) Demoting employees because they engage in union or other protected activities.

(f) Terminating employees because they engage in union or other protected activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the employees named below, in the manner set forth in the remedy section of this decison.

Cuahtemoc Anguiano	Ezequiel Mata
Avitio A. Carrillo	Mario Matta
Jesse R. Dominguez	Kevin Nichols
Anastacio Dominquez Jr.	Derrill Pope
Alvaro Fuentes	James Pope
Thomas B. Gallegos Jr.	Louis Rodriquez
Joe Gaitan	James Rowe
Bill Gleason	Dale Smith
Bill Leasure	Elivorio Soto
Victor Leija	Orvie Springs
Salvador Machuca	Mike Tapia

(b) Offer the below named employees immediate and full reinstatement to their former positions of employment or, if such positions no longer exist, to substantially equivalent positions or, if no work is available or if any of the below named employees would have been included in any subsequent layoffs, then establish a preferential hiring list for the employee or employers and reinstate him or them from that list, before hiring or recalling other, when Respondent resumes hiring, without prejudice to their seniority or other rights or privileges previously enjoyed.

Cuahtemoc Anguiano
Anastacio Dominguez, Jr.
Thomas B. Gallegos, Jr.
Salvador Machuca

(c) Make the employees named above in paragraph 2(b) whole for any loss of earnings or other benefits suffered as a result of their termination on February 11, 1983, in the manner set forth in the remedy section of the decision.

(d) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Post at each of its Midland, Texas jobsites, and its personnel office, copies of the attached notice marked "Appendix."[96] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[96] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Massachusetts Laborers' District Council, a/w Laborers' International Union of North America, AFL–CIO *and* J. F. White Contracting Company and International Brotherhood of Electrical Workers, Local 103, AFL–CIO. Case 1–CD–826

July 29, 1988

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

The charge in this Section 10(k) proceeding was filed January 20, 1988, by J. F. White Contracting Company (White), alleging that the Respondent, Massachusetts Laborers' District Council, a/w Laborers' International Union of North America, AFL–CIO (Laborers' District Council), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing White to assign certain work to employees it represents rather than to employees represented by International Brotherhood of Electrical Workers, Local 103, AFL–CIO (Electrical Workers Local 103). The hearing was held February 9, 1988, before Hearing Officer Carol A. Sax.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

White, a Massachusetts corporation, is engaged in a general contracting and construction business at its facility in Newton, Massachusetts, where it annually derives revenues in excess of $50,000 directly from sources located outside the Commonwealth of Massachusetts. The parties stipulate, and we find, that White is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers' District Council and Electrical Workers Local 103 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

White is the general contractor for a track rehabilitation project for the Massachusetts Bay Transit Authority (MBTA) on mass transit tracks located in one of the underground tunnels. The MBTA contract with White specifies that work on the track renovation project can be performed only between the hours of 9:30 p.m. and 4:30 a.m. and that passenger service on the line cannot be disrupted by the renovation work. The project involves the upgrading of the track and the installation of concrete ducts or raceways immediately adjacent to the track to carry electrical cables that later will be pulled through these ducts. Normally, the process of putting down such ducts involves digging a trench, laying an electrical raceway (essentially a metal, fiberglass, or PVC pipe through which electrical wiring is eventually pulled), and covering it with raw concrete. This conventional method was rejected for this project because it would be impossible for the concrete to dry sufficiently overnight to withstand resumption of regular rail service the next day. White was required to use precast concrete surrounding cylindrical forms, which will eventually be utilized for power and communication cable adjacent to the track. The precast concrete is poured and hardened at an offsite manufacturing plant and transported to the job.

White has collective-bargaining agreements with both Laborers' District Council and Electrical Workers Local 103. White assigned all the work of laying the precast conduit to employees represented by Laborers' District Council.

On December 3, 1987, business agent for Electrical Workers Local 103, Don Berry, sent a letter of grievance to Philip Bonnano, president of White, under the subcontracting clause of the Electrical Workers contract with White, claiming that the work of handling the precast conrete duct was electrical work. After a subsequent conversation between Berry and Bonanno, Bonanno contacted Laborers' District Council Business Manager Paul McNally and informed him of Electrical Workers Local 103's claim to the work. McNally said he would not agree to a reassignment, and that Laborers' District Council would go on strike if a reassignment occurred.

On January 15, 1988, a hearing was held before the joint grievance committee of the National Electrical Contractor's Association. The committee found that White was in violation of its agreement by allowing the work to be performed by employees represented by Laborers' District Council and that White should cease and desist from violating the agreement. Laborers' District Council was not bound by this dispute resolution mechanism.

About January 18, 1988, Bonanno informed McNally of the award and asked if they could work something out. McNally told Bonanno that if he changed the work assignment, Laborers' District Council would not only strike and shut down the instant project, but would also shut down the rest of White's projects in Boston. As of the date

of the hearing, White had not changed the work assignment.

B. *Work in Dispute*

The disputed work involves the handling and installation of precast enclosures for electrical conduit (duct banks/electrical raceways) at the Massachusetts Bay Transit Authority construction project adjacent to Auditorium Station in Boston, Massachusetts.

C. *Contentions of the Parties*

White contends that Laborers' District Council violated Section 8(b)(4)(D) of the Act by its January 18, 1988 threat to strike all White's projects. White and Laborers' District Council further contends that the disputed work should be awarded to employees represented by Laborers' District Council on the basis of their collective-bargaining agreement, White's preference and past practice, area practice, economy and efficiency, and relative skills and safety.

Electrical Workers Local 103 filed a motion to quash the notice of hearing and dismiss the case, contending that the precast duct banks are electrical conduit and that laying electrical conduit is work that should be assigned to employees it represents under the relevant collective-bargaining agreement and under historical practice. It further contends that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. Electrical Workers Local 103 contends that a jurisdictional dispute does not exist and that it is simply seeking to enforce the provisions of its collective-bargaining agreement.

No party contends that there is an alternative method to voluntarily resolve the dispute that binds all parties.

D. *Applicability of the Statute*

In a 10(k) proceeding, the Board must determine whether there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and whether the parties have agreed on a method for the voluntary adjustment of the dispute. In this case, a finding of "reasonable cause" requires evidence that a party has used proscribed means to enforce its claim and that there are competing claims to disputed work between rival groups of employees.

It is undisputed that the business agent for Laborers' District Council threatened to shut down all of White's projects in the Boston area if White reassigned the work to employees represented by Electrical Workers Local 103. There is no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act.

Electrical Workers Local 103 contends there was, in effect, "no threat" because White was going to maintain its "illegal" position in refusing to honor the arbitration award regardless of the threat. Local 103 also contends that there is no traditional jurisdictional dispute, but rather unilateral action by White in assigning the disputed work "to itself and not to its electrical sub-contractor's employees." In support of this contention, Electrical Workers Local 103 cites *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818 (1986), affd. 827 F.2d 581 (9th Cir. 1987).

We reject Electrical Workers Local 103's contention that there was no threat because the alleged threat had no influence on White's assignment of the work. The issue is not the actual effect on an employer's assignment of the work, but rather whether there is reasonable cause to believe that proscribed activity occurred. In this case the threat was clear and unequivocal.

We also reject Electrical Workers Local 103's contention that White's assigning the disputed work to its own employees rather than to its electrical subcontractor's employees brings this case within the type of situation contemplated in *Teamsters Local 578 (USCP-Wesco)*, supra, and that the notice of hearing should therefore be quashed because the real nature of the dispute is contractual work preservation rather than jurisdictional. In *Teamsters Local 578 (USCP-Wesco)*, the employer had a contract with only one union and sought to transfer work out of the unit and subcontract it to another employer. The Board concluded that the dispute was essentially between the union and the employer rather than between rival groups of employees. By contrast, this case presents a traditional 10(k) situation in which two unions have collective-bargaining agreements with White. Both unions claim that their respective agreements cover the same work. Consequently, we conclude that there are competing claims to the same work between rival groups of employees, and consequently, a traditional jurisdictional dispute.

We find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred, that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act, and that *Teamsters Local 578 (USCP-Wesco)* does not apply to this situation. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

No party claims that there are certifications applicable to the work in dispute.

The Laborers' District Council's collective-bargaining agreement clearly covers the disputed work. The contract lists precast concrete work, trench preparation and backfilling, and the setting of pipes and conduits in trenches as work to be performed by employees represented by Laborers' District Council.

Electrical Workers Local 103's collective-bargaining agreement speaks only of electrical work. Electrical Workers Local 103 admitted at the hearing that the agreement does not cover any of the related carrying, unhooking, trench excavation, and backfilling aspects of the job and, in fact, Electrical Workers Local 103 does not seek the assignment of these portions of the job. Moreover, even if the project were being performed with an ordinary wet concrete pour, the only possible involvement of electrical workers would be to place the conduit into the trench when the concrete was poured. In this instance that specific function of placing the conduit prior to the concrete pour was performed at the offsite precast concrete manufacturing plant and that phase of the process is not in dispute here.

Thus, as the work in dispute is not fairly considered electrical, and it is clearly covered by the Laborers' District Council's agreement, we find that this factor of collective-bargaining agreements favors an award of the disputed work to employees represented by Laborers' District Council.[1]

2. Company preference and past practice

The practice of White for at least 20 years has been to assign the work of excavating trenches and the placing of material such as pipe and conduit in trenches to employees represented by Laborers' District Council. Accordingly, this factor favors an award of the disputed work to employees represented by Laborers' District Council.

3. Area practice

Testimony presented at the hearing shows that the type of work involved in this dispute is identical to that traditionally assigned by other general contractors in the area to employees represented by Laborers' District Council. Bonanno testified that he knows of no instance in which his competitors used anyone but Laborers-represented employees to perform such work and that he often sees his competitors using the very same individuals. Accordingly, this factor favors an award of the disputed work to employees represented by Laborers' District Council.

4. Relative skills and safety

White is satisfied with the skills demonstrated by the employees represented by Laborers' District Council. Additionally, the work is being performed in a confined area involving the potentially hazardous hoisting and unloading of heavy precast concrete sections. In such a confined area, the unnecessary presence of two full crews would add to the congestion and to the potential for hazardous conditions. White presented testimony that there are hazards involved in the hoisting and setting of these concrete materials; the traditional electrical skills of the employees represented by Electrical Workers Local 103 would have no relevance. Accordingly, this factor favors an award of the disputed work to employees represented by Laborers' District Council.

5. Economy and efficiency of operation

The operation of bringing the precast materials into the tunnel, digging 100 feet of shallow trenching, placing the concrete materials, and backfilling the shallow trench involves no more than 30 to 60 minutes and the disputed part of the operations occupies only a few minutes. If White assigned the placing of the precast ducts to employees represented by Electrical Workers Local 103, White would have to pay them for a whole shift to do a few minutes' work, and White would still require the presence of a crew of employees represented by Laborers' District Council. Under White's present assignment, employees represented by Laborers' District Council perform all aspects of this operation, including the disputed work and perform other Laborers' tasks upon completion of that operation. Accordingly, economy and efficiency of operation favors awarding the disputed work to

[1] Member Johansen accepts the grievance committee's interpretation of the contract, finds both contracts cover the work and, therefore, concludes that this factor favors neither group.

employees represented by Laborers' District Council.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Laborers' District Council are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, area practice, economy and efficiency of operation, and relative skills and safety. In making this determination, we are awarding the work to employees represented by Laborers' District Council, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of J. F. White Contracting Company represented by Massachusetts Laborers' District Council, a/w Laborers' International Union of North America, AFL–CIO are entitled to perform the handling and installation of precast enclosures for electrical conduit (duct banks/electrical raceways) at the Massachusetts Bay Transit Authority construction project adjacent to Auditorium Station in Boston, Massachusetts.

Livingstone College *and* Livingstone College Federation of Teachers and Librarians, AFT, AFL-CIO, Local 4110, Petitioner. Case 11-RC-4989

July 29, 1988

DECISION AND DIRECTION OF ELECTION

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held on April 29 and 30, 1981, before Hearing Officer Jasper C. Brown Jr. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, the Regional Director for Region 11 transferred the case to the Board for decision.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

1. The Employer, Livingstone College, is engaged in commerce within the meaning of the Act and it will effectuate the policies of the Act to assert jurisdiction over it.

2. The Petitioner, Livingstone College Federation of Teachers and Librarians, AFT, AFL-CIO, Local 4110, is a labor organization seeking to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. Livingstone College is a predominantly black, liberal arts institution of higher learning located in Salisbury, North Carolina. The College is made up of an undergraduate school, known as the School of Arts and Sciences, and a Graduate School of Theology, known as Hood Seminary, both of which are situated at the main campus in Salisbury. The College is divided into four divisions—Business Affairs, Student Affairs, Planning and Development, and Academic Affairs—each under a division head. Above the division heads is the president of Livingstone College, who is responsible for the daily operation of the school.

In addition to faculty and professional employees, Livingstone College employs numerous nonprofessional employees in various categories throughout its main campus (see attached appendix).[2] The Petitioner seeks to represent all the Employer's full-time, nonprofessional employees employed at the main campus,[3] excluding faculty, professional, and confidential employees, guards, and supervisors as defined in the Act.

The Employer contends that the unit of all nonprofessional employees sought by the Petitioner is inappropriate because it is composed of three main groups of employees—clerical/secretarial employees; buildings and grounds employees; and dormitory directors—which do not share a community of interest with each other and which constitute separate and distinct appropriate bargaining units. It further argues that the clerical/secretarial employees cannot, in any event, be included in the same unit with the buildings and grounds employees, but must instead be placed in a separate unit, in view of the Board's "long-established" policy of not including office clerical workers with other groups of employees, i.e., "manual" workers. Finally, the Employer claims that the petitioned-for unit includes employees who are, in its view, "technical" employees having no community of interest with the other employees in the unit sought, and who should be placed in a separate unit if the Board should direct that an election be held.[4]

[1] This matter was transferred to the Board for decision because the Board at the time was considering whether it had jurisdiction over this Employer in *Livingstone College*, Case 11-RC-4957, and the issue was once again being raised by the Employer in the instant case. On November 30, 1987, the Board issued a decision in Case 11-RC-4957 (286 NLRB 1308) finding, inter alia, that its assertion of jurisdiction over this Employer was proper and not prohibited by the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). In light of the holding in that case, we find no merit to the Employer's assertion here that the Board lacks jurisdiction over it.

[2] The appendix is a copy of P. Exh. 2 containing the names and job classifications of employees listed on the Employer's payroll during the time period relevant here. P. Exh. 2 was produced during the hearing by the Employer's business manager, Bobby Aldrich, pursuant to a stipulation of the parties. The list excludes those classified by the Employer as faculty, professional, or supervisory.

[3] The unit is described in the petition as consisting of secretaries, clerical staff, technicians, maintenance (or janitorial staff), and dormitory directors. However, it is clear from the record and its brief to the Board that the Petitioner seeks to represent a unit of all nonprofessional employees. Thus, the unit sought by the Petitioner would include the following employees listed in the appendix: clerical/secretarial employees; computer and keypunch operators; BEOG, NDSL, and workstudy coordinators; records clerk; keeper of records; laboratory assistant; dormitory directors; invoice auditors; cashier/accountant; admissions officer; bookstore/canteen manager; director/Learning Center; administrative assistant/development; Living Learning Centers coordinator; and buildings and grounds employees.

[4] The Employer thus contends that the 13 employees listed under "OTHERS" in the attached appendix, along with the BEOG and workstudy coordinators, the records clerk, and the laboratory assistant, are "technical" employees who should be excluded from any unit found appropriate. Of the 13 employees listed under "OTHERS," the Petitioner would include all but the following in the unit: payroll accountant, federal programs accountant, recruiter, and UNCF coordinator. The Petitioner would also exclude the position of recruiter, solicitation, etc., held by employee Louise Shipman, because she is the wife of the college president and a part-time employee.

Contrary to the Employer, we find that the unit sought by the Petitioner, consisting of all full-time, nonprofessional employees, is appropriate for collective-bargaining purposes. In determining the appropriateness of a nonprofessional unit in a college or university environment, the Board applies the rules traditionally used to determine the appropriateness of a unit in an industrial setting.[5] In this regard, a campus or collegewide unit, like a plantwide unit, is viewed by the Board as presumptively appropriate under the Act.[6] The burden of proving that the interests of a given classification of employees are so disparate from those of others that they cannot be represented in the same unit rests with the party challenging the unit's appropriateness, in this case the Employer.[7] The latter has not met its burden here.

The record reveals, contrary to the Employer's contention, that the clerical/secretarial employees, the buildings and grounds employees, and the dormitory directors share a strong community of interest with each other and with other nonprofessional employees. Thus, employees in all three groups, along with other nonprofessional employees, receive the same hospitalization coverage, pension coverage, medical insurance, vacation privileges, holidays, and entitlement to workmen's compensation privileges. They are all subject to the same policies and procedures found in the college faculty/staff handbook, and can attend the monthly faculty/staff meetings as well as the faculty/staff retreats.[8] Further, all nonprofessional employees are subject to the same hiring procedures. Thus, employees are recommended for employment by the head of the division in which employment is sought, with the college president having the final authority over the hiring.[9]

There are, to be sure, some distinctions to be found among these three groups of employees. The buildings and grounds employees, for example, receive an hourly wage for a 42-hour workweek, begin their workday at 7:30 a.m., and work one-half day on weekends, although employees in the other two groups, along with other nonprofessional employees, are salaried, work a 40-hour week, and have work hours from 8 a.m. to 5 p.m. On the other hand, the dormitory directors work only 9-1/2 months of the year (to coincide with the academic school year), although all other nonprofessional employees, including the clerical/secretarial employees and the buildings and grounds employees, are employed year round.[10] These minor distinctions, however, are insufficient to overcome the strong community of interest that employees in these three groups, as well as all other nonprofessional employees, share with each other, or to rebut the presumptive appropriateness of the collegewide unit sought by the Petitioner.

Further, the separate supervision of employees in these three groupings and their infrequent contact with each other generally is, in our view, not enough to negate their otherwise strong community of interests.[11] Nor do we find any merit to the Employer's suggestion that the three employee groups cannot be included in one overall unit merely because, if petitioned for separately, they might arguably constitute appropriate units. When making unit determinations, the Board does not concern itself with whether the unit petitioned for is *the only* or *the most* appropriate unit for collective bargaining; rather, the Board has held that the Act requires only that the unit requested be *an* appropriate unit.[12] Thus, even assuming the smaller groups proposed by the Employer could be found appropriate, the larger overall unit sought by the Petitioner here would not be rendered inappropriate.

We also do not agree with the Employer that the clerical/secretarial employees cannot be included in the same unit with the other employee groups. Although the Board ordinarily does not include office clerical workers in a unit containing manual workers because of their different inter-

[5] *Cornell University*, 183 NLRB 329, 336 (1970); *Harvard College*, 269 NLRB 821 (1984).

[6] See *Cornell University*, supra, where a unit similar to that petitioned for here was found to be appropriate.

[7] *Airco, Inc.*, 273 NLRB 348, 349 (1984) (employer found not to have met its burden of showing that plant operators did not share a community of interest with the other employees in the requested plantwide unit).

[8] According to Business Manager Aldrich, buildings and grounds employees are invited to attend the faculty/staff meetings and are frequently represented at these meetings by their firstline supervisor. The record is silent as to whether these employees can also attend the staff/faculty retreats. However, we note in this regard that Aldrich testified that the buildings and grounds employees receive the same benefits, which presumably would include the staff/faculty retreats, as other full-time nonprofessional employees.

[9] However, with respect to the buildings and grounds employees, Business Manager Aldrich testified that he has final authority over the hiring in this department.

[10] All nonprofessional employees, except for buildings and grounds personnel, execute a "Notice of Employment Authorization" contract annually. The buildings and grounds employees receive an hourly wage rather than a salary and are not required to execute such a contract.

[11] In *Airco, Inc.*, supra, the Board found a plantwide unit appropriate notwithstanding that employees in different classifications had little contact with each other, and possessed different skills, training, and working conditions. Compare also *Austin Cablevision*, 279 NLRB 535 (1986), where the Board clarified an existing clerical employees unit to include the salesclerks who worked in a separate department, were separately supervised, and had no interchange or official contact with office clerical employees. Also, *Jones & Laughlin Steel Corp.*, 57 NLRB 357 (1944), where the Board found that the different modes of pay, i.e., salary vs. hourly rate, was not enough to keep employees out of the same unit.

[12] *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951).

ests,[13] it has, nevertheless, found them to be properly included in such a unit in situations where the office clericals were shown to have strong mutual interests with other employee groups.[14] Here, the record clearly shows that the clerical/secretarial employees share the same interests with other employees, are subject to the same personnel policies, work the same hours as most unit employees, and receive the same fringe benefits. The record further shows that there is frequent contact between the clerical/secretarial employees and certain other unit employees, i.e., "technical" employees. Finally, we note that the Petitioner seeks to represent all nonprofessional employees, including the clerical/-secretarial employees, and there is no union here that seeks to represent the clerical/secretarial employees in a separate unit.[15]

We also find no merit to the Employer's contention that the BEOG coordinator, workstudy coordinator, records clerk, laboratory assistant, and the 13 employees listed as "OTHERS" in the appendix, should be excluded from the unit as "technical" employees.[16] Initially, we note that if these employees are found to be technical employees, as urged by the Employer, that fact alone would not require their exclusion from the unit sought by the Petitioner. The Board has long held that it will not automatically exclude technical employees from units of other employees whenever their placement is in issue. Rather, the Board will determine their unit placement on the basis of an analysis of their community of interest.[17] Here, the record shows that these individuals share the same community of interest with other employees in the bargaining unit. Thus, they receive the same fringe benefits,[18] work the same hours, and are subject to the same policies and procedures of the faculty/employee handbook applicable to all nonprofessional unit employees. Further, these employees are hired in the same manner and are apparently required to execute a yearly notice of employment authorization contract. On these facts, it is clear that these individuals properly belong in the unit sought by the Petitioner, regardless of whether they are technical employees under the Act.[19]

The Employer seeks to exclude from the unit as confidential employees two secretaries in the office of the president, Victoria Thomas and Joanna Phipps, and two secretaries in the dean's office, Sandra Grier and Mary Mitchell. The Petitioner seeks to include Phipps, Grier, and Mitchell in the unit but would exclude Thomas from the unit as a confidential employee. Although the record suggests that all four employees perform basically the same duties, the evidence as to the exact nature of their duties is conflicting and, in our view, insufficient to establish whether, at the relevant time period, any or all four of these individuals "assist[ed] and act[ed] in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations" which would render them "confidential employees

[13] This policy has been applied most frequently in the industrial setting where the office clericals differ from production workers and plant clericals by working in separate offices on administrative matters not directly related to production. See, e.g., *Beech Aircraft Corp.*, 170 NLRB 1595 (1968); *Carling Brewing Co.*, 126 NLRB 347 (1960).

[14] See *Standard Oil Co. of California*, 116 NLRB 1762 (1956) (office clericals included in same unit with sales employees, production and maintenance employees, truckdrivers); *Southern Minnesota Supply Co.*, 116 NLRB 968 (1956) (office clericals included in employerwide unit containing, inter alia, mechanics and machinists).

[15] *Georgetown University*, 200 NLRB 215 (1972), cited by the Employer in support of its position that the clerical/secretarial employees should be excluded from the unit, is factually distinguishable from the present case and, therefore, not controlling. Thus, unlike here where the Petitioner seeks to represent a collegewide unit of all nonprofessional employees, the petitioner in *Georgetown University* was seeking only a unit of service and maintenance employees. The Board rejected the employer's attempt in that case to include the clerical employees in the unit sought, noting that such a unit does not normally include office clerical employees. As stated, the Petitioner here is not seeking such a limited unit and the record clearly establishes a strong community of interest between the clerical/secretarial employees and other employee groups.

[16] The Board defines a "technical" employee as one who does not meet the strict requirements of the term "professional" employee as defined in the Act, but whose work is of a technical nature involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools or through special courses. *Postal Service*, 210 NLRB 477, 480 (1974). The Employer, in its brief to the Board, concedes that these employees are not professional employees within the meaning of the Act.

[17] *Sheffield Corp.*, 134 NLRB 1101, 1103 (1961).

[18] The Employer's business manager, Aldrich, testified that all nonprofessional employees, which includes these individuals, receive the same fringe benefits. However, Aldrich also testified that employee Releford, who is listed under "OTHERS" as the director of the Learning Center, receives benefits available only to faculty members in addition to those benefits provided to nonprofessional employees.

[19] The record, in any event, fails to support the Employer's claim that these individuals are technical employees. Thus, the record is devoid of any evidence showing that these 17 individuals engage in work that can be viewed as technical in nature requiring the exercise of independent judgment, or that they possess and are required to have some form of specialized training to perform their job functions.

Although we find that employee Releford is not a technical employee, we are, nevertheless, unable to determine from the record whether she can be classified as a professional or a nonprofessional employee, as she appears to have a community of interest with both classifications of employees. Further, we note that in the earlier *Livingstone College* case (see fn. 1, supra), Releford's name was included in the *Excelsior* list containing the names of faculty members, although her ballot was challenged. In light of its holding in that case, the Board found it unnecessary to resolve her challenged ballot. In view of the above, we shall allow Releford to vote subject to challenge.

We shall also allow employee Shipman to vote under challenge. Although the Petitioner claims that Shipman is the wife of the college president and a part-time employee and, therefore, excludable on these grounds, no evidence whatsoever was produced at the hearing concerning Shipman's duties or work schedule. Lacking such evidence, we find it proper to allow her to vote subject to challenge.

The Petitioner would also exclude employees Harris, Colson, Everhart, and Chambers, listed under "OTHERS" in the appendix, from the unit but gives no reason for seeking their exclusion. There is nothing in the record to suggest that these employees fall within any of the categories that are to be excluded from the unit. We shall, accordingly, include them in the unit with other nonprofessional employees.

under the Act." See *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956); *Associate Day Care Services*, 269 NLRB 178, 180–181 (1984); *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170 (1981). In view of the conflicting nature of the evidence presented with respect to these individuals, we shall permit them to vote under challenge.[20]

In summary, we find that the following unit of employees is appropriate for collective bargaining:

> All full-time nonprofessional employees employed by Livingstone College at its main campus in Salisbury, North Carolina, in the following classifications: clerical/secretarial employees; buildings and grounds employees; computer and keypunch operators; BEOG, NDSL, UNCF, and workstudy coordinators; records clerk; keeper of records; laboratory assistant; dormitory directors; invoice auditors; cashier/accountant; federal programs accountant; payroll accountant; recruiter; admissions officer; bookstore/canteen manager; administrative assistant/development; Living Learning Centers coordinator; but *excluding* all faculty, professional and confidential employees, guards and supervisors as defined in the Act.

We shall direct that an election be held among employees in the unit.

[Direction of Election omitted from publication.]

MEMBER CRACRAFT, concurring.

I concur in my colleagues' finding that a unit of all full-time, nonprofessional employees is appropriate herein. The interests of these employees are admittedly diverse. There exists among them separate supervision, different skills, wages, benefits, and hours and little interchange or interaction. However, the unit sought consists of all nonprofessional employees of the Employer.[1] Further, we need not determine "the *only* appropriate unit, or the *ultimate* appropriate unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'"[2] On these bases and in light of the limited evidence before the Board, I would find that the unit sought constitutes an appropriate unit.

[20] The Petitioner would exclude from the bargaining unit employee Phyllis Wells, who is employed as a secretary at Hood Seminary, on "First Amendment grounds of separation of Church and State." Contrary to the concerns expressed by the Petitioner, we see no reason to exclude Wells from the bargaining unit. Initially, we note that Wells is a nonprofessional employee employed by the College and not the AME Zion Church which founded and sponsors the College. As a nonprofessional employee, she clearly shares a strong community of interest with other unit employees. Further, in its earlier *Livingstone College* decision (fn. 1, supra), the Board found that the AME Zion Church was "not involved with the College in a manner which creates a significant risk of constitutional infringement," noting in particular that the College was not financially dependent on the Church.

[1] A unit of such scope is the first one deemed appropriate in Sec. 9(b) of the Act, the section on which the Board's authority to establish collective-bargaining units rests. Such a unit has invariably been found appropriate by the Board since its earliest days. See, e.g., *Western Electric Co.*, 98 NLRB 1018, 1032 (1952); *Montefiore Hospital & Medical Center*, 261 NLRB 569, 573 (1982); see also *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986), in which the court endorsed the Board's long held practice of determining that when a labor organization seeks a broad, all-encompassing unit, an employer's argument that smaller units are "presumptively appropriate" or even more appropriate are unavailing. Id. at 887.

[2] *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951).

APPENDIX

Livingstone College
Salisbury, North Carolina

Full-Time Employers
LISTED ON THE PAYROLL ENDING
March 31, 1981–April 3, 1981

Clerical/Secretaries/Technical Assistants/Staff

1. Rosalind Baker, Secretary—Public Relations
2. Brenda Brown, Secretary—Housing
3. Deborah Colbert, Records Clerk—Financial Aid
4. Joann Diggs, Coordinator of BEOG—Financial Aid
5. Grace Duncombe, Secretary—Alumni Office
6. Mary Edwards, Clerical Asst.—Reproduction Center
7. Karen Ellis, Secretary—Word Processing
8. Blanche Ford, Secretary—Maintenance Dept.
9. Sandra Grier, Secretary—Office of the Dean
10. Elsie C. Griffin, Secretary—Business Office
11. Connie Hawkes, Secretary—Co-op Program
12. Jacqueline Logan, Secretary—Education Dept.
13. Marva McCain, Workstudy Coordinator—Financial Aid
14. Cora McCombs, Keeper of Records—Office of the Registrar
15. Yvette McGill, Secretary—Placement Center
16. Jerrell McKenzie, Secretary—Social Welfare Dept.
17. Dorothy Moore, Computer Operator—Data Processing
18. Shelly Martin, Secretary—Institutional Research
19. Patricia Minter, Secretary—Library
20. Mary Mitchell, Secretary—Office of the Dean
21. Lucille Phifer, Secretary—Upward Bound
22. Joanna Phipps, Secretary—Office of the President
23. James Rainbow, Lab. Asst.—Biology & Physics
24. Gertrude Robinson, Secretary—Athletics

25. Norma Ross, Secretary—Office of the Registrar
26. Valiere Stifford, Secretary—Hood Seminary
27. Donna Sharpe, Secretary—Library
28. Angela Stackhouse, Secretary—Student Affairs
29. Phyllis Stevenson, Secretary—Title III Office
30. Vanessa Tillman, Keypunch Operator—Data Processing
31. Victoria Thomas, Secretary/Adm. Asst.—Office of the President
32. Phyllis Wells, Secretary—Hood Seminary
33. Inah White, Secretary—Office of Development
34. Linda Williams, Secretary—Student Affairs

Counselors

1. Arnethia Alexander
2. Peggy Bowden
3. Walter Hawk

Others

1. Rochelle Baker, Invoice Auditor/Purchasing
2. Henry Davis, Cashier/Accountant
3. Richard Everhart, Federal Programs Accountant
4. Louis Chambers, Payroll Accountant
5. Andrew Harris, Recruiter
6. Lula Holloway, Admissions Officer
7. Ruth Camp, Bookstore/Canteen
8. Queen Lee, NDSL Coordinator
9. Michelle Releford, Director/Learning Center
10. Dorothy Colson, UNCF Coordinator
11. Debra Bell, Administrative Assistant/Development
12. Louise Shipman, Recruiter, Solicitations, etc.
13. Viola Smith, Living-Learning Centers Coordinator

Dormitory Directors

1. Ruby A. Fleming
2. Loretta Oliver
3. Eula Robinson
4. Timothy Dixon
5. Joseph Henderson
6. Anthony Stewart
7. Carolyn Beatty
8. Gary Curlee
9. Floyd Pittman
10. Samuel Moore
11. Micheal Sheilds
12. Morris Wiggins
13. Lydia Colbert
14. Mary Gibson
15. Erline Johnson
16. Tangy Hubbard
17. Annie Thompson
18. Mildred McCary, Student Union Mail Supervisor

Buildings & Grounds Personnel

1. Clarence Fleming, Electrician—(P-T) (Student)
2. Melvin Reid, Plumber
3. Isaac Wilkins, Carpenter

Others

1. Helen Bennett, Custodian
2. Clarence Brown, Janitorial/Buildings
3. Will Bush, Custodian
4. Kenneth Carroll, Preventive Maintenance Officer
5. Walter Clayborn, Custodian
6. Lelia Cuthbertson, Custodian
7. Benjamin Daniels, Grounds
8. Adam Eberhart, Painter
9. Everette Fleming, Painter
10. Brenda Hawthorne, Custodian
11. Sandra Hawthorne, Custodian
12. Julia Jones, Custodian
13. Julia Morrow, Custodian
14. George Miller, Custodian
15. Sylvester Pruitt, Custodian
16. Calvin Shaw, Janitorial/Buildings
17. Frances Simpson, Custodian/President's Home
18. Beulah Tate, Custodian
19. Donnie Torrence, Janitorial/Grounds
20. Asalee White, Custodian
21. Ruth White, Custodian
22. Henry Wilds, Central Receiving
23. Sarah Williams, Custodian

Security

1. Earl Hardaway, Officer
2. Nathan King, Officer
3. Joseph Robinson, Officer
4. Jerry Stockton, Officer

Nuclear Fuel Services, Inc. *and* Oil, Chemical & Atomic Workers International Union, Local 3-677. Case 10-CA-21201

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On February 10, 1986, Administrative Law Judge William N. Cates issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions for the reasons stated below and to adopt the recommended Order.

This case concerns the Respondent's refusal to grant vacation pay to striking employees. In *Texaco*, we held that the question whether an employer violates Section 8(a)(3) or (1) by refusing to continue benefit payments to a disabled employee on commencement of a strike will be resolved by applying the test for alleged unlawful conduct articulated by the Supreme Court in *Great Dane*. Under this test, the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike.[2] The burden then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits by proving waiver or by demonstrating reliance on a nondiscriminatory contract interpretation that is reasonable and arguably correct.[3] If the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be "inherently destructive" of important employee rights or motivated by antiunion intent.[4]

The *Texaco* analysis of the Supreme Court's *Great Dane* test for unlawful conduct is applicable to the instant case. Applying the *Texaco* principles to the facts here, we find that the General Counsel has not established a prima facie case of 8(a)(3) and (1) conduct concerning the Respondent's failure and refusal to grant vacation benefits to striking employees.

Whether the General Counsel has met the prima facie burden of proving that the vacation benefits were due and payable, and therefore accrued, on the date the Respondent withheld them depends on an interpretation of the collective-bargaining agreement.[5] The contract here provides for unit employees to have paid vacations of varying durations depending on each employee's length of service. It also contains provisions concerning the scheduling of employees' vacation periods. We agree with the judge that the contract does not provide for payment for vacation pay in lieu of vacation but, rather, contemplates employees' taking time off. After the strike began, however, the Respondent received from the Union and individual employees a number of requests, which the Respondent denied, for the employees to be "paid" their vacation benefits or given their "vacation pay." As the employees were on strike, and thus not working, they made no requests to schedule vacations. As the contract does not provide for vacation pay apart from the taking of a vacation, we find that in requesting vacation pay the Union and the striking employees were seeking a benefit not contained in the contract. Moreover, there is no evidence that the Respondent had ever in practice departed from the terms of the contract and granted vacation pay in lieu of vacation in the past. Accordingly, we conclude that the vacation benefits that the Respondent denied were not accrued benefits.[6]

Moreover, even if the requests of the Union and the striking employees were viewed as requests to take vacations, rather than simply requests for vacation pay, denial of the requests at that time

[1] Absent evidence of actual discriminatory intent, the judge's analysis of the instant case is consistent with *Texaco, Inc.*, 285 NLRB 241 (1987), especially in his use of the test set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[2] *Texaco, Inc.*, supra.

[3] Id.

[4] Id.

[5] Id. at fn. 22 and accompanying text.

[6] Contrary to our dissenting colleague, we do not find the contract's failure to expressly prohibit the granting of vacation pay in lieu of vacation warrants a finding that such pay was available under the contract. As the judge found, the vacation provisions of the contract contemplate employees' taking off vacation time, not pay in lieu of vacation. In fact, the contract provides for vacation pay in lieu of vacation only in one circumstance—when an employee is discharged. As the contract provides for vacation pay in lieu of vacation only in this limited circumstance, and fails to mention it in any other context, we think a claim for pay in lieu of vacation in the circumstances here is unsupported.

Additionally, contrary to our dissenting colleague, we do not find that the vacation benefits were shown to be accrued by the testimony of Bailey, the Respondent's human resources manager, that the employees would have received vacation benefits if they had continued to work rather than having gone on strike. We agree with the judge that, considering Bailey's testimony in context, Bailey was merely stating a "truism."

would not have been unlawful. Thus, article 8, section 4 of the agreement provides that employees must work at least 8 hours on the last scheduled workday before their vacation begins. The employees here did not meet this requirement because they were on strike, and thus not working, when they requested their vacation benefits. Without meeting this requirement, the employees could not satisfy all the conditions necessary to entitle them to take vacations. Therefore, even had they sought to take vacations, their vacation benefits would not have been accrued.[7]

Further, assuming arguendo that the General Counsel did establish a prima facie case, the Respondent has established a legitimate and substantial business justification for its refusal to grant vacation benefits to striking employees. The Respondent demonstrated its reliance on a nondiscriminatory contract interpretation, which is reasonable and arguably correct. Article 8 of the collective-bargaining agreement provides for employees' vacation with pay; it does not, however, provide for vacation pay separate from taking vacation time off. As article 8, section 4, requires that employees work at least 8 hours on the last scheduled workday before and at least 8 hours on the first scheduled workday after vacation, it is, at the very least, reasonable to construe article 8 as contemplating that employees be in work status prior to taking a vacation. Moreover, a common understanding of "vacation" is a respite from work. Because the Respondent's contract interpretation is reasonable on its face and is consistent with the common understanding of "vacation," and there is no explicit contract language, bargaining history, or controlling past practice to the contrary, we find that the Respondent has established a sufficient rebuttal, even assuming that the General Counsel had made out a prima facie case.[8]

Additionally, we agree that, for the reasons the judge stated, the Respondent's denial of requested benefits was not inherently destructive of important employee rights or motivated by antiunion intent.

The complaint further alleges that the Respondent's denial of vacation benefits violated Section 8(a)(5) of the Act. As we have concluded that under the contract the employees were not entitled to vacation pay in lieu of taking vacation and, further, were required to work on the last scheduled workday in order to be entitled to take vacation, it follows that the Respondent did not violate Section 8(a)(5) by denying the requests of the Union and the striking employees for vacation benefits.

Accordingly, we shall dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

MEMBER CRACRAFT, dissenting.

Contrary to my colleagues, I find that the Respondent violated Section 8(a)(5), (3), and (1) by denying employees' requested vacation benefits.

Under *Texaco, Inc.*, 285 NLRB 241 (1987), the General Counsel must demonstrate that the requested benefits were accrued, that is due and payable at the time requested, and were withheld on the apparent basis of a strike. Article 8, section 1, of the parties' collective-bargaining agreement states that employees who worked at least 1000 hours during a 12-month period are entitled to specified amounts of vacation with pay, depending on their length of service.[1] The only discretion the contract affords the Respondent in granting vacations is to limit the number of employees on vacation at any one time to no more than 25 percent of a unit, group, shift, or area. The Respondent's human resources manager, Bailey, testified that the employees for whom the Union requested vacation benefits would have been entitled to the benefits but for the strike. He further testified that the 25-percent limit had nothing to do with the denial of benefits.

[7] In *Texaco, Inc.*, supra, the employees' right to the benefits had accrued because they had accumulated the contractually specified period of employment credit *and* became eligible to receive the benefit due to sickness or disability prior to strike. Here, the dispute involves that aspect of the contractual eligibility test, which determines *when* employees earn the right to receive vacation benefits. Art. 8, sec. 4, supports the Respondent's contention that employees normally are eligible to schedule vacations only in between periods of active work. Unlike the instant case, the employees in *Texaco* and *Amoco Oil Co.*, 285 NLRB 918 (1987), were already receiving their benefits when the strike began, so their benefits clearly were accrued.

Also distinguishable from the instant case is *Bil-Mar Foods*, 286 NLRB 786 (1987), in which the collective-bargaining agreement required employees to be "on the employer's payroll" as of July 1 in order to receive vacation pay. It did not require employees' on-the-job presence on that date for eligibility, like the contract here. (Chairman Stephens did not regard the benefits in *Amoco* as accrued, but that, of course, does not conflict with his conclusion that the benefits here likewise are not accrued benefits.)

[8] As our dissenting colleague points out, in concluding in *Texaco*, supra, that the respondent's contractual interpretation there was no more than post hoc rationalization, we noted that the respondent made no contemporaneous reference to contract interpretation when announcing the suspension of benefits. We also pointed out, however, that the respondent's announcement and its principal defense turned on the noncontractual argument that it should legally be entitled to presume that disabled employees are strikers. Moreover, we specifically found that the respondent's contractual interpretation argument was both unreasonable and not arguably correct. In any event, we find that in the circumstances here, particularly the fact that the contract clearly does not provide the benefits requested, the Respondent's failure to offer a reason for its denial of requests for vacation pay at the time of the requests does not preclude the Respondent from establishing reliance on a nondiscriminatory contract interpretation that is reasonable and arguably correct.

[1] See sec. III,A, of the judge's decision, which sets forth the contractual vacation pay provisions.

Because the striking employees were entitled to vacation benefits according to the contract terms and according to Bailey's testimony, the benefits were accrued. Therefore, the Respondent's denial of the accrued benefits based on the strike establishes a prima facie case of 8(a)(3) and (1) conduct. Consequently, under *Texaco*, the burden shifts to the Respondent to prove a legitimate and substantial business justification, i.e., waiver or reliance on a nondiscriminatory contract interpretation that is reasonable and arguably correct.[2]

In its brief supporting the judge's decision, the Respondent asserts that the collective-bargaining agreement does not provide for vacation pay as an alternative to time off and that there is no evidence the Respondent ever paid employees vacation pay in lieu of vacation. The Respondent also points out that article 8, section 2, states that vacation cannot be accumulated and carried over into a subsequent anniversary year. The Respondent contends that the denial of benefits here is consistent with its past practice established in 1979 of postponing vacations until after the strike.

Although the Respondent accurately states that the contract does not specifically provide for vacation pay in lieu of time off, neither does the contract specifically prohibit it. The contract simply provides that the Respondent pay an employee for a specific time period during which the employee does not have to work, if the employee has worked at least 1000 hours. Therefore, for employees who satisfied the 1000-hour requirement, the right to vacation pay had accrued.

The Respondent's conduct during the 1979 strike does not advance its business justification argument for two reasons. First, there were no requests for vacation benefits during the 1979 strike because that would have made the strikers ineligible for food stamps. Thus, the Respondent did not deny requested vacations in 1979. Second, the Respondent's 1979 postponement of vacation until after the strike was pursuant to a strike settlement agreement, which did not purport to interpret the parties' collective-bargaining agreement. Consequently, the 1979 vacation postponement, based as it was on a strike settlement agreement, cannot serve to demonstrate the Respondent's reliance in the instant case on a reasonable and arguably correct nondiscriminatory interpretation of the vacation pay provisions in the collective-bargaining agreement.

[2] 285 NLRB 241.

In finding that the benefits did not accrue or, alternatively, that the Respondent rebutted the General Counsel's prima facie case, my colleagues rely on the contract provision requiring employees to work their last scheduled workday before and first scheduled workday following their vacation. Even the Respondent, however, did not assert that it relied on this provision in denying vacation benefits. *Texaco* plainly states that it is the employer's burden to "demonstrat[e] reliance" on a particular contract interpretation.[3] Indeed, in *Texaco* the Board rejected the employer's belated contract interpretation as nothing more than a "post hoc rationalization."[4] The majority's attempt to create a business justification for the Respondent is inconsistent with *Texaco*, the very case on which the majority relies. The majority's willingness to mount the Respondent's defense for it is similar to the Fifth Circuit's speculation on the employer's motivation in *Great Dane*, which the Supreme Court held was a reversible error. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 35 (1967).

Further, I simply cannot subscribe to the meaning my colleagues devise for article 8, section 4. The provision must be read in its industrial context to ascertain its meaning. By requiring an employee to work before and after vacation, the provision was not meant to serve as a condition precedent to the accrual of vacation benefits, as the majority interprets it. Rather, the provision is disciplinary in nature; it prevents employees from extending their scheduled vacations by taking a sick day or leave without pay before or after their scheduled vacation. I do not believe such a requirement warrants finding in the circumstances of this case that vacation benefits had not accrued or that the requirement constitutes a reasonable and arguably correct contract interpretation.

As the Respondent has not demonstrated its reliance on a nondiscriminatory contract interpretation that is reasonable and arguably correct, and as the contract provision on which the majority relies would not serve as a substantial and legitimate business justification even if the Respondent had relied on it, I would find that the Respondent violated Section 8(a)(3) and (1) by denying requested vacation benefits to striking employees.

I would further find that by denying the requested vacation benefits, the Respondent has unilaterally changed terms and conditions of employment without bargaining with the Union and has thereby violated Section 8(a)(5) of the Act.

[3] *Texas*, supra.
[4] Id.

Victor McLemore and *William E. Caldwell, Esqs.*, for the General Counsel.
Neil J. Newman, Esq., of Rockville, Maryland, and *Lawrence S. Westcott, Esq. (Venable, Baetjer & Howard)*, of Baltimore, Maryland, for the Respondent.
Helen deHaven, Esq., of Knoxville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This case was tried at Erwin, Tennessee, on 10 December 1985.[1] The charge was filed by Oil, Chemical & Atomic Workers International Union, Local 3-677 (the Union), on 9 September, and the complaint issued on 23 October alleging that Nuclear Fuel Services, Inc. (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by refusing on and after 20 May to grant its employees, then on strike, accrued vacation benefits as requested by the Union. Because Respondent conceded that it has not paid accrued vacation benefits to strikers during the course of the strike, which still continued at the time of the hearing, the sole issue presented in the case is whether Respondent had legitimate business justifications for its conduct.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Maryland corporation with an office and place of business located at Erwin, Tennessee, where it is engaged in the manufacture of nuclear fuels. During the calendar year preceding issuance of complaint, Respondent purchased and received at its Erwin, Tennessee facility goods valued in excess of $50,000 directly from suppliers located outside the State of Tennessee. The complaint alleges, Respondent by its answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint further alleges, Respondent admits, and I further find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Material Facts*

The facts in this case are not in dispute. Respondent and the Union have been parties to successive collective-bargaining agreements since at least 1972 covering Respondent's employees in a production and maintenance unit.[2] The most recent such agreement was effective 15 May 1982 until 15 May 1985. Immediately on expiration of the most recent agreement, the unit employees ceased work and engaged in an economic strike. As indicated earlier, that strike continued at the time of the hearing.

The complaint alleges and the answer admits that on 20 May representatives of the Union requested that Respondent pay striking employees their accrued vacation benefits provided for under the expired collective-bargaining agreement. Roland Bailey, Respondent's human resources manager and a participant in negotiations with the Union, declined the Union's request by telling the union representatives that vacation was going to be handled the same as it had been in 1979, that when the strike was over the employees would come back, that they would pick up their vacation as if the strike period of time had never happened. In short, the returning strikers would have whatever time remaining from the time they reported back to work to take their vacations as if the strike had not occurred.

Bailey's reference to 1979 was an allusion to the 1979 strike by unit employees when Respondent, as part of a strike settlement agreement with the Union, granted returning strikers their accrued vacation time or pay in lieu of vacation at Respondent's option. However, this provision of the settlement agreement specifically precluded reliance on it as precedent for pay for unused vacation.

Despite repeated requests by the Union at various subsequent times for vacation pay for the strikers, Respondent adhered to its position.[3] Moreover, with respect to at least one inquiry by an individual striker about vacation pay on 7 November, Bailey advised the employee in writing that, "In accordance with our past practice, vacation of all bargaining unit employees are being rescheduled during the period of the labor strike due to production requirements," and "[w]hen the strike has ended, the Company will be pleased to discuss re-scheduling of your vacation."

Article 8 of the expired collective-bargaining agreement between the parties is captioned, "Vacations and Vacation Pay" and sets forth the eligibility requirements for vacations. Thus, section 1 captioned, "Paid Vacations" provides:

> The Company shall grant employees vacations with pay under the following conditions:
>
> (a) One week. An employee who has worked not less than one thousand (1000) hours during a period of not less than twelve (12) months fol-

[1] All dates are in 1985 unless otherwise indicated.

[2] More specifically, the appropriate unit alleged in the complaint and admitted by Respondent has been, and is:

> All production and maintenance employees, laboratory assistants, laboratory technicians, plant clerical employees, surveillance technicians, and radiation monitors employed by the Respondent at its Erwin, Tennessee facility, but excluding all office employees, office clerical employees, laboratory employees, other than laboratory assistants and laboratory technicians, technical, professional, and and sales employees, foremen, watchmen, guards, and supervisors as defined in the Act.

[3] Employees who were on vacation at the beginning of the strike, however, were paid for the rest of the workweek in which the strike began.

lowing the anniversary date of his/her last regular employment shall be eligible for one (1) calendar week of vacation and shall receive forty (40) hours pay at his/her regular rate.

Subparagraphs (b) through (f) of the section provide for additional weeks of vacation on a graduated basis based on the employee's length of service with Respondent.

Section 2 captioned, "Vacation Period" provides:

> Employees will be allowed a total of fifteen (15) one-day vacation days which may be taken as ten (10) sick days (under a strict definition of sickness) or ten (10) scheduled and five (5) unscheduled one day vacation days provided that the Company shall not be required to allow more than 25% of a unit, group, shift, or area to be on vacation at any one time. Vacations may be scheduled up to 4:00 p.m. on Monday prior to shift scheduling on Wednesday. Requests for unscheduled one-day vacations must be received by the Company one (1) hour prior to shift change. Vacation earned during one anniversary year provided in Section 1 of this article shall be taken in the anniversary year or immediately thereafter. In no case shall a vacation period be permitted to accumulate and carry over into any subsequent anniversary year. Each employee's vacation period shall be designated by the Company to meet the requirements of operating conditions provided, however, that the period preferrable to the employee on a unit seniority basis shall be selected whenever possible. In the event the Company determines that operating conditions require part or all the Erwin Plant to be shutdown for vacation period, the Company will give the affected employees at least fifteen (15) calendar days prior notice. Discharged employees shall be paid for vacation earned up to the time of discharge.

Section 3 provides for the rate of pay for vacations as follows:

> (a) The rate of pay for vacation period shall be the employee's regular rate at the beginning of his/her vacation period.
>
> (b) An employee will receive vacation pay prior to his/her vacation providing that a minimum of fourteen (14) days advanced written notice is given and a minimum of one week's vacation is taken.

Section 4 requires that the employee work on both the scheduled workday before and after vacation and states:

> Employees paid under Section 1 of this Article shall be required to work at least eight (8) hours on their last scheduled work day before their vacation begins and at least eight (8) hours on their first scheduled work day after their vacation ends, unless excused by their supervisor. Failure to comply with this provision shall be proper cause for discipline.

B. *Contentions of the Parties*

Based on the facts related above and an affirmative response by Bailey to the General Counsel's question whether the only reason Respondent had not paid employees vacation benefits was because they were on strike, the General Counsel argues that Respondent's actions constituted discrimination against the strikers in violation of Section 8(a)(1) and (3) of the Act. In this regard, the General Counsel relies on *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); *Gulf Envelope Co.*, 256 NLRB 320 (1981); *Rockingham Machine-Lunex Co.*, 255 NLRB 346 (1981); and *Jacques Syl Knitwear*, 247 NLRB 1525 (1980). The General Counsel also contends that Respondent's refusal to pay the vacation benefits constituted a violation of Section 8(a)(5) of the Act because as it constituted a unilateral change without bargaining with the Union. The Charging Party in its brief essentially echoed the General Counsel's contentions. Although acknowledging that Respondent's apparent retaliatory intent in failing to pay the vacation benefits could be rebutted by a showing by Respondent of substantial business justifications for withholding the benefits, the Charging Party asserts that Respondent here showed no such justification. To the extent that Respondent relied on the vacation accord reached in settlement of the strike with the Union in 1979, the Charging Party contends that such accord establishes no past practice in view of the uncontradicted evidence in the record in the form of the testimony of Union President Lonnie Tolley to the effect that the Union in 1979 specifically did not request payment of vacation pay to strikers during the strike because it would have rendered the strikers ineligible to receive food stamps. Moreover, the Charging Party argues that the 1979 strike settlement agreement could not in any event establish a past practice of deferral of vacation benefits during the strike since the agreement regarding vacation benefits on its face was nonprecedential.

Respondent contends on the other hand that its failure to pay vacation benefits during the strike was justified by past practice and the prior collective-bargaining agreement set out above. Respondent also relies on provisions of article 3 of the agreement, the "management rights" section, which gives Respondent the right to determine "the schedules of production and the assignment of work." More specifically, Respondent asserts there are no requirements that Respondent grant employees vacation pay in lieu of vacation. Although the 1979 strike agreement did allow payment of vacation pay in lieu of vacation, such allowance was at the option of Respondent. Further, the settlement in this regard was, by further agreement, precluded from establishing a precedent. Under these circumstances and in the absence of evidence that Respondent was attempting to thwart the strike by rescheduling vacations, Respondent argues that its actions were not destructive of employee rights or otherwise discriminatory to employees in violation of Section 8(a)(3) and (1) of the Act. Respondent asserts essentially the same arguments in defense of the 8(a)(5) complaint allegations. Thus, there were no unilateral alterations of employee benefits, according to Respondent.

Respondent would distinguish those cases cited by the General Counsel, supra, as involving situations where the employer treated strikers differently from nonstrikers regarding vacation pay, where the employer's action in denying vacation pay was not in accordance with a recently expired contract or past practice, or where there was no previous collective-bargaining contract at all. These cases are inapplicable to the facts, according to Respondent, who relies primarily instead on *Texaco, Inc.*, 179 NLRB 989 (1969), as being more apposite and as substantiating the legality of Respondent's position.

C. *Analysis and Conclusions*

The analysis of the issues in this case must begin with *Great Dane Trailers*, supra, in which the Supreme Court held that where an employer's refusal to pay accrued vacation pay to striking employees while paying it to nonstrikers was "discrimination in its simpliest form" and therefore violative of Section 8(a)(3) and (1) of the Act. The Court went on to state:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer has engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. [Id. at 34.]

In *Great Dane*, the Court found a violation without ascertaining whether the employer's conduct was "inherently destructive" of employee rights, because the employer failed to present any evidence of a legitimate motive for its conduct.

The principles in *Great Dane* are applicable here if not the facts. However, neither the General Counsel nor Charging Party specifically argues that Respondent's actions were "inherently destructive" of important employee rights. Conduct of an employer is inherently destructive if it "carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended,' and thus bears its own indicia of intent." Id. 388 U.S. at 33, quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228, 231 (1963). Inherently destructive conduct has also been defined as that conduct which has "far reaching effects which would hinder future bargaining, or conduct which discriminates solely upon the basis of participation in strikes or union activity," *Portland Williamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976), or "that which creates visible and continuing obstacles to the future exercise of employee rights." *Inter-Collegiate Press v. NLRB*, 486 F.2d 837, 845 (8th Cir. 1973).

To the extent the General Counsel and the Charging Party rely on Bailey's concession that Respondent failed to pay the vacation benefits due to the strike, I find such concession does not establish an express intent to discriminate against employees which might be considered "inherently destructive" of their rights. Bailey's concession, particularly considered in the context of his preceding affirmative response to the General Counsel's question of whether the employees would have received their vacation benefits if they continued to work after May 20 (i.e., if they were not on strike) was, I conclude, a truism rather than an admission of discriminatory intent. Moreover, no other evidence of union animus on the part of Respondent was shown in this case which might throw a different and more sinister light on Bailey's concession. And there was no evidence here that Respondent treated strikers differently from nonstrikers which would indicate an intention to penalize strikers. I therefore find Bailey's admission does not evince discriminatory intent substantiating a finding of "inherently destructive" conduct.

The case sub judice unlike the situation in *Great Dane* also involves delayed payment of accrued vacation benefits rather than an outright refusal to grant such benefits. At least one court has held that delayed payment of vacation benefits to strikers does not constitute "conduct which bears it own indicia of intent carrying with it unavoidable consequences which the employer must have intended." *NLRB v. Borden, Inc.*, 600 F.2d 313, 321 (1st Cir. 1979). The Board itself has indicated in its holdings in *Texaco*, supra, and *Detroit Edison Co.*, 206 NLRB 898 (1973), that postponing vacation benefits during a strike is not, without more, unlawful. Accordingly, I conclude Respondent's conduct in this case cannot be catagorized as "inherently destructive."[4] Further, in light of this conclusion, the adverse effect of Respondent's alleged discriminatory conduct must be regarded as "comparatively slight."[5] Therefore, under *Great Dane*, and because Respondent has come forward with a claimed business justification, antiunion motivation must be proven. Respondent's business justification must be carefully examined to determine whether it reflects such antiunion motivation. Here, Respondent relies on the provisions of the expired

[4] Based on this same reasoning, I reject the argument of the General Counsel asserted for the first time in his posthearing brief that Respondent's denial in its answer of par. 12 of the complaint alleging the refusal to grant employees accrued vacation benefits was a sham interposed for delay in breach of Rule 11 of the Federal Rules of Civil Procedure. The General Counsel's argument was that Respondent's counsel must have known of Respondent's refusal to pay vacation benefits in light of Bailey's "admission" at the hearing discussed above. Regardless of Bailey's "admission," I do not view Respondent's denial in its answer as inconsistent with its legal position that it had not refused to pay vacation benefits to the strikers but rather had postponed paying them.

[5] As noted, because the vacation benefits have been delayed by Respondent's action rather than eliminated the strikers have lost little. As the court observed in *Stokely-Van Camp*, 722 F.2d 1324 at 1330-1331 (7th Cir. 1983), a case involving similar circumstances, "The only thing [the strikers] 'lost,' was the opportunity to receive wages for work performed for all weeks after [the end of the strike], which opportunity supposedly would have arisen if vacations had been paid during the strike."

collective-bargaining agreement[6] and past practice. If satisfactorily established, these justifications would suffice to rebut the violations alleged. See *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162 (3d Cir. 1981). Moreover, the establishment of such business justification would further serve to distinguish this case factually from Great Dane as well as the other cases cited by the General Counsel, supra.

Considering first past practice, it is to be observed that the record establishes only one time in the past, 1979, when Respondent experienced a strike during which vacation benefits were not paid. Although the record (statements of counsel) alludes to other strikes the record is silent regarding vacation benefits during such strikes. Respondent's failure to pay benefits during the 1979 strike would appear to be diminished in its precedential value because there was no evidence that the Union requested payment of benefits on behalf of the strikers during the strike. There was no evidence that any individual striker sought to receive vacation benefits during the strike. Although the failure by the Union or individual strikers to seek benefits during the strike might suggest an understanding on their part that they were due nothing, the existence of such an understanding is specifically refuted by the uncontradicted and credible testimony of Union President Lonnie Tolley who explained that vacation benefits were not sought because it would have adversely impacted on strikers' eligibility for food stamps. Moreover, the terms under which vacation benefits were paid to employees after conclusion of the 1979 strike were as much a product of the strike settlement as they were the collective-bargaining agreement under which they initially accrued. Further, the stipulation in the strike settlement provisio on payment of vacation pay in lieu of paid time off at the option of the Company specifically precluded future reliance on the provision as precedent. Nevertheless, the uncontradicted and credible testimony of Ray Charles Rice, former human resources representative of Respondent, establishes that consistent with Respondent's position and its views of the collective-bargaining agreement, Respondent canceled vacations of, and did not pay vacation benefits to, strikers during the 1979 strike even though some of them were scheduled before to the strike to start their vacations after the strike began. This evidence at least confirms Respondent's institution of a practice of not paying vacation benefits to strikers. The existence of this practice, albeit not a longstanding one, tends to support Respondent's "business justification."

Considering next the expired collective-bargaining agreement, it is clear such agreement is silent on vacation benefits during the course of a strike. It is equally clear that the agreement does not provide for payment to employees of vacation pay in lieu of vacation. On the contrary, sections 3 and 4 of article 8 dealing with vacations appear to comtemplate employees taking vacation time off. Aside from the provisions of the 1979 strike settlement agreement, the record is silent regarding any practice in granting vacation pay in lieu of vacations. As already noted, while the 1979 strike settlement agreement did allow Respondent to grant pay in lieu of vacation at its option, the agreement by its express terms established no precedent. It thus appears that there is no contractual basis for concluding that the striking employees were entitled to accrued vacation pay as opposed to scheduled time off with pay.[7] In addition, there was no evidence that despite an absence of a contractual provision allowing pay in lieu of vacation Respondent nevertheless in practice granted vacation pay to employees on sick leave or other types of unpaid leave. Thus, there was no departure from past practice despite the terms of the bargaining agreement to show ulterior motivation or discriminatory treatment on Respondent's part.[8]

The strikers' entitlement to time off with pay must then turn on whether under the agreement with Respondent the strikers or Respondent could determine the scheduling of vacations. The bargaining agreement clearly does not specify a calendar period for vacations. Although Respondent under the agreement can specify a plant shutdown and vacation with appropriate notice to employees, and has done so in the past, there is no evidence that before the strike Respondent had scheduled a shutdown period to take place during the strike here. In this regard, the case is distinguishable from the situation in *Wallace Metal Products*, 244 NLRB 41 (1979), where the Board found a violation of Section 8(a)(1) and (3) of the Act by an employer who refused to pay strikers' accrued vacation pay that, under the terms of the collective-bargaining agreement, was to be paid during a yearly scheduled 2-week shutdown, a shutdown which under the facts of that case coincided with the occurrence of the strike.

As Respondent contends, the bargaining agreement here clearly contemplates control and discretion by Respondent in scheduling vacations. Although the agreement provides that Respondent cannot be required to allow more than 25 percent of its employees off at one time for vacation, it also provides that an employee's vacation period shall be designated by the Respondent to meet the requirements of operating conditions provided, however, that the period preferable to the employees on a seniority basis shall be selected whenever possible. Respondent could therefore schedule vacations to best meet its operating needs. The record reflects that Respondent continues to operate during the strike utilizing supervisory personnel. What percent of normal production it is

[6] It is well established that the policies of Sec. 8(a)(5) of the Act require that the terms of a collective-bargaining agreement relating to mandatory subjects of bargaining may not be unilaterally changed without notice to, and negotiation with, the other party to the agreement even though the agreement has expired. See *Hen House Market No. 3 v. NLRB*, 428 F.2d 133 (8th Cir. 1970).

[7] Accordingly, the Board's holding in *Seeburg Corp.*, 192 NLRB 290 (1971), is inapposite. There the Board found a violation in the employer's refusal to pay accrued vacation pay to strikers where the contract specifically allowed pay in lieu of vacation. There vacation pay had accrued before the strike. Thus, no "business justification" could be shown by the employer in refusing to pay the vacation benefits.

[8] It is for this reason that the Board's decision in *Stokely-Van Camp, Inc.*, 259 NLRB 961 (1982), enf. denied 722 F.2d 1324 (7th Cir. 1983), is inapposite. In that case, while the employer was not contractually required to pay vacation pay in lieu of vacation, it had granted such pay to employees on sick leave and other leaves of absence. Consequently, the Board found the employer was not empowered by the collective-bargaining agreement nor past practice to refuse vacation benefits to strikers.

achieving is not shown, but there was *no* plant shutdown.

As pointed out by the administrative law judge with apparent Board approval in *Texaco, Inc.*, 169 NLRB 989, 993 (1969), there is a distinct difference between vacation and strike time, and:

> In vacation time the absence from work is timed to interfere to a minimum degree with a company's operation. For a strike to be effective, the strikers' absence from work must create a maximum interference with a company's operations. Respondent continued to operate at 85 percent of normal during the strike. It is apparent that during such a situation, the fewer people absent from work for any reason, the easier it is for Respondent to continue its operations. Respondent could not control absences due to strike but under its contract and under past practices, it could control absences due to vacations.

Except for the reference to the percent of production achieved during the strike, the above statement can be applied fully to the instant case. If Respondent under the bargaining agreement could control the scheduling of vacations, it could choose not to schedule such vacations during the course of a strike when its need for employees is most critical and while it is still attempting to operate its facility.

The Charging Party's brief appears to argue that Respondent's scheduling of vacations was limited by the contractual provision that "the period preferable to the employee on a unit seniority basis shall be selected whenever possible." This argument ignores the clause to which the proviso was attached which allows Respondent to schedule vacations to meet its operating needs. Further, the proviso itself by use of the term "whenever possible" grants Respondent further discretion in ascertaining what is possible in light of its production needs. Obviously, Respondent's operating needs for personnel are greater during the course of a strike.

Accordingly, I conclude Respondent, like the employer in the Board's *Texaco* decision,[9] supra, was contractually entitled not to schedule vacations during a strike and therefore could withhold vacation benefits. Also as in *Texaco*, Respondent has not canceled vacation benefits for the strikers but has clearly told the Union in the uncontradicted words of Bailey "that the vacation is going to be handled the same as it had been in 1979; that when the strike was over with, the employees would come back, they would pick up their vacation as if this period of time never happened," and "[they] would have whatever time remaining from the time they reported back to work that they had in the past," and that "[i]f it was 2 months, 3 months, to take it, they would have that length of time to take it when they got back." In short, the vacation benefits were simply postponed, not canceled. There would be no lapsing of vacation benefits, and the strikers would not be penalized for the strike. Under these circumstances, I conclude Respondent's withholding of vacation benefits during the strike had only a minor impact on the strike which could not override Respondent's business justification.[10]

Considering all the foregoing, I conclude Respondent was entitled contractually and by past practice to schedule vacation benefits after the strike, so that it had a "business justification" for not paying vacation benefits during the strike. Accordingly, since I conclude that Respondent's action was not inherently destructive of employee rights, and in the absence of any independent evidence of union animus in Respondent's action or other evidence revealing Respondent's disparate or inconsistent application of the collective-bargaining agreement provision on vacations[11] showing Respondent intended to discourage union membership, I find and conclude that Respondent did not violate Section 8(a)(3) and (1) of the Act as alleged. I further find and conclude that since Respondent's actions were in accord with the terms of the expired collective-bargaining agreement, Respondent made no unilateral changes violative of Section 8(a)(5) and (1) of the Act. I shall recommend that the complaint be dismissed in its entirety.

On the foregoing factual findings and conclusions, I reached the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act by not paying vacation benefits to strikers during the course of the strike.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed.

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[9] See also *G. C. Murphy Co.*, 207 NLRB 579 (1973); *Detroit Edison Co.*, 206 NLRB 898 (1973).

[10] In reaching this conclusion, I also note that Respondent made no announcement before the strike that it would withhold benefits during the strike. Such an announcement could be viewed as an effort to dissuade employees from striking. On the contrary, Respondent even allowed employees on vacation at the time the strike began to continue their vacation for the remainder of the workweek in which the strike began. I do not view this conduct as inconsistent with Respondent's position. See *Texaco*, supra.

[11] It was the inconsistent application of the contractual provision on vacation benefits which most persuaded the Board in *Borden, Inc.*, 248 NLRB 387 (1980), enfd. 645 F.2d 87 (1st Cir. 1981), cited in Charging Party's brief, to find that the employer's refusal there to pay benefits to strikers was intended to discriminate against them and discourage their union activity. *Borden* is distinguishable because there is no evidence of an inconsistent application here.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Adair Standish Corporation *and* Flint Local 282-C Graphic Communications International Union, AFL–CIO. Case 7–CA–25059

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On February 6, 1987, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions as modified, to modify his remedy,[3] and to adopt the recommended Order as modified.[4]

We agree with the judge's finding that Adair Standish Corporation committed numerous violations of Section 8(a)(1), (3), and (5) of the Act in the course and aftermath of a successful union campaign at its Standish, Michigan plant. We disagree, however, with some of the rationale stated in the judge's decision. Although we adopt the judge's ultimate conclusions, for the reasons set forth below, we do not in all instances adopt his rationale.

The Respondent is a wholly owned subsidiary of a printing company headquartered in Southfield, Michigan. The Adairs operate two printing plants in Michigan: one at Dexter, close to Southfield, with about 65 employees; and one at Standish, about 150 miles from Southfield, with about 37 employees. Both plants are engaged in the same type of work, i.e., printing automotive service manuals, other manuals, catalogues, and forms. The conduct on which this case is based occurred at the Standish facility.

I. THE 8(A)(1) VIOLATIONS

We agree with the judge's finding that the Respondent violated Section 8(a)(1) of the Act when acknowledged Supervisor Calvin Ireland threatened during the union campaign that the arrival of a new press that had been ordered for the Standish plant was going to be delayed or canceled because of the union activity.[5]

We agree with the judge's finding that the Respondent violated Section 8(a)(1) of the Act when, 2 days after the election, the Respondent posted a notice that stated that "[a]nyone who is interested in revoking their authorization card which you signed prior to the election may do so by obtaining a request form from your supervisor." Dennis Adair testified that the notice evolved from inquiries made by two employees about retrieving their cards.[6] We agree with the judge that the notice

[1] We find no merit in the Respondent's exception to the severance of Case 7–CA–25973 from this case. Our reasons are fully set forth in our decision in *Adair Standish Corp.*, 283 NLRB 668 (1987).

We agree with the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by interviewing employee Carol Barber without observing the safeguards prescribed in *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965). We find no merit in the Respondent's contention that this allegation is barred by Sec. 10(b) of the Act because it was not specifically referred to in the charge. We agree with the judge's ruling at the hearing that this allegation was encompassed within the charge's surveillance allegations. See generally *Clark Equipment Co.*, 278 NLRB 498 (1986).

In finding that the questioning of Barber violated Sec. 8(a)(1) of the Act, Chairman Stephens does not rely on *Johnnie's Poultry Co.*, supra, but finds (1) that, under all the circumstances, employee Barber could not have felt free to refuse to respond to the questions asked by the Respondent's attorney, (2) that in light of the Respondent's expressed hostility to the employees' union activities, an employee in that situation could reasonably have been coerced by the questions concerning what she had signed and whether she knew who had brought the Union in, notwithstanding an assurance that her job would not be affected by her answers, and (3) that these particular questions went beyond the questioning necessary to prepare for the hearing on the Respondent's objections. On the basis of all of these factors taken together, Chairman Stephens finds the 8(a)(1) violation.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We have carefully examined the record and we find no merit in the Respondent's contentions that the judge was biased or had a predetermined theory of the case.

The Respondent has excepted to the judge's conclusion that Plant Manager Dennis Adair is Robert Adair's son. We note that Dennis is John Adair's son but find this immaterial to the decision.

[3] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[4] We shall modify pars. 1(c) and 1(d) of the recommended Order to conform to our decision.

[5] Despite the absence of a complaint allegation, the judge found a separate 8(a)(1) violation in a similar remark made by Supervisor Rich Livingstone several months after the election. We find it unnecessary to pass on the legality of this statement because the finding of an additional violation would be essentially cumulative and would not materially affect the Order.

The judge found, and we agree, that Darrell Baughman was not a supervisor and that, therefore, statements made by him did not constitute a violation of the Act. We find it unnecessary to go beyond this conclusion and do not rely on the judge's further discussion as to whether remarks made by Baughman would have constituted violations if Baughman were a supervisor.

[6] Employee George Nott testified that on election day, he asked Scott Merrill, one of the Respondent's attorneys, what use the Union could make of the card that Nott had signed earlier. When Merrill said the card could be used to fine him if Nott crossed a picket line, Nott asked how

Continued

was a violation of Section 8(a)(1), but only for the following reasons. We find that the Respondent violated Section 8(a)(1) because it did not merely advise employees of their legal rights, but rather solicited them to revoke their authorization cards. Although it is, of course, lawful "for an employer to inform employees of their rights under Section 7 [in] an atmosphere free of coercion, intimidation, or union animus," *Peoples Gas System*, 275 NLRB 505, 507–508 (1985), that is not the situation here. In this case, the Respondent's communication to employees occurred in the context of contemporaneous violations of Section 8(a)(1), (3), and (5). In addition, the notice was posted immediately after the Union's election victory that the Respondent adamantly opposed. Finally, we note that the notice directed employees to their supervisors to obtain revocation forms. In apparent furtherance of this directive, Supervisor Ireland testified that he "took it upon himself" to "let the employees know that I had the forms to fill out to revoke their authorization cards." Employee Cummings verified that he had been approached by Supervisor Ireland about the availability of such forms. As the judge reasoned, this procedure puts employees "in the limelight and on the spot" in a manner inconsistent with their basic Section 7 right freely to choose whether to engage in or refrain from union activities. Finally, this coercive aspect of the notice was not mitigated by any employer assurances against reprisals for failing to request a form. Accordingly, we adopt the judge's finding that the Respondent's notice violated Section 8(a)(1).[7]

II. THE 8(A)(3) VIOLATIONS

We agree with the judge that the Respondent violated Section 8(a)(3) of the Act when it posted a notice a few days after the election announcing a new and more stringent tardiness policy, stating that the behavior of employees who did not report on time each day "will result in disciplinary action immediately." We also agree with the judge that the Respondent's issuance of a written warning to employee Tim Cummings pursuant to the new policy violated Section 8(a)(3) of the Act.

We also adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending employee Ed Lachcik for 2 days. We do so for the following reasons. As the judge found, given the capricious and unpredictable manner in which tardiness was handled in the past, it is reasonable to conclude that despite Lachcik's record of tardiness and the fact that he had previously received two warnings, the suspension was at least in part due to the Respondent's unlawful imposition of its new attendance policy. In this regard, we note, as the judge did, that after receiving his second warning on May 7, 1985, Lachcik was late numerous times between May 7 and the September 11 election without receiving any further discipline. Shortly after the election, Lachcik was suspended for the first time, for tardiness that occurred before the new policy was announced. Thus, the General Counsel has established that the employees' protected activity was a motivating factor in the Respondent's decision to suspend Lachcik. Under the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the burden shifts to the Respondent to show that it would have suspended Lachcik even in the absence of the employees' selection of the Union. We find that the Respondent has failed to meet its burden. The Respondent offered only vague testimony that employees had been suspended or discharged in the past for attendance problems. No personnel records were introduced to substantiate this. Since Lachcik's suspension was imposed under the new policy and given the unpredictable way tardiness had been handled in the past, the Respondent has failed to show that the suspension would have occurred without the union activity.

We agree with the judge's finding that the Respondent violated Section 8(a)(3) of the Act by its refusal to take delivery of the Goss Press at Standish. In March 1985 the Respondent purchased a reconditioned high-powered press which it admittedly intended to install in its Standish plant to replace an older, slower Color King Press. Delivery was scheduled for July.[8] Meanwhile, union organizing efforts began at Standish in June resulting in an election and union victory in September. Delivery of the press was delayed. The new press was put into storage and ultimately in May 1986 was installed at the Dexter plant.

The judge found that "this turn of events smacks of a motivation tainted by organizational considerations," and noted that two admitted supervisors made this connection in talking to employees. The

he could revoke the card. We find it unnecessary to pass on the judge's commentary in fn. 23 of his decision concerning this advice.

[7] We agree with the judge that by Supervisor Ireland's action in approaching employees and stating that he had the forms, the Respondent committed an additional 8(a)(1) violation. Although not alleged in the complaint, this matter was fully litigated at the hearing.

Chairman Stephens agrees that, through the combination of the posted notices and the statements to employees by their supervisors concerning the availability of the revocation forms, the Respondent violated Sec. 8(a)(1) of the Act. He would not break the conduct down into separate violations.

[8] All dates are in 1985 unless otherwise noted.

judge rejected the testimony of Robert Adair and the Respondent's explanation that the change was made for purely business reasons, i.e., competition from Canadian printers and the loss of automotive manual contracts. Robert Adair explained that the press was diverted because Dexter was the main plant, John Adair was there, and the quick turnaround jobs are done at Dexter. These factors, however, existed in March when the decision was made to place the press at the Standish plant. Thus, the judge found that the Respondent's explanation had "nothing to do with the volume of business, only the logistics." The judge, in rejecting the Respondent's explanation, stressed that he was not disputing the Respondent's business judgment but found the explanation unlikely, particularly in light of the Respondent's failure to substantiate its economic claim by producing full and complete evidence as to the Company as a whole, or even as to the Standish plant standing alone. The judge concluded that the Respondent's decision to place the new press at Dexter instead of Standish was motivated solely by antiunion considerations, in violation of Section 8(a)(3).

We agree with the judge's analysis.[9] In adopting the judge's decision in this regard, we additionally find that the failure to install the Goss press at Standish adversely affected the employees' terms and conditions of employment because the arrival of the new press was reasonably anticipated by the employees as having a beneficial effect on their jobs. According to the credited and uncontradicted testimony of employee Tim Cummings, Dennis Adair had spoken of the new press in the context of the Company's attempt to expand into a new field. This testimony raises an inference that diversion of the press from Standish could reasonably result in diversion of new work from Standish. Further, the installation of the new Goss press was intended to replace the older, apparently more difficult to run Color King press. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by its failure to install the Goss press at the Standish plant.[10]

III. THE 8(A)(5) VIOLATIONS

We agree with the judge's finding that the Respondent violated Section 8(a)(5) of the Act by failure to bargain over the changed personnel policy enforcing stricter discipline for tardiness and by its failure to bargain over the economically motivated September 25, 1985 layoffs of Larry Foster and Cynthia Johnson. The Respondent has filed exceptions to the judge's finding of an 8(a)(5) violation in its failure to bargain over the layoffs, and to the make-whole remedy ordered. We find the Respondent's exceptions to be without merit. The judge's unfair labor practice finding and recommended remedy with respect to the layoffs are in accordance with Board precedent. See *Lapeer Foundry & Machine,*, 289 NLRB 1185 (1988); *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Adair Standish Corporation, Standish, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

"(c) Telling employees that equipment would not be or might not be installed at their plant because of their union activities."

2. Substitute the following for paragraph 1(d).

"(d) Soliciting employees to revoke their authorization cards, and having supervisors personally inform individual employees that they had the revocation forms available."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

[9] Moreover, even treating this as a mixed motive case and assuming that there was a partial business motivation based on economic considerations, the Respondent still has not met its burden under *Wright Line*, supra, to establish that it would have taken the same action even absent the employees' union activity.

[10] The judge's Order requires that the press be moved from Dexter to Standish. This puts into effect what would have been the status quo ante but for the discriminatory act of the Respondent. We find no merit in the Respondent's exception alleging the remedy is punitive.

WE WILL NOT refuse to bargain with Flint Local 282-C, Graphic Communications International Union, AFL–CIO or any other labor organization, after such a labor organization has prevailed in a representation election, by making material changes in existing terms and conditions of employment of our represented employees without consulting the labor organization as required by law.

WE WILL NOT discriminate against employees for supporting the Union or any other labor organization by transferring equipment in order to diminish the employment opportunities available to the employees and by promulgating more stringent attendance rules.

WE WILL NOT tell employees that equipment will not be or might not be installed at their plant because of their union activities.

WE WILL NOT solicit employees to revoke their authorization cards and WE WILL NOT have supervisors personally inform individual employees that they have revocation forms available.

WE WILL NOT conduct interviews with employees in preparation for a hearing (i) without informing them that their participation in the interview is purely voluntary and that they can refuse to answer any questions, or (ii) in an atmosphere of hostility to the Union involved, or (iii) while conducting such interviews, exceed the legitimate scope of inquiry for such interviews so as to unnecessarily and coercively intrude into the Section 7 activities of employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL promptly install in our Standish plant the Goss HV press which was installed in the Dexter plant in May 1986.

WE WILL, if we have not already done so, offer Cynthia Johnson and Larry Foster immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent ones, without prejudice to their seniority or any other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from their unlawful layoffs, less any interim earnings, plus interest. In addition, WE WILL make whole any employees including Edward Lachcik and Tim Cummings who have suffered losses stemming from application of the new policy relating to tardiness adopted about September 13, 1985.

WE WILL remove from our files any reference to the layoffs of Larry Foster and Cynthia Johnson on September 25, 1985, the September 17, 1985 disciplinary notice issued to Tim Cummings, and the September 17 suspension of Edward Lachcik and any reference to other disciplinary action involving other employees since about September 13, 1985, issued pursuant to the new tardiness rule adopted at that time, and notify them all in writing that such expunction has been made, and that such adverse actions will not be used against them in any way.

WE WILL rescind the September 13, 1985 tardiness disciplinary policy and the offer of assistance for the revocation of union authorization cards also announced about September 13, 1985, and remove the posted notice of such policies.

WE WILL notify and, on request, consult with the Union before making changes in any mandatory subject of bargaining.

ADAIR STANDISH CORPORATION

Dwight R. Kirksey, Esq., for the General Counsel.
Francis T. Coleman, Esq. and *Scott R. Merrill, Esq. (Boothe, Prichard & Dudley)*, of Washington, D.C., for the Respondent.
Donald B. Greenspon, Esq. (Greenspon, Scheff & Washington, P.C.), of Detroit, Michigan, for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. This case was tried in Bay City and Midland, Michigan, on various days in August and September 1986. The consolidated complaint alleges that Respondent committed several violations of Sections 8(a)(1), (3), and (5) of the Act in the course and aftermath of a successful union campaign at its Standish, Michigan plant.[1]

All parties have submitted briefs,[2] which I have carefully reviewed, as I have similarly considered the record

[1] As explained in the "Order Granting Motion To Sever" issued by me on 5 November 1986, I granted a motion by the Charging Party to sever the allegations of the consolidated case (Case 7–CA–25973) dealing solely with Respondent's general refusal to recognize and bargain with, and its refusal to furnish information to, the Union. On 10 November 1986, I issued a decision in that case (JD–294–86).

[2] On or about 21 November 1986, Respondent filed "Respondent's Motion To Strike Certain Portions of the Briefs Filed by the General Counsel and Charging Party." Thereafter, the General Counsel and the Charging Party filed answers to the motion. As they point out, the "Motion to Strike" is, in fact, simply a reply brief. Presumably, Respondent recognized that while the Board's Rules and Regulations permit the filing of "motions" without stated limitation (Sec. 102.24), they make no express provision, in Sec. 102.42 dealing with the filing of "a" brief, for reply briefs. Hence, Respondent filed what lawyers would identify as a reply brief, with the clearly inappropriate title of "Motion to Strike." Ironically, in doing so, Respondent included a statement of alleged fact which is *dehors* the record and which would fall within those categories normally subject to a motion to strike; further included a statement of fact regarding the contents of the complaint which is indisputably erroneous; and made several misstatements of the record.

Charging Party requests denial of the motion; the General Counsel asks me to reject the document and strike it from the record. Having had, perforce, to read the "Motion to Strike" to determine whether it was well-founded, I see no point in striking it from the record. I shall, however,

Continued

of the proceedings[3] and my recollection of the witnesses as they testified. There follow the findings of fact, conclusions of law, and recommendations I have drawn from these sources.

I. THE DIVERSION OF THE GOSS HV

A. *Background*

Respondent is a wholly owned subsidiary of a printing company with headquarters in Southfield, Michigan, a suburb of Detroit. Robert Adair is president and one-third owner of the Company and its real estate, machinery-purchasing, and other subsidiaries, and his brother John presumably is another owner.

The Adairs operate two printing plants in Michigan: one at Dexter, close to Southfield, with about 65 employees, and one at Standish, perhaps 150 miles from Southfield, employing approximately 37 workers.[4] The Standish plant was opened last, in or about 1976. Both plants have basically engaged in the same sort of printing work—automotive service manuals for use by service shops and garages, and other kinds of catalogs, forms, and manuals—although Dexter, unlike Standish, also does all the "preparation" work for both plants. Robert Adair testified that the Standish plant was established because it was thought to be "cost effective" to have another plant in the Detroit vicinity which was within a day's commute, with time left over; he later explained that the average cost of labor was less at Standish—"That is the reason we are there."[5]

There were at Standish two printing presses—a large, fast, sophisticated one called the Goss HV and a smaller, slower, older Color King.[6] Adair testified that early in 1985, he and brother John anticipated an increase in business and decided to trade in the Color King for another Goss HV, to be placed in the Standish plant. They contracted at the end of March to purchase a remanufactured Goss from Rockwell Graphic Systems, Inc., in Chicago.

The sale was originally planned to be consummated in June, but evidently the renovation was not completed by that month. However, on 15 July, a Rockwell representative dispatched a mailgram to Adair stating that the press was "expected to ship week of 7/29/85" and to be received on "7/31/85," and that Adair should arrange to have the payment balance ready to forward on "7/26/85." The press was never installed at Standish. Eventually, instead, it was sent to Dexter, and a smaller press called the Surburban, requiring fewer employees to operate, according to Robert Adair, was removed from Dexter and installed in place of the expected Goss at Standish.

The first question presented is why the plan was changed. The General Counsel and the Charging Party attribute the decision to the union activities of the Standish employees.

The record shows that at some time around late June, a Standish press employee named Larry Foster, another employee named Cynthia Johnson (both of them here alleged to be discriminatees), and "maybe 25–30 people" met in the lunchroom one morning after accidentally discovering that a less senior employee named Darrell Baughman (about whom more later) was earning a higher wage than other employees. The group chose six employees—including Foster and Johnson—to speak to Plant Manager Dennis Adair, son of Robert, "about seeing if we could get some insurance and a pay raise possibly."

A few days later,[7] the six spoke to Adair; he said that he would "get back to" them, but time passed and nothing happened.

One morning, a number of people in the lunchroom inquired about the results of the meeting with Adair. They "had like a vote" to investigate finding a union to help them, and appointed Foster to undertake the search.

Foster ultimately made contact with Thelma McConnell, an organizer for GCIU, and a meeting at a motel between McConnell, Foster, Johnson, and three other committee members ensued. The next day, the five employees explained to "the rest of the group" how a union could be organized. A week later, perhaps on 9 July, McConnell met with a "majority of the people" at the town hall, where she obtained a number of signed authorization cards. Present at the meeting as a result of Foster's invitation was Calvin Ireland, conceded by Respondent to be one of the only three statutory supervisors (including Dennis Adair) at the plant; Ireland also signed a card.[8]

The Union filed a petition with the Board on 15 July, and the 11 September election resulted in a 25–11 union victory.[9]

According to the General Counsel and the Charging Party, it was the appearance of the Union on the scene in July, and its subsequent victory in September, which led Respondent to change its mind about installing the newly refurbished five-or six-manned Goss in the Standish plant and to put it instead at Dexter, while sending the smaller three-or four-man[10] Suburban to Standish from Dexter to replace at Standish the Color King which had been traded in on the new Goss. The General

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treat it as a reply brief which neither the regulations specifically, nor I in my discretion (*Allis-Chalmers Corp.*, 234 NLRB 350, 351 fn. 4 (1978)), has authorized, and I shall, to the best of my ability, ignore it.

[3] Errors in the transcript have been noted and corrected.

[4] There were 37 voters in the 11 September election.

[5] I found it difficult to believe that, as he testified, Adair could not quantify the comparative wage scales at the two plants because the record shows that he personally reviewed and signed each pay change, at least at Standish.

[6] At some material times, the Standish plant has operated a night shift limited to one press crew; normally, the rest of the plant—the binders, the shippers, etc.—does not work at night.

[7] Foster's testimony, from which this passage comes, is atrocious regarding dates and times.

[8] Respondent referred to Ireland at the hearing as "supervisor press department," not necessarily limited to the day shift.

[9] Respondent subsequently filed objections to the election; a hearing officer found the objections to be without merit on 22 November 1985; on appeal, the Board agreed and issued a certification of representation on 27 May 1986; and on 6 June, the Respondent filed a motion for reconsideration with the Board, which the Board denied on 24 September.

[10] Robert Adair testified that the Suburban "normal[ly]" takes a three-man crew; Judy Schumacher testified that when she worked on it, four people were required.

Counsel relies not only on the timing of the change and on what it considers to be weaknesses in Respondent's explanation of it, but also on certain statements and other indicia of unlawful motivation. We turn first to the latter contentions.

B. *The Alleged Evidence of Motivation*

1. Larry Foster testified that at some point between 9 July and 11 September, while he and Supervisor Ireland were operating the Color King, Foster said that he would be happy when it was replaced by the Goss (obviously a subject of common knowledge at the plant) because the King press was difficult to operate. According to Foster, Ireland "told me that I should not be too anxious in getting rid of the King press, because of the Union activity they could take and cancel the new Goss coming." Although Ireland testimonially conceded that he might have told Foster that the new press *was* coming, he denied that he also told him "it was not" coming or expressed an opinion that the press would come in if the Union did.

The complaint alleges that in or around September 1985, Supervisor Ireland "threatened employees that the delivery of the recently ordered Rockwell-Goss press was going to be delayed or cancelled because of the employees' support for the Charging Union and because of the Charging Union's organizing campaign." Although Foster's recall of the timing of events was abominable, he did not strike me as a dishonest person;[11] the whole of Ireland's testimony, on the other hand, left me doubting his reliability. Accordingly, I accept Foster's testimony as recited above.[12]

I conclude, moreover, that the statement alleged—made by an acknowledged supervisor and suggesting a possible link between "Union activity" and adverse action against the employees—is clearly coercive within the meaning of Section 8 (a)(1). That Foster invited Ireland to attend the first union meeting does argue, it is true, that Foster regarded the relationship between Ireland and the rank-and-file to be one of equality, thus mitigating the effect of the statement on Foster. At the same time, Foster also knew the side of Ireland which afforded the latter a desk (or two, according to employee Cummings) and daily employment involving, unlike the other employees, little or no routine manual labor in the regular course of his duties. The evidence also shows that Ireland signed disciplinary warnings in the "Signature of Foreman or Supervisor" Block and was thought to be in charge of all presswork in the shop, next to Adair. There was enough there, I believe, to lead Foster to believe that in speaking of such possibilities, Ireland was echoing the mindset of the employer. I therefore conclude that in making his assessment of the possibilities, Ireland violated Section 8(a)(1) as alleged. I further conclude that the statement by Ireland lends force to the contention that the diversion of the new Goss from the newly unionized Standish plant to the unorganized Dexter shop was motivated by union-related considerations.

2. A similar, but more definite, statement was attributed to Darrell Baughman, the night-shift press operator, by 3-year employee Brian Lachcik, who was, at the time, "press help" working with six other employees on the night shift. Lachcik testified that on one occasion, after the election, Baughman told the crew that "the new press is not coming in, it got shipped to Dexter." He went on to say it was "on account of the Union. He said once this Union is in, we ain't going to have the new press in. He said you should have waited until the new press come in before the Union came in. You should have put the new press in."

Baughman did not testify. There was, however, a good deal of testimony about him, and its aggregate leaves me convinced that Baughman was, or was apparently, in a position to make definitive pronouncements about the reason for management decisions.[13] He was the operator of the press at night, in charge of a crew of six people and also, because seldom were any other workers present, often "in charge" of the building (to which he had a key) as well.[14] Lachcik testified that when he went on the night shift, Adair introduced Baughman to him by saying, "[T]his is your foreman on the night shift, he is going to tell you what to do, you listen to him."

This admonition was arguably directed primarily to Baughman's control over the press. There is scant evidence in the record of real supervisory-type responsibility possessed by Baughman. Lachcik testified that if he felt ill, he would "ask . . . Darrell if I could go home," and Baughman would say, "okay, sometimes—if we got enough help you can go."[15] Baughman possessed neither the authority to hire, fire, nor impose discipline on the members of the night crew. The evidence does show that Baughman earned 50 cents per hour more than the day-shift press operator—Dennis Adair testified that the extra pay was because Baughman was an expert machinist, a licensed truckdriver, an expert press operator, and "very, very dependable"—but it will be recalled that, according to Foster, it was the extra 50 cents received by

[11] Of the six instances of Foster's unreliability outlined in Respondent's brief, five have to do with the timing and duration of various events. As to the sixth—whether Foster was ever told that he was promoted to "press operator," Respondent asserts, inter alia, that "no other witness confirmed the alleged promotion." Supervisor Ireland, when asked on redirect what Foster's position was "during the summer of 1985," answered, "I believe press operator."

[12] I do not think, however, although I cannot be sure, that the conversation could have occurred as late as 9 July while Foster and Ireland were operating the Color King. The testimony is extremely confused as to when in 1985 Respondent stopped using the Color King. Foster elsewhere testified that the last such time was 2 July. On the other hand, Plant Manager Adair testified that the Color King was being used, but "very little," "during the summer."

[13] Even though Baughman did not testify, Lachcik's testimony is troublesome, in that he has Baughman saying, at once and the same time, that the new press "*got shipped* to Dexter" and "*once this Union is in, we ain't going* to have the new press in." There is clear tension between the conflict in tenses.

[14] So Dennis Adair conceded. Other nonsupervisory employees also had keys, however.

[15] On brief, the Charging Party misstates the testimony in also asserting that employee McMann "similarly has received permission from Baughman to leave the shift early." What McMann really testified on cross-examination was, "I would tell [Baughman] what the problem was, you know, and then he takes care of it from there . . . . I would leave."

Baughman which instigated the concerted activity in June, which suggests that the complaining employees viewed him as one of them. Baughman voted without objection in the election.

Of considerable importance is the fact that Dennis Adair stays in close contact with the night-shift operations. Lachcik testified that Adair would normally stay over 60 or 90 minutes into the 3:30 to midnight shift to help get the job going; would usually return to the plant about three times a week at 10 p.m. and "stay a couple of hours"; and, if he did not return in person, would call about 11 p.m. to monitor the job.[16]

Having considered, although not recited here, all the testimony regarding the asserted supervisory status of Baughman,[17] I am convinced that he does not qualify as a "supervisor" within the meaning of Section 2(11) of the Act. *D. V. Copying & Printing*, 240 NLRB 1276, 1281–1282 (1979). I agree with Respondent that, of the criteria there listed, the only one which might possibly apply to Baughman is the power "responsibly to direct" other employees, and this record shows neither that he "responsibly" directs the night crew, nor that he does so, as the Act also requires, with "the use of independent judgment." If the disputed employee in *Bowne of Houston*, 280 NLRB 1222 (1986), cited by Respondent, is not a supervisor, I do not see any possibility that Baughman would be so considered by the Board.

Nor, assuming that he was a leadman, can I conclude that he ostensibly possessed sufficient authority to be considered an agent of Respondent in the opinion of the other employees, so that they would impute to the employer any sentiments expressed by Baughman regarding the consequences of union activity.[18] Although Baughman apparently acted on occasion as if he thought he possessed managerial authority, there is no evidence that Respondent ever gave employees "just cause" for believing that Baughman's remarks regarding labor-management relations represented "the policies and desires of the management." Cf. *Machinists Local 35 v. NLRB*, 311 U.S. 72, 80 (1940); *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183, 1187 (5th Cir. 1977).

I therefore recommend dismissal of this allegation.

3. There was further testimony of the same stripe, however, which, although not alleged in the complaint as an unfair labor practice, shores up the General Counsel's claim of a connection between the union activity and the Respondent's change of heart about locating the new press.

Cynthia Johnson testified that she had several conversations with Rich Livingstone, Respondent's third admitted supervisor, after her layoff in September. At a discussion in a bar, a few weeks before the instant hearing, the bindery supervisor, Livingstone, said to Johnson and fellow employee Janet Johnson that "that is where we messed up. If we would have waited a couple more months, the new press would have been put in and we would have went ahead with the Union." Janet Johnson, a believable witness, gave testimony which confirmed that given by Cynthia Johnson; Livingstone was never produced to deny or explain the conversation. I credit the two employees.[19]

4. The complaint alleges that, in violation of Section 8(a)(1), at some time between 15 July and 11 September, Baughman told employees that because of the union activities, "he was watching them and recording their actions in a 'black book' and threatened that their jobs

[16] Adair testified that he returned on the average of "three, four" nights a week and called in "once or twice a night."

[17] Perhaps the most significant other evidence is that Baughman performs the apparently ministerial act of signing the employee timesheets.

[18] With respect to an issue to be discussed infra, I note the testimony of Lachcik that he and employee Kohn, seeing a notice about getting certain request forms from their "supervisor," asked Baughman who the "supervisor" of the night shift was.

[19] I also conclude that Respondent violated Sec. 8(a)(1) by virtue of Livingstone's remark. Although the complaint is silent on this discussion, and Livingstone failed to testify, the Board has told me that in such circumstances it is appropriate to rest an unfair labor practice finding on such uncontested testimony. *Paul Distributing Co.*, 264 NLRB 1378 (1982). I, of course, defer. Respondent cites *Barkman Contracting*, 276 NLRB 1062 fn. 2 (1985), involving a backpay claim for certain calendar quarters for employees not listed in the specification, found by the Board not to have been "fully litigated." What the Board meant in this context is not discussed.

Respondent argues that there is no evidence that Adair ever communicated with Livingstone regarding the new press or knew of or authorized his remarks. It further asserts that Livingstone, the bindery supervisor, was in no position to speak authoritatively about the location of a press and was obviously venturing his own opinion, citing *Abbey Island Park Manor*, 267 NLRB 163 fn. 1 (1983), and that in such circumstances, "a discriminatory motive cannot be attributed to the employer simply as a result of casual statements made by supervisors," citing *NLRB v. Swan Super Cleaners*, 384 F.2d 609 (1967), and *Dayton Food Fair Stores v. NLRB*, 399 F.2d 153 (6th Cir. 1968).

There are two separate issues here—whether the remark constitutes evidence of Respondent's mindset, and whether it constituted a violation of Sec. 8(a)(1). *Abbey Island* involved an office clerical employee, clearly not a supervisor, who was also held not to be an agent "for hiring purposes" regarding a statement about the possibility of rehire made to an applicant. *Swan Super Cleaners* does not stand for so broad a proposition as that quoted above. In the present case, Livingstone was one of only three conceded supervisors at the plant, having direct authority over a bindery work force varying in size from 2 to 12. The presence or absence of a new Goss HV would obviously affect the volume of his own work, and so he would quite naturally have an interest in its disposition. When Adair was asked at the hearing whether he had ever "consult[ed]" Ireland or Livingstone about decisions to purchase and install equipment, his answer was a surprisingly weak, "No, I don't believe so. I don't recall ever doing that." The fact that, without explanation, Livingstone was not called as a witness to say that he made no such statement or was merely expressing his personal opinion is a strong ground for inferring that his testimony would be adverse to Respondent. It is, of course, possible that Livingstone (and Ireland) simply voicing their own sentiments about the effect of unionization on the location of the press, but it happened that they proved to be right. In this setting, I am inclined to believe that they knew something about Respondent's state of mind which the lesser employees did not know.

As for concluding that an 8(a)(1) violation was committed, the court in *Dayton Food Fair Stores*, supra, did hold that the remarks of a (arguendo) supervisor could not to constitute such a violation, attributable to the company because "[t]he remarks were made on Davis' own initiative, without the knowledge and consent of Food Fair. At most, they were hearsay evidence of the company's attitude, made by one sympathetic to the union campaign." The reference to "without the knowledge and consent of Food Fair" appears to be a factual finding made by the court; at least, I am unable to find it in the decision of the administrative law judge or that of the Board. But in *Dayton*, where the supervisor told an employee to "watch his step because the company knew of his activity," the Board held that Sec. 8(a)(1) had been violated, a conclusion which is binding on me (*Iowa Beef Packers*, 144 NLRB 615, 616 (1963), and I do not doubt that the Board would make a similar finding today, whether the supervisor was sympathetic to the union campaign (not shown to be true in Livingstone's case) or friendly with the employee to whom the remark was addressed.

were in jeopardy in the event they received a certain number of demerits." Brian Lachcik, who said that Baughman had never before spoken of a "black book," testified at first that "after the election" and "before the [objections] hearing," Baughman had told the night employees that he "had the little black book, and he was putting checks on it. He said three strikes [you're] out on the book." On cross, he reaffirmed that this occurred after the election, but his pretrial affidavit states that Baughman made the remark "during the campaign." Asked which was accurate, Lachcik replied, "I believe now it was probably after . . . the election."

William McMann, named by Lachcik as having been present on this occasion, testified for Respondent, but, regarding this incident, was only asked if he had ever "seen" a black book in Baughman's possession or heard him make "any threats to any employee"; his answers were in the negative.

Given McMann's failure to directly rebut Lachcik's testimony on the "black book" incident when the opportunity was there to do so, together with Baughman's failure to appear and deny, I feel constrained to accept Lachcik's testimony, even taking into account his prounion stance (he was one of the few employees who wore a homemade union button) and his confusion about the timing of this statement by Baughman.

Nonetheless, accepting arguendo that Baughman, contrary to my earlier conclusion, is a legal representative of Respondent, I perceive no basis for finding the violation of Section 8(a)(1) alleged in the complaint. The latter asserts that Baughman "told employees" that he had adopted the "black book" "because of their activities on behalf of the Charging Union and because of the Charging Union's organizing campaign." In fact, contrary to the General Counsel's assertion on brief, Lachcik did not testify that Baughman made any reference to "the employees' support for the union," nor, contrary to Charging Party's brief was the remark addressed only to Lachcik. In consequence, the necessary link to Section 7 concerted activities is absent, and I would find no basis for inferring one in the circumstances. I recommend dismissal of this allegation.

5. Further alleged as a violation of the Act (and asserted to be indicative of Respondent's attitude toward the Union) is Lachcik's undisputed testimony that a couple of weeks before the election, after Lachcik had caused a "bad accident," Baughman "advised" him to take his homemade union button off "before Denny sees it, he might get a little steamed on what happened here." Evidently Baughman himself had not objected to the wearing of the button, but thought that Adair, in conjunction with the accident, might. To me, this sounds like simply considerate advice, and not the "order" which the complaint alleges, and I would find no violation based on this event, even if I thought Baughman legally represented Respondent in some way.

6. Further alleged to be a violation of Section 8(a)(1) is an announcement posted by Respondent on about 13 September, 2 days after the election, which stated: "Anyone who is interested in revoking their authorization card which you signed prior to the election may do so by obtaining a request form from your supervisor." According to Respondent's testimony, this notice evolved from inquiries made by two employees about retrieving their cards.

Employees George Nott testified for the Respondent that, on election day, he asked Scott Merrill, one of Respondent's attorneys, what use the Union could make of the card earlier signed by Nott. When Merrill said the card could be used to fine him if Nott crossed a picket line, Nott asked how he could revoke the card. Merrill said he would draw up a revocation form and send it to Adair. Adair also testified that another employee, Arlene La Fever, broached him about revoking her card; she did not testify.

When union adherent Wayne Libbrecht saw the notice "a couple of days" after the election, he went to see Supervisor Ireland about it. Ireland told him to ask the office secretary, who handed him two stamped envelopes and a form letter addressed to the Union, the letter asking for return of the authorization card in the "stamped, addressed envelope which is enclosed."[20]

The complaint asserts that the posting of the notice and the implementation of the revocation system violated Section 8(a)(1) because it "could be used by Respondent to monitor which employees chose to revoke their union authorization cards, and which did not." The underlying assumption of this unusually specific allegation must be that the Respondent had knowledge of the identity of those employees who had signed cards. There is no direct evidence that Respondent possessed such knowledge, although it is very likely that Respondent assumed that certain employees such as Foster and Libbrecht, who wore union buttons in the plant, had done so, and it is arguable that Respondent knew of others through its Supervisor Ireland, who had been present at the July meeting when a number of employees had signed. In this limited sense, Respondent might have been capable of "monitor[ing]" the behavior of certain known or assumed signatories. Because we have no solid indication that Respondent was aware of any more than a handful of employees who *had* signed the cards, the claim that the system "could be used to monitor" which employees chose to revoke their union authorization cards, and which did not, seems fanciful.

More forceful is the contention (not expressly advanced in the complaint) that the suggestion to revoke cards, posted by the Respondent just 2 days after the union election victory, constitutes overarching interference with the private union affairs of employees and a calculated demonstration of defiance in the face of the union electoral success. The Board does not seem to have steered a particularly steady course in treating this sort of problem.[21] In considering what approach to apply in dealing with the employer who involves himself in the termination of the relationship between employees and unions, the Board has referred to several factors, in

[20] It is not true, as the Charging Party asserts on brief, that employee Krozeleski obtained a form from Baughman; Krozeleski testified only that Baughman stated that employees on his crew "could come to him" for such forms.

[21] I say this with full appreciation of, and sympathy for, the constraints within which the Board has had to perform over the years.

some cases stressing one or the other, in some cases failing to discuss seemingly pertinent prior precedent.

I begin arbitrarily with *Perkins Machine Co.*, 141 NLRB 697 (1963), in which an employer, by letter, brought to the attention of employees the contractual escape period for withdrawing from membership and revoking dues-checkoff authorizations. The employer enclosed two copies of a withdrawal form, and envelopes addressed to the union and the company. The cover letter stated that the company was merely informing the employees of their rights, that it was not urging resignation, and that the employee's decision would not affect his treatment by the company. The Board found nothing wrong with the employer bringing to the attention of its employees their contractual rights, noting the absence of threat or benefit and the company's assurances of neutrality and nonreprisal.

Cyclops Corp., 216 NLRB 857 (1975), involved the aftermath of a strike, where 13 employees spoke to the employer about withdrawal from checkoff. The company sent a letter to all employees notifying them of their withdrawal rights, and another letter informing each employee of his or her "anniversary date" for purpose of withdrawal, stating that the company "must" be notified of the employee's decision so that it would be apprised whether to continue deducting dues. The administrative law judge found *Perkins* applicable, despite the absence of any assurances by the employer of freedom of choice, and he assigned some weight to the fact that in *Cyclops*, unlike *Perkins*, 13 employees had evidently prompted the employer's action.

These two cases thus seem to say that an employer, without disavowing detriment to the employees, may lawfully choose to notify the employees of their rights to dissolve their relationship with a union voluntarily and provide them with information and forms to be used to that end, at least in a setting where a bargaining agreement imposes constraints on dissolution. In *R. L. White Co.*, 262 NLRB 575 (1982), in which no contract existed, the Board appeared to apply a different standard. There, during the course of an organizing campaign, the employer distributed a leaflet answering the question of how an employee could revoke an authorization card, giving the addresses of the relevant local union and the Board Regional Office, and stating that the matter "is solely that employee's decision." The Board, without referring to *Perkins* or *Cyclops*, seemed to prohibit any "assistance" beyond information as to addresses, saying (at 576):

> An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance,[5] or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation. *Aircraft Hydro-Forming, Inc.*, 221 NLRB 581, 583 (1975).

[5] The mere publication of the addresses of the Union and the Regional Office does not constitute unlawful assistance. See *Tartan Marine Company*, 247 NLRB 646, 655–656 (1980).

The Board dismissed the complaint, pointing to the facts that the employer "did not attempt to monitor" actual revocation, and had "assured employees" that the decision was solely theirs. *White* appears to stand for the proposition that any "assistance" beyond the furnishing of addresses renders the conduct in issue unlawful, as would an "attempt" by the company to keep track of which employees followed through, and that assurances to the employees of benign motivation have some meaning, even where no monitoring occurred.

Soon thereafter, *Ace Hardware Corp.*, 271 NLRB 1174 (1984), came along. Citing *Perkins* and *Cyclops*, but not *White*, the Board found nothing wrong with an employer, in response to an employee's question about withdrawal from the union during a preelection speech, saying that it was not his job to help people get out of the union, but that if they would "come to him or members of management, he could assist them in getting out and would help them in any way possible." He also held up a dues-checkoff card and stated that he "would see what he could do" in helping in that area, on request. The Board found it to be established Board law that employers could "bring to employees' attention" their right to resign and revoke "so long as the communication is free of threat and coercion or promise of benefit. In both *Perkins Machine Co.* and *Cyclops Corp.*, the Board approved the employer's supplying of withdrawal of information and forms." Thus, the seeming prohibition of *White* against giving "assistance" (aside from addresses) appeared to have been silently abandoned.

Four months later, however, in *Mariposa Press*, 273 NLRB 528, 529 (1984), the gospel according to *White* was, in part, resurrected. In *Mariposa*, the employer circulated a self-initiated (according to the administrative law judge, at 540) letter to employees, telling them how to go about rescinding a card, together with a sample letter of withdrawal. The *Mariposa* decision states:

> An employer may lawfully inform employees of their right to revoke their authorization cards even if employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance or otherwise creates a situation in which employees would tend to feel peril in refraining from such revocation. *R. L. White Co.*, 262 NLRB 575 (1982). Here, the Respondent did not attempt to monitor whether employees would actually revoke their authorization cards and there is no evidence that the Respondent requested or gave assistance to any employee.

The Board distinguished other cases by pointing out that preelection meetings in *Mariposa*, the employer had assured employees of their right to support a union and

stated that it would not discriminate against any employer who desired "to vote for or talk up a union and if the union won, [the Respondent] would bargain with the Union." (Id. at 530.) Because the employer's letter to employees about their right to withdraw had set forth a sample statement to be copied and sent to the Union and the Board, it is clear that the Board did not consider such a sample as itself constituting "assistance," as it had implied in *White*.

Finally, *University of Richmond*, 274 NLRB 1204 (1985), failed to mention any of the foregoing cases. Before the election, "several" employees had questioned management about getting their cards returned. Thereafter, a management representative held meetings in which it told employees how to do so, and gave each employee a letter and stamped envelope addressed to the local regional director. The manager "explained that the employees were free to sign the letter and mail it or throw it out, and that management would not monitor their decision." The form letter states, in part, "I understand that my employer will not know either that I signed a card or that I requested its return." The Board dismissed the complaint, stating:

> The Board has held that an employer may lawfully assist employees in the revocation of their authorization cards when employees initiate the idea of withdrawal and have the opportunity to continue or stop the revocation process without the interference or knowledge of the employer.[5] Applying those principles here it is undisputed that employees initiated the idea of withdrawal by questioning Inlow and Hardy about the revocation process. The credited evidence also shows that Inlow assured employees that they were free to do with the letter as they wished and guaranteed them that the Respondent would not monitor their decision. There is no evidence that the Respondent coerced employees into requesting their cards back; nor did it exert pressure on employees to mail the letters. Instead, the decision to revoke the authorization card rested solely with each employee.[6] Therefore, we shall dismiss this complaint allegation.

[5] *Jimmy-Richard Co.*, 210 NLRB 802, 803 (1974).

[6] We find the judge's reliance on *Gayston Corp.*, 265 NLRB 1, 12 (1982), to be misplaced. In *Gayston*, the employer was engaged in a course of unlawful conduct, of which the distribution of union membership withdrawal forms was an integral part, calculated to cause employees to withdraw their support from the union . . . *Gayston* is inapposite because that factor is not present here.

White, supra, and *Mariposa*, supra, had expressly found irrelevant the fact that employees had not previously solicited information about withdrawal, so long as the employer, in broaching the subject, offered no improper "assistance." Richmond, on the other hand, seems to allow the employer to "lawfully assist," but only "when employees initiate the idea of withdrawal" and "have the opportunity to" revoke or not without the interference or knowledge of the employer, a factor apparently established in *Richmond* by the assurances given to employees "that they were free to do with the letter as they wished" and the "guarantee . . . that the Respondent would not monitor their decision."[22]

In attempting to synthesize the foregoing decisions, it seems fair to say that the Board has consistently held that an employer, even without having been asked, may bring to the attention of its employees the various rights they possess to rescind authorization cards, to withdraw from union membership, and to cancel dues-checkoff authorization.[23] There is, however, a distinction drawn in the cases between advising of the right to rescind and the furnishing of "assistance" in doing so. The result in *Jimmy-Richard*, supra, seems a sound one: the employer only gave out withdrawal forms to those employees who individually asked for one. But the Board has gone beyond that, on occasion,[24] and held that an employer, unprompted, may not only bring up the subject of revocation as a general matter with the employees (without employee instigation, *Perkins, White, Mariposa*) but may also offer assistance in the form of letters, envelopes, and addresses (only *with* employee instigation, *Richmond*). However, it is at this point, the Board has seemed to sense, that the danger of coercion becomes more concrete.

When all the employees are advised by the employer of their right to withdraw cards (even though perhaps, as in the instant case, only one or two may have inquired about the subject), without any indication why the employer has been provoked to advise them, an instinctive feeling arises that many of the card-signing employees, not fully cognizant of the extent of the employer's knowledge regarding the identity of signers, might consider it discreet to accommodate the employer by signing and sending off the forms. That would appear to be the reasoning behind the Board's frequent emphasis, as recently as *Richmond* (Inlow assured employees that they were free to do with the letter what they wished and guaranteed them that Respondent would not monitor their decision), on the fact that the employer has in one way or another conveyed to the employees that the choice is theirs and that no harm will come to them from a failure to comply.

In the present case, with an exception to be discussed below, it is important to note that Respondent did not indiscriminately pass out forms, etc., to the employees; it only posted notices telling "[a]nyone who is interested in

[22] The Board's citation of *Jimmy-Richard* in *Richmond* seems to apply the limited principle of the former case to the rather different factual case found in the latter. In *Jimmy-Richard*, the employer only gave withdrawal forms to those employees who specifically requested them from management, without any prior prompting from the latter. In *Richmond*, management launched a series of employee meetings and distribution of forms to all employees after only "several" employees had inquired about withdrawing.

[23] In a preelection context, the right to urge rescission of cards makes some sense: the results might be, for example, that the union would lose the 30-percent showing of interest necessary to the holding of an election. Postelection and precontract advisories, however, seem more difficult to rationalize, particularly in the present case—while we have no authorization cards in evidence, they evidently did not also constitute "membership" cards, because the testimony shows that there would be no membership for these employees unless a contract was signed. Thus, the advice to an inquiring employee that he could be fined for crossing the picket line during a hypothetical strike appears to be erroneous.

[24] But see *White*, supra; *Mariposa*, supra; and *Tartan Marine*, supra.

revoking their authorization card which you signed prior to the election may do so by obtaining a request form from your supervisor." This offer would, I think, nonetheless tend to induce a state of uncertainty and concern in at least the more timid card-signers: Does the employer know about my signing a card? Will I get into trouble if I do not accept his offer of a rescission form?

As indicated, it appears to be the Board's position that this kind of potentially coercive notification can and should be mitigated by assurances given by the employer that the employees will suffer no penalty if they fail to send in the form. (*Perkins*, supra; *White*, supra; *Mariposa*, supra; *Richmond*, supra; contra, *Cyclops*, supra). In this case, however, Respondent gave no such assurances. As I conclude the body of precedents, the failure to do so in these circumstances imbued the bare notices with a reasonable tendency to coerce employees in the exercise of their Section 7 rights and thereby violated Section 8(a)(1).[25] Moreover, to the extent that "lawful . . . assist[ance]" is permitted by *Richmond* only "when employees initiate the idea of withdrawal," the one or two employees who assertedly raised the question here contrasts unfavorably with the "several" employees who inquired in *Richmond*.

In any event, there is specific evidence that one acknowledged supervisor went out of his way to confront employees with the fact that such forms were available. Employee Cummings testified that he had been approached by Ireland about the availability of such forms, and Ireland also testified that he "took it upon himself" to "let the employees know that I had forms to fill out to revoke their authorization cards." He said that he did not think the notices were posted as of that time, but that seems most unlikely.

It is, I believe, especially coercive conduct for a supervisor to approach individual employees and reinforce the posted revocation message. Putting employees in the limelight and on the spot in such a fashion clearly has a reasonable tendency to influence them in the exercise of the rights authorized and protected by Section 7. I conclude that Ireland's individual approaches to employees about revocation of their cards thereby violated Section 8(a)(1).[26]

[25] One might argue that the Board should outlaw altogether these wholesale efforts by employers to persuade or suggest to employees the possibility of withdrawing from or changing their relationship with unions. The nature of that relationship is really none of the employer's business, in almost all situations; and the potential for coercion would appear to outweigh—assurances or not—any conceivable legitimate purpose to be served by an employer intruding itself into the private association between employee and union.

[26] Although this aspect of the activity related to the withdrawal forms was not alleged in the complaint, it could not have been more fully litigated, having issued from Ireland's own mouth, and is therefore subject to a finding of violation. "It is settled law that the Board may find an unfair labor practice when the issue has been fully litigated even though it had not been specifically pleaded in the complaint." *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1241 (9th Cir. 1980). The same principle applies to the more general violation just found. Although the complaint spells out a theory, which I reject (the revocation procedure "could" be used to "monitor" those employees who chose to revoke and those who did not), it is clear that the lawfulness of the procedure itself was being put in question, and I cannot believe that the issue could have been more comprehensively litigated than it was.

7. On or about 13 September, 2 days after the election and perhaps the same day that the revocation notice just discussed was posted, Dennis Adair posted the following notice:

> To All Adair Standish Employees.
>
> Now that the election is behind us, we can go back to "business as usual." I have been trying to be very careful in these past few months to make sure no one felt like he or she was being singled out for discipline because of his or her views on unionism.
>
> As a result, I have now [sic; obviously should be "not"] enforced some of our Company policies as strictly as I have in the past—especially the Company attendance policy. It is important for everyone to be at work *on time* each day. Failure to do so without prior authorization from someone in management *will* result in disciplinary action immediately.
>
> When you don't show up on time it puts that much more of a burden on us as well as all of your fellow workers. This isn't fair to the people who are dedicated to making the Company work. Thank you for your cooperation.

Paragraph 15(a) of the complaint alleges that the notice constitutes an announcement that certain policies would be enforced more strictly than in the immediate past, in retaliation against the union activities of the employees and the Union's success at the polls 2 days earlier; paragraph 15(b) charges that a written reprimand issued to employee Tim Cummings on 17 September and a 2-day disciplinary suspension issued to employee Edward Lachcik on the same day were the unlawful product of this more strict enforcement of the rules as announced in the 13 September posting; and paragraph 16(a) asserts that the posting constituted unilateral action violative of the Union's right to be consulted as provided by Section 8(a)(5).

a. *The 8(a)(3) violations.* The threat against those employees who do not report "*on time* each day"—was clearly a new and more stringent policy than had obtained in the past. The witnesses agreed that the only prior published rule pertaining to lateness was a sign stating that employees would forefeit 12 minutes pay for each tardiness, and the evidence shows that this longstanding practice continued throughout the preelection campaign period. The published threat of a new, undefined, and "immediate" "disciplinary action" was an unprecedented event, and one may reasonably infer (as the employees very likely did) that it signaled a hardened attitude by management toward them as a result of the union victory of 2 days before. That the Company was still doggedly battling the Union by virtue of this threat could only have been confirmed by the appearance at the same time—2 days after the election—of the notice offering to assist in retrieving authorization cards.

This is not to say that Respondent had not disciplined employees in the past for attendance problems, but the imposition of discipline had seemingly been a capricious thing. Dennis Adair testified that he had discharged em-

ployee Dobler, and others whom he could not recall, for tardiness, but no personnel records were produced. He further testified that he had in the past given written warnings to Dobler, Ed Lachcik, Raymond Moore, and Calvin Ireland, but no copies were kept of this sort of discipline until the plant obtained a copying machine in the spring of 1985. Employee Tim Cummings testified on cross-examination that he believed that Dobler and Mooer had received warnings slips years before, and that Dobler was fired for absenteeism. He further agreed that others had been terminated for not reporting on time, usually after receiving warnings, but he believed that employees were first orally warned before they received written warnings. (He told Ray, "30 days if you are late, in 30 days you are going to get a written warning.")

The only copies of such warnings entered into evidence by Respondent—given a possible postcopier range of around April 1985 to 22 September 1986, the last day of the hearing—were a 4 April 1985 warning notice to Lachcik for "lateness" and "absence," with the warning that "2nd notice will have discipline[sic] action"; and a "2nd notice" dated 7 May 1985, noting the same deficiencies and threatening: "If you are late or miss a day during the month of May, employment will be terminated." Clearly, the threat in the first notice that a second notice "will have discipline[sic] action" was not to be taken seriously.

On 17 September 1985, however, Lachcik received a 2-day suspension for "third notice of lateness." The timecards pertaining to Lachcik put into evidence by Respondent encompass an 8-week period beginning with the week ending 4 August and terminating in the week ending 22 September 1985.[27] They show that Lachcik was late once in the first week, on time in the second, late twice in the third week, on time in the fourth, tardy twice in the fifth week, once in the sixth, three (substantial) times in the seventh, and none in the eighth (in which he worked only 3 days because of the suspension). The 17 September suspension notice does not state which (if less than all) of the latenesses brought about the discipline.

On the same day that Lachcik was suspended, dayshift press operator Cummings, a 7-year employee, received from Adair a written warning citing "Lateness" and reading, "You must be here on time!" Cummings' lateness record for the same 8-week period as that pertaining to Lachcik was proffered by Respondent and was at least as unimpressive as Lachcik's: one lateness in the week ending 22 August, three the following week, once the week thereafter, twice in the next week, none in the subsequent week, twice the next week, twice the week after that (including a 90-minute absence on the day of the election), and none in the final week (after receipt of the written warning). Three on-time working days elapsed between the last tardiness and the 17 September notice.

That Respondent acted within the bounds of the law in issuing a warning slip to Cummings on 17 September is put in issue by his testimony that he had had "a rash of tardiness since about December" of *1984*, and that while Adair had mentioned to him in March or April 1985 Cummings' responsibility to be on time, the "rash" continued without penalty, other than the normal sanction of loss of paid time.[28] To the question whether a survey of Cummings' timecards going back to January 1985 would show that he was late about as many times as are shown on the eight August and September cards in evidence, Cummings answered, "I would think so, yes."

This question was asked and answered prior to a 6-week hiatus in the hearing. It should have inspired Respondent to refute Cummings' testimony, if untrue, by producing documentation to the contrary. No such documentation was introduced when the hearing resumed. I consider it reasonable, therefore, to draw the inference that Cummings' claim of 9 or 10 months of frequent and previously undisciplined tardiness is supported by the record.

This indicates, I think, that the notice did announce, and Respondent did implement, a new and more stringent tardiness policy a few days after the election. If, as I infer, Cummings was consistently late from December 1984 to the following September, and only once, in March or April, drew a rebuke, after which he continued to be tardy without sanction, it seems fair to conclude that Respondent was willing—or resigned—to accept Cummings as he was.[29] The written warning of 17 September bespeaks a decidedly different approach, and the only apparent explanation of the differences lies in the union election victory of 11 September.

There is no evidence in the record that Cummings was a notorious union adherent, but that is beside the point. His record shows that before the 13 September announcement, Respondent had not maintained the policy proclaimed on that day—that if an employee does not report "*on time* each day," his or her tardiness "*will* result in disciplinary action *immediately*." That this was a far cry from the past practice is demonstrated by the testimony of Supervisor Ireland, who said, "We have *on occasion* if people miss too much time or [are] late *too often*, we warn them with a written notice." I attribute the change to the lost election—indeed, the fact that Adair issued two written disciplines on the same day, only 6 days subsequent to the election, after a 10-year tenure as plant manager during which he could testimonially identify only four employees who had received written warnings, probably speaks for itself—and find that the

[27] Thus, we do not know the tenor of Lachcik's attendance record from 7 May, his last disciplinary notice, to the end of July.

[28] Adair testified that before the warning notice, he had had "several" discussions with Cummings about his tardiness. In general, I did not find Adair to be a reliable witness. As an example, Adair testified that Foster has never been a press operator, while, as noted above, Respondent's witness Ireland, asked about Foster's status during the summer of 1985, replied, "I believe press operator." This is consonant with Foster's testimony that, for the short period in that summer in which the Color King press was operational, Adair told him he was the "press operator." I would give credence to Cummings in a conflict with Adair.

[29] Cummings testified on cross-examination that, in a conversation with Livingstone, the latter asked Cummings if he "deserved" the pink slip, and he answered, "I said I deserved it when I was being late, not after the election." I do not believe that this was necessarily a concession that Cummings deserved the warning, but was, rather, more an iteration of his opinion, previously expressed, that there was something suspicious about the delay.

rule change violated Section 8(a)(3). I also find that the change, as it affected Cummings, violated the same section.

The Lachcik case is somewhat more difficult. Unlike Cummings, Lachcik was already encumbered by two warnings; the record shows, although with imprecision, that other employees had been in the past suspended or discharged after compiling a disciplinary record; and it seems possible that Lachcik's performance in August and September might possibly have earned him a 2-day suspension in preunion days. Given, however, the entirely capricious and unpredictable manner in which tardiness was handled in the past, it seems reasonable to conclude that insofar as the discipline of Lachcik was rendered under the aegis of the new policy, it too might never have been imposed in the absence of that decree. I would therefore recommend finding a violation concerning the Lachcik allegation.

b. *The 8(a)(5) violations.* As for Respondent's failure to satisfy its obligation to bargain with the Union subsequent to the 11 September election, the law has taken the consistent course that after a union has won an election, the employer is immediately bound to bargain with the union about changes in working conditions, even though objections have been filed by the employer and no certification has issued. *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 869–870 (5th Cir. 1966), enfg. in pertinent part 151 NLRB 248 (1965); *Catholic Medical Center*, 236 NLRB 497, 500 (1978); *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701, 703 (1974). A material change in the disciplinary system is a subject about which the Union was entitled to receive notification and be afforded the opportunity to bargain; before the new policy was announced, it had received neither. Similarly, although I am recommending dismissal of the 8(a)(3) allegations relating to Larry Foster and Cynthia Johnson, their layoff was subject to collective bargaining; Respondent, however, simply announced the action directly to the two employees as a fait accompli. In so doing, Respondent violated Section 8(a)(5) of the Act in both instances. *Clements Wire & Mfg.*, 257 NLRB 1058, 1059 (1981), and cases cited.[30]

8. The complaint alleges that on 22 October, the day before the commencement of a Regional hearing on Respondent's objections to the election, Respondent's counsel violated Section 8(a)(1) by interviewing employees without assuring the employees that "they did not have to meet with counsel and answer his questions or in any other way indicate that the employee's [sic] participation in said interrogation was wholly voluntary" and by attempting to secure information which was "unreasonably beyond the scope of his preparation for the hearing on Respondent's objections," thus constituting "coercive interrogation of the employees' union activities."

Only one employee testified on behalf of the General Counsel on this issue. Carol Barber was one of the five employees whom Respondent's Attorneys Coleman and Merrill had indicated to Adair that they wished to interview. Adair asked Barber if she would "mind staying" on 22 October to talk to the company lawyers. She said she would do so.

Barber testified that when she was taken into the office and introduced to Coleman and Merrill, Coleman told her that "what [she] had to say would not affect [her] job or [her] position or the trial the following day." Coleman then allegedly asked if she "knew who had brought the Union in"; if she "had signed a green card"; if she "had signed anything else"; "if anybody else had signed anything [sic]"; and "if anybody else was members of the Union."[31]

Merrill, she testified, asked a couple of questions, having to do with whether Foster "sat at the table" (presumably at union meetings) with the union officials, and whether initiation fees had been waived. She denied that anyone had told her that she did not have to answer questions, that she did not have to stay, and that she had an option to answer a question or not.

Barber made a positive personal impression, but some of her testimony on cross gives considerable pause. On another subject, when asked what the company layoff policy was, she answered, "Generally for a while there it was the lowest one in seniority working [who was first laid off]," but then, asked whether it was not true that Adair "lays off whoever he wants" regardless of seniority, Barber answered "Yes" adding, "There is no policy." But then she stated, "Since I have been there, it is the least seniority. We were last hired in, we were first laid off. Asked whether her affidavit conceded that Adair has not followed seniority for layoffs, Barber replied, "Sometimes he does, sometimes he doesn't." But she immediately termed "accurate" the following quotation from her affidavit: "The employer's past practice with regard to layoff and recall of employees has been that it has not followed seniority and Dennis Adair has laid off or recalled whoever he has wanted."

Contrary to Barber, Attorney Merrill testified that it was he who asked Barber the majority of the questions put to her, Attorney Coleman having posed only one or two questions initially and then having left the room. Merrill stated that he prefaced his questioning of Barber and the other employees as follows:

[30] Respondent's brief ignores the *Mike O'Connor* line of cases completely and concentrates on the irrelevant question of whether there had been a formal request for "bargaining" by the Union before the election. Although the argument is beside the point, I note that it must require a supreme effort of will to assert, as Respondent does, that none of the three letters sent by the Union on 12 July 1985 "unequivocally demands that the Company bargain with the Union," given the Union's statements in one of the letters to Adair that (1) the majority of the employees had designated the Union as their bargaining representative; (2) the latter "claims the right to represent them"; (3) the Union "stands ready to meet . . . to discuss the matter of recognition"; and (4) "If the Company agrees to recognize the Union as representative of its Production and Maintenance employees and agrees to bargain collectively on the terms of a labor contract, the Union will be pleased to withdraw the NLRB petition."

Eagle Material Handling, 224 NLRB 1529 (1976), enfd. 558 F.2d 160 (3d Cir. 1977), cited by Respondent, is an entirely different case. There, the union had *lost* the election before the employer's unilateral changes, and the Board accordingly found no violation of Section 8(a)(5). When a union wins an election, even though it has not been certified and has "not yet requested the Respondents to bargain," the employers nonetheless undertake unilateral action "only at their peril." *Laney & Duke Storage*, supra at 266–267.

[31] On cross, however, she attributed this question to Merrill.

> I then informed the employees, each employee as they entered the room, and after we had introduced our names, that they did not have to talk to us, that their participation had to be voluntary. I then explained that we were going to ask them some questions that were going to be used as possible testimony at the hearing the next day. I told each employee that I had no desire to know on [sic] their views of the unionism either before or against the unionism [sic], and I told the employees that whatever they said would not be used either favorably or disfavorably towards the employment position with the company. And that the employee could refuse to answer any question if he felt it was too personal or didn't want answer the question.

A 2-1/2-page affidavit given by Merrill to the Board on 25 October, however, did not support this testimony. The affidavit focuses on his prehearing interrogation of employees, and the pertinent portion reads:

> At the start of each of the meetings with the individual employees, I introduced myself as an attorney for the company. I told them the company was involved in a hearing the next day concerning possible misconduct by the union during the campaign. I told each of them that they might be a possible witness at the hearing and I needed to review any possible testimony with them. I gave each the following assurance: I told each that whatever response they made would not have any adverse impact [initialed by Merrill] on their job or working conditions [initialed] at the company. I also told them that their response would not have any favorable impact on their jobs. I told them I was not interested on [sic] their views on whether they were for or against the union, but was just interested as to whether he (or she) had any knowledge about statements, threats, or other acts of intimidation by the union [initialed]. This is all I told them about the purpose of the meeting. With the exception of Barber, who I knew had been subpoenaed by the union to appear at the hearing, I told the others that they would be compensated by the Employer for their appearance at the hearing.

At the present proceeding, Merrill maintained that although he had told the Board agent who took his affidavit that he "had given the voluntary assurances, that I told employees that they did not have to respond," the agent had inadvertently omitted this portion of Merrill's statement from the affidavit, and then, compounding the omission, Merrill had failed to notice this missing language when he "hurriedly" read over the affidavit (even though he had initialed corrections of typing errors as he did so). His haste resulted from the fact that he had spent a day of overseeing affidavit-giving by Respondent's witnesses and was in a hurry to return to Washington from Detroit. He further gave the seeming unlikely testimony that he had not read over the copy of the short affidavit, which had accompanied him back to Washington, until shortly after 15 November, when the complaint issued, even though he knew that the attorney's prehearing interviews were a subject of investigation. When asked whether he then wrote to the Regional Office to formally supplement his affidavit, he replied that he had not done so, but had instead telephoned the Board investigator to tell him that the affidavit was in error (as shown above, the complaint claimed, in part, that the employees had not been told that "they did not have to meet with counsel and answer his questions").[32]

Having testified on direct that Coleman had "initially asked [Barber] one or two questions" before he departed, Merrill agreed on cross that his affidavit also erred in stating, "I did all of the interrogations of the individuals. Coleman may have present [sic] for the first meeting (with Tim Krozeleski) but he did not attend the others as I was the only lawyer present for them." While he recalled that Coleman did not ask Barber any "substantive" questions, he could not "recall which questions he asked her" of a nonsubstantive nature.

Like Barber, Merrill was a personally impressive witness, but his testimony leaves much to be desired. Three other witnesses offered confirmation, in varying degrees, of Merrill's testimony. Adair testified that he had been instructed by the lawyers to notify the witnesses that they "didn't have to stay and speak" to the lawyers, and that he did so; he further recalled that Merrill told Barber that the interview was voluntary and she did not have to answer the questions. Employee Krozeleski testified that Adair told him the attorneys would "like to talk to me if I wanted to." *All* he could remember of his 10-minute talk with Attorney Merrill was:

> A. That it was—if I wanted to speak with you and stay to discuss anything?
>
> Q. And what, if anything else, was told to you?
>
> A. Well, that's about it. And I agreed to stay to discuss.

Krozeleski could not remember whether he had been informed that he would be a witness at the hearing or even whether the hearing was mentioned.

Employee McMann, who had been appointed press operator only 3 months before, was more helpful to Respondent: "You [Merrill] were very cautious and you told me who you were and that you represent the company and that—the union is trying to come in there and that [Sic]. And you told me it was very voluntary if I wanted to talk to you or not and that. And I said, yeah, I can talk to you and that, and so we talked." Overall, McMann seemed a reasonably honest witness, but he seemed somewhat anxious to give answers favorable to the Respondent on examination regarding the supervisory status of Baughman.

The parties agree that the governing ground rules here are set forth in *Johnnie's Poultry Co.*, 146 NLRB 770, 774–775 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965), in which where the Board lists the "specific safeguards" necessary to afford an employer the "privilege" of questioning employees before a hearing:

[32] The Board agent was not called from Detroit to give rebuttal to Merrill's testimony, which was the next-to-last testimony given on the last day of the hearing in Midland, Michigan.

> Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

Despite the flaw in the testimony of Barber,[33] it is not easy to feel confident here that she was told of her right to "participate on a voluntary basis." Merrill testified that he had been told, when he gave his affidavit, that "there was some indication that proper warnings may not have been given." He went on to say that he told the Board agent that "I had given the voluntary assurances, that I told employees that they did not have to respond." The likelihood of the Board agent having omitted this from the affidavit and the likelihood that Merrill "neglected" to notice the omission when he read over the affidavit before he signed seem remote indeed, as does the assertion that he did not again check over the short document on his return to Washington. I was not overly impressed with the confiriming evidence offered by Respondent, as discussed above, and, although the decision is not an easy one, I would be more inclined to believe that Merril simply forgot to give Barber the assurance of her right to abstain.[34]

However, two of the other "boundaries" mapped out in *Johnnie's Poultry* were also "transgresse[d]" here, thus in any event making the interrogation of Barber unlawful under the scheme of that case. The "context" was plainly not "free of employer hostility to union organization." Before the election, Respondent had sent its employees a letter relating that in the forthcoming weeks it would be discussing "all the disadvantages of Unions and how you and your families could be seriously hurt by union representation."[35] It decided not to install the new press at Standish, a decision openly attributed by Supervisor Ireland to Foster as being related to the union effort. Within days after the election, Respondent continued visibly to battle the Union: it posted a new and more restrictive disciplinary system; it imposed discipline on employees Lachcik and Cummings for behavior theretofore tolerated (at least in Cummings' case) for many months; and it went out of its way to influence employees to revoke their authorizations to the newly selected Union. It is safe to say that the questioning did not "occur in a context free of employer hostility to union organization."

In addition, Merrill's questioning did "exceed the necessities of the legitimate purpose" of preparation for the hearing on objections "by prying into other union matters." Respondent had filed five objections to the election, to two of which (alleged objectionable conduct under *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973)), it later produced no evidence. The third and fourth objections related to the possibility that employees Lachcik and Naiman had made various threats to other employees. The fifth sought to show that Foster had, one night in August, come to Adair's house and overturned some garbage cans.

Under prevailing law, Respondent had a legitimate interest in attempting to prove at the hearing on objections that Lachcik, Naiman, and perhaps Foster were "agents" of the Union.[36] To inquire into these questions, it was unnecesary to "ask . . . all of the employees who, in their minds, the main representative of the union among the employees was," as Merrill himself states in his affidavit.[37] Moreover, while Merrill testified as to some questions which he *had* put to Barber, he did *not* expressly deny having asked other questions earlier attributed by her to him, such as the legally irrelevant "who had brought the Union in" (the proper question would have specifically referred to Foster, Naiman, and Lachcik), "if anybody else had signed anything," and "if anybody else was members of the Union."[38]

Accordingly, because I conclude that the questioning of Barber failed to explain her right to refrain from answering, was overbroad, and occurred in a context unacceptable according to *Johnnie's Poultry*, Respondent violated Section 8(a)(1).[39]

C. *The Diversion of the Goss HV and the Layoff of Foster and Johnson: 8(a)(3) Allegations*

The foregoing discussion considers several of the unfair labor practices alleged in the complaint, both before and after to the election, on which the General Counsel would rely as tending to prove that Respondent's motivation in redirecting the newly purchased press from Standish to Dexter was informed by antiunion considerations. The General Counsel would, in addition, use this background for purposes of inferring that the layoff of union adherents Foster and Johnson on or about 25

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[33] In her favor is her willingness to testify that she was told at the outset that "what [she] had to say would not affect [her] job or [her] position or the trial the following day."

[34] There is some additional support for this conclusion in the statement in Merrill's affidavit that he told employees that he "*needed* to review" any possible testimony they might give, which clearly implies that the employees had no choice in the matter.

[35] Although not alleged to be an unfair labor practice—indeed, the latter was offered by Respondent for another purpose—the warning of "serious hurt" to employees and their families strikes me as a distinct showing of "employer hostility." *Kenco Plastics Co.*, 260 NLRB 1420 (1982) (animus may be inferred from lawful activity).

[36] Although the objection based on Foster's alleged foray into Adair's garbage seems truly frivolous.

[37] Merrill did not testify to having posed this question. The closest he came testimonially was that, to gather evidence on "an issue of agency involving Mr. Foster," he asked Barber "if she had received an authorization card" and "who she had received it from." Although Respondent's brief states that Merrill asked Barber "whether Foster had given other individuals authorization cards . . . (Tr. 727-730)," Merrill did not so testify, either at the cited pages or anywhere else.

[38] I think that Barber probably erred in imputing most of these questions to Coleman; I suspect that Merrill was, in large measure, the interrogator.

[39] Although the complaint does not expressly mention the "context" criterion of *Johnnie's Poultry*, the context to which I refer was fully contested in the course of litigating this case. In any event, the sole factor of exceeding the necessary scope of inquiry would bring the principle, and the violation, into play.

September was similarly inspired. We turn first to Respondent's change of mind regarding the location of the new press.

The reader would do well to re-read the first few pages of this decision at this point. In brief, Respondent purchased in May 1985 from Rockwell International a reconditioned high-powered press which it admittedly intended to install in its Standish plant, replacing the older, slower Color King located there (and trading in the latter on the "new" press). An employee union effort began at Standish around the end of June and resulted in a union election victory on 11 September; for asserted reasons to be explored hereafter, the new press was eventually put into storage, and it was not until May 1986 that it was installed—but at Dexter, Respondent's other plant, rather than at Standish. On its face, this turn of events smacks of a motivation tainted by organizational considerations, and two admitted supervisors, as found above, made such a connection in talking to employees about the reasoning behind this volte face.

Respondent's principal witness on the subject of its decision to install the newly purchased Goss at Dexter instead of Standish was President Robert Adair; his brother John, who assertedly shared in making the decision, inexplicably did not testify. Robert Adair was a personally satisfactory witness, but his testimony, studied as a whole, seems inconsistent and improbable.

He testified that the intent in opening the Standish plant in 1976 was primarily to produce service manuals, price lists, etc., for the automotive industry in Detroit (General Motors and its components, Ford, Chrysler, and American Motors), the same type of work done at Dexter for many years—"that is our market, the automotive manual market." Adair testified that he and brother John were "very optimistic" about the state of their business at the beginning of 1985, based on recent experience, and decided to trade in the Color King at Standish and install a second Goss HV there. After contracting in March for the press with Rockwell, which undertook to recondition the press, they hoped to have it delivered in May and running by July, but delays kept it from being finished until September. Actually, the "tentative" scheduled contract date for shipment was "June 1985." What Adair failed to mention was that, by an addendum signed by him on 20 May 1985, Respondent additionally purchased "1-Lot parts necessary to reverse the quarter fold fly arrangement," which presumably added some time to Rockwell's reconditioning work.

Reference has been made to the 15 July mailgram from Rockwell to Respondent announcing that the former "expected to ship week of 7/29/85" with receipt by Respondent on "7/31/85." Appearing as the General Counsel's witness, a Rockwell managerial employee, Glenn Hill, testified that in "June," Rockwell's sales manager and Adair had verbally "agreed" that the press "would not be ready" until September. This sounds like a curious sort of arrangement. Hill could not say that the press was not in fact ready for delivery in July, as the mailgram indicates, and he agreed that when Rockwell sends such a mailgram, chances are very small that the equipment is not delivered by the estimated date; he did not indicate the reasons for delays in the estimated "less than one or two precent" of such instances. Adair testified that unanticipated delays precluded such shipment in July and August, but he said there was no such later documentation like the mailgram. This also seems peculiar; if Rockwell was accustomed to notifying of probable arrival by mailgram, one would assume that it would also announce delays in the same manner.

"[S]ometime" in September, Adair says, notice was received from Rockwell that the press was ready, and Adair, brother John, and son Dennis went to Chicago to inspect it. After finding the press to be in order, Adair told Rockwell that he was unsure where the press would be installed, and he asked Rockwell to store it for him. He testified, "They agreed to store it until January of 1986."[40] This appears to mean that in September, Adair was already planning on keeping the new press out of commission until at least January.

Adair's first explanation for this decision was that in "June" 1985, when the bids were let for the 1986 car manuals, "we found that we had lost a great deal of work that we had the previous year," Chevrolet being a "large portion" of it. Instead of the anticipated 10- to 15-percent increase, catalog division experienced a 17-percent decline. Most of the work, he said, was lost to Canadian printers taking advantage of the exchange rate. Adair continued, "And the other thing that happened in June that made me think twice about this press is that General Motors photographic announced a $4 to $6 million dollar expansion of their facilities to handle more work. That is in process now, which made me realize that in a year or 2 years down the road from last spring, there was going to be a lot less General Motors work available to outside printers such as ourself [sic]. And that is when we decided that we had made a mistake." Adair stated that in June, he asked Bob Bowers of Rockwell "what would happen if we cancel this order," and Bowers replied, "We would probably try to hold you to the contract." Bowers was not called to testify about this conversation.

There are several problems here. One is that Hill, financial manager of Rockwell's customer service group in Chicago, testified that in speaking with Robert Adair in early September, the latter told him that "business was *real good* and they were thinking of creating a third satellite plant . . . possibly in Michigan, or possibly in Indiana" and the new press would go to the third satellite plant if he opened one. When Adair testified thereafter, he was not asked to comment on or refute Hill's undoubtedly accurate testimony.

At trial, Respondent placed much stress on the fact that it discovered in June 1985 that it had failed to win "probably seven or eight" separate bids for the automotive manuals for the Chevrolet division. However, Adair was not reluctant to state that he had "many times" lost annual bids which the firm had previously been performing of the same "magnitude" as the Chevrolet bids that were lost in 1985. After the loss of the Cheverolet bids,

[40] There is no support whatever in the record for Respondent's claim on brief that "the decision to warehouse the new Goss H.V. press . . . was made . . . before the Company had any knowledge of union organizing activity [ie., before July]."

the firm subsequently went after other business: "We got some, but [the total volume] went down." Adair testified that for fiscal year 1985, ending 30 June 1985, total sales volume for the two plants had been $9 million, a figure that slipped approximately $1 million for fiscal year 1986.[41]

Analysis reveals that the core issue here of why the change of plans was made so that the new press wound up at Dexter rather than Standish is only tangentially related to Respondent's sales as of June 1985; the real issue is not whether the press was needed after June, but why it was placed in one location rather than the other. Respondent's handling of the former issue is, however, of some interest.

As noted, even as he was testifying to the loss of the Chevrolet bids in June 1985, Robert Adair was very persistent in telling counsel for the Charging Party that Respondent loses bids "of that magnitude . . . . every day of the week . . . all the time . . . absolutely" including work that the firm had performed the previous year. He also insisted that loss of sales in 1 year is at best only a "slight consideration" in assessing what he expects the future to bring—"last year is ancient history." In attempting to dramatize the loss in sales as a result of the June 1985 bidding, Respondent was very guarded in offering documentary evidence that might show the overall sales for the fiscal years involved, even though it was urged to do so by virtue of a ruling by me.

Through Genevieve Rakstis, an accountant employed by Adair for 27 years, evidence was adduced that "like 90 or 95 percent" of the work done for Chrysler, Ford, and General Motors over the years has been performed at Standish, and that "like 90 percent, I think," of the work done at Standish is for those three customers. How Rakstis deduced these figures is unclear, because Robert Adair, when asked to approximate what portion of overall volume was produced at Standish in fiscal year 1986, testified that he did not know because "we don't keep separate records of what is done at Standish or what is done at Dexter. . . . [W]e have no records saying which one was done where."[42]

Putting that problem aside, however, Respondent introduced some salemen's commission records, which shows a comparison between total sales to the three automobile companies for Respondent's fiscal year ending 30 June 1984, 1985, and 1986. These records reflect that for the years ending 30 June 1985 and 30 June 1986, sales to General Motors dropped about $1 million (from about $1.7 million in fiscal year 1985 to about $700,000 in fiscal year 1986).[43]

It is, however, very difficult to know from these bare figures for only three clients how well the Company was doing during the remainder of 1985 and the first part of 1986 because the figures represent only about one-third of Respondent's $9 million total sales volume, as testified to by Adair. Although an attorney for Respondent stated that they had "total sales figures for all the corporations," Respondent chose not to introduce them; given Adair's concession that the Respondent did pick up "some" new work during 1985–1986, the remaining figures may have cast a revealing light on an obscure corner of the case, and it would not be unfair to draw an adverse inference against Respondent for its resistance to painting a complete picture. *Plumbers Local 669 v. NLRB*, 789 F.2d 9, 15 fn. 18 (D.C. Cir. 1986). (Board correctly discounted employer's assertions that it made 150 unsuccessful bids in the absence of any documentation to support the claim.) It is well to recall at this point the uncontroverted and entirely credible testimony of Rockwell's Glenn Hill that, in September 1985, Robert Adair had told him that "business was *real good* and they were thinking of creating a third satellite plant . . . possibly in Michigan, or possibly in Indiana." I can see no reason for Adair to have lied so elaborately to Hill about the well-being of his business—and this was months after assertedly losing the Chevrolet work.

Also relevant here is the uncontradicted testimony of employee Cummings that on an occasion before the union activity commenced, as he and Dennis Adair talked about the new press, the latter said that it had "better register and is supposed to do a lot better color work," and the Company was "trying to expand into a new field where they can get more work for the color." It would be of considerable interest to know what the remaining undisclosed sales figures show.

The last time that Adair was asked (by his counsel) why "in June of '85" he "made the decision not to have the press delivered to Standish," he again answered in terms of the lack of an overall basic need for the machine itself rather than the choice of placement. He referred to the "invasion" by the Canadian printers and the information he had received indicating that General Motors would be producing its own service manuals in the future. When he spoke of this topic the first time, Adair stated that "General Motors photographic *announced* a $4 to $6 million dollar expansion of their facilities to handle more work." The second time, he offered a somewhat different account: "my *conversation* with people at GM photographic who informed me they were going to make a very large expansion in their plant and that they would possibly be doing all General Motors service manuals in the future." He went on, indeed, to expand on conversations with other equipment firms which indicated equipment purchases by General Motors geared not only to the production of service manuals for General Motors, but also for "other people," meaning

[41] This included a bid, apparently lost in September, for a 3-year contract for Michigan state income tax forms which Respondent had performed at Standish for 8 of the preceding 9 years.

[42] Despite this professed lack of knowledge, however, several pages earlier Adair had been able to state that he thought that "all of the Chevrolet manuals were done at Standish" in fiscal year 1984. Later, he said that he "thought" volume was down in Standish in fiscal year 1986, "but I don't know because we don't keep separate records."

[43] They also show a lesser decline in the Ford account—from about $1,370,000 in fiscal 1985 compared with about $1,260,000 in 1986. Sales to Chrysler, however, *rose* from about $700,000 to $880,000. These latter sets of figures would seem to indicate that the "Canadian printers" may not have represented as much of a threat to the market as Adair tesified. It is also worth noting that Respondent's sales to these three companies during the fiscal year ending 30 June 1984, not long after which, according to Respondent, it was encouraged to purchase the new press, amounted to about $3,263,000 compared with sales of $2,866,000 for the year ending 30 June 1986, a difference of only about $397,000.

that Respondent might be losing "more than just General Motors' business . . . to this equipment."

Respondent also introduced evidence that it made an attempt in March 1986 to sell the new press, again pursuing what I view as a misguided theory of the real issue here. One might note, however, that while the evidence unquestionably supports a conclusion that Respondent did advertise the press for sale in a single issue of the "Printers Hot Line" on 5 March 1986, the sales effort does seem half-hearted. Thus, the ad was carried only once; Adair testified that his asking price for the press, not shown in the ad, was "the same we paid for it, approximately $770,000," without indicating why he would not be willing to take a loss on a piece of equipment he did not need; he testified that he received "two or three responses" to the ad, but told us nothing else about them; and he never bothered to try to resell the press to Rockwell, which, of course, deals in this sort of used equipment. But if Respondent was not in fact interested in selling the press, what could be the reason for this documented, yet seemingly tepid, advertisement effort? One answer might be that a Board complaint was pending which alleged that Respondent's refusal to take delivery of the press was inspired by the successful union organizational effort.

There is also conflict in the testimony regarding when the decision was made not to place the new press at Standish. After Rockwell had stored the press gratis until January 1986, it was moved into commercial storage in Jackson, Michigan, for some months. At some time prior to May 1986, or so Adair testified, "We decided, my brother and I, that we had a lot of money in the press sitting there brand new[44] and decided that we would put it into our Dexter plant and run it and put our old press that was in Dexter as a standby press into Standish. We knew if we put it into Standish, it would just sit there. So we put it into Dexter so that we could get some use out of it." Thus, Robert at this point testimonially placed the decision around the spring of 1986. Robert was not, however, elsewhere consistent in answering this question. Thus, when asked by counsel for the General Counsel if it had been in May 1985 that the outlook for the new press going to Standish had changed, Adair replied that he could not be specific about the dates, but it was "[s]ometime in the spring when I saw these contracts leaving, when we made a decision." Because the contracts allegedly "left" in June 1985, Adair here pushed the "decision" back a year. But when Dennis, who was present during his father's testimony, was asked when he learned "that the decision would not be made [sic] to place the press in Standish," he replied that he "first learned about it around September [1985] . . . [r]ight around the time of the trip" to Chicago, from "Bob Adair, Sr." Thus, there appears to be a serious inconsistency within and between the two Adairs on this point, casting doubt on the overall veracity of Robert Adair concerning the timing of the decision.

When Adair was asked why the decision was made "in May" to ship the Goss to Dexter, he replied, "Well, our discussion was that if we put it in Standish it would sit there most of the time and not turn over . . . . [It would sit there because] we didn't have enough business to warrant two presses. We were running one press [at Standish] and turning out all the work we could get. And we had a lot of money in this press and we wanted to use it somehow so we put it in our main plant." Because the testimony was that both Dexter and Standish produced automotive manuals, the next logical question was asked—why Dexter instead of Standish? The answer was that Dexter was the "main plant": "There will always be work done in Dexter because our prep department is there but mainly because my brother John is there. And there are some jobs that I want him right there and he wants to be right there when they are printed for a number of reasons having to do with quality, delivery and so on." Adair explained that the "fast turnaround jobs" are done in Dexter because of "the proximity of the prep department and it is closer to Detroit. It is quicker."

For the following reasons, I find the foregoing explanation to be illogical:

1. If there was not enough work at Standish for two Goss HV presses, then there was also not enough work at Standish and Dexter for one each. On that assumption, does it make any sense to unpack, install, and perhaps occasionally use (for "fast turnaround jobs") a newly reconditioned press instead of continuing to vigorously attempt to sell it "STILL IN CRATES. NEVER USED," as Respondent's March ad in the "Printers Hot Line" proclaimed?

2. If the jobs for which Adair wanted brother John "right there" were the "quality" and "fast turnaround" jobs, it would appear that Respondent had been able to perform such work satisfactorily in the past with the existing Dexter equipment (Adair did not specify what were the "some jobs" for which he wanted John to be present, or how many such jobs there were to which he was referring). No reason is offered why the new Goss was suddenly needed for such work at Dexter. Obviously, Adair was not referring to the ordinary, year-in, year-out manual printing that had been done at Standish *without* John's immediate presence.[45]

3. Even if the foregoing made any sense, why did it take from June 1985 until March or April 1986 for its reasonableness to become evident to the Adairs? Adair testified that it was in June 1985 that he "made the decision that this press was a mistake" and he and his brother "discussed what to do. We had a problem." The fact is that the first and only nominal attempt to sell the press was not made until March 1986, and it remained in storage, after the Adairs finally inspected it in September, for about 6 months.

[44] The cost of the press and related equipment seems somewhat unclear. Adair testified, and the documents in evidence appear to confirm, that the total cost (not including $90,000 trade-in for the Color King) was $770,000. Rockwell employee Glenn Hill, however, put the "net" cost at $566,000, a figure that Respondent's brief adopts.

[45] On brief, Respondent does not even refer to the "mainly because . . . John is there" alleged purpose. The brief states: "reconditioned press shipped to Dexter . . . because Dexter had its own 'prep department,' was closer to Detroit automotive market, and had high volume, quick turn-around capability."

It should be pointed out that this same reasoning could have applied when the new machine was purchased in April 1985. A decision based on the same special factors (brother John's location; the quick turnaround jobs) would have then also made it equally sensible to send the new press to Dexter and ship the Dexter Suburban press to Standish, which already had one Goss HV. Such an explanation as Respondent offers has nothing to do with the *volume* of business, only the *logistics*. Instead of adopting that arguably sensible approach, however, Respondent had decided in April 1985 to put the new Goss in Standish—until the Union won the September election.

4. Subsequently, when asked again by counsel why the decision not to receive the new press at Standish was made, Adair said, "It was based on the fact that we had competitive problems and we were going to have less business at Standish and at Dexter, probably. And we didn't need that additional capacity." Asked if it was his assessment that Respondent could "produce the necessary volume of business with the one HV press that was at Dexter," Adair answered, "That is right. We discussed that and decided that we didn't need more than one." I find these replies most confusing.

As for the lack of "need" for "that additional capacity" because of a business decline, Respondent already *owned* the additional capacity; the question was where to *locate* it. As for the following question and answer, I am not sure what Adair meant. "[D]idn't need more than one" what? Respondent *already* owned at least two Goss HV presses to which the testimony specifically alludes, the existing one at Standish and the new one put in at Dexter.

5. Having given this involved rationale for ultimately sending the press to Dexter instead of Standish, Adair failed utterly to replicate it when asked by his counsel on redirect examination, "In '85 *in June of 85 when you made the decision not to have the press delivered to Standish*, what were the principal considerations then?" Adair replied, "the two principal considerations were the invasion of our market by the Canadian printers and my conversation with people at GM Photographic who informed me that they were going to make a very large expansion in their plant and that they would possibly be doing all General Motors service manuals in the future." For one thing, as already shown, Adair had testified that he and John had made the decision not to have the press delivered to Standish in the spring of 1986, and yet he was willing to accept the predicate of the question that it was "in June of '85." For another, the answer is not at all responsive to the question put; it is the answer to another question about why he may have been concerned that buying the new press was a mistake. Both errors show, I think, for a man of his stature, and poise, an unseemly uncertainty about the facts.

The preceding analysis finds a good deal of fault with the testimony of Respondent's principal witness in attempting to explain why the new press was shifted from the recently unionized Standish plant to the unorganized Dexter facility. In finding the testimony unbelievable, I do not think that I am simply disputing Adair's business judgment. Although, it is true, I consider certain aspects of the explanation highly improbable, I think such analysis is proper when the business "explanation" is as unlikely as this one is; and when it is accompanied by internal and external contradictions, failure to offer appropriate and available details, and similar insignia of unreliability, the weakness of the proffered explanation may be considered affirmative proof of the General Counsel's case. *Wright Line*, 251 NLRB 1083, 1088 fn. 12 (1980), "The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case. See, e.g., *Shattuck Denn Mining Company v. NLRB*, 362 F.2d 466 (9th Cir. 1966)." For the reasons thoroughly set out above (including the express statements by supervisors linking the decision to the Union), then, I conclude that Respondent's decision to emplace the new press at Dexter instead of Standish was motivated solely by antiunion considerations, in violation of Section 8(a)(3).[46]

The complaint and the evidence presented appear to allege two different theories of an 8(a)(3) violation regarding Larry Foster and Cynthia Johnson. Paragraph 13 refers to the refusal to take delivery of the Goss press at Standish, "*thereby causing* the layoff of employees Cynthia Johnson and Larry Foster," because of the union activities, and union election victory, of "its employees" (emphasis added). Paragraph 14 alleges that the 25 September layoff of the two was motivated by "their activities on behalf of, and support for the Charging Union, and because of" the union election triumph. I take paragraph 13 to allege that the Johnson and Foster layoffs were simply a proximate consequence of the unlawful action of diverting the press, and paragraph 14 to mean that even if the altered decision about the press was lawful, the selection of Johnson and Foster for layoff was independently discriminatory.

Regarding the second contention, it is difficult to say that Foster and Johnson were selected because of their union activities.

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[46] The Respondent errs in stating that, to sustain an 8(a)(3) violation, the General Counsel "must meet the *Wright Line* test and show that the action would not have taken place but for the union activity." That, of course, is not the test laid down by *Wright Line*; as the Board recently stated in *Cullum Mechanical Construction*, 281 NLRB 453 fn. 2 (1986), "We . . . do not adopt the judge's statement that the General Counsel had the burden of proving that Wokasch would not have been discharged absent his protected activity. See *Wright Line*, 251 NLRB 1083 (1980)." The test, as the Board further states in *Cullum*, is whether the General Counsel has established that "protected activity played a part" in the adverse action taken; in a so-called mixed motive case, the respondent may then attempt to show that the action would have been taken regardless of the protected activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983). Although I would, however, not consider the present case to be one involving mixed motives, see *Transportation Management*, supra at 399 fn. 4, in which event it would seem sufficient to prove that the protected activity played a part in the action taken, the Board holds that a *Wright Line* analysis is required in all cases involving an 8(a)(3) and (1) motivation, even where there is a finding of pretext, which "necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied on, thereby leaving intact the inference of wrongful motive established by the General Counsel" (*Bridgeway Oldsmobile*, 281 NLRB 1245 fn. 2 (1986), quoting *Limestone Apparel Corp.*, 255 NLRB 722 (1981).) It should suffice to say that I conclude that the General Counsel has established here that the union activity was a motivating factor in redirecting the press and that Respondent has not proved that, in the absence of such activity, it would have located the press at Dexter in any event.

Johnson was one of the committee of six who spoke to Adair in June about improved benefits. Employee Joseph Krozeleski testified that he once saw Johnson, Foster, and Naiman informing employees in the bindery about a union meeting that night, which prompted him to tell Adair "these guys are organizing a union." Whether, as the General Counsel assumes on brief, Krozeleski named the three is not clear; asked what Adair replied, Krozeleski said cryptically, "Not much really, because it was pretty much kept secret." It seems probable, however, especially in this small plant, that Adair came to know who the union activists were.

Johnson and former employee Judy Schumacher both testified that, probably in June, in speaking to Adair about the new press, they expressed a concern that it might be equipped with a "stacker" like the existing Goss, a device which could automatically perform their normal job of press "jogger," and which might result in their layoff. According to Johnson, Adair "told me and Judy not to worry, we would not be getting laid off because we would be put in the bindery department if [the new press] had a stacker." Adair was not asked about this statement, and he very well may have made it, but it would seem extraordinary if he meant it, given the history disclosed by this record.[47]

Although Respondent maintained no rigid classification system, the record shows that workers were broadly classified in the minds of both management and labor. Johnson was, clearly, considered "press help" (the classification given by Lachcik to himself at hearing); Carol Barber, testifying for the General Counsel, said that Johnson worked on the press "most of the time." However, it had not been uncommon in the past that when work slowed down on the Color King press, to which she was principally assigned, Johnson, who began her career in the bindery, would be detailed to the bindery to take up slack there, and sometimes she might find herself doing both kinds of work in the same day.

In the summer of 1985, as work on the Color King came to an end (Johnson was laid off for a week in June, together with all the bindery workers), she was assigned to the bindery at the time she was laid off on 25 September. She and Foster were called out of the punchout line by Adair to be told that they were being laid off; they gave different versions of the conversation.

Johnson recounted that she had told Adair that the choice was unfair "because I was working in the back [i.e., the bindery]," and Adair had replied, "Well, you are considered press and things are really slow so I am going to have to lay you and Larry off." Foster recalled only that Adair called the two of them out of line and said they were being laid off "for lack of work. That is all he said."

It is difficult to understand why Johnson would think her selection was unfair. Surely she understood that her primary job was working on the presses, and she also knew that, as she and Foster both freely testified, there had been other occasions in the past on which they had been laid off before other employees, primarily bindery workers, over whom they held companywide seniority.[48] Moreover, the likelihood of her imminent layoff in any event from the bindery work is made evident by the fact that also in September, four other bindery workers were laid off shortly after Johnson. Although Adair testified in answer to a question on cross that his "assessment of an employee's merit [is] the determining factor" in deciding who to lay off, there is no reason to believe that Johnson's work in the bindery was appreciably more valuable than that of those who normally worked there.

As for Foster, his union activity was more notorious—he had been a member of the original six-person committee, he was one of the two or three employees who had worn union badges before the election, he served as the union observer at the election (and, as discussed above, his name may have been mentioned to Adair by Krozeleski, as one of a group which was "organizing a union"). But with respect to his selection for layoff on 25 September, there is, as in Johnson's case, no substantial basis for inferring that the choice was related to such activity.

Foster testified that he worked in "the press department." Although the record is rather uncertain on the point, it is clear that, since around early July, very little or no work had been performed on the Color King press on which he had been employed. Thereafter, Foster was doing odd jobs (helping on the Goss press "if someone did not come in," a "little maintenance" around the plant, and "help[ing] out in shipping.") Taking as true the testimony of, inter alia, Foster, Johnson, and, ultimately, Barber, that Company seniority played no role in layoff selection (Foster, first employed in 1980, had been laid off for 3 months between November 1980 and February 1981; for 5 months in 1982, called back for 2 months, and then laid off for another month; laid off for 4 months in 1983, and then for another month in that year after returning for 19 days; and laid off for 2 months in 1984), there is no cogent proof that his selection in 1985 was unjustly motivated. Given that the only press crews working were the ones that normally operated the Goss (which did not include Foster);[49] the Sep-

[47] I might add that there were passages in the testimony of these seemingly dependable employees that left me wondering about their credibility.

[48] In her 7 years with Respondent as of 1985, Johnson had been laid off at least 13 times for periods lengthy enough to collect unemployment benefits.

[49] Foster testified that when he and Johnson were laid off in September, the other two employees who had previously worked on the now unused Color King "went onto nights." No effort was subsequently made at the hearing to develop this statement. As far as I can tell, Foster was simply wrong on this score.

Elsewhere in the record, Foster identified the three people who worked with him on the Color King until it was taken down as "Greg Walker, Cynthia Johnson and Judy Schumacher," and sometimes "Greg Kohn." Schumacher testified that she was granted personal leave for 3 months on 23 August 1985 and did not attempt to return until November. Employee Brian Lachcik testified that among the crew working with him on the press night shift from January–November 1985 were "Gregg Kohn" and "Greg Walker." Employee McMann, asked who were the other empoyees on the night shift "during the summer of 1985," also named "Greg Kohn" and "Craig [sic] Walker" (Lachcik also named a "Ralph Skelter" not mentioned by McMann). It seems fairly clear from this that Foster was wrong in saying that Walker (and/or Kohn and/or Schumacher) was transferred to the night shift when he and Johnson were laid off in late September. I do not believe, however, that Foster

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tember release of five employees from the bindery (the staff of which varies greatly with the amount of work being done); and the small size (two to three employees) of the remaining department, shipping-receiving-warehousing, it is difficult to conclude that Respondent was acting from antiunon motivation in determining that Foster should be the next to go.

This is not to say that a certain aura of suspicion does not emanate from the testimony and the basic facts of the case. Foster and Johnson were core members of the union effort, with Foster being particularly conspicuous. Because of the several record admissions that in the past Dennis Adair had often laid off regardless of plant seniority, it might have seemed the easiest course for him to say that the choice of Johnson and Foster was made on the basis of a lack of press work plus the kind of odd jobs that they had been doing. Instead, Adair became involved in an assertion that the other people in the pressroom "were more qualified at their positions . . . . [t]he other members of the crews were better at what they were doing than Larry could have been if he had replaced them." He also stated that Foster was "not qualified" to perform work in the bindery. He eventually came around, however, to saying that there was sort of a presumption of superiority; "But I would not lay somebody off that was normally in that position, because if they are normally in that position, they're there because they're good, and I'm not going to replace them." He then answered "Yes" to the leading question, "Is it fair to say you maintained the crews intact?" In explaining the choice of Johnson, Adair could not rely on her lack of qualification to perform bindery work, so he simply stated that she was not a "bindery worker," and therefore not entitled to consideration over those who were.

There is something dubious about all this. Nonetheless, given the unquestioned absence of any policy favoring companywide seniority, and the fact, so far as the record shows, that Foster and Johnson were the next likely candidates for layoff (with other bindery workers following a few days later), I cannot conclude that the selection of those two for layoff on 25 September should be attributed to their union association.

The other question apparently posed by the complaint—whether the diversion of the new press had the *consequence* of causing the layoff of Foster and Johnson (perhaps more appropriately a subject for discussion in the remedy section)—can be answered briefly. To reach a conclusion of consequential discrimination, the record would at least have to show that, had the new Goss been installed at Standish by 25 September 1985, there would have been additional work done on that press. There is no such evidence in the record, nor can it be assumed. If the record contained some description of what work was performed on the new Goss at Dexter during that period, there might be some basis for drawing such an inference, but the record is silent in that subject. Accordingly, I recommend that this allegation be dismissed.

D. *The Alleged 8(a)(5) Violations*

Regarding the allegations of unilateral action laid under Section 8(a)(5), however, the General Counsel has made her case. As previously noted, layoffs are a mandatory bargaining subject about which an employer cannot act unilaterally after a union has prevailed in a representation election. *Clements Wire & Mfg. Co.*, supra, 257 NLRB 1058, 1059 (1981). The failure to notify and consult with the Union about the layoffs of Foster and Johnson on 25 September, presenting the Union instead with a fait acompli, thereby violated Section 8(a)(5).[50]

CONCLUSIONS OF LAW

1. Respondent Adair Standish Corporation is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Flint Local 282-C, Graphic Communications International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By, in or about July 1985 and August 1986, telling employees that a new printing press would not be, might not be, or was not installed at the Standish, Michigan plant, because of the union activities of the employees; in September 1985, posting a notice inviting employees to revoke their union authorization cards while failing to notify employees that their decisions on the matter were voluntary and would not adversely affect their employment, and having a supervisor personally inform employees of this program; in October 1985, in an atmosphere of hostility to the union, conducting an interview of an employee in preparation for a hearing on objections to an election, and, while conducting such an interview, exceeding the legitimate scope of inquiry, an failing to inform the employee that her participation was voluntary and that she could refuse to answer any questions, Respondent violated Section 8(a)(1) of the Act.

4. By, in 1985 and 1986, refusing to install a new printing press at the Standish, Michigan plant as it had originally intended and instead installing the press in its Dexter, Michigan plant; and by, on or about 13 September 1985, announcing and implementing a new and more strict attendance policy, and, on 17 September, applying

deliberately intended to lie about a matter so easily subject to documentary and other refutation.

This matter is further confused by the testimony of Johnson that the employees who worked with her on the Color King had been Foster, Schumacher, and Bob Bonner (and Ray Moore "before he quit" in June 1985). There is no evidence, from the identification of the night crew given by various employees, that Bonner ever transferred to that shift. Foster testified that when he occasionally worked on the Goss during the summer of 1985. Bonner was the "roll stand attendant," and he further stated that, at the time of his testimony, Bonner was still working on that press, presumably on the day shift. Bonner was one of the group of six that met with Adair in June about increased benefits, and he also met with the union organizer thereafter.

[50] The fact that there existed an established past practice of making such layoffs would seem to be totally immaterial in the presence of a new bargaining agent, which, of course, has never had an opportunity to acquiesce in, or waive its rights to be consulted about, the Employer's right to take such action unilaterally. As the Board held in *Clements Wire* and again in *San Antonio Portland Cement Co.*, 277 NLRB 309 (1985), quoting *Elito Corp.*, 263 NLRB No. 106 (Aug. 31, 1982) (not reported in Board volumes), "while an employer may properly decide that an economic layoff is required, once such a decision is made, the employer must nevertheless notify the union and, upon request, bargain with it concerning the layoff."

the policy to employees Cummings and Lachcik, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By, in September 1985, unilaterally changing its attendance policy and laying off employees, Respondent violated Section 8(a)(5) and (1) of the Act.

6. In all other respects alleged in the complaint, the General Counsel has failed to establish that Respondent violated the Act.

THE REMEDY

Certain remedial relief is called for by the conclusions reached above, in addition to the customary cease-and-desist order and the posting of notices.

First, I shall recommend that Respondent be required to transfer the new Goss HV press from the Dexter plant to the Standish plant, as had been originally contemplated prior to the advent of the Union. That will help to restore the intended status quo. If, of course, future bona fide business considerations warrant removal or sale of the press, nothing in the law would preclude such action.

Second, Larry Foster and Cynthia Johnson must be made whole for their layoffs, which were accomplished without the notice and consultation required by law. *Clements Wire*, supra at 1059, and cases cited at fn. 8. It is obvious from the record that layoffs and recalls are frequent at this plant. Foster testified that he was recalled to work "sometime in May" of 1986; he was employed at the plant on 6 August, the day he testified. It seems fair to assume that reinstatement occurred on the day in May on which he was recalled, but because there may be some unknown problem about his reinstatement I shall include in the remedy a provision for his reinstatement.

Johnson testified that she was recalled around Christmas 1985, worked 3 days,[51] was laid off again, and was called back for 1 day in January. I sustained an objection to further questioning whether she "refuse[d] reinstatement" when she was called back to work in mid-April, on the theory that recalls made subsequent to the filing of a charge of discrimination are not relevant to the issue of discriminatory motivation. In Johnson's case, I do not believe that a termination date can be determined here for her backpay period; that will have to be resolved at the compliance stage.

Clements, supra, had the employer bargain, on request, with the union concerning layoffs that had occurred during a 20-month period; because we deal here with ony two employees, one of whom has evidently been reinstated, I see no need for such a specific order. I have considered the General Counsel's recommendation that the backpay remedy apply to "any employees in the unit who have been unilaterally laid off since September 13, 1985." But the record establishes with any clarity only the unilateral layoff of Foster and Johnson. Unlike the new disciplinary policy, the evidence does not show that the Respondent adopted a "policy" of unilateral layoffs which was presumably applied thereafter.

The Board has adopted some slightly varying remedies recently in these unilateral layoff cases, perhaps based on its knowledge about whether employees have or have not probably returned to work. Compare *San Antonio Portland*, supra, with *Flex Products*, 278 NLRB 417 (1986). For want of a better reason for choosing, I shall follow the formula in *Flex*, the more recent case. Both Foster and Johnson should be made whole for their net loss of earnings from 25 September 1985 to the date of Respondent's offer of reinstatement to them, with interest, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[52] The same monetary remedy should apply to Edward Lachcik regarding his 2-day suspension.

The disciplinary notices issued to Cummings and Lachcik on 17 September 1985 must be rescinded and excised from their records. In this instance, the adoption of the new tardiness policy was an affirmative act, and it is fair to presume that it has been applied according to its terms. As the Board held in *Van Dorn Plastic Machinery Co.*, 265 NLRB 864 (1982), the rule must be rescinded and the status quo restored by removing from their records and making whole all employees "adversely affected" by the "unilateral change in [the employer's] attendance/tardiness program including, as appropriate, reinstatement to their jobs and backpay" in the manner set forth above. The policy threatening "immediate" discipline for every instance of tardiness, and the one offering to assist in revoking authorization cards, must also be rescinded and notice thereof removed from the walls.

The General Counsel seeks the inclusion of a visitatorial clause to assist in assessing compliance with this Order. The General Counsel has, as a matter of rote, included this request in every brief filed with administrative law judges over the past several months, and has also made the clause subsequently an issue before the Board. Although not flatly rejecting the possibility of adopting such a clause, the Board has not, to my knowledge, ever done so; its reaction appears to have invariably been that the clause is "not appropriate" in the circumstances of the case before it. E.g., *E. B. Manning & Son*, 281 NLRB 1124 fn. 1 (1986); *Princeton Holiday Inn*, 282 NLRB 30 fn. 2 (1986) (finding clause "unnecessary" even in absence of exceptions to it). Although the clause seems benign enough and probably useful, I cannot distinguish the present case from others in which the Board has determined it to be inappropriate. I shall therefore not recommend approval of the General Counsel's request.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[53]

ORDER

The Respondent, Adair Standish Corporation, Standish, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[51] A period about which she exhibited some uncertainty on cross-examination.

[52] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[53] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Refusing to bargain with Flint Local 282-C, Graphic Communications International Union, AFL–CIO (the Union), or any other labor organization, by, after a union has prevailed in a representaton election, making material changes in the existing terms and conditions of employment of its employees without consulting the union.

(b) Discriminating against employees for supporting the Union or any other labor organization by transferring equipment in order to diminish the employment oportunities available to such employees and by promulgating more stringent attendance rules.

(c) Telling employees that equipment would not be or might not be or was not installed at their plant because of their union activities.

(d) Informing employees about, and assisting them in the exercise of, their right to revoke authorization cards, without also notifying employees of their right not to do so and of the fact that employees who fail to take advantage of the offer would not be adversely affected; and having supervisors personally inform individual employees of the right to revoke their cards.

(e) Conducting interviews with employees in preparation for a hearing (i) without informing them that their participation is purely voluntary and that they can refuse to answer any questions, or (ii) in an atmosphere of hostility to the union involved, or (iii) while conducting such interviews, exceeding the legitimate scope of inquiry for such interviews so as to unnecessarily and coercively intrude into the Section 7 activities of employees.

(f) In any other manner coercing, restraining, or interfering with the Section 7 rights of employees.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Promptly install in its Standish, Michigan plant the Goss HV press which was installed in the Dexter, Michigan plant in May 1986.

(b) If it has not already done so, reinstate Cynthia Johnson and Larry Foster to their former jobs or, if those jobs no longer exist, to substantially equivalent ones, without prejudice to their rights and privileges, and make them whole in the manner set forth in the remedy section of this decision. In addition, make whole any employees, including Edward Lachcik, who have suffered losses, including suspension and discharge, stemming from application of the new policy relating to tardiness adopted on or about 13 September 1985.

(c) Remove from its files any reference to the layoffs of Larry Foster and Cynthia Johnson on 25 September 1985, and any references to the disciplinary notices issued to Tim Cummings and Edward Lachcik on 17 September 1985 and to other disciplinary action involving other employees since on or about 13 September 1985 issued pursuant to the new tardiness rule adopted at that time, and notify them all in writing that such removal has been made, and that such adverse actions will not be used as a basis for future personnel actions against them; and rescind the 13 September 1985 tardiness disciplinary policy and the offer of assistance for the revocation of union authorization cards also announced on or about 13 September 1985, and remove the posted notices of such policies.

(d) Notify and consult with the Union, on request, before making changes in any mandatory subject of bargaining.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its place of business in Standish, Michigan, copies of the attached notice marked "Appendix."[54] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[54] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Globe Metallurgical, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Case 9–CA–24163

July 29, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On December 29, 1987, Administrative Law Judge Thomas A. Ricci issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, supporting brief, and answering brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, we are satisfied that the Charging Party's contention that the judge was biased is without merit. Thus, although the judge, albeit improvidently, stated at sec. III,5, par. 2 of his decision, that "Silvus' purpose was to lie at the hearing" and that "counsel for the [Charging Party] refused to answer the question on the record," and further stated at sec. III, par. 7, that the Region "concluded that Weaver was not telling the truth in his signed charge," none of these isolated statements nor any other record evidence demonstrates judicial bias or the failure of any party to receive a full and fair hearing.

[2] The Charging Party excepts to the judge's finding in sec. III, 9, par. 3, that its representative Rauch "had his daughter write up [the October 7] letter, and that she relied upon notes he had written." The Charging Party claims that its district director, Weaver, rather than Rauch, authored this employee letter. Although we agree with the Charging Party that Weaver testified that he wrote the letter, and that Rauch disclaimed authorship, we find sufficient evidence to support the judge's finding that Rauch was actually responsible for the letter insofar as it stated that the Respondent intended to implement its final offer. Thus, Weaver testified that his negotiating notes reflect important discussions between the parties, and that he considered the Respondent's announced intent to implement its final offer important. However, Weaver's October 7 bargaining notes make no mention of this statement. Conversely, Rauch's negotiating notes for the final bargaining session state that the Respondent intended to put its final offer into effect. As Weaver instructed Rauch to prepare the employee letter from Weaver's notes, Rauch prepared the letter, and Rauch's notes were affixed to Weaver's affidavit and the employee letter at the hearing, the evidence is sufficient to conclude that Rauch inserted this statement into the employee letter. In any event, a contrary conclusion would not affect our determination of the merits of the complaint.

In sec. III, par. 8, the judge found that the detailed record testimony of contract negotiations was irrelevant to these proceedings absent any allegation that the Respondent bargained in bad faith or refused to bargain with the Union. We disagree. The substance of the bargaining sessions is relevant to the issue of bargaining impasse, a complaint allegation in this case. However, because we agree with the judge that the Respondent did not threaten to implement its final offer and, further, that the strike was economic, we need not reach the impasse issue.

We expressly disavow the judge's statement in sec. III, par. 7, that "In other words, [the Region] concluded that Weaver was not telling the truth in his signed charge." Neither we nor the judge knows the precise basis for the Region's dismissal of Weaver's 8(a)(5) charge that the Respondent unlawfully implemented its final offer.

Finally, we correct the following errors of the judge: (1) in sec. III, par. 3, the statement "Paul Gorman . . . recalled that Eugene Weaver . . . asked him, twice . . . whether the Company intended to implement its last offer of settlement," is corrected to reflect Gorman's testimony that Weaver once asked him this question; (2) in sec. III, par. 4, the statement "But the Company at the same time also told the Union agents that it was willing to continue the collective bargaining process," is corrected to reflect that the Union told the Respondent that it was willing to continue negotiations if the contract were extended; (3) in sec. III, 5, par. 2, the statement "counsel for the Respondent" is corrected to state "counsel for the Charging Party." These corrections do not affect the outcome of this case.

David Ness, Esq., for the General Counsel.
H. Victor Hansen, Esq. and *Lawrence S. McGoldrick, Esq. (Fisher & Phillips)*, of Atlanta, Georgia, for the Respondent.
Steward Jaffy, Esq., of Columbus, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge. A hearing in this proceeding was held at Marietta, Ohio, on 30 September and 1 October 1987, on complaint of the General Counsel against Globe Metallurgical, Inc. (Respondent). The complaint issued on 9 June 1987, based on a charge filed on 1 April 1987 by United Steelworkers of America, AFL–CIO–CLC (the Charging Party). The issue presented is whether the Respondent violated Section 8(a)(5) of the Act. Briefs were filed by all parties.

On the entire record and from my observation of the witnesses, I make the following[1]

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Globe Metallurgical, Inc., a Delaware corporation, is engaged in the production and sale of ferroalloys at Beverly, Ohio. During the calendar year preceding 31 December 1986, in the course of its business operations, it sold and shipped from its Beverly, Ohio facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Ohio. I find that the Respondent is an employer within the meaning of the Act.

[1] Counsel for the Charging Party filed a posthearing motion to reopen the record for the purpose of offering into evidence two letters exchanged between the Respondent and the Union in March 1987. The motion is denied.

II. THE LABOR ORGANIZATION INVOLVED

I find that United Steelworkers of America, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

This entire case turns on a very simple, very limited, and very plain question of fact. Did a spokesman for the Respondent, at the end of a 13-day long, fruitless collective-bargaining session, utter the word "yep," when asked by the principal spokesman for the Union whether the Respondent intended to implement its last offer of contract renewal? The effective contract expired several hours after that word is alleged to have been uttered, and the Union called a strike of the 150 to 200 employees in the bargaining unit at the very moment the contract expired—at exactly 12:01 a.m. on 8 October 1986. For some months thereafter the Respondent continued its reduced operations with its old salaried and managerial employees doing the reduced work of the striking employees. And then, 7 or 8 months later, in 1987, it started to hire replacements for the strikers, about 50 all told. Throughout that entire period the Respondent did not change any of the conditions of employment of any of its employees in the bargaining unit as set out in the contract that had expired in October 1986. Indeed, in the summer of 1987 it asked the Union to send some of the strikers back to work. The Union refused to permit that, and the strike went on.

The sole remedy asked by the General Counsel, if the complaint prevails, is a finding now—that is, at the time of the hearing—exactly 1 year after the strike started, that it was an unfair labor practice strike as distinguished from an economic strike.

Paul Gorman, who led the Respondent's group throughout the long negotiation sessions through August, September, and October, recalled that Eugene Weaver, the district director of the United Steelworkers, asked him, twice, towards the end of the last bargaining session, on 7 October, whether the Company intended to implement its last offer of settlement. Gorman said at the hearing that he was uncertain at that moment as to what the Company would do next, given his knowledge that the Union was on the verge of calling a strike. But he did directly deny telling Weaver that the Company intended to make any unilateral changes or implement a new contract.

The clearest reality shown on this record is that the reason the Union called the strike was because the contract expired and the Company refused to extend it further. Simply put, its decision was not to have its people work when there was not a binding contract in effect. At the last critical meeting on 7 October the Union repeated its request that the Company agree to extend the contract on a day-to-day basis; the Company refused. But the Company at the same time also told the union agents that it was willing to continue the collective-bargaining process. A better name for this kind of strike is a no-contract no-work strike. In plain words, an economic strike.

As it happens, I do not credit Weaver against Gorman. In the light of all the testimony I credit Gorman's denial of having said he would implement his last offer. But even were I to find that an agent of the Respondent made such a statement on 7 October, I would still have to find that that statement was not the cause of the strike that immediately followed. If the reason for the strike was simply that, why did the Union refuse to send its people back when the Company asked for them several months later, and when the Union well knew nothing at all had changed in the conditions of employment of any of the employees in the bargaining unit? Why did it wait 6 months before filing its charge with the Board, a charge that does not even allege what now constitutes the heart of the complaint?

In his testimony at the hearing Weaver said a reason for not permitting his people to go back to work in the summer of 1987 was because he did not know what the Company was paying the production and maintenance employees, or what it would pay the returning strikers. During that same period Weaver was again negotiating with the Respondent, as the Company had invited it to do in May 1987. In fact there were at least half a dozen such meetings between June and the time of the hearing in October. For a union agent so engaged to say he did not know what an employer was paying its people greatly impairs the witness' credibility.

His assertion as a witness conforms with the charge in this case, which Weaver personally filed, where he wrote that the Company had unilaterally implemented its demands for concessions on 8 October 1986. The Regional Office investigated that charge, of course, and found there was no merit in it, that the Company had not unilaterally changed any of the conditions of employment. In other words, that office concluded Weaver was not telling the truth in his signed charge. That is why the complaint is limited merely to the word "yep." Weaver's notes of the critical meeting of 7 October say nothing about implementation. When Weaver contradicted Gorman regarding the use of the word "yep," I do not credit Weaver.

More than half of the 2-day hearing was taken up with Weaver's detailed recital of all the minutiae that were discussed during the 13 bargaining sessions that took place from August to October. He kept repeating proposals and counterproposals, arguments and counterarguments, without end. The General Counsel placed into evidence Weaver's notes made concurrently with the talking that went on; they total over 250 sheets of lengthy, finely written words. In turn the Respondent offered as exhibits the simultaneous notes made by one of the management representatives who attended all the meetings for that very purpose. They total over 220 pages. In addition there are copies of many written proposals offered back and forth throughout the period. There is no allegation of bad-faith bargaining by the Respondent. There is no allegation that the strike was caused by any refusal to bargain. Because of the objective evidence showing beyond a doubt that this was an economic strike and not an unfair labor practice strike, I see no purpose in repeating in this decision all the irrele-

vant data about what the parties said to one another throughout all those bargaining sessions.

The following facts, clear on the record, suffice to dispose of the entire proceeding. Chronologically:

1. On 29 September 1986 the Union asked the Company to agree to extend the contract—due then to expire at 12:01 on 1 October—on a day-to-day basis. The Company refused. As an inducement to prevail on the Company to agree to that arrangement, the Union said it would—if the contract became binding only from day to day—not strike without giving the Company 2 days' notice in advance. In that very offer is shown the Union's state of mind to strike the moment the contract expired.[2] The parties did agree that day to extend the contract for 1 week, to 12:01 a.m., 8 October.

2. The parties met and discussed the issues again on 30 September and 2 October. At the 2 October meeting Weaver told the company agents he could not meet with them the next day because he had to meet with the employees. The following is his testimony regarding what he told the Company that day.

> We had not had an opportunity to meet with the membership and we were telling the Company that on the 3rd we needed to meet with the membership the following day. . . . To get authorization from the membership giving the committee the authority to make a decision in future meetings whether as to a right to strike or a right to extend this contract, whichever was necessary.

I can only read this statement of the Union's district director as an admission that the Union's position was that very day that there would either be a strike or an extension of the contract. It was a paraphrase of the old cliche: No contract, no work.

3. The next meeting took place on 6 October. This time Weaver had a letter with him when he arrived and handed it to Gorman. It again requested an extension of the contract on a day-to-day basis. It reads in part:

> If the Company accepts this proposal and the Union should later decide to strike, the Union will provide the Company with 48 hours notice of its intent to strike. We propose to use the 48-hour period for the purpose of meeting with Company representatives to assure that arrangements are in place for an orderly and safe shutdown of the Company's facilities.

The Company again refused. This was the Union, on 6 October, again making clear that absent an extension of the old contract a strike was already decided on. But Weaver's story is that the word "yep" did not come from Gorman until the next day. If strike action had already been decided on, how could the word "yep"—even assuming it was uttered the next day—have had anything to do with this case?

4. At the stroke of midnight on 7 October the employees walked off the job. Knowing this would happen the managers had the employees turn in their safety equipment before leaving. The very timing of the strike, of course, is the most convincing proof that the two facts were precisely related—contract expiration and strike. If the word "yep," allegedly uttered a few hours earlier, had really disturbed the Union into thinking about strike action, surely it would have waited a day or two to see if the Respondent really meant to change the employees' pay.

5. The Union's position in this entire picture is badly damaged by the testimony of David Silvus, a union committeeman who attended all the bargaining sessions. The General Counsel called him only to testify that he heard Gorman answer "yep" to Weaver's insistent questioning about whether the Company intended to implement its last offer. Questioning was then taken over by counsel for the Union. The lawyer led Silvus into agreeing with him that the employees did not strike that night, but that they were ordered out of the plant by management, in short, locked out against their will:

> Q. And were those people permitted to work who were scheduled to work on the midnight shift?
>
> A. No. They weren't.

The complaint says the employees engaged in a strike that night. Throughout Weaver's testimony he kept talking about the Union's strike action. Asked was the purpose of his questioning to prove the Union did not strike and that the men were sent home against their will, counsel for the Respondent refused to answer the question on the record.[3] Silvus' purpose was to lie at the hearing, and his testimony about the word "yep" makes even Weaver's testimony less credible.

6. The day after the strike started Carl McMannis, the Union's president, was interviewed by a reporter. He was quoted as follows in the local press of 9 October. The parties stipulated that he was correctly quoted.

> But McMannis said the Company's 11:30 p.m. shift did report to work. The workers left at midnight because they had no contract under which to continue working.
>
> The Company's final offer came at 10:15 a.m. Tuesday. It included a total reduction in wages and benefits of about $4.90 per hour as well as elimination of some jobs to save another $1.43 cents per hour. Total cost savings to the Company would be $6.33 cents per hour.

[2] This finding, which I make, is supported by a statement in the General Counsel's posthearing brief where he says: "It is clear that the Union's strike was prompted by Respondent's refusal to further extend the 1983–1986 contract."

[3] Obviously, the Charging Party's lawyer is in disagreement with his client, the district director of the United Steelworkers. In his brief he repeats—in conflict with his client's testimony as well as with the General Counsel's complaint—that on the night of October 7, 1986, the Respondent "sent them [the employees] home and locked the gates." His position is not enhanced by the fact—also asserted in his brief—that somebody in the Ohio Bureau of Employment Services expressed the opinion that when a work stoppage is a result of an employer's "refusal to extend the expired agreement," against a union's desire, the result is a lockout. The decision in this case will rest, as it must, on the credible testimony of the witnesses.

> The Union's negotiating team didn't accept that offer, McMannis said. When the Company refused to grant another extension of the old contract so that negotiations could continue, union workers had no choice but to go home as of midnight Tuesday.

If this statement does not call for the dismissal of the complaint in this case, I do not speak English.

7. Picketing went on for a year—from October 1986 to October 1987, when the hearing in this case took place. Not once did any picket sign mention unfair labor practice as having provoked the strike.

8. In April 1987 the Company asked the Union to come in and attempt to reach an agreement so that the entire problem could be resolved. A number of meetings did take place; the parties talked six or seven times, but no agreement was reached. At the start of these bargaining sessions the Company asked the Union to send some of the strikers back, for there were some jobs to be filled. The Union refused to do that. On 29 April 1987, Union President McMannis was again correctly quoted in the local newspaper: "It would be my wish that they wouldn't go back because we have no contract," McMannis said. Again, the union president calls for dismissal of the complaint.

9. Finally, on 30 May 1987 the Union held an outdoor mass rally of about 1000 members. Weaver was the master of ceremonies and the principal speaker. His total speech to the members was recorded and placed in evidence. After detailing the Company's demands for economic concessions, and after explaining the reasons for the Union's refusal to agree to lesser pay or to any agreement for reductions, one of the statements he made to all those people was that the strikers were "just simply conducting an economic strike."

Weaver tried to talk away this clearest admission that alone defeats the complaint by saying, as a witness, that it was a poor choice of words, that although he said the strike was economic he did not really believe it, and that, anyway, all those people present at the rally did not know the difference between the two concepts. His attempted explanation only serves all the more to discredit him in this case.

All this talk by Weaver also helps one to understand a letter the Union wrote to some of the strikers on the day after the strike started back in October 1986. In that letter they were told, among other things, that the Company "intended to implement their final offer at midnight October 7." The letter was offered in support of the testimony of Paul Rauch, a union representative, as further proof that Gorman had used the word "yep." Rauch testified he had his daughter write that letter, and that she relied on notes he had written about the last meeting after it had ended.

The note Rauch made to himself—also received in evidence—was prepared long after the meeting had ended, indeed after the strike had started at midnight. The note starts with the statement "locked out midnight October 7." This means he wrote the note on October 8, whereas the meeting he says he quotes from had ended at 10:30 a.m. the day before. Significantly, however, the notes written during the bargaining session by the union representative charged with that responsibility contain no reference to implementation or intent to implement anything. This means, of course, that what Rauch wrote in his note, the day after the meeting—that Gorman had said he would implement the contract, as well as the letter he had written to the strikers, represent only a figment of his imagination. The next phrase in his purported notes of the meeting reads: "Company made final offer and intended to put it in effect." To me, this writing was no more than the union officer's fabrication, as an afterthought, in support of the charge later filed accusing the Respondent of having put its last offer in effect. If there is one thing a district director of this Union would put down in his notes of a bargaining session, it is the statement by a company of an intent to commit an unfair labor practice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

It is recommended that the complaint be dismissed.

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

L. W. Le Fort Company, Inc. *and* International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Lodge No. 92, AFL–CIO. Case 21–CA–23984

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On September 15, 1986, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by the statements of Mike Grant, one of the Respondent's owners, to employee Joseph Ennes in February 1985 and to employee James Perez in May 1985 that there was not going to be a union, and his threat to employee Preston Williams in June 1985, overheard by Perez, that he would fire Williams once the Union was out of the way. Further, we conclude, as did the judge, that the Respondent violated Section 8(a)(5) of the Act, but we base the violation only on the Respondent's unilateral changes in health and welfare benefits.

In the spring of 1985, the Respondent and the Union began negotiations for a collective-bargaining agreement to succeed the one scheduled to expire May 31, 1985.[2] After seven bargaining sessions, the Respondent submitted its final proposal dated May 30. The employees rejected the proposal on June 1, but did not vote to strike. As of June 1 the Respondent stopped making the payments to the pension and health and welfare funds that the expiring contract required. The parties met again on June 3 and 7, but did not resolve their differences. On June 11 the Respondent made another final offer that contained some provisions more restrictive than those it had proposed earlier.

From the evidence presented concerning negotiations, we conclude that the parties engaged in hard bargaining, remained far apart on key issues, and reached impasse as of June 1 when the employees rejected the Respondent's May 30 offer. The General Counsel does not contend, nor does the record evidence indicate, that the Respondent's conduct during negotiations through May 30 constituted bad-faith bargaining per se. The complaint alleges only bad-faith bargaining on or after June 11 and unlawful changes in pension and health and welfare benefits on or after June 1. Under these circumstances, we do not find, as the judge did, that the June 1 impasse was tainted by the Respondent's threats to employees or by any prior bad-faith bargaining. Rather, we find that the June 1 impasse was bona fide and, thereafter, the Respondent was free to implement its final offer of May 30.[3] As that offer did not provide for pensions, we find that the Respondent could lawfully terminate pension contributions after impasse, and did not violate Section 8(a)(5) when it discontinued payments to the pension fund designated by the contract. The May 30 proposal, however, did include a health and welfare provision that stated that the Respondent agreed "to remain in the Southern California Steel Fabricators and Boilermakers Trust." Accordingly, we find that the Respondent violated Section 8(a)(5) when, contrary to its final offer, it discontinued contributions to the health and welfare fund designated by the contract and established a different health and welfare plan as a condition of employment.[4]

Based on our review of the course and conduct of negotiations we do not agree with the judge that the Respondent's proposals of June 11 warrant the conclusion that the Respondent was engaged in surface bargaining.[5] On the issues of union security, checkoff, and pension benefits, the key issues that had separated the parties from the beginning of negotiations,[6] the Respondent's position, set out in the June 11 proposals, remained the same. Likewise, its position on a hiring hall, contrary to the judge's finding, was the same as its May 30 position, reserving for the Respondent the right to hire new employees from any source. The holiday ben-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates are in 1985 unless otherwise noted.

[3] See *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[4] See *Wayne's Dairy*, 223 NLRB 260, 265 (1976). See also *Stone Boat Yard*, 264 NLRB 981 (1982), enfd. 715 F.2d 441 (9th Cir. 1983).

[5] See *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984).

[6] The parties stipulated that throughout the contract negotiations, the positions of the parties had been fairly consistent on the union security, checkoff, and pension issues, "with the employer consistently taking the position that union security and checkoff and pension not be part of the successor collective bargaining agreement, or not be included, and the union consistently taking the position that those three items be included in the collective bargaining agreement."

efits and wage classification rates proposed were also unchanged.

On some issues the June 11 proposals were more restrictive than the May 30 proposals. The June 11 proposals lengthened the probationary period for new employees and the employment period required for employees to earn prorated vacation benefits. They shortened the contract term from 2 years to 1 year, with the result that a limited second-year wage adjustment was deleted. They amended the grievance procedure and the strike and lockout provisions to omit arbitration and permit the Respondent to implement its final grievance decision and the Union to apply economic sanctions in response. They replaced the health and welfare plan of the expired contract with a different plan. It is significant, however, that the Respondent advanced its June 11 proposals after the parties had reached a legitimate impasse and its economic position was strengthened by the employees' failure to strike.[7] In these circumstances we do not think the June 11 proposals demonstrate that the Respondent had no intent to compose the differences it had with the Union and sought to frustrate bargaining.

In so concluding, we do not find that the Respondent's antiunion statements to employees and its unilateral changes in the health and welfare plan warrant a different result with respect to the Respondent's June 11 proposals. Thus, we note that two of the three antiunion statements were made prior to the parties' bargaining through May 30 and we have found, and the General Counsel has not alleged otherwise, that the Respondent did not engage in bad-faith bargaining through that date, notwithstanding the antiunion statements.[8] Further, although the Respondent's unilateral changes in the health and welfare plan violated Section 8(a)(5) and such conduct is a factor to be considered in determining whether overall bad-faith bargaining occurred, it does not necessarily follow from such conduct that the Respondent's June 11 proposals demonstrated an intent to avoid reaching an agreement with the Union. *Roman Iron Works*, 275 NLRB 449, 453 (1985). In this regard, we emphasize, as noted above, that many of the June 11 proposals were consistent with the May 30 proposals and that, although certain other of the June 11 proposals were more restrictive than the May 30 proposals, they were advanced after the parties had reached a legitimate impasse and the Respondent's economic position had been strengthened by the employees' failure to strike. Accordingly, considering the Respondent's overall conduct here under *Atlanta Hilton*, supra, we conclude that the General Counsel has not established by a preponderance of the evidence that the Respondent's conduct in making more restrictive proposals on June 11 constituted surface bargaining rather than good-faith, albeit hard, bargaining.[9]

AMENDED CONCLUSIONS OF LAW

Substitute the following paragraphs for the judge's Conclusions of Law 5 and 6.

"5. By discontinuing the health and welfare payments required by the bargaining contract that expired May 31, 1985, and replacing the contract health and welfare plan with a different plan, the Respondent violated Section 8(a)(5) and (1) of the Act.

"6. By threatening employees that there was not going to be a union and that the Respondent would fire an employee once the Union was out of the way, the Respondent violated Section 8(a)(1) of the Act."

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we will order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We have found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to contribute to the health and welfare fund designated

[7] See *Barry-Wehmiller Co.*, 271 NLRB 471 (1984); *Hyatt Regency New Orleans*, 281 NLRB 279 (1986).

[8] The judge, in finding that the Respondent's June 11 proposals were so regressive as to warrant an inference that the Respondent had no real intent to compose its differences with the Union, relied heavily on the Respondent's changed bargaining posture in 1985 compared to previous years. He concluded that the "real motivating factors" behind this change were an incident in February in which Grant expressed to the Union's shop steward his unhappiness with the Union's denial of pension benefits to Grant's father, a longtime union member, and Grant's confrontation in February or March with the Union's president concerning the treatment of the latter's son, who was employed by the Respondent. Even were we to consider these incidents as reflecting more than Grant's personal pique with the Union, such incidents would not be determinative of whether the June 11 proposals, in themselves, were so unreasonable as to constitute bad-faith bargaining. In any event, we note that these incidents occurred prior to the good-faith bargaining through May 30.

[9] Chairman Stephens would not extend the logic of *Barry-Wehmiller Co.*, 271 NLRB 471 (1984), i.e., finding no manifestation of bad faith in an employer's offering the union a less favorable contract after it has weathered a strike, to the situation here, where the Respondent has altered its offer for the worse after the Union has simply voted to reject it and has, for the moment at least, declined to strike. The changes—in particular, the withdrawal of the offer to arbitrate grievances—were not insignificant, and they were made a little more than a week after one of the Respondent's owners told an employee that there was going to be "no union in the shop." Even granting that the parties had been at impasse over issues other than those involved in the clauses in which the regressive changes were made, Chairman Stephens would find that an employer that, without any real explanation, makes its total contract offer even less favorable than the offer already rejected is not seeking in good faith to reach a collective-bargaining agreement with the union. Thus, Chairman Stephens would predicate the 8(a)(5) violation on the additional ground of regressive bargaining.

by the contract that expired May 31, 1985, and by establishing a different plan. Therefore, we shall order it to bargain, on the Union's request, about health and welfare benefits and to reimburse the fund designated by the contract for the amounts it failed to pay from June 1, 1985, when it discontinued payments, through November 30, 1985, the date the parties stipulated the period of liabiiity should end.[10] We shall also require the Respondent to make whole employees for any losses or expenses incurred by reason of its unlawful unilateral conduct, with interest as computed in *New Horizons for the Retarded*.[11]

ORDER

The National Labor Relations Board orders that the Respondent, L. W. Le Fort Company, Inc., Placentia, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that there will not be a union and that employees will be discharged when the Union is gone.

(b) Refusing to bargain collectively with International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Lodge No. 92, AFL–CIO, as the representative of its employees in the appropriate unit described below, by unilaterally discontinuing health and welfare contributions to the fund designated by the bargaining contract that expired May 31, 1985, or by unilaterally instituting a different health and welfare plan.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning health and welfare benefits and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees in the Respondent's plant located at 1136 Richfield Road, Placentia, California, performing work in manufacturing, fabricating, assembling, contract and repair shops, including the operation of all machines, mechanical devices and tools as may be required to properly perform and complete the work covered by the scope of prior collective bargaining agreements between the parties; excluding all employees who are presently represented through collective bargaining agreements with other unions affiliated with the AFL–CIO, office and clerical employees, technical and professional employees, guards and supervisory employees.

(b) Make whole unit employees by contributing to the health and welfare fund designated by the collective-bargaining contract that expired May 31, 1985, and by reimbursing employees for any losses or expenses incurred by reason of its unlawful conduct, in the manner set forth in the remedy section of the decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(d) Post at its facility in Placentia, California, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[10] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the health and welfare fund in order to satisfy our make-whole remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, when there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld or additional administrative costs, but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[11] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees that there will not be a union and that employees will be discharged when the Union is gone.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Lodge No. 92, AFL–CIO, as the representative of our employees in the appropriate unit described below, by unilaterally discontinuing health and welfare contributions to the fund designated by the bargaining contract that expired May 31, 1985, or by unilaterally instituting a different health and welfare plan.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of our employees in the following appropriate unit concerning health and welfare benefits, and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees in our plant located at 1136 Richfield Road, Placentia, California, performing work in manufacturing, fabricating, assembling, contract and repair shops, including the operation of all machines, mechanical devices and tools as may be required to properly perform and complete the work covered by the scope of prior collective bargaining agreements between the parties; excluding all employees who are presently represented through collective bargaining agreements with other unions affiliated with the AFL–CIO, office and clerical employees, technical and professional employees, guards and supervisory employees.

WE WILL make whole unit employees by contributing to the health and welfare fund provided for by the collective-bargaining contract that expired May 31, 1985, and by reimbursing employees for any losses or expenses incurred by reason of our unlawful conduct, in the manner required by the Board.

L. W. LE FORT COMPANY, INC.

Salvador Sanders, Esq., for the General Counsel.
A. Patrick Nagel, Esq., of Newport Beach, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This matter was heard by me in Los Angeles, California, and is based on a charge filed by International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local No. 92, AFL–CIO (the Union) on or about 13 June 1985 alleging that L. W. Le Fort Company, Inc. (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On or about 30 October 1985 the Regional Director for Region 21 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(5) and (1) of the Act.

The issues raised by the pleadings were tried before me on 11 and 12 December 1985. All parties appeared at the hearing through counsel and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, and my consideration of the briefs filed by each of the parties, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a California corporation engaged in the business of fabricating products from steel and their installation in industrial and commercial establishments, having its office and place of business in Placentia, California. During the normal course and conduct of its business operations, it purchases and receives goods, products, and materials valued in excess of $50,000 directly from customers located outside the State of California.

Based on these admitted facts, I find that Respondent is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The complaint, as amended, or argued by the General Counsel at the trial, advances two propositions as the essential issues in this case. The first is that in or about February[1] and in or about May or June, Respondent threatened employees by stating that there was not going to be a union at Respondent. The second is that since on or about 11 June Respondent has failed and refused to bargain collectively in good faith with the Union by, among other things, submitting regressive proposals in an attempt to avoid agreement and to create an impasse in bargaining; as a consequence, the General Counsel asserts that Respondent has therefore violated Section 8(a)(5) of the Act by its failure and refusal to make health and welfare pension payments on behalf of employees into the appropriate trust funds, as set forth in the recently expired collective-bargaining agreement.

Another matter, which was apparently inadvertently left open by the parties as an issue in this case, concerns the appropriate description of the unit involved. Neither party disputes that this controversy involves only the Respondent's shop employees, and that Respondent's field employees are covered by a separate collective-bargaining agreement. The complaint alleges a unit described as "all production and maintenance employees performing work in manufacturing, fabricating, assembling, contract and repair shops, excluding all employees who are represented through collective-bargaining agreements with other unions affiliated with the AFL–CIO, office clerical employees, technical and professional employees, guards and supervisors as defined in the Act." The complaint's allegation in this respect comports substantially with the wording in the recognition clause of the collective-bargaining agreement between the parties, which expired on 31 May. The only difference in substance between the old recognition clause and that which was plead in the complaint is that the complaint's allegation fails to mention the inclusion of workers operating "all machines, mechanical devices and tools as may be required to properly perform and complete the work covered by the Scope of the [A]greement." Respondent's proposal of 28 March sets forth a recognition clause consistent with that which had been contained in the previous collective-bargaining agreement, as did the Union's proposal of 1 May. No change was made in the proposals advanced by Respondent on 30 May, 11 June, or 27 November, or by the Union's proposal advanced on 21 October, or by any proposal advanced by any party during the course of the negotiations. However, Respondent's answer denies paragraph 6 of the complaint, that being the paragraph setting forth the description of the unit. During the telephonic pretrial conference and at the trial itself, no resolution was reached, though counsel for the parties did agree during the course of the trial to get together at a later point and stipulate to some modified language satisfactory to all parties. The problem here arises from their failure to have done so, and from the failure of either party to subsequently mention the matter or bring it up in their briefs. Although I have no hesitance, based on their representation at trial and in conversations with me, in labeling this omission by counsel for the parties as mere inadvertence, rather then the product of a conscious design to inject another issue into the case, I am not at liberty to infer what their stipulation would have been. For, as I stated at the trial, the allegation regarding the appropriate unit must be treated as though denied. Of course, the burden of establishing every element of a violation under the Act is on the General Counsel. *Western Tug & Barge Corp.*, 207 NLRB 163 fn. 1 (1973). And since a finding that bargaining has been sought for a unit appropriate for the purposes of collective bargaining is an essential element to a finding that Section 8(a)(5) of the Act has been violated, a failure of proof regarding it might ordinarily lead to dismissal of the complaint, notwithstanding the strong sense that such failure was due to mere inadvertence on the part of counsel for the parties. As has been demonstrated, however, the Union and Respondent have dealt with each other previously, and have had prior collective-bargaining agreements, as well as a number of proposals aimed at securing a new collective-bargaining agreement to succeed the expired agreement. Also, as shown above, each of these agreements or proposals contain identical language in their respective recognition clauses. I deem these documents to be sufficient evidence, in the absence of countering evidence from Respondent, of the appropriateness of the unit described in each such document. Accordingly, I find and conclude that a unit consisting of

> All production and maintenance employees in Respondent's plant located at 1136 Richfield Road, Placentia, California, performing work in manufacturing, fabricating, assembling, contract and repair shops, including the operation of all machines, mechanical devices and tools that may be required to properly perform and complete the work covered by the Scope of [prior collective bargaining agreements between the parties]; excluding all employees who are presently represented through a collective bargaining agreement with other unions affiliated with the AFL–CIO, office and clerical employees, technical and professional employees, guards and supervisory employees

constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[2]

B. *Background*

Respondent, a California corporation, has, as noted above, been engaged in the business of fabricating structural steel, as well as the fabrication and installation of plating lines and fuming exhaust systems at its facility in

[1] All dates will refer to the calendar year 1985, unless specified otherwise.

[2] This description is drawn from the several documents mentioned above, referring to the parties' previous collective-bargaining agreement and their respective proposals during the course of negotiations, all of which came into evidence as joint exhibits.

Placentia, California. Respondent and the Union have had a collective-bargaining relationship for over 40 years. For the last 29 of those years, the Union's business representative, Jack Doore, has either conducted or assisted in negotiations toward the successive collective-bargaining agreements with Respondent.

On 26 March the Union's president, George Cowie, wrote Respondent requesting that negotiations be commenced toward a new agreement to replace that which was due to expire at the end of May. Respondent and the Union thereafter entered into negotiations and, in fact, conducted nine bargaining sessions, on the following dates: 11 and 25 April; 1, 7, 13, 17, and 23 May; and 3 and 7 June. The negotiating parties also agreed that all agreements reached on individual issues would be subject to modification prior to full agreement being reached. Finally, the General Counsel notes in his brief that he does not contend that Respondent's conduct during negotiations through 30 May constitutes bad-faith bargaining per se.

C. *The Alleged Threats*

1. Joseph Ennes Jr.

Joseph Ennes Jr. worked for Respondent as a welder from 1977 until March. During the 9 months preceding the termination of his employment for medical reasons, he served as the Union's shop steward. Ennes recounted that sometime in February he was talking with Michael Grant, one of the two owners of Respondent, who oversees Respondent's plant and performs sales work in addition to operating as a superintendent and plant manager. According to Ennes, as they talked Grant mentioned that Grant's father, who had operated the plant for many years, had learned that he was not going to get a pension from the Union, ostensibly because he did not work with tools. Ennes recalled Grant going on to say that he was going to get out of the Union and that "they were going to try to get the Union out of the shop altogether." Under cross-examination, Ennes testified that Grant told him that both he and his brother Joe were going to resign from the Union and that his father, also named Joe, had been denied a union pension despite having made contributions to the Union's pension fund for a long time.

Mike Grant remembered the conversation, despite his inability to place its exact time period. As he recalled, that particular conversation had been preceded by others in which Ennes had expressed curiosity about the efforts of Mike Grant's father to obtain a pension. Mike Grant had been telling him in previous conversations that his father, Joe Grant, was having a difficult time. Mike Grant recalled that as he walked by Ennes that morning, Ennes asked him how his father was doing with his pension and that he responded that he did not think his father was going to get a pension and that his father was pretty upset about it. Mike Grant went on to say that he told Ennes that he was taking himself out of the Union, as was his brother, who is also a member of the management of Respondent. He explained this as motivated by his understanding that the difficulty encountered by his father was that the trustees of the pension wished to count only the time that his father spent working with his hands in the trade. He denied saying anything to Ennes about what would occur in the upcoming negotiations. Grant was not asked specifically whether he had told Ennes that he intended to end the Union's representation of employees in the shop.

I credit Ennes' testimony over that of Mike Grant. Ennes was careful not to enlarge on his statements and successfully withstood a vigorous cross-examination. Mike Grant, in contrast, was not even asked about the specific point in controversy.

Accordingly, I find and conclude that the General Counsel has proven the complaint's allegation that in February Respondent, through Grant, threatened employees by stating that there was not going to be a union at Respondent.

2. James Perez

Former employee James Perez worked for Respondent as a welder for about 6 months in 1984 and for about 2 weeks in 1985. This last period of employment ending immediately prior to the expiration of the collective-bargaining agreement, shown by other evidence to have been on 31 May.[3]

Perez testified that one afternoon he was in the shop and was approached by Mike Grant, who told him that the collective-bargaining agreement was to expire in a few days and that he could lay him off so that he would be able to collect unemployment compensation, inasmuch as he knew that the employees were going to walk out on strike. (Perez opted to be laid off.) Perez also went on to testify that Mike Grant said to him that there was not going to be a union anyway, that it was asking for too much, more than Respondent could afford. Perez further testified that he told at least three or four other employees about Mike Grant's statement to the effect that there would no longer be a union at the shop.

According to Perez, this conversation with Mike Grant was apparently a followup to a conversation he had had on the previous day with Mike Grant, during which Mike Grant had told him of an incident that occurred when he Grant had been in a ball game and had run into the owner of another business such as Respondent's. Perez recounted that Mike Grant went on to say to him that he was supposed to "get back" to the owner of the other shop and let him know what came about in the contract negotiations and that he intended to tell the other owner that he Grant could not afford the Union.

Finally, Perez testified that only several days preceding the conversations with Mike Grant, set out above, he overheard an exchange between Grant and an employee named Preston Williams, who, it developed, is a brother-in-law to Grant. The exchange between Preston Williams and Mike Grant was quite loud and heated, so that all those in the shop could overhear it. According to Perez, Grant stated that Preston and another employee were not working fast enough. When Williams responded that

[3] Perez repeatedly asserted that his employment in 1985 was during June, and that the conversation about to be recited occurred immediately prior to 28 June. He was obviously mistaken. Mike Grant admitted having this conversation with Perez, and that it occurred prior to 1 June.

the blades on the machines he was given to work with were dull and needed sharpening, Grant became upset and called Williams a big cry baby and went on to say that "once we get the Union out" he could fire Williams.

Grant testified about these conversations, and admitted that it occurred on the Thursday before the employees voted on whether to accept Respondent's final offer.[4] Grant would have it that he told Perez that he intended to try to settle the dispute with the Union regarding a new collective-bargaining agreement, but he seems in his further testimony to have tacitly acknowledged that he regarded the fact of a strike as a foregone conclusion. And, while he was asked to (and did) deny that he had said words to the effect that he would try to get rid of the Union, I regard his denial as tepid, and as not quite directly meeting that which he had been accused of, which was that he had simply stated to Perez that there was not going to be a union anyway.

Grant also acknowledged that he had had a conversation with Perez on the day preceding that would have been Wednesday, 29 May. He stated that during this conversation, he simply told Perez of a conversation he had with the owner of another business in Orange County on the previous night, and that he merely said to Perez that he had told his counterpart that the Union was asking for a heck of a lot and received a sort of commiserating response.

And finally, he acknowledged that he had a dispute with Preston Williams in the shop, which may have been overheard by Perez and others.[5] Grant admitted that it was probably true that during the course of the shouting match with his brother-in-law, Preston Williams, in which he upbraided his brother-in-law for being a slow worker, he probably did say that he would "fire his ass," and that he "might have" said something to the effect of "To hell with you and the Union!"

Perez was an extremely credible witness despite his seeming inability to get a particular date straight. I have no reason to doubt the truth of the substance of his testimony, especially in light of the less than fervent or convincing denials put forward by Mike Grant.

Accordingly, I find and conclude that Respondent, through Grant, violated Section 8(a)(1) of the Act by threatening employees when Grant told Perez on 30 May that there was not going to be a union, as well as the loud and angry threat overheard by Perez (and probably others) in the shop in the latter part of June when Grant threatened to fire Williams once the Union was out of the way. I conclude that each such threat would necessarily have the reasonable effect on employees of restraining them, and coercing them from engaging in union activities.

As far as the conversation between Grant and Perez goes concerning the conversation that Grant recounted that he had had with the owner of another business at a ball game, I do not find that any of the language there rises to the level of a threat. At most, such language is ambiguous or indicative of a state of mind by Grant that he simply did not know what would happen in the future.

D. *Further Background Facts Regarding the Alleged Refusal to Bargain*

It seems clear that throughout the bargaining history between Respondent and the Union, they had enjoyed an amicable relationship. Grievances had been few or nonexistent. Indeed, the relationship between Grant's father and Doore, the Union's business agent, was such that Doore had literally changed Grant's diapers many years ago.

Nevertheless, in early 1985 an incident occurred which, in my opinion, lies at the heart of the Respondent's greatly changed attitude toward the Union. According to Mike Grant, Doore's boss at the Union is Marvin Haines. Grant recalled that in the summer of 1983 Doore came to him asking him to give a job to Marvin Haines' son, a member of the Union and out of work. Grant testified that both Doore and Haines were old friends of his father and that "it wouldn't have killed me to have an extra helper in the shop"; so out of friendship to Haines and Doore, and in consideration of the friendship they had with his dad for many years, he agreed to give a job to young Lloyd Haines.

Grant recalled that Lloyd worked there for about a year before being laid off for lack of work and then was recalled after a time. After the layoff he worked for Respondent until March or April 1985. In February or March, however, Lloyd Haines, while working at Respondent's shop, got into an argument about who was going to use a burning outfit with another employee named Harry Davenport. Their fight was confined to yelling at one another, with no pushing or shoving. Nevertheless, Mike Grant got in the middle and broke them up. He told both of them to go back to work and just drop the matter. Davenport, according to Grant, turned and went back to work, but Haines blew up and started cursing, threw his tape measure against the wall, stormed out of the shop, got in his car, and drove away. This occurred sometime shortly after the workday had just begun. Young Haines stayed away for the balance of the day. Late that afternoon, Lloyd Haines' father, Marvin Haines, called Grant and asked what was happening. Grant related to him the story set out above. Marvin Haines then stated that his son Lloyd would be back to work on the following morning. Grant agreed. Before their telephone conversation was over, Marvin Haines told Grant that he was going to come by to see Grant.

The next morning Lloyd Haines returned to his job with Respondent. Thirty minutes or an hour later, his father, Marvin, showed up and came across Mike Grant in the parking lot. Among other things, according to Grant's undisputed testimony, Marvin Haines told him that he did not like what had happened yesterday, and that his son had told him around the dinner table the previous evening that there were a lot of things that

[4] This would place the conversation on Thursday, 30 May, because it is conceded by all the parties that the vote concerning acceptance or rejection of the offer occurred on Saturday, 1 June.

[5] He explained that this occurred shortly following an incident between an employee named Yates and other employees. According to Grant, Yates was subjected to verbal harassment by union adherents which caused him to quit his job and remain off work for a couple of days.

were going on in the shop that he did not like, since he heard that Le Fort was getting away with too much, compared with other shops. Grant responded that he did not know what he was talking about and went on to say that the shop was run according to the Union's book, and that Respondent has always gotten along well with the Union, since each had shown the ability to give a little bit and sometimes to take a little bit in order to enjoy a good working relationship. Grant was met only by Marvin Haines' rejoinder that he did not like everyone in the shop picking on his son. At that Mike Grant recounted how he, himself, had worked in the shop for his dad for 15 or 20 years and had been picked on because he was the son of the owner and that Lloyd, Marvin's son, was going through a little bit of the same thing. Grant testified that Marvin Haines told him that he was not "buying this crap" and went on to remark that Doore was letting Respondent get away with too much. Mike Grant testified that he told Haines, that he did not know what he was talking about and he did not think that he was being fair to Doore, and that they got along perfectly well.

Then, according to Grant, Marvin Haines stated "That's bullshit, and if I have to, I'll come down here every day and I'll tell you how to run your company as far as who you will hire and who you will put out on your field jobs." Grant told Haines that he was full of shit, and started to walk away. Then he calmed down a bit and Haines grabbed him. Grant said to Haines, "Look, Marv, I don't know if you are picking on me because I am a new, young owner, or if you think I'm green or what, but I'm not going to stand by and have you come and tell me how to run my business. I don't need you and I don't need your union. If you want to work hand-in-hand like we have done in the past with Mr. Doore and yourself and my father, I'll be more than happy to work out with you people, but you're not going to tell me how to run my own company." Marvin Haines then left.

According to Grant, after this incident Doore seemed "just a little bit cold," and there was one grievance filed when Grant laid off Marvin Haines' son, together with three or four other people, because of lack of work.

E. *The Alleged Refusal to Bargain*

Briefly recapping, Respondent and the Charging Party were parties to a succession of collective-bargaining agreements for approximately 40 years. The most recent agreement was effective from 1 June 1982 to 31 May 1985. On 26 March the Charging Party's president wrote Respondent a standard reopening letter to begin negotiations toward a new collective-bargaining agreement. Respondent, through counsel, sent a similar letter to the Charging Party on 28 March and submitted proposals toward a new contract on 29 March.

Respondent met with the Union on 11 and 25 April and 1 May in negotiations. On this last date, the Union submitted a proposal to Respondent.

The parties met in further negotiations on 7, 13, 17, and 23 May.

On 29 May Doore wrote a letter to all employees covered by the expiring contract, telling them that a meeting would be held on 1 June for them to accept or reject Respondent's "last and final proposal for a new working agreement."

On 30 May Respondent, through counsel, wrote to Doore stating that Respondent "has just concluded extensive negotiations with you" and that the Respondent "deems that all meaningful negotiations have been concluded inasmuch as the major areas of dispute remain unresolved." The letter went on to recite that it was enclosing a copy of the Respondent's best and final offer, that if Respondent's enclosed best and final proposal was not accepted by employees and the Union by 1 June that it would deem a bona fide impasse to have been reached, that if not accepted, all proposals from Respondent were withdrawn, and that if not accepted, Respondent intended to implement its final economic proposals. Finally, as recited therein, Respondent's letter to Doore did enclose a copy of a complete proposal.

Respondent's employees did meet and vote on the proposal before them. They determined to reject it. However, they did not vote to engage in strike activity and have not done so to date.

Instead, the parties met again on 3 and 7 June. As previously noted, and as stipulated at the trial, the parties found themselves continuing to be in disagreement over provisions for union security, checkoff, and pension.

On 11 June Respondent through counsel, wrote to the Union that Respondent was unwilling to reinstate certain provisions that had been in its previous proposals having to do with union shop and checkoff, and the Union's pension plan. This letter also enclosed another "final offer" from Respondent to the Union for a collective-bargaining agreement.[6] The letter went on to recite that if not accepted by 14 June Respondent would deem a bona fide impasse to have been reached and would automatically withdraw all offers.

There has been no substantial change in the stance of the parties since that time, except that on 21 October the Union submitted a proposal to Respondent and on 27 November Respondent submitted a proposal to the Union.

At the trial the parties were able to stipulate that the differences between them that prevented a collective-bargaining agreement from being reached lay in the areas of union security, dues checkoff, and the pension plan. Although Respondent admits that it ceased making payments to the pension, health, and welfare funds pursuant to provisions in the expired collective-bargaining agreement on 1 June, the parties stipulated further at trial that, should any liability be found on Respondent's part to have continued such payments, that such liability should end as of 1 December.

Discussions and Conclusions

The General Counsel concedes in its brief that Respondent's conduct during negotiations through 30 May does not constitute bad-faith bargaining per se. Yet he argues that the violations of Section 8(a)(1) of the Act, as

[6] Albeit, for only 1 year, rather than 2 years, as has been previously proposed.

previously found, constitute valid evidence of Respondent's mindset throughout these negotiations, and particularly, in its presentation of what the General Counsel terms "regressive" collective-bargaining proposals on 11 June.

In any discussion of allegations such as these, it is always necessary to briefly review the duties owed to one another by the parties to collective-bargaining negotiations. First of all, the Act imposes on employers and unions alike the duty to conduct their negotiations with one another in good faith. The failure of a party to do so may result in a finding that it has committed an unfair labor practice. In cases involving allegations against employers, the violation is of Section 8(a)(5) of the Act, which makes it illegal for an employer to "refuse to bargain collectively with the representative of its employees."

Second, the obligation to bargain collectively, although never satisfied by application of rote or formula, is defined in Section 8(d) of the Act to include

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession;

Determinations regarding good faith must necessarily be made on a case-by-case basis. It must be remembered, however, that some sorts of conduct are deemed so patently contrary to genuine desire to reach agreement that proof of the mere fact of their occurrence will sustain a finding of a per se violation. Actions that fly in the face of the 8(d) requirements have long been considered to be per se violations of the Act's bargaining duty regardless of any other good-faith activities. For example, if an employer were, during negotiations, to make unilateral increases in wages, changes in merit wage policy and sick leave policy, all of which are deemed to be "mandatory" subjects of bargaining, it will be held guilty of a per se violation of Section 8(a)(5). When faced with such a situation, the Supreme Court said

> a refusal to negotiate *in fact* as to any subject which is within Section 8(d) and about which the union seeks to negotiate, violates Section 8(a)(5), though the employer has every desire to reach agreement with the union upon an overall collective bargaining agreement and earnestly and all good faith bargains to that end. [*NLRB v. Katz*, 369 U.S. 736, 743 (1962).]

However, obvious per se violations aside, the courts consider an employer's entire course of conduct, or the totality of circumstances, in determining good-or bad-faith bargaining. The appropriate standard is whether the circumstances clearly indicate "a desire not to reach an agreement with the union." *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953). In *Altanta Hilton & Tower*, 271 NLRB 1600 (1984), the Board stated its adherence to this "totality of conduct" test to be utilized in deciding whether an employer is, on the one hand, engaging in lawful, hard bargaining to achieve a contract that it considers desirable, or, on the other hand, is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. There the Board specifically reiterated that a party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree, citing *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973). Adamant insistence on a bargaining position was again stated to be an insufficient basis for a finding of bad faith in and of itself, citing *Neon Signs Corp. v. NLRB*, 602 F.2d 1203 (5th Cir. 1979). The Board in *Atlanta Hilton Tower* recited a number of criteria of bad faith, among which were "unreasonable bargaining demands," and "unilateral changes in mandatory subjects of bargaining." Nevertheless, the Board held to its old and often stated view that employers are bound to make *some* reasonable effort in *some* direction to compose differences with representatives of employees, in order that Section 8(a)(5) of the Act be read as imposing *some substantial obligation*.

Although not intending to depart from the General Counsel's concession that Respondent did not engage in activities that amount to per se violations of Section 8(a)(5) of the Act prior to 30 May, it must be observed that Respondent was most certainly engaged in hard bargaining and was seeking substantial concessions at all times throughout these negotiations. As Respondent concedes in its brief, "the employer wished to delete from the prior agreement and the Union wished to retain the union shop, the dues check-off, and employer contributions to the National Boilermakers-Blacksmith Pension Fund." The Respondent contends that it had sound, competitive business reasons for its positions on these issues, such as the loss of gross volume and profit due to nonunion competition, the Union's inability to supply workers with requisite skills, the Employer's unwillingness to compel employees hired outside the Union's hiring hall to join the Union, the increased costs associated with the dues checkoff, the fear of future withdrawal liability under the pension plan, and genuine fear of loss of management controls as a result of the confrontation between Respondent's management and the "local lodge president [sic]." Respondent presented no documentation of any sort at the trial in support of these claims of economic distress. Nor did the testimony of Grant sustantially assist Respondent's position, for I observed him to testify only in vague and conclusionary terms, even assisted (as he was) by the leading and suggestive questions of his counsel, except regarding the issues of his confrontation with the Union's president.

Grant's version of the confrontation is the only version that is in the record. I accept it as evidence of Respondent's valid concern at the time it occurred that a real change in its relationship with the Union might be in the offing. However, despite the fact that Grant thereafter

found Doore to be "a little cold," and notwithstanding the fact that one grievance was filed, I see no real warrant for Respondent concluding that the Union had embarked on a course remarkably different, in its relationship with Respondent, from that which had obtained for decades. Nor, of course, which might legitimize Grant's threatening statements to employees, found previously.

Instead, it appears most likely to me that Grant's confrontation with the Union's president, plus Grant's unhappiness with the failure of the Union to "bend the rules" a bit and provide his father with a pension, were the real motivating factors behind Respondent's changed bargaining posture in 1985, compared to previous years.

Accordingly, I am inclined to find that the changes set forth in Respondent's bargaining proposal following 1 June to be so regressive as to warrant my drawing the inference, given my understanding of the background set forth above, that Respondent simply had no real intent to seek to compose its differences with its employees.

Respondent's proposal of 30 May was rejected by employees and its next proposal was simply to abolish the previous practice and agreement for employees to be hired through the Union, a practice that was shown by the evidence to have been followed between the parties with a true spirit of accommodation for whatever conditions were current when a question arose.

Its proposal also weakened the previous requirement that 48 hours notice of layoff or recall be given, to provide that it need only be given "whenever feasible."

Other changes in provisions concerning qualifying for holiday pay, startup time, the probationary period, a contractual duration of only 1 year, and the abolition of any right to compel arbitration feature the Respondent's proposal of 11 June.

Considering these changes, together with the key issues having to do with the union shop, the dues checkoff, and the employer contributions to the pension, health, and welfare funds, it seems very difficult for me to imagine just how the employer could be said to have been making "some reasonable effort in some form to compose his differences with the Union." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). Thus, I would find and conclude on these facts and circumstances that Respondent violated Section 8(a)(1) and (5) of the Act by engaging in surface bargaining.

There exists other, and even more persuasive evidence of a violation of Section 8(a)(5) by Respondent. This is furnished by the Respondent's unilateral implementation of a health and welfare plan for its employees, and its concurrent cessation of payments to the trust fund provided in the expiring collective-bargaining agreement.

Respondent contends that its actions in this regard are privileged by virtue of its having proposed the abolition of the payments to the joint trust throughout the negotiations as well as that a bona fide impasse in negotiations occurred on 1 June, when the employees rejected Respondent's contract proposal.

The law relating to this issue is well settled. If the parties to collective-bargaining negotiations fail in good-faith efforts to reach agreement, an employer does not thereafter violate the Act by putting into effect, or implementing, provisions that are consistent with proposals previously advanced to the collective-bargaining representative of the employees and that met with rejection. *NLRB v. Williamsburg Steel Products*, 369 U.S. 736, 745 (1962); *J. Hofert Co.*, 269 NLRB 520 (1984); *Western Newspaper Publishing Co.*, 269 NLRB 355 (1984). Such failure of agreement is termed an "impasse."

In *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), petition for review denied sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board set forth certain first principles relative to the concept of impasse, as follows:

> An employer violates his duty to bargain if, when negotiations are sought or in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.
>
> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

In a fairly recent case the Board has demonstrated its adherence to the principles announced in *Taft Broadcasting*. See *E. I. duPont & Co.*, 268 NLRB 1075 (1984).

It must be conceded that the issues stipulated by the parties as having been those that prevented agreement were each of extreme importance. Thus, it can not be said that the unfair labor practices of Respondent, in threatening its employees[7] and by engaging in surface bargaining have not fatally flawed Respondent's argument that it engaged in negotiations in good faith. In other words, no matter how deadlocked the negotiations appeared to have been on 1 June, they were tainted by the unfair labor practices of the Respondent. The evident deadlock was prevented thereby from ever ripening into a good-faith impasse, which would have privileged Respondent in its unilateral changes in the health and welfare system and pension plan. This is so because a deadlock that is caused by a party who refuses to bargain in

[7] Two witnesses testified that while employees of Respondent, they were threatened with words indicating that they could not depend on the continued presence of their collective-bargaining representative in the workplace. I have found those threats violative of Sec. 8(a)(1) of the Act. I find here that they also reached a very substantial portion of Respondent's work force, as, according to Grant's testimony, that work force consisted of approximately 19 employees at the time that the threats were made. Recalling that in addition to the two employees who heard the threats, there were also three or four others to whom one employee repeated the threats he had heard, it seems apparent that at least 20 to 25 percent of the Respondent's total work force was made aware of Respondent's threats. The impact of such threats on the Union's base of support among employees, including its ability to obtain strike authorization, can only be speculated on.

good faith is not a legally cognizable impasse justifying unilateral action. *Bethlehem Steel Co.*, 147 NLRB 977, 978 (1964); *Northland Camps, Inc.*, 179 NLRB 36 (1969). See also *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1349 (9th Cir. 1978). Based on these considerations, I find that no impasse existed from and after 1 June and that, as a result, Respondent was not privileged to implement its last and final offer.[8]

CONCLUSIONS OF LAW

1. L. W. Le Fort Company, Inc. is now, and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Lodge No. 92, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees in Respondent's plant located at 1136 Richfield Road, Placentia, California, performing work in manufacturing, fabricating, assembling, contract, and repair shops, including the operation of all machines, mechanical devices, and tools that may be required to properly perform and complete the work covered by the scope of (the collective-bargaining) agreement (that expired between the parties on 31 May 1985); excluding all employees who are presently represented through a collective-bargaining agreement with other unions affiliated with the AFL-CIO, office and clerical employees, technical and professional employees, guards and supervisory employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since at least on or about 1 June 1980, the Union has been the exclusive collective-bargaining representative of all the employees in the unit found appropriate above, for the purposes of collective bargaining, within the meaning of Section 9(a) of the Act.

5. By engaging in collective bargaining without a real intent to reach agreement and by instead engaging in "surface bargaining," by unilaterally changing existing working conditions at a time when no valid impasse in negotiations existed concerning mandatory subjects of bargaining, and by threatening employees that their collective-bargaining representative would not be present to represent them in the future, Respondent has violated Section 8(a)(1) and (5) of the Act.

6. Respondent has not violated the Act except as set forth above.

7. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has committed various unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Since the violations of the Act disclose an attitude on the part of the Respondent to behave without regard to the rights of its employees, I will recommend to the Board a broad remedy designed to suppress any and all violations of a like or related nature. *Hickmott Foods*, 242 NLRB 1357 (1979). It will be required that Respondent bargain collectively in good faith with the Union and, if agreement is reached, embody that agreement in a written, signed contract. Respondent will also be required to post the usual notice advising employees of their rights and the results of this case.

In order that the requirement to bargain in good faith may have meaning, Respondent shall be ordered to reinstate the wages, hours, and working conditions in effect at the expiration of the 1982-1985 collective-bargaining agreement between the parties on 1 June 1985, if requested by the Union, and to maintain such wages, hours, and working conditions in effect unless and until modified by agreement with the Union or reaching a valid impasse in negotiations.

Because I have found that Respondent violated the Act by discontinuing its payments to the health, welfare, and pension funds provided for the unit employees under the expired collective-bargaining agreement, I shall recommend that Respondent be ordered to restore, on the Union's written request, the health, welfare, and pension program that was in effect previously, and to make payments thereto identical to those that it would have paid had it not unlawfully discontinued payments up until the stipulated cutoff date of the parties of 1 December 1985. Respondent shall also be required to make whole any employees for additional expenses incurred, or insurance benefits lost by reason of its unilateral change in the insurance coverage, together with interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]

[8] Presuming, at this point, that the implementation of the last and final offer was sufficently "consistent" with the terms previously offered the Union.

California Cooperative Creamery *and* Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 386, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] Case 32–CA–8878

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On February 9, 1988, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below.

The General Counsel has excepted to the judge's failure to find that the Respondent's office manager, Ed Esther, violated Section 8(a)(1) of the Act by informing Ken Love that he was not hired because of his union activities. We find merit in the General Counsel's exceptions.

The Respondent purchased its Hughson facility from Knudsen Corporation in November 1986.[3] The Respondent commenced operating the facility on December 2 with a supervisory staff and work force composed primarily of former Knudsen officials and employees. Ken Love, a former Knudsen production employee, was not hired by the Respondent. On December 24, Love spotted the cars of the Respondent's plant superintendent, Randy Ferguson, and office manager, Ed Esther, outside a local bar. Love entered the bar and bought Ferguson and Esther a beer. He then asked Ferguson why he had not been hired. Ferguson answered that there were a lot of factors and he did not care to discuss it. Ferguson then left.

Love sat down and drank several more beers with Esther. He then asked Esther to tell him the truth about why he was not hired by the Respondent. Esther stated, "just between me and you," the Respondent was "blackballing" Love because he was a "strong union man." Love replied that he was not a strong unionman and did not even attend union meetings.

The judge noted that Esther's authority was limited to office employees and that he had no authority or responsibility in the hiring of production and maintenance employees. He found that Esther had expressed a personal opinion. He also concluded that a conversation occurring at a bar after a few drinks should raise no reasonable expectation that Esther was acting on behalf of the Respondent. Accordingly, the judge dismissed this allegation of the complaint on the basis that Esther's remarks were nothing more than speculation or his personal opinion that could not be imputed to the Respondent. We disagree.

Although Esther did not supervise employees in Love's former department, he was an office manager with undisputed supervisory status. Therefore, his remarks to Love were bound to carry some weight—the degree of weight and the likely interpretation to be given the remarks depending on their context.[4] In this regard, Esther's comments occurred shortly after Love had initiated a conversation with Esther and Ferguson, who *was* responsible for the hiring of production and maintenance employees, about the failure to hire Love. Although the conversation continued in the social milieu of drinking at a bar, Love's inquiry about hiring to Ferguson and his reiteration of this inquiry to Esther do not appear to have been purely social, informal, or amicable. Furthermore, Esther's prefatory "just between you and me" would reasonably tend to indicate that he was communicating confidential information gained from a management source instead of merely expressing a personal opinion, even if that was what he actually was doing. Under these circumstances, Esther would reasonably appear to be acting as the Respondent's agent in making the clearly coercive statement that the Respondent had not hired Love because he was a strong unionman. Accordingly, we find that the Respondent thereby violated Section 8(a)(1) of the Act.[5]

We agree with the judge, however, that Esther's remarks did not establish union animus with respect to the Respondent's hiring process. As the judge found, Esther had no authority or responsi-

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates hereafter refer to 1986.

[4] See *NLRB v. Cable Vision, Inc.*, 660 F.2d 1, 6 (1st Cir. 1981).

[5] *Haco Engineering Co.*, 265 NLRB 27 (1982).

Member Cracraft concurs in her colleagues' finding that Esther's statement to Love violated Sec. 8(a)(1) of the Act as it reasonably tended to interfere with, restrain, and coerce employees in the exercise of their Sec. 7 rights.

bility in the hiring of production and maintenance employees. There also is no evidence that he had any involvement in the decision whether Love or the other production and maintenance employees should have been hired. Accordingly, we do not find sufficient basis for inferring that Esther was speaking with actual knowledge of the Respondent's motive for not hiring these employees.

AMENDED CONCLUSIONS OF LAW

Add the following as Conclusion of Law 4.

"4. By informing an employee that it would not hire him because of his past union activities, the Respondent violated Section 8(a)(1)."

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, California Cooperative Creamery, Hughson, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing any employee that he would not be hired because of his past union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Hughson, California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT inform any employee that he would not be hired because of his union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CALIFORNIA COOPERATIVE CREAMERY

William O'Connor, Esq., for the General Counsel.
Wesley Sizoo, Esq. (Moore, Sizoo & Cantwell), of Walnut Creek, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Modesto, California, on November 18 and 23, 1987. On June 29, 1987,[1] the Acting Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing, based on a charge filed on April 23 by Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 386, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union), alleging that California Cooperative Creamery (Respondent) has violated Section 8(a)(3) and (1) of the National Labor Relations Act (29 U.S.C. § 151 et seq).

The complaint alleges that Respondent violated Section 8(a)(3) and (1) by refusing to hire employees Tom Johnson, Jay Peeples, Charles Barker, Otis Hale, Ken Love, and Richard Smith because they had engaged in certain protected union activities. The complaint further alleges that Respondent independently violated Section 8(a)(1) by implying to an employee that other applicants had not been hired because of their protected union activities, and by informing an employee that he was not hired because he was "a strong union man."

The parties were permitted during the hearing to introduce relevant evidence, examine and cross-examine witnesses, and argue orally. Posttrial briefs were filed on behalf of the General Counsel and Respondent. On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

[1] Unless otherwise stated, all dates occurred in 1987.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with its office and principal place of business in Petaluma, California, with a plant located in Hughson, California, where it has been engaged in the nonretail processing, marketing, and sale of milk products.

During the 12 months preceding the issuance of the complaint, Respondent shipped goods valued in excess of $50,000 directly to customers located outside the State of California. Respondent admits and I find that, at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that, at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Respondent purchased its Hughson, California facility in November 1986 from Knudsen Corporation, which had gone into bankruptcy. The Union had represented the production and maintenance employees at the Hughson facility at least 10 years under Knudsen's ownership and Knudsen's predecessors, Foremost and Foremost-Mckesson. Knudsen ceased its Hughson operation on October 14, 1986.

On November 24, 1986, Respondent finalized its purchase of the Hughson facility. It agreed to recognize the Union and met on three occasions for contract negotiations but no agreement was reached. During negotiations, the Union took the position that the Respondent should hire the former Knudsen employees based on seniority. Respondent took the position that it would consider seniority but would not hire solely on the basis of seniority. No agreement was reached on this subject. Respondent began hiring in late November 1986, and its first employees began working on December 2, 1986. Respondent hired former Knudsen employees but did not hire on the basis of seniority. After three negotiation sessions, a decertification petition was filed in Case 32–RD–802. Negotiations were suspended at the suggestion of the Union, pending the outcome of the decertification election. On April 17, 1987, the Union lost the representation election and was decertified. Respondent continued to hire former Knudsen employees. At the time of the instant hearing, Respondent had only hired former Knudsen employees to work at Hughson with just three exceptions. Two of the exceptions were part-time summer employees who were sons of milk producers who sold products to Respondent. The other exception was an experienced employee who was hired on the basis of a recommendation of a supervisor.

Within this factual background, the General Counsel alleges that Respondent refused to hire Johnson, a union vice president and shop steward, Peeples, Barker, Hale, Love, and Smith because the employees filed grievances or otherwise sought to enforce collective-bargaining agreements between the Union and Respondent's predecessors. Further, the complaint alleges that during the interviewing processes, Tim Colbert, Respondent's plant manager, told Gary Guyer, an employee, that Respondent had not hired Johnson and Peeples because of their protected union activities. Finally, the complaint alleges that Ed Esther, Respondent's office manager, told Love that Love was not hired because he was "a strong union man." Respondent denies all allegations of the complaint.

B. *The Hiring Process*

In November and December 1986, Respondent received numerous job applications for employment at the Hughson facility. The applications were reviewed by Tim Colbert, plant manager, and Randy Ferguson, plant superintendent. Colbert had been plant manager at the Hughson facility since 1979. Ferguson had been plant superintendent at the facility since 1982 and had been a shift superintendent from 1979 to 1982. Colbert and Ferguson had received instructions from Douglas Hecker, Respondent's comptroller, to use the last seniority list from Knudsen and "pick the best possible employees" from the list. Hecker told Colbert that Respondent wanted a turnkey operation, meaning that the company wanted to start up as close to the date of the plant acquisition as possible. Colbert and Ferguson reviewed the applications and chose 28 former Knudsen employees for interviews. The 28 former Knudsen employees were interviewed by Colbert, Ferguson, Hecker, and Ralph Sartori, Respondent's plant manager at it Petaluma facility.[2] The 28 employees were all eventually hired by Respondent. After the initial interviews, Hecker and Sartori played no further role in the hiring process. There is no allegation nor any evidence that Hecker or Sartori had any union animus, or had any knowledge of union activities by any of the applicants for employment.

The first group of employees hired, the foremen, began working on December 2. Several others were hired to help clean up and prepare for a state inspection scheduled on December 7. The work force gradually expanded thereafter. As mentioned earlier, all employers hired were former Knudsen employees with only three exceptions.

The six alleged discriminatees all applied for employment with Respondent but were not hired. On November 28, Johnson, the shop steward and a union vice president, went to the plant and talked to Colbert. Colbert confirmed that Johnson was not one of the initial hires. Colbert said he had gone through the applications "with great emotions." Colbert said that the warehouse where Johnson worked would probably be the last department to start back up again. Colbert did not inform Johnson that he (Johnson) would not be hired.

Johnson attended the negotiating sessions and, in late December, raised the question why he, and other senior employees, had been passed over in the hiring process. Mike Nash, Respondent's CEO, indicated that he believed the employees were only qualified to perform the

[2] Colbert reports to Sartori who has responsibility for Respondent's Hughson and Petaluma facilities. Respondent's employees at its Petaluma facility are represented by a sister local of the Union.

jobs listed on the seniority list given Respondent by the Union. Johnson took the position that the senior employee were qualified to perform numerous jobs in the plant based on their past experience with Knudsen. Nash answered that he would discuss the matter with Colbert.

C. *The Alleged Threat by Esther*

Ken Love, a former Knudsen employee, testified that on Christmas Eve, he spotted the cars of Ferguson and Ed Esther, office manager, parked outside the local bar near the Hughson facility. Love entered the bar with his son and brother. Love bought Ferguson and Esther a beer and then asked Ferguson why he was not hired. Ferguson answered that there were "a lot of factors" and he did not care to discuss it. Love's brother said that Ken knew every job in the plant and began to argue with Ferguson. Ferguson then left.

Love sat down with Esther and the two continued to drink and talk. After several more beers, Love asked Esther to tell him the truth about why he was not hired by Respondent. According to Love, Esther said, "just between me and you," Respondent was "blackballing" Love because he was a "strong union man." Love said he was not a strong union man and did not even attend union meetings.

Esther testified that after Love pressed him for an explanation for not being hired, he told Love that he did not know and that Love should "talk to his other friends." Love's version of this conversation is credited over Esther's denial. Esther is Respondent's office manager but has no authority with respect to production and maintenance employees. Further, he had no role whatsoever in the hiring of production and maintenance employees. Love admitted that Esther was giving his own opinion and not speaking on behalf of Respondent during this Christmas Eve conversation.

D. *The Statement to Guyer*

Gary Guyer, a former Knudsen employee who was hired by Respondent, was interviewed by Colbert and Ferguson in late December. Ferguson told Guyer that the employee should be prepared to work a lot of overtime and learn different jobs. Ferguson said there would be no job bidding and employees would have to work in different jobs and different departments. Colbert said that the plant was under new ownership and that only "the cream of the crop" had been hired. He said the plant was starting from scratch and that "there would be no Tom Johnsons or Jay Peeples." Respondent would not hire employees "who couldn't pull their weight," or who were "troublemakers" or "bad eggs." Colbert did not explain what he meant by troublemakers or bad eggs. There was some discussion about benefits, Guyer's skills, and assignments. At some point in the conversation, Colbert said he did not know if the plant would be union or not, but that it did not make any difference to him.

Ferguson testified that no reference was made to Johnson or Peeples in the interview with Guyer. He further denied that there was any mention of bad eggs or troublemakers. Colbert also testified that there was no reference to Johnson, Peeples, bad eggs, or troublemakers in the interview with Guyer. Colbert admitted that he told Guyer that Respondent did not know whether the Company would be union or not, and that it made no difference to Colbert whether the company was union or not.[3] I have decided to credit Guyer's version of this conversation over the denials of Ferguson and Colbert. Guyer, a current employee of Respondent, was unlikely to testify against his current supervisors unless his testimony was truthful.

E. *The Activities and Work Records of the Six Applicants*

Tom Johnson was the warehouse leadman at the time Knudsen closed the Hughson facility. Johnson was Knudsen's most senior employee and the union shop steward. It is undisputed that Johnson was an active steward and brought grievances on behalf of the Union and employees. In processing the grievances, Johnson dealt with both Ferguson and Colbert. However, there is no evidence that Colbert or Ferguson ever harbored any animus against Johnson for his union activities.

According to Ferguson, Johnson would stretch out his work to make it last a full day, and that he did not get along with Peeples, who worked in the warehouse under Johnson. Johnson admitted that he and Peeples did not get along. Although Respondent apparently was pleased with the end result of Johnson's work in the warehouse, it took issue with the amount of time, i.e., total man hours, it took for the work to be done. The employee Respondent now utilizes to perform the warehouse function performs the warehouse job in 20 hours per week elsewhere in the plant. With Johnson and Peeples working full time in the warehouse, Johnson still required additional assistance from other employees to perform the warehouse function.

Jay Peeples had been a warehouse helper since 1977 and was second in seniority to Johnson. The only union or protected activity that the General Counsel could point to was that Peeples took a bereavement leave in 1986.

Ferguson at first objected to Peeples' proposed leave but Peeples took the leave anyway. Peeples was paid for the full 2 days of leave without any protest by Ferguson or Colbert.

Ferguson testified that Peeples had a poor work record. The deficiencies listed were loss and damage of a product, the falsificaton of production figures, the failure to perform certain weighing procedures, and his lack of qualifications to operate certain machinery. The General Counsel apparently took isssue with Ferguson's conclusion that Peeples could not operate certain machinery. The General Counsel points out that early in his employment with Knudsen, Peeples operated such equipment. However, Peeples had not operated the equipment since 1977 and the equipment had been updated.

Charles Barker had been a mix helper since 1954. Barker had filed numerous grievance involving overtime,

[3] The decertification petition had been filed and Colbert did not know whether the Union would be decertified or not.

vacation pay, boots,[4] sick pay, and wage rates. He had a grievance pending at the time of Knudsen's closing. There was no evidence of any animus against Barker because of these grievance activities.

Ferguson testified that Barker had made incorrect mixes, had falsified production reports, and was generally a marginal and unsatisfactory employee. Barker did not testify.

Otis Hale had been employed at the Hughson plant since 1967. His position at the time of the Knudsen plant closure was that of powder bagger. Hale had filed a number of grievances including grievances concerning boots, job duties, lunchbreaks, premium pay, and changes in work schedules. In May 1985, Hale filed a grievance concerning a job bid and a job awarded to another employee. Johnson discussed the grievance with Colbert and they disagreed over Hale's eligibility, to bid on the job in question. Colbert said in this discussion that it would be "a cold day in hell" before Hale was eligible, and that Hale would get the job over Colbert's "dead body." Johnson continued to pursue the grievance, and Hale was eventually awarded the job. In my view, this evidence establishes only that Colbert opposed the grievance on the merits. It does not establish that Colbert harbored any animus against Hale for utilizing the grievance procedure or any animus against the Union.

Ferguson testified that Hale had a record of excessive absenteeism, and a record of negligence in operating certain machinery. Ferguson concluded that Hale was a marginal and unsatisfactory employee. Hale did not testify.

Ken Love had been employed at the Hughson facility since 1975. At the time of the Knudsen closing, Love was working in the receiving department. Love had been involved in a number of grievances. On one occasion in 1984, Love refused to run a machine unless he was given boots. Love was sent to Colbert's office where he reiterated his position. The next day Love was given boots and he operated the machine in question.

Ferguson testified that not hiring Love was "a close call." Love was a marginal employee, although he was acquainted with most, if not all, jobs in the plant. According to Ferguson, Love was very poor about filling out charts and logs, and that Love essentially wanted to work days and bag powder with no responsibility. Ferguson made reference to Love's problems with absenteeism, although Love had no recent problem with absenteeism. In fact, Respondent hired some employees who had absenteeism records arguably worse that Love's.

Richard Smith had been employed at the Hughson facility since 1979. His positions included butter and powder packer, floorman churn operator, receiving, and loading and checking. Smith filed a number of grievances including a grievance concerning boots. In the fall of 1984, Smith was called to Colbert's office and told to perform the work and grieve the boot issue later. According to Smith, Colbert said that if Smith pursued the boot issue it would eventually cost Smith his job with the Company. Colbert testified that he the did not say that the grievance could cost Smith his job. Rather, he said that Smith should perform the work and grieve the matter later. Colbert explained that the failure to perform the work could cost Smith his job. Colbert's testimony on this point is credited.

In general, Respondent denies that union activities or union membership had any part in its hiring decisions. Respondent's witnesses, Hecker, Sartori, Colbert, and Ferguson, all testified that Respondent was looking for "multi-talented people that had good records, attendance, good attitudes, were good self-motivating employees, or were recommended from another plant like the Knudsen Modesto plant." It is undisputed that Respondent gave preference to Hughson employees and former Knudsen employees. These employees were known to be represented by the Union. In hiring operating engineers for the Hughson facility, Respondent hired only former Knudsen employees represented by the Operating Engineers. It hired qualified employees but did not hire on the basis of seniority. Respondent's employees at its Petaluma facility are represented by a union.

Respondent acknowledges that, among those employees actually hired, several had been involved with grievances, had received warning letters and been disciplined. The record establishes that the decison to hire an applicant was based on the personal observations and evaluations of Colbert and Ferguson. These two supervisors had personal experience with the employee-applicants based on years of experience with Knudsen and Foremost, and made the hiring decisions. Thus, in my view, it is the motivation of these two supervisors that is at issue here.

F. *Analysis and Conclusions*

The General Counsel, relying on the testimony of Guyer that Colbert said Respondent would hire no Tom Johnsons or Jay Peeples, people who did not carry their weight, troublemakers, or bad eggs, argues that Johnson, Peeples, and the other discriminatees were union activists or union troublemakers. I find the remarks made by Colbert do not necessarily mean that Johnson and Peeples were union activists or union troublemakers. Peeples' activities were limited. The remarks could just as easily mean that peeples and Johnson were employees who were not "the cream of the crop," did not perform their share of the work, or were troublemakers in the normal sense of the word. "Absent a showing that the word is being used in a manner 'synonymous with lawful union activity' in the circumstances of a particular case, Employers may . . . hire . . . as they choose if they have sufficient lawful reason, which includes refusal to hire so-called trouble makers." *Guarantee Savings & Loan*, 274 NLRB 676, (1985); *NLRB v. Aclang, Inc.*, 466 F.2d 558, 561 (5th Cir. 1972).

Neither Colbert nor Ferguson explained what he meant by troublemakers or bad eggs. The reference is ambiguous and could just as likely refer to the supervisors' views that Johnson and Peeples were employees who did not pull their weight, and did not get along with other employees. Under the circumstances, I find

[4] Barker, Smith, and Hale had filed grievances concerning the contractual right to wear boots provided by the Company under certain conditions.

that Colbert's statement to Guyer would not reasonably tend to restrain, interfere with, or coerce employees in the exercise of their rights. *Sun Coast Foods*, 273 NLRB 1642 (1985). I find no violation of the Act and, therefore, recommend dismissal of the 8(a)(1) allegation of the complaint. I further find this statement to be insufficient evidence to establish that Respondent sought to discriminate or discriminated against Johnson or Peeples because of union activities.

Further, I find that Esther's comments to Love do not establish a motive for Respondent's failure to hire Love or any other applicant. Esther had no authority or responsibility in hiring production and maintenance employees. His authority was limited to office employees and he had little or no contact with production and maintenance employees. Esther had been drinking and expressed a personal opinion to Love. However, it is clear that he was not speaking on behalf of the Employer. *Rood Industries*, 278 NLRB 160, 163 (1986). A conversation occurring at a bar after a few drinks should raise no reasonable expectation that Esther was acting on behalf of the Employer. Moreover, Esther had no responsibility for or authority over the hire of Love or the other production and maintenance employees. Under theses circumstances, Esther was not an agent of Respondent for hiring production employees, and his remarks were nothing more than speculation or his personal opinion, which cannot be imputed to Respondent. *Zack Co.*, 278 NLRB 958 (1986); *Abbey Island Park Manor*, 267 NLRB 163 (1983).

Section 8(a)(3) of the Act expressly prohibits discrimination based on union considerations in the hire of employees. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182–187 (1941). It is beyond question that the filing and processing of grievances by an employee, whether a union steward, is a protected by the Act. *Mack Trucks*, 242 NLRB 651, 656 (1979). Here, Colbert and Ferguson are the agents of Respondent who decided that applicants Johnson, Peeples, Barker, Hale, Love, and Smith would not be hired. Accordingly, it is on their motivation that the analysis must focus to determine whether the six alleged discriminatees were denied employment with Respondent because of activity protected by the Act. See, e.g., *Guarantee Savings & Loan*, 274 NLRB 676 (1985); *Advanced Installation*, 257 NLRB 845, 854 (1981), enfd. mem. 678 F.2d 1231 (9th Cir. 1982).

"Essentially, the elements of a discriminatory refusal-to-hire case are the employment application by each alleged discriminatee, the refusal to hire such, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus gainst it, and refused to hire the applicant because of such animus." *Big E's Foodland*, 242 NLRB 963, 968 (1979); *Hoboken Shipyards*, 275 NLRB 1507 (1985).

Of the six alleged discriminatees, only Johnson had union activities that distinguished him from other job applicants. The other alleged discriminatees did not stand out from other bargaining unit employees hired by Respondent. During the period of over 7 years in which Colbert and Ferguson dealt with Johnson as shop steward, there is no evidence that either supervisor harbored any animus against Johnson because of his union or steward activities. The General Counsel produced some evidence that the supervisors disputed the merits of certain grievances, particularly the question of the Company's obligation to furnish boots. However, there is no evidence that the supervisors did not amicably resolve such disputes. There was no evidence of any subsequent animus or hard feelings. Under the circumstances, the evidence tends more to support a finding of a harmonious relationship between the supervisors and the Union than the union animus argued by the General Counsel.

Furthermore, prior to hiring any employees, Respondent voluntarily recognized the Union. In hiring employees, Respondent gave preference to its predecessors' employees represented by the Union.[5] Respondent continued to give preference to such employees even after the Union was decertified. Respondent voluntarily recognized the Union representing its operating engineers. In hiring engineers, Respondent hired only former employees of Knudsen's facility. Such conduct by Respondent strongly militates against a finding that Respondent harbored any animus toward the Union. See *Sun Coast Foods*, 273 NLRB 1642, 1644 (1985).

Based on the lack of animus against union members and supporters by Respondent, in general, and Colbert and Ferguson, in particular, I find that the General Counsel has not established a prima facie case. By failing to establish such union animus, the General Counsel has been unable to show that Respondent failed to hire the applicants because of union animus. Thus, the record evidence is insufficient to establish that Respondent failed to hire the six applicants for any reason other than those offered at the hearing. Under such circumstances, the burden does not shift to Respondent to justify its refusal to hire the six applicants. See, e.g., *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Finally, the General Counsel seeks to buttress this weak case by arguing that Respondent's reasons for not hiring the employees are pretextual. I find no merit in this argument. The reasons for not hiring the employees are subjective and based on Colbert's and Ferguson's observations and evaluations. None of the reasons were shown to be false. Some of the employees actually hired were not outstanding. However, there is no evidence that such evaluations were tainted by union considerations. The subjective reasons for not hiring the applicants cannot be used to substitute for the failure to establish a prima facie case. None of the employees was so outstanding that the failure to hire would raise an inference of discrimination. Under the facts of this case, I refuse to substitute my judgment for that of Respondent's supevisors.[6] It is not my place to second guess Re-

[5] The existing legal principles establish that Respondent was not obligated to hire the employees of Knudsen merely because it purchased the assets of that company. *Hoboken Shipyards*, supra; *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974).

[6] See, e.g., *Hoboken Shipyards*, supra; *NLRB v. Ogle Protection Service*, 375 F.2d 497 (6th Cir. 1967), cert. denied 389 U.S. 843 (1967).

spondent's hiring decisons. This point is best illustrated by the fact that Johnson and Peeples (two full-time employees) were replaced by one part-time employee.

CONCLUSIONS OF LAW

1. Respondent California Cooperative Creamery is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 386, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to show by a preponderance of the evidence that Respondent has violated Section 8(a)(3) and (1) of the Act as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

Interstate Material Corporation *and* Local 786, Building Material, Lumber, Box Shaving, Roofing and Insulating, Chauffeurs, Teamsters, Warehousemen and Helpers, and Related Industry Employees, Watchmen and Security Guards Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO[1] and Allied Workers Union Local 101, Party to the Contract. Case 13–CA–25946

July 29, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On May 28, 1987, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief,[2] and the General Counsel filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order.

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

We agree with the judge's finding that the Respondent violated Sec. 8(a)(3) by failing and refusing to recall certain employees from layoff. In so doing we find that the General Counsel established a prima facie case and the Respondent failed to demonstrate that its refusal to recall would have occurred absent its desire to rid itself of Local 786 and perfect its relationship with Local 101. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) (approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)). However, in so finding, we do not rely on comments made by Rufus Cook, the Respondent's chief executive officer and counsel, during his cross-examination of one of the Respondent's employee/drivers.

Also, although we agree with the judge that the Respondent violated Sec. 8(a)(2) of the Act, we do not rely on the judge's discussion and rationale concerning the dues authorization cards. It is well established that the Act is violated where an employer recognizes and contracts with one union as its employees' exclusive bargaining representative at a time when the employer and another union are bound by a current contract that recognizes that union as the exclusive bargaining representative of the same employees and thereafter fails and refuses to recognize the latter union and to honor its contract. *Ana Colon, Inc.*, 266 NLRB 611 (1983). Here, the Respondent recognized and contracted with Allied Workers Union Local 101, although bound to a current contract with Local 786 concerning the Respondent's same group of employees. We find, therefore, that by these acts the Respondent violated Sec. 8(a)(2).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Interstate Material Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Sheryl A. Sternberg and *Steven L. Sokolow, Esqs.*, for the General Counsel.

Rufus Cook and *Barbara J. Revak, Esqs.*, for the Respondent.

Leonard Samuels Sr., president, and *Alvester Samuels*, secretary-treasurer, for Allied Workers Union Local 101.

DECISION

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Chicago, Illinois, on 26, 27, 28, and 29 January 1987 pursuant to charges filed by Local 786, Building Material, Lumber, Box, Shaving, Roofing and Insulating, Chauffeurs, Teamsters, Warehousemen and Helpers and Related Industry Employees, Watchmen and Security Guards Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 786) and complaint and amended complaint issued on 26 June and 30 July 1986, respectively. It is alleged that Interstate Material Corporation (Respondent) violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act (the Act). Respondent denies the commission of unfair labor practices. On the entire record,[1] and the comparative testimonial demeanor of the witnesses testifying before me, and after considering the arguments of the parties during trial and in their posttrial briefs, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The complaint as amended alleges, Respondent admits, and I find that at all times material to this proceeding, Respondent, a coporation with offices and places of business at 1432 West 32d Street and 9050 South Green Street, Chicago, Illinois, until in or around January 1986, and thereafter at 4000 South Cicero Street and 2604 West Fulton Street, Chicago, Illinois, has been engaged in the business of supplying construction materials, including ready-mix concrete, to contractors, and during the past calendar and/or fiscal year, a representative

[1] On April 27, 1987, my Order to Show Cause why the record should not be corrected in numerous respects issued. The General Counsel filed a motion to correct the transcript on 21 April 1987. No response to my Order has been received, nor has any objection to the General Counsel's motion been received. Accordingly, the official record is corrected in the particulars set forth in the Order and motion.

period, in the course and conduct of these business operations, purchased and received at its Chicago, Illinois facilities products, goods, and materials valued in excess of $50,000 from other enterprises located within the State of Illinois, each of which other enterprises had received the products, goods, and materials directly from points outside the State of Illinois and sold goods and services valued in excess of $50,000 to enterprises located in Illinois, which enterprises were themselves engaged in commerce and satisfied the Board's standards for assertion of jurisdiction other than the indirect inflow and indirect outflow standards. On these facts, I conclude and find, as Respondent admits, that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Local 786 and Allied Workers Union, Local 101 (Local 101) are now, and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

III. SUPERVISORS AND AGENTS

Rufus Cook and Renee Bradford, Respondent's president and vice president, are conceded by Respondent to be its agents. Respondent further agrees that Andre Duncan was its director of operations and a statutory supervisor from 29 July 1985 until 20 February 1986, and that Walter Mays was a statutory supervisor until 24 May 1986. Respondent denies responsibility for any statements made by Duncan or Mays relevant to the matters before me. The statements and conduct of an employer's supervisors are attributable to the employer,[2] and there is no evidence Respondent advised its employees that it was disavowing any statements or conduct of Duncan or Mays. The statements and conduct of Duncan and Mays referred to in this decision are therefore attributable to Respondent.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Complaint Allegations*

1. Respondent violated Section 8(a)(3) and (1) of the Act by laying off or discharging employees represented by Local 786 at its 32d Street and Green Street facilities; by ceasing operations at these facilities and transferring work performed by these employees to its Cicero Street and Fulton Street facilities; and by failing and refusing to recall or reinstate the employees, all because the employees engaged in statutorily protected activities and in order to discourage such activities.

2. Respondent violated Section 8(a)(5) and (1) of the Act by denying Local 786 requests to bargain and withdrawing recognition from Local 786 since on or about 12 February 1986; and, by Andre Duncan, bypassing Local 786 and, on or about 8 April 1986, bargaining directly with employees concerning recall, transfers, wages, and other terms and conditions of employment.

3. Respondent violated Section 8(a)(2) and (1) by recognizing and entering into a contract with Local 101 as the bargaining representative of Respondent's employees at a time when Local 101 did not represent a majority of the employees.

B. *Preliminary Findings*

Respondent is a minority business enterprise engaged in supplying ready-mix concrete to various projects conducted by agencies of the State of Illinois or the city of Chicago. Commencing in 1983, Respondent operated its business from leased premises at 1432 West 32d Street and 9050 South Green Street, Chicago, Illinois. The State of Illinois and the city of Chicago questioned Respondent's minority status because Respondent was leasing its trucks and equipment, as well as the above premises, from Prairie Material Sales, Inc. (Prairie) and also obtained its rock, sand, and cement from Prairie. In the opinion of the governmental authorities concerned, this demonstrated Respondent's lack of independence. To meet these concerns, Respondent commenced a search for different premises on which to conduct its business and contracted in August 1985 to purchase 11 trucks from Prairie. These trucks were subsequently delivered to Respondent in late September or early October 1985. Respondent then secured new premises at 2604 West Fulton Street, effective 1 January 1986, and at 4000 South Cicero, effective 1 February 1986, by leasing both locations from Cook Development Company, another business headed by Rufus Cook with corporate offices at 1331 South Michigan Avenue, Chicago. Cook Development leased the Fulton Street realty and purchased the ready-mix and related equipment there located from Colonial Brick Co. on 20 December 1985, and has purchase agreements with third parties on both locations. The move to a new quarters was not inspired by antiunion considerations, but resulted from lawful economic considerations unrelated to questions of union representation, and did not violate the Act as the complaint alleges.

On 26 November 1985, Local 786 filed a petition[3] with the Board's Region 13 requesting a representation election in a unit of Respondent's ready-mix truckdrivers. A hearing thereon opened on 12 December 1985. The representatives of Respondent and Local 786 present stipulated, subject to the agreement of Rufus Cook, Respondent's chief executive officer who was not present, that a representation election in a unit of all full-time and regular part-time ready-mix truckdrivers employed by Respondent at 1432 West 32d Street and 950 South Green Street, Chicago, Illinois, would be held on 10 January 1986. The hearing was recessed to 18 December 1985 for the purpose of either obtaining the signature of Rufus Cook to a written election agreement or continuing with the hearing in the event no signature was forthcoming.

Cook met with Board agent Daniel Murphy and Local 786 Business Agent Salvatore Badami at the Board's Chi-

[2] See, e.g., *NLRB v. Elliott-Williams Co.*, 345 F.2d 460 (7th Cir. 1965), enfg. 143 NLRB 811 (1963).

[3] Case 13-RC-16800.

cago Offices on 18 December 1985. There Cook and Badami signed a Stipulation for Certification Upon Consent Election that was recommended by Murphy and approved by the Regional Director. The appropriate collective-bargaining unit set forth in the stipulation reads as follows:

> *Included*: All full-time and regular part-time redimix truckdrivers employed by the Employer at its facilities located at 1432 W. 32nd Street and 9050 S. Green, Chicago, Il.
>
> *Excluded*: All office clerical employees, professional employees, guards and supervisors as defined in the Act.

Cook credibly testified that he was assured by Board agent Murphy that the bargaining unit description in the stipulation meant what it said. Salvatore Badami testified that the bargaining unit for the election was whatever was in the stipulation. Cook signed the stipulation. On the advice of Murphy and Badami that there would be no need for an election if Respondent entered into a collective-bargaining agreement with Local 786, Cook told Badami he would enter into such an agreement. Cook and Badami then proceeded, in different cars, to the offices of Local 786 where Badami introduced Cook to Walter Hoff, the president of Local 786. Cook gives the following account of what then transpired:

> We started talking. Mr. Hoff pulled out an agreement which was a pre-printed version of what is here as I-2 and handed it to me and said, "This is the agreement, I understand that you are ready to sign it."
>
> . . . .
>
> And I said, "That's right, but let me look at it." And then I looked at it. It took me a few minutes to go over it. I asked him what happens, because I noticed that first paragraph there that says that the Northern Illinois Ready-Mix and Materials Association's Agreement. I asked him what happens if we are not a member of the association and we don't join, and thus as the time we sign it we are an independent. As he said, "Refer to the back of the agreement."
>
> . . . .
>
> [this referred to] Pages 10 and 11 with the provisions that are there under "Agreement for Adoption for Non-Association Employers." I had a copy of the stipulation with me, and I then looked at the stipulation and asked him what is the bargaining unit under this agreement. . . .
>
> . . . .
>
> Mr. Hoff said, "The bargaining unit is the plants that—and a non-association employer has at the time the agreement is signed." I said, "Well, that's different from the bargaining unit if it's the association because it seems to be the entire association if you are a member of the association." He said, "Yes, that's right."
>
> . . . .
>
> I then told him that we were interested in the training program for bringing minorities into the industry and so forth, and asked him about that and he said they were presently willing to do what was required to sign an agreement to enable us to get that.
>
> Q. Was there any other communications between the two of you?
>
> A. Not that I can recall, no.
>
> Q. At that point, you then signed the agreement?
>
> A. Yes.
>
> Q. After signing the agreement, did you leave the offices of Local 786?
>
> A. I did. I returned to my own office.

Hoff denies any knowledge of the stipulation when he met with Cook on 18 December 1985. He does not directly dispute Cook's version of their conversation, but states there was no discussion of what the bargaining unit at Interstate would be. Both men are credible. Hoff's narrow testimony that there was no discussion of what the bargaining unit at Interstate would be does not contradict Cook's broad testimony that Hoff told him the bargaining unit for a nonassociation employer was the plants the employer had at the time the agreement was signed. Here we have a question of perspective, and I am persuaded both men were testifyng to that which they honestly recalled. What probably happened is that Cook concluded, quite naturally I believe, that Hoff's comments on the bargaining unit were designed to convey this was Respondent's bargaining unit, but Hoff, also quite naturally, denies a specific reference to an "Interstate" bargaining unit but not a general reference to bargaining units. There is no evidence Cook advised Hoff of Respondent's intention to move its operations to other locations, and I conclude he did not.

The contract signed by Cook and Hoff on December was an agreement for adoption for nonassociation employers of Local 786's 1 May 1983 through 30 April 1986 agreement with Northern Illinois Ready Mix and Materials Association with special grievance procedure and delinquent payments provisions for nonassociation employers. Although I am persuaded the parties understood their agreement covered Respondent's ready-mix drivers, which were the only employees it then had, the agreement lists ready-mix truck chauffeur; quarry or pit chauffeur; other truck chauffeur; laborer or other employee operating fork lift or front end loader; chauffeur or laborer employed in yards, warehouse, or team track handling block, brick, and building materials; transit mix or hopper operator; and transit mix or hopper employer operating gasoline cranes loading or unloading materials as the classifications covered thereunder. That Respondent did not then employ some of these classifications does not alter the fact that the signed agreement is applicable to any employee working in those classifications.[4]

[4] I refused to permit Respondent to question Hoff regarding the meaning of certain articles in the collective-bargaining agreement. On reflection, I conclude I made a good ruling but gave a bad reason. The articles speak for themselves and Hoff's conjectures regarding their meaning would have no probative weight. I therefore conclude my ruling was correct.

When the contract was signed, Respondent was engaged in supplying ready-mix concrete to A. N. Ebony Co., which has the same corporate address and registered agent as Respondent and was then a subcontractor on a paving project at Chicago's O'Hare Airport. Respondent employed from 11 to 15 drivers, owned the same number of trucks, and utilized these trucks and drivers to pick up ready-mix from a supplier in Des Plaines, Illinois, and deliver it to A. N. Ebony at O'Hare. This work was suspended in late December 1985 when Andre Duncan,[5] Respondent's director of operations and the direct supervisor of the drivers, called them all together and told them the work was being stopped because it was too cold to pour concrete. He further told them they would be called back and the work would resume in the spring when the weather warmed up.

As previously noted, Respondent moved its operations to 2604 West Fulton and 4000 South Cicero effective 1 January and 1 February 1986, respectively. These newly obtained facilities required reconstruction for Respondent's purposes. To that end, Duncan offered Willie Hatter, Itiel Ammi (whose name was Donald Bolding at the time), Dennis Alford, and other drivers employment at lesser wages doing labor work readying the Cicero facility for use. Ammi and Alford accepted the offer. Ammi worked until 24 January 1986 at $4.50 per hour. Alford worked until 7 March 1986, apparently at the same wage. Throughout the winter, until Duncan left the position of director of operations in February and after he became the materials engineer, Duncan had several conversations with Ammi, Hatter, David Morgan, and David Canada where they inquired when the job would start up again and they would be recalled. He responded to these inquires with the assurance that they would be called back as soon as Renee Bradford, Respondent's vice president, authorized it. That Respondent considered the laid-off drivers to be its laid-off employees and contemplated recalling them as late as 11 March 1986 is shown by the minutes of a staff meeting held by Repsondent on that date and Duncan's credible explanatory testimony relating to that meeting. The minutes reflect that in discussing the status of Respondent's drivers, the participants noted, "We have a roster of ten experienced drivers that have not been called in yet." Duncan, who was present at the meeting, explains that the "ten experienced drivers" referred to the drivers Respondent planned on returning to work from layoff, including Ammi, Hatter, David Morgan, David Canada, and Steve Canada. Moreover, Walter Mays told David Canada on several occasions in March 1986 that Canada would be recalled back to work as soon as the reconstruction of the Cicero plant was completed. Mays obviously considered Canada to be a laid-off employee to be recalled. None of the drivers working for Respondent in 1985 were recalled to work as drivers in 1986. The statements to employees by supervisors and management's discussion of their status on 11 March 1986 is sufficient to show the drivers were not permanently laid off in December 1985, and did have a reasonable expectation of recall when work resumed in 1986. Respondent proffers no persuasive reason for its failure to recall its "ten experienced drivers" referred to in the March 1986 meeting. The statements of Cook[6] during his cross-examination of David Canada, 1 of the experienced 10 illustrate that Respondent most likely had no legitimate reason not to recall the men. That Cook, Respondent's chief executive officer as well as its attorney, was totally unaware of the reason Canada was not recalled and therefore sought at hearing to develop Canada's prior employment history for the purpose of ascertaining the reason Respondent did not recall Canada strikes me as highly improbable, and indicates, in my opinion, an effort to construct a colorable reason where none exists. The failure to proffer a valid reason for not calling the laid-off drivers, combined with what appears to be an effort to construct a pretextual reason, warrants an inference that Respondent had no legitimate reason, and I draw that inference.

Shortly after Respondent's acquisition of the new facilities, Local 786, by letter of 11 February 1986, advised Respondent the existing agreement was terminated effective 1 May 1986, and requested negotiation of a new

[5] Duncan was a believable witness whom I credit.

[6] The statements were:

By Mr. [Cook]

Q. Mr. Canada, you say that you worked for the Material Service before you went to work for Interstate?

A. Yes.

Q. How long were you at Material Service?

. . . .

THE WITNESS: Approximatley six to seven years.

By Mr. [Cook]

Q. And you left when, sir?

A. 1983.

Q. For what reason did you leave?

A. I got fired.

. . . .

By Mr. [Cook]

Q. What were you fired for?

SHERYL STERNBERG: Objection.

JUDGE WOLFE: Sustained.

. . . .

RUFUS COOK: *It is certainly possibly, Judge, that the reason that the man was not rehired was not a union affiliation, but had something to do with his prior record. I have no way of determining that without being able to question him.*

JUDGE WOLFE: Now, are you telling me that from finding out from him, whether or not he was ever fired, I can conclude from that that the company did not call him back for that reason?

RUFUS COOK: I am not saying that—

JUDGE WOLFE: I have to have some affirmative evidence in the company that that is the reason. I don't understand here. All I am saying, I don't know from this, why he wasn't called back [at] this juncture. I don't know what reason the company will put forth but it seems to me that the reason that he was fired someplace else doesn't make any difference unless the company is prepared to show that he was, in fact, not called back because of that previous discharge. He could say, "Yes, I was fired." But the mere fact that he says he was doesn't mean that is the reason that he wasn't called back. I don't want to imply any recall rights. I mean that he wasn't hired. Let me put it this way.

RUFUS COOK: *My point is this, I don't know this gentleman, I have never met him and I know nothing about his situation.* However, if in fact, upon investigation, it is determined that the reason for which he was fired originally from Material Service, was also something that effected him at Interstate and we would have a problem of proof establishing why he was fired from Materials Service in the first place. In other words, we would have to call him back as our witness to simply establish why he was fired from Materials Service. [Emphasis added.]

agreement to be effective 1 May 1986. The letter also asked Respondent to advise when negotiation meetings could be had. Cook testified that Respondent did not reply to the letter because when he read it he noted it was signed by Richard Lein, the secretary-treasurer of Local 786, who was not familiar with the facts of the stipulation or the agreement between the parties. Cook continues that he assumed Lein would learn from Hoff what the provisions of the agreement were and that the letter was inappropriate.

Respondent recognized and entered into a collective-bargaining agreement with Local 101 on 2 April 1986 that covers "all individuals other than supervisory, clerical and management employees" of Respondent, and contains union-security and checkoff provisions. According to Cook, in late March he received a phone call from Local 101 officials requesting a meeting to discuss organizing and representation. He agreed to meet with them. They then met on 2 April 1986. Cook requested evidence of their majority status. The union representatives said they had such evidence, but not with them, and asked for a recess to produce the evidence. Cook agreed. Later that day they met and, says Cook, presented him with authorizations signed that very day by a majority of Respondent's employees and designating Local 101 as their representative, whereupon Cook, on behalf of Respondent, entered into a collective-bargaining agreement with Local 101. Leonard Samuels, the president of Local 101, was one of those meeting with Respondent on 2 April 1986. He testified the cards were secured by his business agent, and he did not personally solicit them. Neither the business agent nor the employees alleged to have signed the authorizations testified. No other proof that the cards were signed by those whose names appear on them was adduced. The authorizations have therefore not been properly authenticated and are not probative evidence of representative status. *Stop-N-Go Foods*, 279 NLRB 777 (1986).

During the hearing on 27 January 1987, Respondent, by its counsel Rufus Cook, offered the stipulation that the employees Respondent considered in the bargaining unit on 2 April 1986 were Mark Agic, John Weaver Jr., Robert Weaver, David Hole, John Ciciora, and Kenneth Rayon and explained that Stephen McIntire and Edward Cantrell were temporary employees brought to Chicago by John Weaver Sr., supervising consultant for Interstate, and returned to their place of origin as soon as the work they were hired for was done. The General Counsel agreed with the stipulation and it was received. Respondent had previously tendered photocopies of six signed cards authorizing Local 101 to represent the signer. The cards dated 2 April 1986 bore the names of Cantrell, Rayon, McIntire, John P. Weaver II, and William Thomas. The sixth card was dated 7 April 1986 and purportedly signed by Donald Brandy. Record summaries prepared by Respondent show that Brandy was not employed until 14 May 1986 and Thomas was first employed on 5 May 1986. Thus neither was an employee on the dates they purportedly signed cards. Respondent does not contend they were in the bargaining unit on 2 April 1986, and they obviously were not. Excluding the cards of Brandy and Thomas, as well as those of McIntire and Cantrell, who were represented by Respondent to be temporary employees, the cards of Rayon and John P. Weaver II are all that remain as valid designations by unit employees. Two is clearly not a majority in a unit of six.

On 28 January, Cook represented that his stipulation of the prior day was incorrect because McIntire, Cantrell, and Henry Little were also in the bargaining unit, thus expanding the unit to nine employees. In addition, Cook proffered a card purportedly signed by John Ciciora on 2 April 1986, and represented that it had just been furnished to Respondent by Local 101. Leonard Samuels, Local 101's president, testified that he had, on the first day of the hearing, 26 January, delivered copies of authorization cards bearing the signatures of Cantrell, Rayon, McIntire, and John P. Weaver II to the General Counsel in response to a subpoena duces tecum requiring delivery of originals or copies of authorization cards or other evidence of majority support obtained by Local 101 from Respondent's employees. Samuels further testified that when he arrived at the hearing he noted there was a card missing, but went ahead and gave the four to the General Counsel because that was all he had, but then, after the second day of trial, procured a copy of a card signed by Ciciora. The General Counsel objected to Respondent's withdrawal from its earlier stipulation regarding unit composition and to any consideration of the card of Ciciora.

Regarding unit composition, Cook's original position that Cantrell and McIntire were temporary was accompanied by a convincing recitation of the reasons for their hire and the duration thereof. The United States Court of Appeals for the Seventh Circuit long ago held:

> [T]he rule, in our judgment, is this: In a real and legitimate controversy, a party should be left within the knot of his averments in pleadings and admissions in testimony, unless the Court can find an absolute demonstration from other evidence in the case, or from facts within judicial notice, like the laws of physics, etc., that under no circumstances could the averments and admissions be true.[7]

The Board has also dealt with this problem, noting in *Kroger Co.*, 211 NLRB 363, 364 (1974), "[I]t is generally accepted that a stipulation is conclusive on the party making it and prohibits any further dispute of the stipulated fact by that party or use of any evidence to disprove or contradict it." Cook's poststipulation effort to include Cantrell and McIntire in the unit for no reason other than asserted mistake, in the absence of any evidence that would convincingly demonstrate the stipulation is not or could not be true, is not persuasive. Accordingly, I find and conclude the unit was as stipulated by Cook on 27 January. It necessarily follows that even if the cards of Rayon, John Weaver II, and Ciciora be

[7] *L. P. Larson Jr. Co. v. W. Wrigley Jr. Co.*, 253 F.2d 914, 918 (7th Cir. 1918), cert. denied 248 U.S. 580 (1918); and see *John McSain, Inc. v. United States*, 375 F.2d 829, 831 (Ct. Cl. 1967), where it states, "A stipulation is a judicial admission binding on the parties making it absent special considerations." No such "special considerations" are present in the instant case.

counted, these are not a majority in a unit of six employees. Parenthetically, I note that Respondent's possession of authorization assignments purportedly signed by Brandy and Thomas before they were employed does not inspire confidence in the validity of any of the authorizations. Moreover, I have concluded and find that the drivers laid off in December 1985 had been promised recall, were considered by Respondent to be its employees on layoff as late as its managerial meeting in March 1986, had a reasonable expectancy of employment when the work recommenced in the spring of 1986, and were and are employees of Respondent awaiting recall on and after 2 April 1986. None of these laid-off employees authorized Local 101 to represent them so far as the record shows. Respondent's assertion in its 3 June 1986 letter to the Board, and in an attachment to its answer to the complaint, to the effect that Local 101 was a union whose orientation was predominantly black and was therefore the choice of the Cicero plant employees who were predominantly black, is not supported by Respondent's records and Respondent's testimony showing that although all of its drivers, with the possible exception of David Morgan, in December 1986 were black, of those employees contended by Respondent to constitute the bargaining unit on 2 April 1986, seven were white (Agic, John Weaver Jr., Robert Weaver, Hole, Ciciora, McIntire, and Cantrell), and only two were black (Rayon and Little). Respondent's misrepresentation of the racial makeup of the 2 April 1986 employee complement in order to support its recognition of Local 101 further erodes confidence in Respondent's bona fides. For all the reasons set forth above, I conclude Local 101 did not enjoy majority status on 2 April 1986.

The first time that concrete was mixed and deposited into trucks at the Cicero plant for delivery was 4 April 1986. None of Respondent's employees who thereafter performed work covered by either labor agreement had been employees in 1985. Respondent's reasons for preferring the new employees and the new union over the old may be found in the statements of John P. Weaver Sr., a supervising consultant to Respondent who was clearly a supervisor and agent of Respondent when he made the statements. As related by Andre Duncan, during a staff meeting in early spring 1986 it was mentioned that another union was on the scene, and John P. Weaver commented that the people in this union could drive, do labor work, or do whatever else required and were not paid Teamsters wages. Weaver agrees that he spoke to Interstate personnel, including Duncan, about "the Allied Union" in mid-April after the Local 101 contract was signed, and expressed the view that connection with that union gave Respondent the flexibility of using employees for more than one task and benefited Respondent in other ways so as to give it a competitive edge. Both witnesses are credited, including those items mentioned by one but not the other.

By telegram of 5 May 1986, Local 786, by President Hoff, sent Respondent a telegram reading as follows:

> Local Union 786 hereby demands that you immediately recall all employees covered by our collective bargaining agreement and schedule negotiations regarding the successor agreement.

By certified letters of 6 and 7 May 1986, Local 786, by Salvatore Badami, requested Respondent to schedule a labor management committee hearing on the grievances of Ammi and Hatter that asked for their recall to work and to make them whole for losses. On 12 May 1986, Respondent, by Vice President Renee Bradford, delivered the following letter to Walter Hoff:

> It is the position of Interstate Material Corporation that, pursuant to the collective-bargaining agreement between Interstate Material Corporation and Local #786 of the International Brotherhood of Teamsters, Interstate is under no obligation to bargain with Local #786 regarding facility locations other than those bargaining units covered by the agreement.
>
> In December of 1985, as an offshoot of a proposed consent election, both parties to this agreement stipulated that the bargaining units covered were Interstate's 1400 West 32nd Street and 9050 South Green Street locations.
>
> Unfortunately, as the result of long and complex litigation, Interstate has terminated all leases for the Green Street and 32nd Street locations. Due to the limitation on location which comprise the bargaining unit covered by the agreement with Local #786, the contract provisions from this agreement did not survive Interstate's relocation. Therefore, the seniority and lay-off provisions, as well as the agreement itself have no applicability to the new locations.
>
> In reliance on the stipulation and agreement between the parties, Interstate has, at the request of its employees, entered into a labor agreement with another union regarding the facilities at 4000 South Cicero and 2604 West Fulton, under that union's authority as exclusive bargaining representative for the employees within this separate and distinct bargaining unit. As you are aware, Interstate is a black-owned and operated minority enterprise, and its employees have chosen to be represented by a union whose membership, leadership and orientation are predominantly black. Being mindful of the requirements of the City of Chicago that the work-force of minority companies be at least 51% black, the decision made by our employees to affiliate with a black union has positive implications in terms of aiding Interstate's efforts to comply with the City requirements. In any case, the choice of a union was solely up to our employees, and they made their choice.
>
> We appreciate the fine working relationship we have had with Local #786. Since we and a number of other minority businessmen are interested in expanding possible sources of financing for minority businesses, we would appreciate the opportunity to talk with the leadership of your union regarding possible pension fund loans. The lack of such loans, and the failure of predominantly white unions to address minority problems of this type, is one of the

> reasons why black unions with black orientation are considered desirable by employees such as ours. Again, we would welcome the opportunity to discuss this aspect of the matter with you.

Respondent then, on 20 May 1986, dispatched the following letter to Salvatore Badami regarding the grievances:

> Pursuant to your written notice to Interstate, dated February 11, 1986, Local 786 terminated its collective bargaining agreement with Interstate, effective May 1, 1986.
>
> As I explained in my May 12, 1986 letter to your president, Mr. Hoff, the plant locations covered by this agreement are no longer operated by Interstate. The bargaining unit covered by this agreement was, as stipulated, location-specific. Therefore the agreement, which was terminated at your request, is not subject to re-negotiation, and its provisions, including grievance procedures, are no longer in effect.
>
> Although these two men may have been covered by the expired contract, at no time did either of them approach their former supervisors or any other agent of Interstate prior to the April 30, 1986 contract termination date. The first occasion Interstate had to become aware of the grievances was upon receipt of the written grievance reports, almost two weeks after expiration of the contract. As such, their grievances of May 6 and 7 are improper both in substance and procedure since there was no contract in effect at the time these were first brought to Interstate's attention.
>
> In sum, Mr. Badami, for the above-cited reasons it is our position that the Labor Management Committee has no authority or jurisdiction to issue any decision binding on Interstate in this matter.
>
> Further, as you are well aware, the same issue regarding the appropriate bargaining unit has been raised by yourself with the NLRB. It would seem reasonable on both of our parts to suspend action regarding a Committee hearing pending the determinaton by the NLRB.

Hoff wrote to Respondent on 1 August 1986 as follows:

> Enclosed you will find the current "Ready Mix Material" contract, in duplicate. On Page 11—Agreement of Adoption for *Non-Association Employer*, please fill in the exact name of your company and the addrees, date and sign both contracts, indicating the title of the person signing. Please return the two signed contracts to us for my signature and I will sign them and return one for your files.

The record contains no evidence of any further communications between Local 786 and Respondent.

C. *Concluding Findings*

The collective-bargaining agreement signed by Cook and Hoff on 18 December 1985 did not expire on its terms until 30 April 1986. During that period Local 786 enjoyed an irrebuttable presumption of majority status in the unit of employees covered by that agreement,[8] and a rebuttable presumption thereafter.[9] The presumption continues unrebutted by the evidence before me. Cook, an attorney, examined the agreement before he signed it. As he notes, "It took me a few minutes to go over it." How minutely he examined the document is a matter of speculation, but he raised no question regarding the job classifications covered. This is perhaps understandable because it appears that the only employees Respondent had at the time were drivers inasmuch as it purchased its cement from other employees who delivered it directly to the ready-mix trucks owned by Respondent and from here it was dispensed to A. N. Ebony employees. There is, however, no indication that Hoff made any effort to mislead Cook regarding the type of employees to be covered by the agreement, or that Cook had any objection to the job classification so covered. Respondent's contention is quite different. Simply put, Respondent asserts the unit set forth in the Stipulation for Certification Upon Consent Election was confined to the 32d Street and South Green Street locations, and therefore limited the application of the signed collective-bargaining agreement to those locations.

Respondent's contention is based on an erroneous conclusion that the stipulation and the collective-bargaining agreement with Local 786 are an integrated agreement. Contrary to Repsondent's posttrial brief, neither the execution of nor Regional Director's approval of the stipulation means that "Local 786 is certified by NLRB as the collective bargaining agent for 'all full time and regular part-time red[i]-mix truck drivers employed by employer at its facilities located at 1432 West 32nd Street and 9050 South Green, Chicago, Illinois." The stipulation on its face is simply a stipulated agreement by the parties thereto to proceed to a secret-ballot election among Respondent's employees in an agreed-on unit at an agreed-on time and place for the purpose of determining whether a majority of those employees wanted to be represented by Local 786 for purposes of collective bargaining. The Board issues no certification of representation unless the union party to such a stipulation receives a majority of the valid votes cast by the unit employees in the election provided for in the stipulation. In short, without a union election victory there is no union certification by the Board. The Board agent truthfully advised Cook of an option available to him, and Cook, on behalf of Respondent, elected to recognize Local 786 rather than to utilize the Board's election processes. When he did so, no question concerning representation remained to be resolved by the election, which was the purpose of the stipulation. The stipulation was therefore rendered a nullity with no legal force or effect. The correct advice given to Cook by Board Agent Murphy, with which Badami agreed, that the bargaining unit in the stipulation meant what it said cannot be construed as either an agreement by the parties or Board assurance that the unit stipulated for purposes of a Board-conducted election would control

[8] See, e.g., *BASF-Wyandotte Corp.*, 276 NLRB 498, 504 (1985).
[9] *Burger Pits, Inc.*, 273 NLRB 1001 (1984).

the composition of an employee unit in a collective-bargaining agreement voluntarily entered into in lieu of utilizing the Board's election processes. Moreover, neither the comments about the stipulation unit by Murphy and Badami, nor the discussion between Hoff and Cook regarding the coverage of the collective-bargaining agreement are sufficient to vary or contradict the content of the written and signed contract between Respondent and Local 786. There is no persuasive evidence that agreement is not complete and accurate on its face, and examination of the document reveals no ambiguities or other basis to warrant the use of oral testimony to explain its clear terms. The well-established rule that all prior oral understandings on the agreement are presumed to be merged in the final written agreement of the parties[10] is clearly applicable to the instant case. I therefore find that the collective-bargaining agreement Respondent executed with Local 786 on 18 December 1985 accurately and completely sets forth the agreements of the parties regarding all items, including the job classifications of employees covered, contained therein. I further specifically find there was no agreement to limit the coverage of the contract, which contains no limitation of the bargaining unit to specific locations, to Respondent's employees located at 1432 West 32d Street and 9050 South Green Street.[11]

The absence of geographical limitation does not completely answer the question of the contract's applicablity to new locations, specifically the Cicero facility where Respondent's ready-mix operation is now in progress.[12] The applicable rule in relocation cases has been succinctly expressed in *Westwood Import Co.*,[13] as follows:

> [A]n existing and effective collective-bargaining agreement remains in effect following a relocation, provided operations and equipment remain substantially the same at the new location, and a substantial percentage of the employees at the old plant transfer to the new location.

The only real change in operations as a result of the relocation to the Cicero facility is that Respondent's employees, rather than those of a supplier, now prepare and load the ready-mix into the trucks for delivery. There is no substantial change in either operations or equipment. The preparation and loading of cement at the abandoned facilities would not have changed the bargaining unit, and the performance of this work with the accompanying operation of the necessary equipment at the Cicero plant has no impact on the bargaining relationship.[14] Ready-mix trucks remain ready-mix trucks doing the same type work, and there simply is no showing of any substantial change in equipment. A substantial percentage of employees at the old facility obviously were not recalled to the Cicero facility. They did, however, remain employees of Respondent with a reasonable expectancy of recall, and have never, as far as the record shows, been told by Respondent they are no longer its employees. They continue to be employees on layoff and the refusal to recall them is alleged to be an unfair labor practice. Direct evidence of unlawful motivation is not to be found in this case. This is not surprising because such evidence is rarely available to the finder of fact who must therefore often rely on circumstantial evidence and legitimate inference from the record as a whole.[15] The record does, I believe, reveal sufficient evidence to warrant a finding the failure to recall was unlawfully motivated.

As late as 11 March 1986 Respondent treated the laid-off drivers as employees awaiting recall. This is consistent with the repeated assurances by Duncan and Mays that recall would coincide with the resumption of concrete delivery in the spring. Concrete delivery resumed on 4 April 1986. None of the laid-off drivers were recalled, instead Respondent initially utilized individuals as drivers who were hired to rehabilitate the facility, and then hired two new employees in April, 13 in May, 5 in June, 6 in July, 5 in August, 1 in September, and 2 in October 1986, but not one of its "ten experienced drivers" on layoff. Respondent does not begin to convincingly explain why this was so, nor what type of work those it did hire performed. Cook's comments during his examination of Canada show a conscious effort by Respondent to find a pretextual reason for failure to recall him, and, as I have found, provide reason to infer the true reason was unlawful. The failure to proffer reasons for the failure to recall others also warrants an inference Respondent had no valid reason to so do. Some of these new hires were surely drivers, given the fact Respondent had 11 to 15 trucks and by its own count 9 employees, including batchman Agic, at most, and the further fact that the sale and delivery of ready-mix concrete was what the business was all about. Accordingly, I conclude there was work available for the laid-off men. Why then were they not recalled? Consideration of all the evidence in the light of logical probability and common sense leads me to the following conclusions. Cook well knew when he contracted with Local 786 that the Respondent was about to transfer its operations to other locations. He did not tell Hoff this because he erroneously believed a mere change of location would relieve Respondent of its bargaining obligation. When Local 786, by Lein, its secretary treasurer, requested negotiations in a letter of 11 February 1986, Respondent simply ignored it. I do not credit Cook's testimony that he did not reply because he assumed Hoff would tell Lein that the letter was inappropriate. This explanation was not convincing when I heard it, and I think it more likely Cook had already decided, even though the drivers were still Respondent's employees, not to bargain further with Local 786. When Respondent elected to ignore the 11 February 1986 re-

[10] *Petersen & Lytle*, 60 NLRB 1070, 1071 fn. 1 (1945).

[11] The designation of these locations in the stipulation would not, even if relevant, confine recognition to those locations. *Molded Acoustical Products*, 280 NLRB 1394 (1986), and cases cited.

[12] There is no indication in the record that any relevant operations are being conducted at the Fulton Street facility.

[13] 251 NLRB 1213, 1214 (1980), enfd. 681 F.2d 664 (9th Cir. 1982).

[14] *Drukker Communications*, 258 NLRB 734, 747 (1981); *Paper Mfrs. Co.*, 274 NLRB 491 (1985); *International Paper Co.*, 150 NLRB 1252, 1259 (1965).

[15] See, e.g., *Irwin County Electric Membership Cooperative*, 247 NLRB 1357, 1363 (1980); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

quest to bargain, it refused to bargain in good faith as required by the Act and therefore violated Section 8(a)(5) and (1) of the Act.[16] What happened between 11 March 1986 and Respondent's recommencement of ready-mix delivery to cause "ten experienced drivers" on layoff not to be recalled or claimed as employees? The answer, I conclude is that Respondent, on being made aware of Local 101's organizing efforts in March 1986, as Cook testifies it did, and looking toward restarting its ready-mix operation in April, decided, for the reasons Weaver Sr. explained later in April, that Local 101 should be cultivated. To that end, Respondent invited Local 101 to meet and show their degree of employee support. When the Local 101 representatives showed up on 2 April, they had no evidence of support with them. After requesting and receiving a recess, they apparently returned with authorization cards purporting to bear employee signatures. Strangely, the cards on which Respondent seeks to rely as a basis for recognition are dated that very day, which suggests Local 101 had no proof of employee support prior to 2 April and gives rise to a suspicion that the completed cards came into being during the recess. Not one card has been shown to be signed by the person whose name it bears, and they are therefore invalid as unauthenticated. Moreover, the purported execution of authorization cards by Brandy and Thomas before they were employed is a further reason to suspect all the cards presented were invalid. The evidence dictates a conclusion that Respondent recognized and entered into a contract with Local 101, which included union-security and checkoff provisions, at a time Local 101 did not represent a majority of Respondent's employees in a unit appropriate for collective bargaining, and at a time when Respondent had a collective-bargaining agreement with Local 786 covering those employees, and by so doing assisted Local 101 in violation of Section 8(a)(2) and (1) of the Act. *Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961); *Carbonex Coal Co.*, 262 NLRB 1306 (1982).

Turning to the issue of failure to recall, it must first be noted that the absence of specific evidence of intent to discourage union membership does not mean no violation of Section 8(a)(3) of the Act can be found. As expressed by the Supreme Court of the United States in *Radio Officers v. NLRB*, 347 U.S. 17, 45 (1954):

> [A]n employer's protestation that did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence.

The Court further stated (at 51):

> Encouragement and discouragement are "subtle things" requiring "a high degree of introspective perception." Cf. *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 231.

Respondent, by assisting and thereby encouraging membership in Local 101, discouraged membership in Local 786. This conduct, together with what I perceive to be an attempt to perfect its relationship with Local 101 and assure the absence of employment for Local 786 by hiring new employees and refusing to recall the laid-off Local 786 employees was, I conclude, designed to discourage membership in Local 786, a predictable result, as well as encourage membership in Local 101. The refusal to recall therefore violated Section 8(a)(3) and (1) of the Act. The laid-off drivers remain Respondent's employees who should have been recalled to the Cicero plant. The *Westwood Import* requirement that a substantial percentage of old plant employees transfer to the new plant would therefore have been met in the absence of Respondent's unfair labor practices. Accordingly, Local 786's collective-bargaining agreement was applicable to the Cicero facility, and Respondent refused to bargain in violation of Section 8(a)(5) and (1) of the Act when it refused, by letters of 12 and 20 May 1986 as well as by its refusal to respond to Local 786's 11 February 1986 letter, to negotiate with Local 786.

As the General Counsel concedes, there is no evidence Andre Duncan bargained directly with employees on or about 8 April 1986 as the complaint alleges. The error on the date is not significant if, as the General Counsel contends, Duncan bargained directly with employees in December 1986 and February and March 1986.[17] Duncan's responses to employee inquiries regarding the possible day they would be recalled were innocent, and so far as the record shows, truthful estimations bereft of any bargaining element. He neither did nor said anything with regard to transfers or "other terms and conditions of employment" other than to advise them there was labor work available at less than the contract rate, but by so advising them, and by employing two at less than contract rates Duncan did, as Respondent's agent, engage in direct bargaining with the employees in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 786 and Local 101 are labor organizations within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full time and regular part time employees employed by Respondent in the following work classifications: Ready Mix Truck Chauffeur; Quarry or Pit Chauffeur; Other Truck Chauffeur; Laborer or other employee operating Fork Lift or Front End Loader; Chauffeur or Laborer employed in yards, warehouse or team truck handling Block, Brick and Building materials; Transit Mix or Hopper Opera-

[16] *Hassett Maintenance Corp.*, 260 NLRB 1211, 1217 (1982).

[17] See, e.g., *Omico Plastics*, 184 NLRB 767, 770 (1970).

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tor; and Transit Mix or Hopper Employee operating gasoline cranes loading or unloading materials.

4. Local 786 is the exclusive representative of the employees in the unit described in paragraph 3, above, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By refusing to bargain with and withdrawing recognition from Local 786, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By bypassing Local 786 and bargaining directly with employees regarding wages, Respondent violated Section 8(a)(5) and (1) of the Act.

7. By recognizing, bargaining with, and executing a collective-bargaining agreement covering the unit of employees above described and containing a union-security clause with Local 101 notwithstanding the fact that Local 101 did not represent a majority of the employees and the employees were covered by a collective-bargaining agreement between Respondent and Local 786, Respondent assisted and supported Local 101 in violation of Section 8(a)(2) and (1) of the Act, thereby encouraging membership in Local 101 and discouraging membership in Local 786.

8. By failing and refusing to recall its laid-off drivers for the purpose of discouraging membership in Local 786, Respondent violated Section 8(a)(3) and (1) of the Act.

9. Respondent's layoff of drivers in December 1985 has not been shown by a preponderance of the credible evidence to be violative of the Act, nor has its transfer of unit work to different locations.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual cease-and-desist and notice-posting requirements, Respondent will be required to withdraw and withhold recognition of Local 101 as the collective-bargaining representative of its employees, and reimburse all former and present employees for dues, assessments, and other moneys, if any, paid by or withheld from them pursuant to the union-security and dues-checkoff provisions of the aforementioned collective-bargaining agreement, together with interest thereon. *Vernitron Electrical Components*, 221 NLRB 464 (1975), enfd. 548 F.2d 24 (1st Cir. 1977).

Respondent shall be further ordered to meet and bargain with Local 786 on request, reducing any agreements reached to a signed document, and to reinstate and make those ready-mix drivers laid off in December 1985 whole for any loss of earnings suffered as a result of Respondent's unlawful failure and refusal to recall them, the backpay interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[18]

[18] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

The visitatorial clause requested by the General Counsel appears unnecessary in the circumstances of this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Interstate Material Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Local 786, or any other labor organization, by failing and refusing to recall employees from layoff.

(b) Assisting or contributing support to Local 101 by recognizing or bargaining with such labor organization as the exclusive representative of its employees for the purposes of collective bargaining unless and until Local 101 is certified by the Board as the collective-bargaining representative of the employees pursuant to Section 9(c) of the Act.

(c) Maintaining or giving any force or effect to the collective-bargaining agreement between the Respondent and Local 101 effective 2 April 1986, or any extention or modification thereof; provided, however, that nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms, and conditions of employment that may have been established pursuant to the performance of that contract.

(d) Withholding from the pay of any of its employees union dues or other union fees or assessments that have been deducted on account of any obligation of membership in Local 101, and paying to Local 101 any dues, fees, or assessments that have been deducted from the pay of its employees.

(e) Refusing to bargain in good faith with Local 786 as the representative of its employees in the appropriate unit described above for the purpose of dealing with Respondent concering grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work.

(f) Bypassing Local 786 and bargaining directly with employee members of the unit represented by Local 786 regarding wages or other working conditions.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from Local 101 as the representative of its employees for the purpose of collective bargaining unless and until Local 101 is certified by the Board as the collective-bargaining representative of the employees pursuant to Section 9(c) of the Act.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Reimburse all former and present employees for all initiation fees, dues, assessments, and other moneys, if any, paid by or withheld from them on account of any obligation of membership in Local 101 in the manner provided in the remedy section of this decision.

(c) On request, bargain with Local 786 as the exclusive representative of all employees in the unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a written, signed agreement:

> All full time and regular part time employees employed by Respondent in the following work classifications: Ready Mix Truck Chauffeur; Quarry or Pit Chauffeur; Other Truck Chauffeur; Laborer or other employees operating Fork Lift or Front End Loader; Chauffeur or Laborer employed in yards, warehouse or team track handling Block, Brick and Building materials; Transit Mix or Hopper Operator; and Transit Mix or Hopper Employee operating gasoline cranes loading or unloading materials.

(d) Offer in writing immediate employment, without prejudice to any seniority or other rights and privileges, to each of the ready-mix drivers of Respondent who were laid off in December 1985 and whom it could have employed but declined to employ on or about 4 April 1986 and thereafter, if necessary replacing employees who had not been employed by Respondent on 18 December 1985 but who were hired by the Respondent after that date, such employment to be offered for the classifications, at the rates, and under the conditions previously enjoyed by the laid-off drivers, and make the truckdrivers whole for any loss of pay they may have suffered by reason of Respondent's unlawful failure to recall them when ready-mix delivery resumed in April 1986. The backpay and interest thereon shall be computed in the manner set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of moneys due under the terms of this Order.

(f) Post at is corporate offices at 1331 South Michigan Street, Chicago, Illinois, and its facilities at 4000 South Cicero Street and 2604 West Fulton Street, Chicago, Illinois, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discourage membership in Local 786, Building Material, Lumber, Box Shaving, Roofing and Insulating, Chauffeurs, Teamsters, Warehousemen and Helpers, and Related Industry Employees, Watchmen and Security Guards Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO or any other labor organization by failing and refusing to recall employees from layoff.

WE WILL NOT assist or contribute support to Allied Workers Union Local 101 by recognizing or bargaining with that labor organization as the exclusive representative of its employees for the purposes of collective bargaining unless and until Allied Workers Union Local 101 is certified by the Board as the collective-bargaining representative of the employees pursuant to Section 9(c) of the Act.

WE WILL NOT give effect to our 2 April 1986 contract with Allied Workers Union Local 101 or to any renewal, extension, modification, or supplement thereof, but we are not authorized or required to withdraw or eliminate any wage rates or other benefits, terms, and conditions of employment that we have given to our employees under the contract.

WE WILL NOT withhold from the pay of any of our employees union dues or other union fees or assessments that have been deducted on account of any obligation of membership in Allied Workers Union Local 101 and we will not pay to the Union, any dues, fees, or assessments that have been deducted from the pay of our employees.

WE WILL NOT refuse to bargain in good faith with Local 786, Building Material, Lumber, Box Shaving, Roofing and Insulating, Chauffeurs, Teamsters, Warehousemen and Helpers, and Related Industry Employees, Watchmen and Security Guards Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as the representative of our employees in an appropriate unit for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work.

WE WILL NOT bargain directly with employees in the unit represented by Local 786, Building Material, Lumber, Box Shaving, Roofing and Insulating, Chauffeurs, Teamsters, Warehousemen and Helpers, and Related Industry Employees Watchmen and Security Guards Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

America, AFL–CIO regarding wages or other working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Allied Workers Union Local 101 as the representative of our employees for purposes of collective bargaining unless and until the Union is certified by the Board as the collective-bargaining representative of the employees pursuant to Section 9 (c) of the Act.

WE WILL reimburse all our employees, former and present, for dues and other moneys unlawfully exacted from them under our contract with Allied Workers Union Local 101.

WE WILL on request, bargain collectively with Local 786, Building Material, Lumber, Box Shaving, Roofing and Insulating, Chauffeurs, Teamsters, Warehousemen and Helpers, and Related Industry Employees, Watchmen and Security Guards Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as the exclusive bargaining representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody that understanding in a written, signed agreement. The bargaining unit is:

> All full time and regular part time employees employed by us in the following work classifications: Ready Mix Truck Chauffeur; Quarry or Pit Chauffeur; Other Truck Chauffeur; Laborer or other employee operating Fork Lift or Front End Loader; Chauffeur or Laborer employed in yards, warehouse or team track handling Block, Brick and Building materials; Transit Mix or Hopper Operator; and Transit Mix or Hopper Employee operating gasoline cranes loading or unloading materials.

WE WILL offer reinstatement to our ready-mix driver employees who were laid off in December 1985, and whom we could have employed but declined to employ, if necessary replacing employees who had not been employed by us on 18 December 1985, but who were hired by us after that date, such employment to be offered for the classifications, at the rates, and under the conditions pertaining to these ready-mix drivers on 18 December 1985, and WE WILL make them whole for wages lost as a result of our unlawful failure to recall them, with interest computed thereon.

INTERSTATE MATERIAL CORPORATION

Riley Electric, Inc. *and* International Brotherhood of Electrical Workers, Local No. 68. Case 27–CA–7674

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On September 21, 1983, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] the Charging Party filed cross-exceptions and a brief in support thereof and in opposition to the Respondent's exceptions, the General Counsel filed cross-exceptions and an answering brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified only to the extent consistent with this Decision and Order.

The facts are set out more fully in the judge's decision. The judge found that on March 26, 1980, the Respondent, an electrical contractor in the construction industry, executed a letter of assent-A with the Charging Party (the Union) to the "inside" agreement between the National Electrical Contractors Association (NECA) and the Union. On August 12, 1980, the Respondent executed a letter of assent-A with the Union to the "residential" agreement between NECA and the Union. The letters of assent authorize the Rocky Mountain Chapter of NECA to act as the Respondent's collective-bargaining representatives for all matters contained in or pertaining to the applicable collective-bargaining agreements between NECA and the Union.[2] By its execution of the letters of assent, the Respondent delegated bargaining authority to NECA and, as a consequence, bound the Respondent to the terms of the inside agreements effective April 1, 1980, to March 31, 1981, and April 1, 1981, to March 31, 1983, and to the terms of the residential agreements effective January 1, 1979, to December 31, 1980; January 1, 1981, to December 31, 1981; and January 1, 1982, to December 31, 1982. *Nelson Electric*, 241 NLRB 545 (1979); *Reliable Electric Co.*, 286 NLRB 834 (1987).

From April 1, 1980, through May 19, 1981, the Respondent abided by all the terms and conditions of both the residential and inside agreements, including those relating to the payment of trust fund contributions and to the exclusive use of the Union's hiring hall. It is undisputed that on May 20, 1981, the Respondent ceased abiding by the terms of these agreements.

By letter of August 31, 1982, the Respondent notified the Union that it was terminating "all contracts and agreements" between the Respondent and the Union. By letter of September 1, 1982, the Respondent notified the Union of its intent to terminate the residential agreement effective December 31, 1982. By letters of September 1, 1982, the Respondent also notified the Union and NECA that it had terminated the residential letter of assent-A and the authorization of bargaining authority to NECA contained therein.

Applying the then applicable "conversion" doctrine, the judge found that the parties' 8(f) prehire contractual relationship had ripened into a "traditional" 9(a) majority relationship and that the Respondent had violated Section 8(a)(5) and (1) by repudiating its bargaining agreements with the Union.

In *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), the Board abandoned the conversion doctrine and decided to apply the following principles in 8(f) cases:

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

The Board also noted, at footnote 41 of *Deklewa*, that it will require the party asserting the existence of a 9(a) relationship to prove it.

We find, in agreement with the judge, that the Respondent voluntarily entered into a contractual relationship with the Union by virtue of its execution of the letters of assent.[3] Under *Deklewa*, the

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, cross-exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The authorizations specify that they shall remain in effect until terminated by the Respondent giving written notice to NECA and the Union at least 150 days prior to the then current anniversary date of the applicable agreement.

[3] We find no merit to the Union's contention that the relationship between the Respondent and the Union was, from its inception, a 9(a) rela-

Continued

Respondent became bound for the term of the applicable residential and inside agreements under Section 8(a)(5) and (1). Accordingly, the Respondent's unilateral repudiation on May 20, 1981, when governing agreements remained "binding, enforceable, and not subject to unilateral repudiation" violated Section 8(a)(5) and (1). *Deklewa*, above. As the complaint and the record is directed to the repudiation of the residential agreements effective to December 31, 1981, and December 31, 1982, and to the repudiation of the inside agreement effective to March 31, 1983, we shall provide a make-whole remedy directed to the terms of these agreements.[4]

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action necessary to effectuate the policies of the Act. We shall order the Respondent to comply with the terms of the "residential" agreements with the Union from May 20, 1981, to December 31, 1982, and to the "inside" agreement from May 20, 1981, to March 31, 1983. We also shall order the Respondent to make its employees whole,[5] as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), for any losses they may have suffered as a result of the Respondent's failure to adhere to the "residential" agreements from May 20, 1981, to December 31, 1982, and to the "inside" agreement from May 20, 1981, to March 31, 1983, with interest as computed in *New Horizons for the Retarded*.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Riley Electric, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating the January 1, 1981–December 31, 1981, and January 1, 1982–December 31, 1982, "residential" collective-bargaining agreements between the Respondent and the Union and the April 1, 1981–March 31, 1983, "inside" collective-bargaining agreement between the Respondent and the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole its unit employees, in the manner set forth in the remedy, for any losses they may have suffered as a result of the Respondent's failure to adhere to the "residential" agreements with the Union from May 20, 1981, to December 31, 1982, and to the "inside" agreement with the Union from May 20, 1981, to March 31, 1983. The appropriate unit is:

> Those employees of ours who perform work which is described in and covered by the January 1, 1981 and Janaury 1, 1982, Denver Residential Wiring Agreements and those employees who perform work which is described in and covered by the April 1, 1981, Denver Inside Electrical Construction Agreement, each such agreement being between the Rocky Mountain Chapter of the National Electrical Contractors Association and the Local Union No. 68, International Brotherhood of Electrical Workers.

(b) Pay to the appropriate funds, with interest, the health and welfare, pension, apprentice train-

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tionship. Rather, we find that the relationship between the Respondent and the Union was governed at all pertinent times by Sec. 8(f). The Union contends that the initial agreement executed by the Respondent was undertaken pursuant to Sec. 9(a) because the Respondent was a successor to an employer, Economy Electric (Economy), having an agreement with the Union. We note, however, that under *Deklewa*, the Union, as a party asserting the existence of a 9(a) relationship, has the burden of proving such a relationship. As the Union has failed to demonstrate that it attained 9(a) status with respect to either the employees of the Respondent or those of Economy by means of a Board election or voluntary recognition pursuant to a showing of majority support, it has not satisfied its burden under *Deklewa*. Moreover, the record establishes that Economy, the purported "predecessor," remained in operation after the Respondent, the purported "successor," commenced operations. Thus, it appears that the Respondent independently secured a construction project started initially by Economy, executed an 8(f) prehire agreement with the Union, and then hired employees formerly working at the project to complete the project pursuant to the hiring hall provisions of the newly executed agreement.

[4] Accordingly, we express no view regarding the applicability of any successor agreements pursuant to the terms of the letters of assent.

[5] In his decision the judge failed to order the Respondent to pay its employees wage benefits set forth under the terms of the repudiated agreements. We find merit in the cross-exceptions of the General Counsel and the Union that such a remedy is appropriate.

Whether there are any individuals entitled to be made whole because they were denied an opportunity to work because of the Respondent's failure to continue using a contractual hiring hall is best left to the compliance stage of this proceeding. See, e.g., *Southwestern Steel*, 276 NLRB 1569 fn. 1 (1985), and *Wayne Electric*, 226 NLRB 409 (1976). We recognize, in this regard, that enforcement of the hiring hall provisions contained in the applicable agreements may be at odds with the view of the court of appeals, expressed in *Robertson v. NLRB*, 597 F.2d 1331 (10th Cir. 1979). In this proceeding, however, the issue has been raised solely to remedy the Respondent's unfair labor practices and does not have a bearing on the merits of the unfair labor practices found.

[6] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Because the provisions of employees benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Therefore, any additional amount owed to the trust funds shall be determined in accordance with the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

ing, and other contributions required to be paid under the collective-bargaining agreements by which it has been found to have been bound.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of money due under the terms of this Order.

(d) Post at its facility in Denver, Colorado, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the attached notice marked "Appendix" for posting by the Union, if willing, in conspicuous places where notices to employees and members are customarily posted.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT repudiate the January 1, 1981–December 31, 1981, and January 1, 1982–December 31, 1982, "residential," and the April 1, 1981–March 31, 1983, "inside" collective-bargaining agreements between our company and International Brotherhood of Electrical Workers, Local No. 68, during the term of those agreements.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, with interest, the unit employees who have incurred losses of wages and benefits because of our failure to abide by the terms and conditions of the collective-bargaining agreements between our company and the Union, until the residential agreement's expiration on December 31, 1982, and the inside agreement's expiration on March 31, 1983. The appropriate unit is:

> Our employees who perform work which is described in and covered by the January 1, 1981 and January 1, 1982, Denver Residential Wiring Agreements and those employees who perform work which is described in and covered by the April 1, 1981, Denver Inside Electrical Construction Agreement, each such agreement being between the Rocky Mountain Chapter of the National Electrical Contractors Association and Local Union No. 68 of the International Brotherhood of Electrical Workers.

WE WILL pay to the appropriate funds the health and welfare, pension, apprentice training, and other contributions required to be paid by the collective-bargaining agreement or agreements to which we have been bound.

RILEY ELECTRIC, INC.

Ernest L. Duran Jr. and *T. Michael Patton, Esqs.*, for the General Counsel.
Lawrence W. Marquess, Esq. (Bradley, Campbell & Carney), of Golden, Colorado, for the Respondent.
Philip Hornbein Jr., Esq., of Denver, Colorado, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

FREDRICK C. HERZOG, Administrative Law Judge. I heard this case in trial on October 13, 1982, at Denver, Colorado. International Brotherhood of Electrical Workers, Local No. 68 (the Union) filed an original charge on December 31, 1981, against Riley Electric, Inc. (the Respondent). Pursuant thereto, on April 16, 1982, the Regional Director for Region 27 of the National Labor Relations Board issued a complaint and notice of hearing against the Respondent.

The complaint alleges in substance that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by refusing to comply with and repudiating certain collective-bargaining agreements.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, from my observation of the demeanor of the wit-

nesses, and having considered the posttrial briefs submitted on behalf of the parties, I make the following

Findings of Fact and Conclusions

I. JURISDICTION

The complaint alleges and the answer[1] admits the following facts. The Respondent is now, and at all times material has been, a corporation duly organized and existing by virtue of the laws of the State of Delaware, and maintains its principal office and place of business in Denver, Colorado, where it is, and at all times material has been, engaged in electrical contracting in the construction industry. Further, the Rocky Mountain chapter of the National Electrical Contractors Association (NECA), has been an organization composed of employers engaged in electrical contracting in the construction industry in the State of Colorado and which exists for the purpose, inter alia, of representing its employer-members and/or employers who have assigned bargaining rights to it in negotiating and administering collective-bargaining agreements with the Union. NECA's members annually purchase and receive goods and materials in the course and conduct of their combined business operations having a value in excess of $50,000 directly from points and places outside the State of Colorado. During the calendar year ending December 31, 1981, the Respondent in the course and conduct of its operations provided services valued in excess of $50,000 for other business enterprises, including the First National Bank of Longmont within the State of Colorado, over which the Board would assert jurisdiction on some basis other than indirect standards. Therefore, in accordance with the Respondent's admission at trial, I find and conclude that the Respondent and NECA are now, and at all times material have been, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Alfred and Bonnie Riley are man and wife. For several years preceding April 1, 1980, Alfred Riley was half-owner of a corporation known as Economy Electric Company, which was, and still is, engaged in work similar to that which has since been performed by the Respondent. Economy Electric Company was, and is, a party to the collective-bargaining agreement between NECA and the Union dealing with "inside" electrical work. Although he was half-owner of Economy Electric Company, Alfred Riley served as its vice president and was in charge of its field operations; evidently his co-owner, who bought him out, attended to administrative work and sales work.[2] Economy Electric Company was, and by all that appears may remain, a member of NECA, operating pursuant to NECA's collective-bargaining agreement with the Union.

In April 1980 Alfred Riley became interested in setting up a separate business. He talked to the Union's business manager about becoming a union contractor, and was given a "laundry list" of things to do in order to carry out his plans. One of the items on the "laundry list" called for him to execute a "letter of assent" to the "inside" agreement between NECA and the Union.

For the first few months of its existence the Respondent was not incorporated. Instead it operated as a sole proprietorship, owned entirely by Alfred Riley's wife, Bonnie. Bonnie Riley, however, was nothing more than a figurehead in the business. She did whatever her husband told her to do, and she did nothing unless he told her to do it. Alfred Riley placed her in the position of ownership of the business as a means of "skirting around" certain union rules that might interfere with his desire to either obtain benefits from the Union or to continue work with the tools of the electrician's trade.

On March 26, 1980, Bonnie Riley, at Alfred Riley's direction, went to the Union's offices and signed a "letter of assent" to the "inside" agreement between NECA and the Union.[3]

Both of the Rileys professed to have little understanding of the meaning or significance of the act of signing the "letter of assent." Bonnie Riley claimed to have signed the "letter of assent" solely because her husband asked her to do so, though she did know that he would be enabled to hire union members. Alfred Riley claimed that despite his 20 years' experience as a member of the Union, and 3 years' experience as an officer and owner of a corporation that was a member of NECA and a party to a collective-bargaining agreement between NECA and the Union, his particular expertise lay only in performing electrical work rather than in understanding administrative or legal matters.

Around the same time that Bonnie Riley signed the "letter of assent," Alfred Riley began talking to employees of Economy Electric Company, who were then working on the Economy Electric's project know as Earth Science Institute, about "switching over" from Economy and going to work for his new business. (Alfred Riley had succeeded in taking over the Earth Science Institute project from Economy Electric Contingent on this ability to retain the same employees who had been working on it for Economy Electric.) He secured the employees' agreement and, as he had been advised to do by the Union's agent, instructed each of the

[1] As amended at the hearing.

[2] The co-owner's wife was a full-time employee of NECA.

[3] The text of the "letter of assent" read, in relevant part, as follows:

> In signing this letter of assent, the undersigned firm does hereby authorize Rocky Mountain Chapter, NECA as it collective bargaining representative for all matters contained in or pertaining to the current approved Residential labor agreement between the Rocky Mountain Chapter, NECA and Local Union 68 IBEW. This authorization, in compliance with the current approved labor agreement, shall become effective on the 2 day of July 1980. It shall remain in effect until terminated by the undersigned employer giving written notice to the Rocky Mountain Chapter, NECA and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the aforementioned approved labor agreement.

employees "making the switch" to go down to the Union's office and notify the Union that they were no longer working for Economy Electric so that they could immediately be referred out to Riley Electric pursuant to the Union's hiring hall provisions with NECA.[4]

On or about August 12, 1980 Bonnie Riley once more went to the Union's offices and executed a "letter of assent." On this occasion the "letter of assent" related to the collective-bargaining agreement between NECA and the Union, which had to do with "residential" work. The "letter of assent" was made effective, retroactive to July 2, 1980, so that certain health and welfare benefit payments could be credited properly.[5]

The Respondent's corporation came into being in October 1980 when the sole proprietorship known as Riley Electric Company was issued articles of incorporation.

Respondent concedes that from April 1, 1980, through May 19, 1981, the Respondent hired only members of the Union and that it did so through the Union's hiring hall.[6] During this period of time the Respondent made trust fund contributions on behalf of all its employees as required by the relevant collective-bargaining agreement between NECA and the Union. Respondent paid its employees union scale and abided by all the terms and conditions of both the residential and inside agreement between NECA and the Union until May 19, 1981.[7]

On May 20, 1981, the Respondent, for the first time, hired a nonunion employee. Since then it has hired five additional electricians and at the time of the hearing, had employed six electricians. None were hired through the Union's hiring hall. Neither were they paid wages according to the NECA collective-bargaining agreement with the Union. No contributions to health and welfare trust funds were made on their behalf. Alfred Riley conceded that the work being performed by the nonunion electricians is the same work performed by the union electricians he previously employed, and is work governed by the collective-bargaining agreement. Those employees on the payroll, some seven in number, as of May 20, 1981, who had been previously referred to the Respondent by the Union were terminated on various dates between July 14, 1981, and January or February 1982.

The parties stipulated that the Respondent repudiated both the residential and the commercial, or inside, collective-bargaining agreements. Evidently this stipulation refers to a constructive repudiation, for it is clear that the Respondent did not terminate its delegation of bargaining authority to NECA for either agreement prior to the renewal dates previously mentioned. It was not until August 31, 1982, that Alfred Riley wrote a letter to the Union stating, "Let this letter serve as official notification for the termination of all contracts and agreements between Riley Electric Inc. and Electrical Workers I.B.E.W. Local Union #68." On September 1, 1982, he once again wrote the Union, as well as the Rocky Mountain Chapter of NECA, undertaking to serve notice of his intent to terminate the collective-bargaining agreement and offering to meet and confer with the Local Union for the purpose of negotiating a new contract. Alfred Riley conceded in his testimony that these letters were written as "safety valves," to guard against the loss of this case.

On February 10, 1981, the Union filed a grievance against the Respondent claiming that the Respondent had failed to pay the contractually agreed-on wage rate for overtime work. Alfred Riley appeared at the hearing on the grievance, when he neither sought nor was he offered advice from NECA in defense of the grievance. The grievance was decided in favor of the Union and the Respondent abided by the decision.

In October of 1980, the yellow pages of the telephone directory in Denver, Colorado, appeared. The Respondent's advertisement there included the NECA symbol. Shortly thereafter, according to Alfred Riley's testimony, he was called by an officer of NECA and advised that the NECA symbol would have to be removed from the advertisement. Riley agreed, saying that the symbol had been included erroneously. The symbol was removed at the next opportunity.

Respondent concedes that it was signatory to the collective-bargaining agreement with the Union, but argues that neither the Respondent nor Bonnie or Alfred Riley had ever been members of NECA or applied for membership, or ever sought to or had any involvement in the negotiations between NECA and the Union, and that NECA is not party to either of the "letter of assent" signed by or on behalf of the Respondent.

Conclusions

Principles of industrial democracy embodied within the Act assure employees against the prospect of representation by a union except when the employees have freely chosen such representation for themselves. Section 9(a) of the Act provides that

[4] The parties stipulated at the trial that the following employees of those employers that are ultimately determined in this case to be part of a multiemployer collective-bargaining group represented by NECA constitute units appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

(a) Those employees who perform work which is described in and covered by the January 1, 1981 and January 1, 1982, Denver Residential Wiring Agreements between the Association and the Union.

(b) Those employees who perform work which is described in and covered by the April 1, 1981, Denver Inside Electrical Construction Agreement between the Association and the Union.

Each of the agreements referred to, plus others in evidence, stipulates that the agreements "shall apply to all firms who sign a 'letter of assent' to be bound by this agreement" between the Rocky Mountain Chapter, National Electrical Contractors Association, Inc. and Local Union 68, IBEW. Each agreement also made detailed provisions for matters such as union security, exclusive hiring hall or referral procedure, grievance, apprenticeship program, and many matters relating to wages and working conditions.

[5] Each of the "letter of assent" signed by Bonnie Riley on behalf of the business known as Riley Electric and/or her husband, Alfred, provided that they should remain in effect until terminated by Riley Electric giving written notice to NECA's Rocky Mountain Chapter and to the Union at least 150 days before the then current anniversary date of the relevant labor agreement.

[6] There was one exception insofar as membership was concerned, but even that employee was referred through the Union's hiring hall.

[7] The inside agreement in effect on March 26, 1981, was renewed on April 1, 1980, for a 1-year term, and renewed again on April 1, 1981, for a 2-year term. The residential agreement in effect on August 12, 1980, was renewed for 1-year terms on January 1, 1981, and again on January 1, 1982.

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

There are, of course, exceptions to the general rule. One of these is found in cases involving employers within the building and construction industry. The Act was amended in 1947, as Congress recognized the need to deal with problems that had a peculiar impact on the building and construction industry. Under traditional principles, construction industry employers and unions had been previously prevented from entering into collective-bargaining agreements before the establishment of the union's majority status.

Section 8(f) was included among the 1947 amendments to the Act, and was enacted in large part to immunize employers and unions in the building and construction industry from the strictures of Section 8(a) and (b) of the Act in situations where recognition is granted and a collective-bargaining agreement is entered into before the recognized labor organization's majority status has been established under the provisions of Section 9 of the Act. See *NLRB v. Iron Workers Local 103*, 434 U.S. 335 (1978); cf. *Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961).

Section 8(f) of the Act reads, in pertinent part, as follows:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by an action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement.

There can be little doubt that when the Respondent executed the "letters of assent" with the Union it thereby entered into a contractual relationship with the Union. Apart from the difficulty I have in crediting the testimony of Alfred Riley to the effect that he was uninformed respecting the effects of such a contract, I find that the "letters of assent," themselves, have a clear and unambiguous meaning conveyed on their face. Neither the professed lack of understanding by Alfred Riley nor the alleged failure to explain the contract's import, as testified to by each of the Rileys, seems to be sufficient to warrant a finding that Respondent should be held to have entered into a contractual relationship without an adequate meeting of the minds. Indeed, even the Respondent, in its brief, concedes that the agreements between the Respondent and the Union were 8(f) agreements.[8] The essential question in this case is whether the 8(f) contract between the Respondent and the Union was ever transformed into a Section 9 relationship. For it is well established that during the term of an 8(f) contract an employer may withdraw recognition from the Union and/or unilaterally make changes in the contractual working conditions without violating Section 8(a)(5) unless the Union has obtained a majority status and a 9(a) bargaining relationship had developed. See *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973), decision on remand 208 NLRB 615 (1974); *Ruttmann Construction Co.*, 191 NLRB 701 (1971); *Dee Cee Floor Covering*, 232 NLRB 421 (1977); cf. *Higdon Contracting*, supra.

It seems clear that the complaint, which alleges a violation of Section 8(a)(5), can be found meritorious only if the 8(f) relationship was ever transformed into a Section 9 relationship. This issue will turn on whether the Union became the majority representative among the employees affected; since an 8(f) contract can exist without majority status there is no presumption of majority status that flows from the mere existence of an 8(f) contract. *R. J. Smith Construction Co.*, supra; *Dee Cee Floor Covering*, supra. A union cannot rely on the mere passage of time to transform an 8(f) relationship into a majority 9(a) relationship. Instead, evidence is required showing that sometime during the parties' collective-bargaining relationship, the union obtained either actual majority status or at least a presumption of majority status in an appropriate unit.

The General Counsel contends that the necessary showing has been made in this case. He argues that by executing the "letters of assent" the Respondent not only entered into a relationship with the Union but also joined the existing multiemployer association unit. From that, he concludes that the Respondent's present and prospective work force was immediately merged into a multiemployer unit and simultaneously the Respondent's 8(f) relationship with the Union was merged into the 9(a) relationship already in existence between the Union and NECA, citing *Authorized Air Conditioning Co.*, 236 NLRB 131 fn. 2 (1978), enfd. 606 F.2d 899 (9th Cir. 1979); *Amando Electric*, 238 NLRB 37 fn. 1 (1978). The Respondent argues vigorously for a contrary result, and a finding that the Respondent never became a member of the multiemployer unit.

Based on the record made that, among other things, the Respondent secured the services of each of its employees through the hiring hall of the Union, and that

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[8] The General Counsel's position is similar, although the General Counsel contends that the relationship was immediately thereafter modified, as discussed infra. The Charging Party/Union advances the agreement that, for various reasons, the Respondent entered not merely into an 8(f) agreement, but one possessing all the attributes and entitled to all the protections accorded a collective-bargaining agreement entered into pursuant to Sec. 9(a) of the Act. In light of the General Counsel's decision not to pursue the several theories advanced by the Union, and in view of my decision, which grants the Union relief, albeit on the General Counsel's theory, I see no reason to decide each of the points raised by the Union.

each such employee was a member of the Union during the time period immediately following the execution of the "letter of assent," I find clear warrant for the finding, which I make, that at relevant times after Respondent's 8(f) agreement was executed with the Union, the Union was the majority representative of the Respondent's employees. Consequently, I find that the 8(f) agreements ripened into traditional collective-bargaining agreements to which Respondent was bound. I note that throughout this period the Respondent was paying the wages called for in the Union's contract, was contributing to the health and welfare benefit programs that existed by virtue of the Union's collective-bargaining agreement with NECA, that the Respondent obtained all employees through the Union's hiring hall, and that the Respondent abided by the grievance machinery contained within the agreements between NECA and the Union. Under these circumstances it seems clear that the Respondent was not privileged to repudiate its collective-bargaining agreement with the Union when it did so. See *Haberman Construction Co.*, 236 NLRB 79 fn. 1 (1978); and *V M Construction Co.*, 241 NLRB 584 fn. 1 (1979).

I also conclude, in agreement wih the General Counsel, that the Respondent voluntarily joined the Rocky Mountain Chapter of NECA. In *Ruan Transport Corp.*, 234 NLRB 241, 242 (1978), the Board stated several of the governing principles, as follows:

> The Board has consistently held that "the essential element waranting the establishment of multiemployer units is clear evidence that the employers unequivocally intend to be bound in collective bargaining by group rather than by individual action. The correlative standard for excluding an employer from such a unit is evidence of an intent to pursue an individual course of action with respect to labor relations." As a general rule, the Board has found that an employer does not become a part of a multiemployer bargaining group (i.e., it does not intend to be bound by group bargaining) where it merely adopts a collective-bargaining agreement in the negotiation of which it did not actually participate and which it did not authorize another to negotiate on its behalf.

Here the "letters of assent" signed by Respondent contained the sort of delegations of bargaining authority to NECA that had been repeatedly held to furnish sufficient evidence of the Employer's intent to join with NECA and to become part of the multiemployer bargaining unit. Indeed, there have been instances in which the language demonstrating the intent to be bound was identical to that which is found in this case. See *Nelson Electric*, 241 NLRB 545 (1979); and *Hayden Electric*, 256 NLRB 601 (1981).

Thus, the Respondent's repudiation of its collective-bargaining agreement with the Union was clearly unlawful and violative of Section 8(a)(5) and (1) of the Act.[9] Finally it must be noted that the Respondent failed to give the sort of notice required by Section 8(d) of the Act before it repudiated its contract with the Union. By such a failure the Respondent must be held to have violated Section 8(a)(5) and (1) of the Act. *Amando Electric*, supra: *Oak Cliff-Golman Banking Co.*, 202 NLRB 614 (1973), and 207 NLRB 1063 (1973).

On the basis of these findings of fact and on the entire record in this proceeding, I make the following

CONCLUSIONS OF LAW

1. Riley Electric, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Those employees who performed work that is described in and covered by the January 1, 1981, and January 1, 1982 Denver Residential Wiring Agreements and those employees who perform work that is described in and covered by the April 1, 1981 Denver Inside Electrical Construction Agreement between the Rocky Mountain Chapter of the National Electrical Contractors Association and Local Union No. 68 of the International Brotherhood of Electrical Workers, including those employed by Riley Electric, Inc., constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. At all times since on or about April 2, 1980, the Union has been and now is, the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(c) of the Act.

5. By on or about May 20, 1981, repudiating the terms of the collective-bargaining agreement negotiated between the Union and the Association, and by repudiating the Union as collective-bargaining representative of its employees, Riley Electric, Inc. has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[9] It must be remembered that this is not a case involving a question of whether timely notice was given. Here, the Respondent failed to give any notice whatsoever to the Union until months had passed after it repudiated the agreements. Even then, the notices given to the Union were not necessarily the sort of evidence of clear intent required, but rather were an effort by the Respondent to limit its losses should this case be lost.

Sheet Metal Workers' International Association, Local Union No. 75, AFL–CIO (Owl Constructors) *and* Mike Benavidez *and* Edward Lynn

Sheet Metal Workers' International Association, AFL–CIO; Sheet Metal Workers' International Association, Local Union No. 108, AFL–CIO; and Sheet Metal Workers' International Association, Local Union No. 509, AFL–CIO *and* Mike Benavidez. Cases 21–CB–8621, 21–CB–8717, and 21–CB–9209

July 29, 1988

DECISION AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On February 28, 1986, Administrative Law Judge James M. Kennedy issued the attached Order dismissing the complaints. The General Counsel filed a request for review, and the Respondents filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the Order and the record in light of the request for review and the opposition and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

On October 5, 1983, Mike Benavidez filed a charge in Case 21–CB–8621 alleging that Sheet Metal Workers' International Association, Local Union No. 75 (Local 75) violated Section 8(b)(1)(A) and (2) of the Act by imposing unlawful internal union disciplinary measures against him. The charge was later amended to allege that Local 75 was operating its dispatch hall in an unlawful and discriminatory manner. On January 10, 1984, Edward Lynn filed a charge in Case 21–CB–8717, later amended, alleging the same unlawful conduct, including an allegation that Local 75 unlawfully imposed internal union disciplinary measures against him. On February 6, 1984, the Acting Regional Director for Region 21 consolidated the two cases and issued a consolidated complaint, later amended.

On February 24, 1984, Local 75 filed an answer to the consolidated complaint denying the commission of any unfair labor practices and alleging as an affirmative defense that the allegations that Benavidez and Lynn had been unlawfully disciplined were barred by Section 10(b) of the Act.

At the unfair labor practice hearing on December 5, 1984, the judge dismissed the allegations of unlawful discipline against Benavidez and Lynn, finding them to be barred by Section 10(b). The General Counsel took exception to the ruling on the record. The other portions of the consolidated complaint remained in effect.

At the same hearing, Local 75 moved for the General Counsel to make a more definite statement as to those individuals alleged to have been unlawfully dispatched. The judge directed the General Counsel to file a bill of particulars and indefinitely postponed the hearing pending the filing of such bill.

On August 21, 1985, the judge issued an Order and notice of resumption, ordering that the General Counsel file a bill of particulars by September 6, 1985. On September 4, 1985, the General Counsel filed the bill of particulars.

On September 13, 1985, Local 75 filed a motion to dismiss the consolidated complaint asserting that Local 75 had been dissolved effective March 1, 1985, and that, accordingly, the issues presented in the case were moot. The General Counsel opposed the motion, asserting that the motion was premature as there existed a question as to whether Local 75 had been succeeded by two different labor organizations and that that question involved factual matters necessitating a hearing before a judge. Meanwhile, on April 24, 1985, Benavidez had filed a charge in Case 21–CB–9209,[1] later amended, alleging that Sheet Metal Workers' International Association, Local Union No. 108, AFL–CIO (Local 108) and Sheet Metal Workers' International Association, Local Union No. 509, AFL–CIO (Local 509) had become legal successors to Local 75, and as such were liable for remedying the unfair labor practices attributable to Local 75 in Cases 21–CB–8621 and 21–CB–8717. Furthermore, the charge alleged that Local 108 was implementing the internal union disciplinary measures imposed by Local 75 on Lynn and that Local 509 and the International had threatened to impose the internal union disciplinary measures previously imposed by Local 75 on Benavidez, thereby violating Section 8(b)(1)(A).

On October 11, 1985, the General Counsel issued a complaint in Case 21–CB–9209. On October 18, 1985, Case 21–CB–9209 was consolidated with Cases 21–CB–8621 and 21–CB–8717 and a hearing was set for December 17, 1985.[2] At the hearing, evidence was presented concerning the current status of Local 75 and whether Locals 108 and 509 were legal successors to Local 75 for purposes of

[1] The charge also named Sheet Metal Workers' International, AFL–CIO as a party.

[2] In his order of December 10, 1985, the judge dismissed the allegations in Case 21–CB–9209 relating to unlawful imposition of internal union discipline on the grounds that the allegations, like the allegations in Cases 21–CB–8621 and 21–CB–8717, were barred by Sec. 10(b).

remedying the unfair labor practices alleged in the complaints.

On February 28, 1986, the judge issued his order dismissing the complaints in their entirety. The judge concluded that Locals 108 and 509 were not legal successors to Local 75, that Local 75 was no longer an existing entity that could remedy an alleged violation of the Act, and that there was no evidence that the General Counsel requested a make-whole remedy that would warrant continuation of the case.[3] Finally, the judge concluded that there were no outstanding charges against the International.[4]

The General Counsel's request for review, which was filed on March 21, 1986, and the Respondents' opposition raise several issues. First we must consider whether the correctness of the judge's decision to dismiss the allegations of unlawful discipline on 10(b) grounds is an issue that has been timely raised to us. If we conclude that it is, we must then consider whether the judge properly determined that such allegations were barred by Section 10(b) of the Act. Finally, we must determine whether Locals 108 and 509 are successors to Local 75 for the purposes of remedying the remaining unfair labor practice allegations and whether the judge properly dismissed Local 75 as a party.

1. Turning first to the question whether the judge's dismissal of those portions of the complaints alleging unlawful imposition of internal union disciplinary measures is properly before us, we conclude that it is. At the initial hearing in this matter on December 5, 1984, in Cases 21–CB–8621 and 21–CB–8717, the judge dismissed the above-described complaint allegations, finding them to be time barred by Section 10(b) of the Act. The General Counsel orally excepted to this dismissal at that time but did not file an interim appeal with the Board. When the judge dismissed similar allegations in Case 21–CB–9209 against Locals 108 and 509, he did so reasoning that, upon his bench dismissal in Cases 21–CB–8621 and 21–CB–8717, he invited the General Counsel to take an interim appeal, and as the General Counsel did not do so, the bench dismissal, which effectively dismissed a discrete portion of the complaint, became final on December 26, 1984, because a request for review of that bench dismissal had not been filed within the time period set forth in Section 102.27 of the Board's Rules and Regulations. The Respondents, relying on the judge's dismissal in Case 21–CB–9209, now assert that the matter has not been timely raised to us.

The Board's Rules and Regulations, Section 102.26, provides:

> All motions, rulings, and orders shall become part of the record . . . . [u]nless expressly authorized by the Rules and Regulations, rulings by the Regional Director or by the administrative law judge on motions and/or by the administrative law judge on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to section 102.46.

Section 102.27 further provides:

> If any motion in the nature of a motion to dismiss the complaint in its entirety is granted by the administrative law judge before filing his decision, any party may obtain a review of such action by filing a request therefor with the Board in Washington, D.C., stating the grounds for review, and immediately on such filing shall serve a copy thereof on the Regional Director and on the other parties.

The judge's dismissal of the complaint allegations dealing with the unlawful imposition of internal discipline against Benavidez and Lynn was not an order dismissing the complaint in its entirety, since an extensive portion of the consolidated complaint in Cases 21–CB–8621 and 21–CB–8717 remained in issue. Therefore this situation is governed by Section 102.26 and not by Section 102.27. Pursuant to Section 102.26, a judge's ruling on a motion shall be considered by the Board when the Board reviews the entire record if an exception to the judge's ruling on that motion is included in the party's exceptions filed with the Board. Here, the General Counsel has expressly included in the request for review a request that we reconsider the judge's dismissal of the allegations concerning unlawful imposition of internal discipline. Consequently, we find that the General Counsel has acted in accordance with Section 102.26 and the 10(b) issue is properly before us.

2. The consolidated complaint against Local 75 alleges that on December 1, 1982, an International Trial Board rendered a written decision finding Benavidez and Lynn guilty of internal union charges and fining the two of them and barring them from attending any of the Respondent's meetings. On June 1, 1983, the International General

[3] The judge based this finding on the fact that the General Counsel did not attach the assets of Local 75.

[4] It was alleged that the International was only a party to the internal union discipline portion of the complaint in Case 21–CB–9209.

Executive Council upheld the decision of the International Trial Board, and on June 7, 1983, the Respondent began enforcing the decision of the International Trial Board as upheld by the International's General Executive Council. As stated above, Benavidez' original charge was filed on October 5, 1983, and Lynn's original charge was filed on January 10, 1984. In their motion for dismissal, the Respondents allege that the complaint allegations were time-barred under Section 10(b) because the discipline was imposed on December 1, 1982. The judge found that the portions of the complaint alleging unlawful internal discipline were barred by Section 10(b) on their face, and thus he did not afford the General Counsel an opportunity to present evidence concerning the facts and circumstances on which the allegations in question were based.

The General Counsel asserts that, if permitted, she would present the following evidence: The Charging Parties were active dissident members of Local 75 who were seeking election to office in the upcoming local union elections to be held in July 1983, and the Charging Parties were also active members of a dissident group of Local 75 members who monitored the incumbent officers' running of Local 75. In August and September 1982, internal union charges were filed against Benavidez and Lynn for allegedly engaging in conduct detrimental to the Local at an August 2, 1982 ratification meeting. The International's constitution provides that when local internal union charges are filed, the Local will select a local trial board, which will hear the charges and render a decision that is subject to ratification or rejection of the membership. In the instant case, however, Local 75's trustee requested that the International president appoint an International Trial Board to hold a hearing on the local internal union charges. The International Trial Board rendered its decision on December 1, 1982, finding Benavidez and Lynn guilty of the internal union charges. The International Trial Board imposed a $2000 fine on both Benavidez and Lynn and barred them from participating in any internal union activities in any manner for a period of 4 years. Benavidez and Lynn filed an appeal to the International president pursuant to the International's appellate procedure, and the president transferred the appeal to the International General Executive Council. While the appeal was pending, Benavidez and Lynn continued to campaign actively for local office and to attend all scheduled union meetings. On June 1, 1983, just 6 days before a scheduled union meeting for the nomination of Local officers, the General Executive Council upheld the ruling rendered by the International Trial Board. When Benavidez and Lynn showed up at the June 7, 1983 meeting, they were notified for the first time that Local 75 was going to start implementing the internal union disciplinary measures against them and that they were prohibited from attending the nomination meeting. As a direct result, Benavidez and Lynn were precluded from running for union office. Furthermore, from that time on, Benavidez and Lynn were barred from participating in any union proceedings.

The judge found that the 10(b) period commenced to run on December 1, 1982, when Benavidez and Lynn were notified of the disciplinary action being taken against them, and that the unfair labor practice charges were thus untimely filed. The General Counsel asserts that the 10(b) period did not begin to run until June 7, 1983, after the International Trial Board upheld the ruling and Local 75 notified the Charging Parties that the disciplinary measures would be implemented then. As Benavidez' charge was filed within 6 months of June 7, 1983, the General Counsel asserts that it was timely filed. With respect to Lynn's original charge, filed January 10, 1984, which is beyond 6 months of June 7, 1983, the General Counsel asserts that Benavidez' charge is sufficiently broad to support the allegations as they pertain to Lynn, because the unlawful conduct alleged to have been engaged in by Local 75 against Benavidez and Lynn is identical.

The Board has traditionally held that "a charge concerning union discipline is not time-barred until 6 months after the imposition of the discipline becomes final, regardless of when the disciplinary proceeding may have been instituted." *Musicians Local 66 (Civic Music Assn.)*, 207 NLRB 647, 649 (1973), enf. denied on other grounds 514 F.2d 988 (2d Cir. 1975); see also *Longshoremen ILWU Local 30 (U.S. Borax)*, 223 NLRB 1257 (1976), enfd. 549 F.2d 698 (9th Cir. 1977). The Board, however, announced a new policy in *Postal Service Marina Center*, 271 NLRB 397 (1984), stating: "Where a final adverse employment decision is made and communicated to an employee–whether the decision is nonrenewal of an employment contract, termination, or other alleged discrimination—the employee is in a position to file an unfair labor practice charge and must do so within 6 months of that time rather than wait until the consequences of the act become most painful." *Postal Service Marina Center*, supra at 400. The judge applied *Postal Service Marina Center* to the instant case and concluded that the charges here were time-barred as the 10(b) period began to run on December 1, 1982, the day Benavidez and Lynn were notified of the disciplinary action being taken against them. For the rea-

sons stated below, we find that *Postal Service Marina Center* does not control the instant case and we conclude that the 10(b) period did not begin to run until June 7, 1983, when Local 75 notified the Charging Parties that the General Executive Council had upheld the International Trial Board's decision.[5]

In *Postal Service Marina Center*, an employer notified an employee of its decision to remove the employee from its employ at a specified future date. Subsequently, the employer terminated the employee's employment on the specified date and placed the employee on nonpay, nonduty status. Althought the employee had the right to appeal the employer's decision to the Merit Systems Protection Board, an external agency, the employer's decision to discharge the employee was from the employer's position a final adverse employment decision. Consequently, although the employee availed himself of the appeal procedures under the Merit Systems Protection Board, which did not render its decision until a date within the 10(b) period, the Board reasoned that the employee's charge should have been filed within 6 months after he received notification from the employer that he would be removed from his position.

In contrast to *Postal Service Marina Center*, in which the employer made a final, adverse employment decision, which was appealable, but only to an external agency, here the decision made by the International Trial Board was subject to challenge within the Union and, indeed, pursuant to the Union's constitution could not be final if appealed. Specifically, the International's constitution, which was admitted into evidence, provides for trials in local unions unless the general president, in his discretion, orders the accused to be tried by an International Trial Board. In such instances, the decision of the International Trial Board shall be final *except* for the right-of-appeal as provided under the constitution. Furthermore, the constitution provides that any member of any local whose constitutional rights are violated by any decision or order of any legally constituted tribunal of the local union or council shall have the right to appeal.

Consequently, it is apparent from the International's own constitution that a decision by an International Trial Board is not final when a party opts to exercise his right to appeal that decision. Here, both Benavidez and Lynn exercised their right and appealed the decision against them to the International General Executive Council. Thus, under the Respondents' own constitution, the decision of the International Trial Board was not final. Rather, the final adverse decision involving the intraunion charges did not come until June 1, 1983, when the General Executive Council upheld the International Trial Board's decision.[6]

This case is further distinguishable from *Postal Service Marina Center* in that here, after the International Trial Board rendered its decision fining Benavidez and Lynn and barring them from participating in any internal union activities, the Charging Parties were not notified of a specific date when the discipline would be implemented against them, nor was there any attempt made to implement that discipline prior to June 7, 1983. Rather, Local 75 waited until the General Executive Council upheld the International Trial Board's decision before barring the Charging Parties from participating in union meetings. Thus, Benavidez' and Lynn's status with the Union remained unchanged while their appeals were pending, and at no time during that period were they given notice of a specific date on which their status would change.

Under these circumstances we find that no final decision was made until the General Executive Council upheld the International Trial Board's decision to discipline Benavidez and Lynn. Thus, we find that Benavidez' charge was filed within 6 months of the date when he was notified of the final adverse decision by the General Executive Council and it was thus timely filed.

We further find that on the record here Lynn's allegation, although filed more than 6 months after the notification of the International General Executive Council's decision upholding the disciplinary measures, may be closely related to the conduct alleged in Benavidez' timely filed charge, if the General Counsel's evidence is credited. See *Broadcast Employees NABET Local 531 (Skateboard Productions)*, 245 NLRB 638 (1979). Because the judge did not permit the General Counsel to present her evidence about the circumstances surrounding Lynn's situation, it is not possible to be sure that Lynn's allegation is closely related. Therefore, we remand Lynn's allegation to the judge for further evidence and findings both on the merits and on whether it relates back to Benavidez' charge and thus is timely.

3. Turning to the successorship question, the record shows that Local 75 was chartered in 1974

[5] As Chairman Stephens finds *Postal Service Marina Center* distinguishable from the instant case, he does not pass on whether *Postal Service Marina Center* was properly decided.

[6] See *Machinists Local 68 (Holmatic)*, 274 NLRB 757 (1985), in which the Board adopted the judge's conclusion that a union trial committee's findings and recommended discipline did not constitute a final adverse decision by the union because the union's constitution specifically provided that the union membership had to vote whether to accept the trial committee's findings and recommended discipline.

pursuant to the International constitution to represent trade jurisdictions in the industrial, sign, and kitchen segments of the sheet metal industry, segments that previously had been represented by Locals 108, 509, 170, and 420. Local 75 succeeded and took over administering the collective-bargaining agreements to which the predecessor Locals had previously been signatory. Local 75 received a prorated share of the general funds of the affected locals in proportion to the contributions made by the members transferred to Local 75.

It is undisputed that in 1984 the International was aware that Local 75 was having internal and financial problems. Thus the International appointed Leon Razee to investigate the situation. On December 20, 1984, Razee met with officers of Local 75 and determined that Local 75 was operating at a monthly deficit of approximately $5000. Razee further determined that there was a strained relationship between the officers of Local 75 and the business manager and business representative.

After meeting with Razee, the officers voted to perform their duties without pay and further voted to put before the general membership a recommendation to increase dues. Razee concluded that this would probably be "too little too late" to save the Local.

In early 1985, Razee met with representatives of Locals 75, 108, and 509 to discuss the assets and liabilities of Local 75. During these discussions, Locals 108 and 509 agreed that in the event of a merger, they would "in some way take care of the liabilities," including any and all future costs in connection with the Benavidez-Lynn case.

Although Local 75 expressed an opinion that if a merger were necessary it would like to merge completely with Local 509, Edward Carlough, the International president, determined that Local 75 would be merged in part with Local 108 and in part with Local 509 and "[i]n view of the fact that both locals are receiving members from former Local 75, it was determined that it would be fair to pro rate equally any present and/or future expenses or liabilities . . . between local unions."

Pursuant to the merger terms, Local 509 obtained trade jurisdiction over the industrial and sign segments of the industry, and Local 108 obtained trade jurisdiction over the kitchen segment of the industry. Members of Local 75 employed by an employer in one of the affected segments were automatically transferred to the appropriate local. Local 75's sole business representative was transferred to the staff of Local 509, as were two executive board members, one from the sign and one from the industrial segment of the industry. Local 509 was instructed to retain one of the three clericals previously employed by Local 75, and Local 509 received the titles and two automobiles owned by former Local 75. The merger further provided that Locals 108 and 509 assumed the responsibility for representing the members previously represented by Local 75, and that they were to assume the collective-bargaining relationships previously enjoyed by Local 75.

Effective March 1, 1985, Locals 108 and 509 commenced representing the members previously represented by Local 75 and stepped into Local 75's shoes with respect to administering the collective-bargaining agreements to which Local 75 had been signatory. Locals 108 and 509 thereafter contacted the signatory employers to negotiate successor contracts; however, in several instances the signatory employers refused to recognize Locals 108 and 509 as the collective-bargaining representative for their employees. In such instances the Respondents filed unfair labor practice charges against the employers alleging a refusal to bargain. The General Counsel refused to issue any complaints; however, concluding that Locals 108 and 509 were not Section 9 representatives because, under what was then Board law regarding voter eligibility in union merger and affiliation elections,[7] Locals 108 and 509 could not demand recognition from the employers who had recognized Local 75.

The judge, in considering the above-described facts, found that Locals 108 and 509 were not legal successors to Local 75 and thus could not be found liable to remedy Local 75's unfair labor practices. The judge acknowledged that the Board had applied the successorship doctrine to a labor organization in one instance,[8] but he distinguished that case from the instant case and reasoned that the successorship logic simply does not fit well when applied to labor organizations. For the following reasons, we disagree.

In *Perma Vinyl Corp.*, 164 NLRB 968, 969 (1967), enfd. sub nom. *U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968),[9] the Board established its successor doctrine holding that "one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible

[7] The General Counsel relied on *Furrs Cafeterias*, 268 NLRB 988 (1984), and *F. W. Woolworth Co.*, 268 NLRB 805 (1984). The holding in those cases that a union merger or affiliation vote violated due-process standards if nonmembers were not eligible to vote was overruled by the Supreme Court in *Financial Institution Employees Local 1182*, 475 U.S. 192 (1986).

[8] *Metallic Lathers Local 46 (Cement League)*, 259 NLRB 70 (1981), enf. denied on other grounds 727 F.2d 234 (2d Cir. 1984).

[9] See also *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

for remedying his predecessor's unlawful conduct." The Board reasoned that although the successor was not party to the unfair labor practices, significant policy reasons mandated that the successor be held responsible for remedying the predecessor's unlawful practices. Thus the Board in *Perma Vinyl*, supra at 969, reasoned:

> When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices.

The Board's successorship doctrine was extended to an international union's acquistion of another international union in *Metallic Lathers Local 46 (Cement League)*, 259 NLRB 70 (1981), enf. denied on other grounds 727 F.2d 234 (2d Cir. 1984). There, the Board concluded that there was no policy reason not to apply the *Perma Vinyl* doctrine in the context of union affiliation because the policy reasons for having a successorship doctrine remain the same—victims need a meaningful remedy, the successor organization is the only organization capable of remedying the unfair labor practices, and the "employing industry" has not changed—that is, in the eyes of the victims, the union remains the same.[10]

The judge distinguished *Cement League* from the instant case on the grounds that there the Lather International Union merged with the Carpenters International Union but was able to remain virtually intact as a subdivision of the Carpenters. Here, Local 75 merged into two different unions and did not retain any separate identity in either union. The judge further found that in the situation here, several of the *Perma Vinyl* considerations are missing because: (1) Locals 108 and 509 cannot be seen as "beneficiaries" of Local 75's unfair labor practices; (2) the locals are not part of an "employing industry to be regulated"; and (3) although Locals 108 and 509 are a "source of redress," they did not have the opportunity to adjust the "price" of accepting Local 75's liabilities. Thus, although they accepted Local 75's liabilities under Carlough's directive, that acceptance was voluntary and unsupported by contractual consideration. The judge finally concluded that any attempt to find that Local 75 was merged into Locals 108 and 509 by means of a third-party beneficiary contract executed by the International and Locals 108 and 509 must fail because the International did not have the authority to transfer Local 75's Section 9(a) representative status to a different local. Therefore, since the International's transfer of Local 75's assets (i.e., membership, contracts, and dues-checkoff authorizations) was less than perfect, it would be unfair to conclude that the acquiring Locals were, nevertheless, required to perform their contractual obligations.

We find the judge's analysis unpersuasive. First, we find the distinction made between this case and *Cement League* to be inconsequential. The Board's decision in *Cement League* in no way centered on the fact that the Lathers continued to exist as a subdivision. In fact, although the administrative law judge in that case had issued an order against the Lathing Subdivision of the Carpenters, the Board expressly rejected that order and found that the existence of the Lathers, as a subdivision of the Carpenters, was neither alleged nor litigated. Thus, the Board found that the Carpenters' liability was based solely on its status as a successor to the Lathers.

We further find, contrary to the judge, that the *Perma Vinyl* considerations are present here. Here Locals 108 and 509 may indeed be the beneficiaries of unlawful labor practices allegedly committed by Local 75. Although in the employer-successor cases the successor may benefit from the antiunion atmosphere created by the predecessor, in the union-successor case, such as the one here, the successor may benefit from the unlawful antidissident atmosphere created by a predecessor union. If

[10] The Board recently applied its successorship doctrine in *Local Mine Workers Local 9639 (Beth-Elkhorn)*, 284 NLRB 323 (1987), in which it found that Local 5741 became a successor to Local 9639, when, after Local 9639 entered bankruptcy proceedings, Local 5741 assumed Local 9639's representation obligations with respect to the same employees at the same location; Local 5741 administered the same collective-bargaining agreement without any hiatus; Local 5741 succeeded to the only asset of Local 9639—the future dues obligations of its former members; some Local 9639 leaders, particularly mine and safety committee members, continued to serve for Local 5741; and Local 9639's members transferred to Local 5741.

indeed the Charging Parties were unlawfully disciplined because of dissident activities, Locals 108 and 509 could benefit because such practices would certainly dissuade dissident activity among their members.[11]

Although the "employing industry to be regulated" language from the *Perma Vinyl* decision may not literally apply in the union-successor situation, we find that the reasoning behind the language is just as applicable in the union setting. Granted the Unions here are not functioning as employing industries with respect to Lynn and Benavidez. However, as entities that represent employee interests, they are subject to regulation under the National Labor Relations Act and are susceptible of being found guilty of violating employees' Section 7 rights, just as employers are. In either case, when one entity succeeds another but continues to operate in a manner that is substantially unchanged from the perspective of employees, it is appropriate to call on the successor entity to remedy at least those violations of employee Section 7 rights of which it has knowledge.

Finally, although Local 108 and 509 may not have bargained over their "purchase price" for the assets of Local 75, we find that it nevertheless would advance the purpose of the Act to find that Locals 108 and 509 provide a "source of redress" in the instant case. Although Locals 108 and 509 may not have bargained in the traditional sense for the assets of Local 75, they clearly were involved in the discussions concerning Local 75's problems, and in fact the record reveals that they both agreed to assume the liabilities of Local 75 in the event Local 75 was merged into Locals 108 and 509. Furthermore, there was consideration for their assuming such liabilities in that they also obtained the assets of Local 75. Hence, as Locals 108 and 509 were clearly aware of Local 75's potential liabilities, there is no indication that they were surprised by this action. As the judge found in *Beth-Elkhorn*:

> It is true, unlike in employer successorship situations, Local 5741 could make no "adjustment in purchase price" to compensate for the backpay obligation of the predecessor. However, it was not compelled to assume representation of former Local 9639's members with their employer, and may not in equity now escape that Local's remedial obligations of which Local 5741 was aware. [284 NLRB at 327.]

Accordingly, we find that Locals 108 and 509 can be held as a "source of redress" to remedy the unfair labor practices allegedly committed by Local 75.

Therefore, we find that Locals 108 and 509 are successors to Local 75, and we remand this case to the judge for consideration of the merits of the complaint allegations.[12] We also reverse the judge's dismissal of the complaint against Local 75—a dismissal that had been predicated on the apparent absence of any entity that could remedy any violations that might be found. Because we have found Locals 109 and 508 to be successors for remedial purposes, there is no reason for dismissing the complaint against the entity that allegedly committed the unfair labor practices that Locals 108 and 509 would be called on to remedy.

ORDER

The National Labor Relations Board orders that the complaints in Cases 21–CB–8621, 21–CB–8717, and 21–CB–9209 be reinstated and this proceeding be remanded to Administrative Law Judge James M. Kennedy in accordance with this decision.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and a recommended Order in light of the Board's remand. Following service of such supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

ORDER DISMISSING COMPLAINTS

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This proceeding originally consisted of a consolidated complaint against Local 75 alleging that it had committed three discrete types of unfair labor practices: 1. hiring hall violations against undetermined victims, 2. independent threats and coercion against Charging Parties Lynn and Benavidez, and 3. unlawful union discipline imposed on Lynn and Benavidez. At the initial hearing, on December 5, 1984, I dismissed the union discipline allegation on 10(b) grounds. I then granted Local 75's motion for a bill of particulars regarding the hiring hall while in-

[11] Although the judge seems to find that the transferees' ability to decline to transfer to Locals 108 or 509 in some way lessens Local 108 and 509's ability to benefit from the unfair labor practices allegedly committed by Local 75, we question how free the transferees were to decline membership in Locals 108 and 509. It is likely that they obtained employment through their respective hiring halls and may well have been referred to jobs under contracts with union-security clauses. Furthermore, we see little relevance in this factor, if indeed true. Employees likewise always have the option of not working for a successor employer, but the Board does not find that that diminishes the successor's ability to benefit from a predecessor's unlawful labor practices.

[12] We note that the Respondents have filed a motion for dismissal or in the alternative a more definite statement concerning the alleged hiring hall violations. We do not address the merits of that motion and leave it open for the judge's consideration on remand.

definitely postponing the hearing until the General Counsel issued the bill. The bill was not issued until September 4, 1985, on my setting a deadline on August 21, 1985.

On September 16, 1985, Local 75's counsel moved to dismiss the original complaint on mootness grounds asserting that Local 75 had been dissolved on March 1, 1985, and that no entity existed capable of remedying the unfair labor practices even if they had been committed. The General Counsel opposed asserting that Locals 108 and 509 had become legal successors. I decided to hold a hearing on the motion to dismiss. That hearing was held on December 17, 1985.

In the meantime, on October 11, 1985, the General Counsel issued a complaint in Case 21–CB–9209 against Locals 108 and 509 as well as their parent International Union. I granted the General Counsel's motion to consolidate the two complaints. The new complaint realleged that Local 75 had committed the same three discrete unfair labor practices: 1. the hiring hall violations (expanded to track the recently filed bill of particulars); 2. the same restraint and coercion; and 3. the same union discipline matter. Locals 108 and 509 moved to dismiss the last (joined by the International in its answer) on 10(b) grounds. On December 10, I issued an order granting that motion and partially dismissed the complaint in Case 21–CB–9209.

Still remaining for resolution in both cases are the first two issues, Local 75's alleged hiring hall abuse and certain questions of its supposedly having illegally restrained and coerced Lynn and Benavidez. Locals 108 and 509 are not alleged to have committed any of these violations in the first instance. The International is alleged only as a party to the internal union discipline portion, previously dismissed. Insofar as these three entities are concerned they are not accused of being involved in Local 75's remaining alleged misconduct,[1] although the General Counsel contends Locals 108 and 509 are responsible as successors to make whole any individual who lost an employment opportunity due to Local 75's alleged mishandling of its hiring hall.[2] These two locals deny they are successors to Local 75 and they have moved for dismissal of the entire second complaint.

II. THE FACTS

At the December 17, 1985 hearing regarding the current status of Local 75 and whether Locals 108 and 509 are legal successors, the facts may be summarized as follows:

International President Carlough's Directive

Local 75 was chartered as a local union by the Sheet Metal Workers International Association, AFL–CIO in 1974. It drew its membership from several sister locals in the greater Los Angeles area. It represented employees in three different industries, the food equipment manufacturing industry, the electric sign industry, and the so-called industrial industry. Its business office was in Santa Fe Springs.

In late 1984 Local 75's financial and internal political problems became so severe that International President Edward J. Carlough assigned a representative from Phoenix, Leon Razee, to review the situation and to make recommendations to resolve them. In December and January, Razee filed reports showing that Local 75 was operating at a $5000-per-month loss which it was unlikely to correct. He also estimated that it had assets of about $110,000 cash,[3] nearly 700 active members, 2 automobiles, and an interest in a training facility "wholly owned" by the joint apprenticeship training committee, a separate entity. Its liabilities included the salaries of one business representative and three clericals, office rent, two strikes costing $1200 per week, and the potential liability in the instant NLRB case (which had just begun). Razee reported that the current leadership was ineffectual and could not deal with the problems.

Razee recommended transferring the industrial shops, the business agent, the cars, and the training facility to Local 509. He recommended transferring the sign shops and the food equipment shops to Local 108. He made other detailed recommendations as well. Carlough, however, did not follow them all, particularly the trade jurisdiction recommendation.

On February 8, 1985, by letter to all three locals, Carlough announced that on March 1, 1985, he was transferring the trade jurisdiction over the industrial and sign shops to Local 509 and the trade jurisdiction over the food equipment manufacturing shops to Local 108.

He did follow Razee's recommendation that retired members be given their choice of locals and determined that each member be transferred with full membership credit. He also directed an audit of Local 75's books and records for the purpose of determining a pro rata distribution of assets and liabilities to Locals 108 and 509. In addition he transferred the Local 75 business representative to Local 509, honoring a request from Local 509's business manager. The business representative's employment terms were to be the same as those of other Local 509 representatives.

Carlough also directed that Local 509 allow two of Local 75's executive board members to become executive board members of Local 509, one each to represent the two segments being added to Local 509. He did not issue a similar directive to Local 108.

He also directed the acquiring locals initially to honor the Local 75 dues structure, but said they must meet the minimum dues as set forth in the International constitution no later than July 1, 1985. Because this involved averaging building trades pay scales with those in other industries, as dues are tied to the hourly pay rate, it meant a dues increase to all former Local 75 members within 3 months.

[1] With the dismissal of the internal discipline allegation, and in the absence of any further allegation against it, there is no outstanding complaint against the International Union.

[2] It should be noted that nowhere has the General Counsel stated the name of any potential hiring hall dispatchee who is allegedly entitled to backpay. His bill of particulars names only individuals who were actually dispatched, not those denied job referrals.

[3] Roughly two-thirds of that amount consisted of a strike fund raised by special assessment. That fund cannot be considered as part of Local 75's general fund for it is not the product of dues or operating assessments. It is, instead, an employee asset.

Local 509 was given the two automobiles and the office furniture and equipment. Carlough directed that Local 75's office lease be canceled if possible and, if not, the rent shared by both locals on a pro rata basis. He directed Local 509 to hire one of Local 75's three clericals, but did not direct Local 108 to hire any. Severance expenses of the clericals were to be borne by each on a pro rata basis.

He concluded by directing Locals 108 and 509 to adopt Local 75's contracts in their newly acquired trade jurisdictions and required them to assume joint responsibility for Local 75's debts and obligations, unpaid rent, or judgments for backpay "in suits or other administrative proceedings," i.e., NLRB Cases 21-CB-8621 and 21-CB-8717 involved here. Finally Carlough stated that the books, records, securities, titles, bank accounts, etc., were to be transmitted to the International's general secretary-treasurer for later apportionment to Locals 108 and 509.

He concluded his directive by asserting Local 75's dissolution was necessary because it had become an ineffective representative due to internal strife, had lost members, and had failed to assist its employers in meeting nonunion competition. He could find no effective leadership at Local 75. He said the transfer to Locals 108 and 509 would improve work prospects and provide those employees with strength and capable, self-sufficient leadership. He also asserted that merging various trade jurisdictions in single, larger locals was consistent with the International's current policy of having fewer, but stronger, local unions having the financial resources adequately to represent the membership.

The Dissolution of Local 75

To carry out his directive, International President Carlough ordered his Representative Razee to oversee the dissolution and transfer of the membership and property as he had directed.

Beginning on February 8, 1985, Razee took control of Local 75 and began to dismantle it. The collective-bargaining agreements in all three industries were about to expire. In late February he wrote letters to all the employers advising them of the "merger and division" of Local 75. He notified each employer that its unit employees' union memberships were being transferred to either Local 509 or Local 108 as appropriate and said that the acquiring local would be charged with servicing those employees, the firm, and the remainder of the collective-bargaining contract. He advised that contract renewals and extensions were to be the responsibility of the acquiring union. He concluded by telling the employers the name of the acquiring local's business manager, his address, and his telephone number.

Similarly, Razee sent letters to the Local 75 membership advising them of the change. Most appeared to have accepted it without protest, although approximately 80 sign shop employees filed a petition asking to be placed in Local 108 rather than Local 509. Their petition failed. On March 1, 1985, Locals 108 and 509 began collecting dues from former Local 75 members, principally by Razee's having asked the employers to treat the Local 75 checkoff authorizations as authorizations to the acquiring locals.

He also asked the trustees of the joint apprenticeship program to merge Local 75's program with that of Local 509, and they did so.

Razee then transmitted to the International's secretary-treasurer Local 75's receipt books, union labels, minute books, the official seal (after destroying it), its original charter, credit cards (after destruction), bank statements, canceled checks, other financial records, and a copy of the final audit. In addition he transmitted the strike fund balance of $66,710 to the International. It is not entirely clear whether this fund was later remitted to Local 108 or 509 on a pro rata basis but it appears to have been. On March 12, Razee forwarded the last amount of cash, $6742, left in Local 75's bank accounts to the International. In May, an additional $40 was discovered and also transmitted to the International. Beginning in June, the International began sending checks to Locals 108 and 509 representing moneys formerly held by Local 75. The International sent Local 509 a total of $34,545. In July it sent $38,955 to Local 108. Although the documentation is less than clear, most of this seems to have been strike fund money and seems to have remained earmarked for that purpose.

Razee discharged all three clericals on March 2, 1985, although one was transferred to Local 509. Both Locals were told to honor a severance pay grievance later filed on behalf of the clericals by their Union, Local 30, OPEIU. Likewise all the elected officers were released.

With respect to the collective-bargaining process, Local 509, with its original office in Riverside, had been directed by Carlough to hold meetings on an alternating basis in both Riverside and Buena Park to better accommodate the new members. In early March it sent a questionnaire to its new members asking what they wanted in the new contract. It also advised the employers bound by the Local 75 contract of the merger and attempted to open them for renegotiation. Local 108 sent similar letters to the employers in its new trade jurisdiction.

Local 75, until its dissolution, had been the exclusive collective-bargaining representative as defined by Section 9(a) of the Act of the sheet metal employees employed by 56 or 57 employers. Twenty-five were food equipment shops, whose jurisdiction was given to Local 108; 19 or 20 were industrial shops, and 11 were sign shops whose jurisdiction was given to Local 509.

All of the Local 75 collective-bargaining contracts were due to expire on June 30, 1985. Assuming that Local 75's demise did not cancel its collective-bargaining contracts on March 1 by operation of law, they had only 4 months left when Local 75 was dissolved.

The parties have stipulated that Local 509, as of the date of this hearing, December 17, 1985, had signed collective-bargaining contracts with all but two of the sign shops; furthermore, it appears that it now has contracts with all but seven industrial shops. Local 509 sought to be declared Local 75's successor under Section 9(a), by filing refusal-to-bargain charges against two employers with the Regional Director. However, the Regional Director rebuffed that effort on the ground that the mem-

bership had not been permitted to vote on the issue. She held that Local 509 was not the 9(a) representative of the employees of those two employers, Industrial Sheet Metal and Benner Sheet Metal. Local 509's majority status was also challenged by S & R Industrial Sheet Metal, Industrial Sheet Metal Fabricators of California, Brother's Sheet Metal, and Kruse Metals Mfg. Co.

Local 509 filed election petitions with the Board seeking elections at Kruse and Industrial Sheet Metal Fabricators of California. Although elections were conducted, Local 509 lost each.

At the time of this hearing Local 108 would not stipulate that it had reached contracts with any of the food equipment manufacturers. The General Counsel made no other effort to prove their status except to ask for the stipulation. The record is silent regarding the status of those negotiations, if any, although American Food Service has challenged Local 108's claim to 9(a) successorship.

Furthermore, the dissolution was not done in secret. The Board's Regional Office was notified in January 1985 that dissolution was under consideration and later that it was being carried out. Despite that notice the General Counsel did not seek to seize Local 75's assets to preserve them to satisfy any backpay claims.

II. CONCLUSIONS

A. *Dissolution of Local 75*

The first question to be answered is whether Local 75 still exists in any form. After the above evidence was received counsel for the General Counsel was asked if he now conceded that Local 75 had been dissolved. He refused. Nonetheless, in his brief he makes no contention that it has not been dissolved. In fact, the entire focus of his brief is to argue that Locals 108 and 509 are Local 75's legal successors. It appears that he now concedes, by implication, the facts of dissolution.

Certainly the evidence to that effect is overwhelming and clearly demonstrates that Local 75 has been dissolved. Since March 1, 1985, it has had no officers, no members, no money, no employees, and is no longer in the business of negotiating and/or administering collective-bargaining contracts on behalf of employees it represented. On June 30, those contracts expired and were not renewed by Local 75. Even the very symbol of its existence, its seal, has been destroyed. I have no hesitation in finding that Local 75 was dissolved on March 1. Moreover, the dissolution seems to have been the result of an honest purpose and has not been shown to be an effort to evade any responsibilities under the Act. Indeed, the General Counsel does not so contend. I find, therefore, that Local 75 was dissolved on March 1, 1985.

B. *The Successorship Question*

The harder question is whether Locals 108 and 509 may be found to be legal successors to Local 75 for the purpose of remedying Local 75's alleged misconduct. Before its 1967 decision in *Perma Vinyl Corp.*, 164 NLRB 968 (1967),[4] the Board had held that "bona fide purchasers" of ongoing businesses were not obligated to remedy the unfair labor practices of the seller. *Symns Grocer Co.*, 109 NLRB 346 (1954). In *Perma Vinyl* the Board, persuaded by the apparent injustice to illegally discharged employees, noted that successors, even with knowledge of the predecessor's unfair labor practices, were not obligated to reinstate those employees, much less pay them any backpay. It decided that the *Symns Grocer Co.* policy was too harsh, for it did not offer such employees a meaningful remedy. Finding authority to extend liability to the purchaser in the discretionary remedy language of Section 10(c) of the Act, as well as in the successors and assigns language found in Rule 65(d) of the Federal Rules of Civil Procedure,[5] the Board asserted that it would effectuate Federal labor policy to overrule *Symns*, saying:[6]

> To further the public interest involved in effectuating the policies of the Act and achieve the "objectives of national labor policy, reflected in established principles of federal law," we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

It buttressed that language noting that the purchaser, though not a party to the unfair labor practice, nonetheless had become part of the "employing industry" to be regulated. The Board asserted that when a new employer has been substituted for the old in the same employing industry no meaningful change in the employing industry occurs insofar as the victims of the unfair labor practices are concerned. It observed that the purchaser was in the best position to remedy a discharge, by reinstatement to the "employing industry" and by making a backpay payment. The Board said this would work no real hardship on a purchaser because when he substituted himself for the perpetrator of the unfair labor practices, he became the beneficiary of the illegal conduct. Finally, it concluded, since the purchaser had knowledge of those unfair labor practices, he could easily adjust the price in the contract for the business being purchased to cover such liability. Both the predecessor and successor were to be held jointly and severally liable under this doctrine. Ultimately the Supreme Court agreed with the Board's logic in *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973).

That same logic, however, when applied to local labor organizations simply does not fit well. It is true that the Board has applied the *Perma Vinyl* doctrine in the one reported case involving union mergers, *Metallic Lathers Local 46 (Cement League)*, 259 NLRB 70 (1981), enf. denied on other grounds 727 F.2d 234 (2d Cir. 1984).

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[4] Enfd. sub nom. *U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

[5] See *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945).

[6] *Perma Vinyl*, supra at 969.

The facts of that case, however, are dissimilar to those presented here. The case involved the merger of the Lathers International Union with the Carpenters International Union. As a result of extensive negotiations between the two, the Lathers remained virtually intact as a subdivision of the Carpenters though no longer a separate legal entity. The continued visibility of the dissolved union in *Cement League* easily led the Board to conclude that the Carpenters International Union was a *Perma Vinyl* successor.

Unlike *Cement League* the so-called merger here did not result in a shadow Local 75 appearing within either the Locals 108 or 509 frameworks.

Although Carlough directed Local 509 was to hire Local 75's business representative, its business manager had requested him, and could have hired him without Carlough's directive. The directive did force Local 509 to accept two of Local 75's executive board members (who volunteered). None of these three was involved in Local 75's alleged unfair labor practices and none was taken on Local 75's terms. Local 108 was not even required to accept any of Local 75's officials except as rank-and-file members.

Moreover, significant *Perma Vinyl* considerations are missing. First, Locals 108 and 509 cannot be seen as beneficiaries of Local 75's unfair labor practices. In the employer-successor cases such as *Perma Vinyl* the successor benefited from the antiunion atmosphere created by the predecessor. That atmosphere disadvantaged the Union in collective bargaining and tended to chill employee conduct protected by Section 7, thereby lessening the risk of unionization. No similar impact can be seen here. The substitution of the two unions here created entirely new intraunion atmospheres. Officers new to the transferred membership, unbeholden to Local 75's officers, were presented to the old Local 75 membership. Moreover, those transferees were free to decline Locals 108 and 509's offer of membership altogether. Thus, even if these two locals benefited by an expanded membership base, they cannot be said to have gained an advantage created by Local 75's unfair labor practices.

The second dissimilarity is the "employing industry to be regulated" concept. In *Perma Vinyl* and similar cases one business entity substituted itself for another and the affected employees continued to work without significant interruption or change. It is true that in *Cement League* the Board paid lipservice to that concept, yet its use seems most inappropriate there as it does here. Labor unions are not members of the employing industry as the concept was used in *Perma Vinyl*. They are not, first of all, commercial businesses. Instead of profiting from the gross product of the industry, they seek to regulate the employment conditions of the employees they represent. Their business is one of employee representation, not employment itself. Thus, while it is easy to refer to the employing industry in substitutions of business entities for one another, it is not so easy to say the same when one employee representative is substituted for another. When that happens the employment of represented employees simply remains with the same legal and economic entity, the employer.

Indeed, the Board itself is in the business of providing a means of changing bargaining representatives through the election process. It conducts representation elections and grants or denies 9(a) status based on the outcome. It also will recognize or deny those rights based on an uncoerced proof of majority without an election. If those procedures are followed and a new 9(a) representative is selected, it is beyond doubt that the "successor" becomes insulated from any *Perma Vinyl* liability created by the unfair labor practices of the ousted union. Such changes are hardly of the technical variety with which *Perma Vinyl* is concerned. Similarly, here, the International's attempt to reassign Local 75's 9(a) status to Locals 108 and 509 was hardly a meaningless change of bargaining representative. All three "acquirers" are entities separate from Local 75 for it has long been held that local unions are not simply arms of their parent international union. *Electrical Workers IBEW (Franklin Electric)*, 121 NLRB 143 (1958), citing *Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 395 (1922). That "separateness" forced Local 509 to organize some employers ab initio. It is clear, therefore, that a concept of economic continuity similar to the *Perma Vinyl* employing industry concept is not to be found here.

The last stated *Perma Vinyl* consideration is "source of redress." It is true that Locals 108 and 509 are on the scene and could be viewed as an equitable source of redress, but unlike the *Perma Vinyl* successor they have had no opportunity to adjust the "price" of their accepting Local 75's remains. As previously noted this was not a commerical buy-sell contract. It was an effort by the International to correct a representational vacuum being created as Local 75 followed a path of self-destruction. Two choices faced the International. It could either have let Local 75 destroy itself, leaving its members high and dry or it could try to save what was left by transferring members to other locals. It chose the latter course but in doing so gave the acquiring locals few options. They could accept or reject President Carlough's mandate, but if they accepted they could not adjust any purchase price as can buyers falling under the *Perma Vinyl* doctrine. It was a take-it-or-leave it proposition. Indeed, if they had any input at all into the takeover process it was only through statements to Razee or Carlough. After considering their limited input, Razee made independent recommendations which Carlough did not fully follow. Locals 108 and 509's requests, which were minimal, can hardly be characterized as the sort of negotiations leading to a sale. Their subsequent acceptance of Carlough's terms is more in the nature of accepting a gift than it is in the nature of a purchase.

Thus, although Carlough required the Locals to assume Local 75's liabilities, including those Local 75 might suffer as a result of these unfair labor practices, it cannot be said that the Locals had contractually obligated themselves to assume Local 75's debts or judgments. In fact Locals 108 and 509's acceptance of the liabilities under Carlough's directives appear to me to be the acceptance of a volunteer, unsupported by contractual consideration. Volunteers are not usually liable for the debts of others, absent some sort of detrimental reliance, not

seen here. Moreover, the preexisting debts of another are insufficient consideration to make such a promise an enforceable contract.

The General Counsel argues, however, that one should not be able to accept the assets of the perpetrator of unfair labor practices without also accepting its liabilities and that Locals 108 and 509's acceptance of Carlough's terms is a recognition of that obligation.

This raises the final *Perma Vinyl* consideration, unsaid there or in any of the cases in its line, but clearly present. That is the presence or absence of privity between the successor and the predecessor.[7] First, I should observe that in every *Perma Vinyl* type successor case, including *Cement League*, there is direct privity between the predecessor and the successor. This is usually found in the buy-sell contract, but is sometimes present through operation of law, i.e., a bankruptcy trustee or takeover by a secured creditor. Clearly, here, Locals 108 and 509 had no privity of contract with Local 75. They were separate entities. *Franklin Electric*, supra. Both acquired their rights, such as they are, from the International. They had no negotiations whatsoever with Local 75. It is true that both looked at Local 75 with some care after the International began to sense that Local 75 was failing. Both knew they were likely recipients of Local 75's remains and wished to assure themselves that they would not be saddled with an albatross. Presumably they could have rejected the International's largesse had they wished. Even so, unlike the *Perma Vinyl* successors they did not negotiate with their predecessor. Consistent with the privity requirement is *Southland Mfg. Corp.*, 186 NLRB 792, 805 (1970), a case dismissing a claim of successorship liability. In that case the successor acquired a moribund business from a middleman, the Small Business Administration, well after the predecessor had stopped operating. As the successor had no privity with the predecessor, the Board held the successor was not obligated to remedy the unfair labor practices committed by the previous operator. A study of the *Perma Vinyl* line of cases, therefore, clearly mandates the conclusion that privity between the predecessor and the putative successor is necessary before *Perma Vinyl* remedial liability will attach.

Accordingly, since it has been shown that Locals 108 and 509 had no privity with Local 75, I cannot agree with the General Counsel that one cannot accept the assets of a moribund entity from a middleman without also accepting its liabilities. *Southland Mfg. Co.*, supra. Specifically, I conclude that Locals 108 and 509 are not successors within the meaning of the *Perma Vinyl* doctrine.

The General Counsel's final argument is based on the "contractual assumption of liability" cases such as *Liberty Electronics Corp.*, 143 NLRB 605 (1963), and *Emerson Electric Co.*, 176 NLRB 744 (1969). In those cases, applying third-party beneficiary contract concepts, the Board found that the successor had agreed with the predecessor, as part of the purchase agreement, to pay the predecessor's liabilities arising from its unfair labor practices. In these cases not only can privity be readily found, but they may even be characterized as foreshadowing the *Perma Vinyl* price adjustment factor, for the parties had foreseen the liability and had adjusted the price to accommodate it. In any event there was a clearcut contract supported by bargained-for consideration designed to benefit third parties—the victims of the unfair labor practices.

The same cannot be seen here. I have already found that this transaction was more in the nature of a gift, conditional perhaps, but certainly less than a contract. As noted above, there was no privity between Local 75 and the two acquiring unions. Moreover, there was no bargained-for consideration creating a contractual relationship. Thus no third-party beneficiary contract was created.

I should add one final observation here. Even if one might find an effort to reach a third-party beneficiary contract here, it appears incomplete. The International, in its directive, told Locals 108 and 509 to administer Local 75's contracts for their duration (120 days) and tried to posit them as new 9(a) representatives. Furthermore, it tried to hand over to the acquiring Locals, through both the contracts and the checkoff authorizations, the mandatory right to collect dues. Neither of those efforts could legally have been performed because the International could not transfer the 9(a) relationship enjoyed by Local 75 to anybody. It could not even seize it for itself. That is a right reserved for the employees; they, and only they, have the right to determine who their exclusive collective-bargaining representative shall be. No one else, including the president of an International union, may lawfully transfer that status to another representative without proof of uncoerced majority status. Likewise, the International could not force former Local 75 members to pay dues to Locals 108 or 509. Neither the union-shop provisions of the Local 75 contracts nor the dues-checkoff authorizations to Local 75 permitted the acquiring locals to demand dues from those members being transferred. Thus, the International could not, in reality, transfer these Local 75 assets in the same form in which Local 75 had enjoyed them. The International Union's transfer of such assets was therefore less than perfect. That being the case, one can reasonably question whether the alleged third-party contract had sufficiently matured to obligate the acquiring locals to perform their obligations under this supposed contract, payment of Local 75's liabilities. I suggest that the "contract" was not fully performed by the International and therefore the Locals are not obligated to perform either.

In any event this transaction is, at best, a conditional gift. If the donees of the gift honor its terms, well and good. If not, the donor may have its own redress. Either way, third parties, such as the Board or Local 75 backpay claimants have no enforceable rights against the donees. I therefore reject the General Counsel's argument that Locals 108 and 509 are obligated by contract to remedy Local 75's unfair labor practices.

[7] The Supreme Court actually does discuss privity as a requirement but easily found it in the case before it. *Golden State Bottling Co. v. NLRB*, supra at 179, 180. Thus it found the rule 65(d) "successor and assigns" language applicable. Had privity been absent it seems likely that the Court would not have found successor liability.

As Locals 108 and 509 are neither *Perma Vinyl* successors nor bound by contract to remedy Local 75's unfair labor practices it follows that the motion to dismiss the case against them, Case 21–CB–9209, should be granted.

C. *The Case Against Local 75*

Remaining to be decided is the question of whether it would serve any purpose to resume the prosecution of Local 75. It has been held that the Board is entitled to a remedy even as against an entity which is no longer in business. See for example *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 107 (1942); *NLRB v. Electric Steam Radiator Corp.*, 321 F.2d 733, 738 (6th Cir. 1963); *Armitage Sand & Gravel*, 203 NLRB 162, 166 (1973). These cases are bottomed on the premise that it serves the public policy of obtaining a remedial order against a wrongdoer and that a source of economic redress may be found. Assets can be chased and seized and the private rights involved may obtain at least partial satisfaction.

Is that consideration present here? First we should look at the order the General Counsel is seeking. Is it seeking a cease-and-desist order, a make-whole order, or both? To the extent that it seeks a cease-and-desist order dealing with the alleged hiring hall improprieties and the alleged restraint and coercion, Local 75's dissolution renders that remedy meaningless. The Board has held cease-and-desist orders against dissolved labor organizations moot and unnecessary. *Steelworkers Local 14055 (Dow Chemical)*, 229 NLRB 302 (1977). Thus the policy is clear that the Board will not issue such an order where, as here, it would be totally ineffectual. I see no reason to proceed for the purpose of issuing such a remedy.

With respect to backpay, however, the policy is not as clear. It may be that Local 75 assets could be found if one were to make a thorough search. Yet is counsel for the General Counsel seeking such an order? I note that he has had in his possession since December 1984 all of Local 75's hiring hall records, he has known since approximately January 1985 that Local 75 was in danger of being dissolved, and he has known since February 1985 that dissolution was occurring. Yet at no time did the General Counsel take steps to prevent the dispersal of Local 75's assets. Moreover, he has never, even in his bill of particulars, named a single person believed to be entitled to backpay.

In light of these facts can it be said that counsel for the General Counsel even seeks a backpay order? I conclude, despite any remonstration to the contrary, that he does not. If the General Counsel truly sought backpay he would have attempted to obtain a protective order in the United States district court and would have promptly issued a bill of particulars naming at least some hiring hall users supposedly entitled to that remedy. Compare the remedy issued in *Polis Wallcovering Co.*, 262 NLRB 1336, 1339 (1982). There the Board affirmed an administrative law judge who ordered backpay for the named discriminatee, but not for hiring hall users who were not named but who belonged to the class being discriminated against. This case would result in a similar remedy, only a cease-and-desist order.

Even if the General Counsel now seeks a backpay order one may ask if it is truly worth it. The bill of particulars asserts 174 to 175 referrals, about 85 percent, to have been improper. Local 75's remaining assets, if traced, appear to be small. As a result no private rights would be adequately satisfied while the expense in seeking to satisfy them would be enormous. In this age of shrinking agency budgets, this pursuit would not be cost-effective. Moreover, the public interest has in fact been served. To the extent Local 75 may have been a wrongdoer, it no longer exists and cannot continue to harm referral applicants. I conclude, therefore, that continued processing of the case against Local 75 would not effectuate the policies of the Act. Accordingly, I shall grant the motion to dismiss Cases 21–CB–8621 and 21–CB–8717.

[Recommended Order for dismissal omitted from publication.]

Hemisphere Broadcasting Corporation (WBCN) *and* Lesley E. Warren. Case 1–CA–23094

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On June 26, 1986, Administrative Law Judge Norman Zankel issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found, and we agree, that the General Counsel has failed to sustain her burden under *Wright Line*[1] of establishing a prima facie case of discrimination in the discharge of Lesley E. Warren based on her union or other protected concerted activities. It is, therefore, unnecessary to resolve whether the Respondent would have discharged Warren in the absence of these activities. We also find, however, that a preponderance of the evidence does support a finding that Warren's discharge was discriminatorily accelerated. Her former coworkers, Stephen Berger and Judy Carlough, both of whom were promoted to supervisory positions shortly before Warren's discharge, harbored strong animus against Warren because of her position on withdrawing sales personnel from the collective-bargaining unit. They influenced a reversal of a management decision made prior to their promotions to defer the date of Warren's termination until a replacement for her position could be found. We agree with the General Counsel that the issue has been fully and fairly litigated.

The judge acknowledged that, if Berger and Carlough in their newly attained capacities as supervisors participated in the Respondent's decision to discharge Warren (i.e., had their promotions predated the discharge decision), that would provide a substantial basis for inferring that the discharge was unlawfully motivated. This is because Berger and Carlough were in the forefront of efforts to sever the sales division from the unit. Berger, at least, was found to have harbored substantial hostility toward Warren for her resistance to those efforts. The judge further found that Warren's resistance risked, but did not ultimately prejudice, Berger and Carlough's promotional opportunities. The judge declined to pass on the General Counsel's alternative theory, finding that Berger and Carlough's request for Warren's immediate termination was a "sincere and legitimate benevolent expression." We disagree.

In sales department shop meetings and informal discussions Warren and Berger heatedly debated the issue of severing that department from the unit. Berger and Carlough had both long advocated withdrawal from the unit and voiced their concerns to the shop. Based on representations they had received from management, they viewed their proposal as facilitating both sales department access to management information (from which they had been barred so long as the information could be used in negotiations) and a restructuring of the department to increase the number of supervisory positions, of which Berger and Carlough were both the ultimate beneficiaries when the latter aspect of their proposal was implemented. Warren, on the other hand, opposed the proposal and expressed her intentions to continue to be covered by a union contract.

As Carlough described it, "it was an emotional thing," with Warren pitted against the rest of her shop on the issue, particularly against Berger whose arguments with Warren were loud and bitter. Warren abstained from voting on the proposal at the first union membership meeting, which vote was conducted by a show of hands. Warren spoke against the proposal and also abstained from voting at the second membership meeting and, although the vote was by secret ballot, she revealed her abstention—the only one. Warren further credibly testified to Berger and Carlough's adverse reaction after their proposal was defeated. At a March 15, 1985 meeting between membership and management, Warren attacked the same proposal when it was presented by management and, after other proposals affecting compensation for sales representatives and the additional management slots were later negotiated, Warren vigorously opposed ratification. The judge concluded that Warren's union activities were open and notorious.

Berger and Carlough acknowledged having urged Sales Supervisor Robert Mendelsohn to terminate Warren immediately on learning that Mendelsohn intended to do so when her replacement was hired, and it is undisputed that he adopted their suggestion. The explanations for opposing deferral of her termination were not consistent. Thus, both Berger and Carlough stated they had favored an immediate termination in a spirit of compassion

[1] 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 789 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

and fairness toward Warren so as not to foster her false expectations that she would fit into the new departmental structure. Carlough stated as her first concern, however, a perceived interference with the Respondent's ability to sustain Warren's current accounts if her pending vacancy became public knowledge in the course of interviewing candidates to replace her.

First, the intense hostility between Warren and her former colleagues belies any claim that their motives flowed from any genuine spirit of compassion. As to the "publicity" motive advanced by Carlough, the record shows that the interviewing process for Warren's replacement was already well underway at the time Carlough allegedly voiced concern that the news would spread within the industry. Further, Berger mentioned no such expressed concern over publicity, and Mendelsohn's testimony in that regard conflicted as much with Carlough's as corroborated it. Thus, Mendelsohn testified that Berger and Carlough feared not that the spread of news of Warren's pending termination would threaten accounts, but that "word would get back to Lesley."

We therefore reject the reasons advanced by the Respondent's witnesses for urging an acceleration of Warren's termination and find the real reason was the evidenced hostility toward Warren's protected activity of resisting withdrawal of her shop from the bargaining unit. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by acceding to unlawful motivation from its supervisors to accelerate an already planned lawful discharge.[2]

REMEDY

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designated to effectuate the policies of the Act.

Having found that Lesley E. Warren's discharge on May 14, 1986, was accelerated because of her union activities, but that the Respondent intended to terminate her lawfully when a replacement could be hired, we shall not order that she be offered reinstatement, but only that she be made whole for any loss of earnings she may have suffered as a result of her discharge prior to the hiring of that replacement, by payment to her of a sum of money equal to the amount she would have earned in wages and other benefits from the date of her termination to the date of her replacement, less net interim earnings. The amount of backpay shall be calculated in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Hemisphere Broadcasting Corporation (WBCN), Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Accelerating the timing of employees' terminations for engaging in activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Lesley E. Warren whole for any loss in earnings and other benefits, plus interest, she may have suffered because of the discrimination against her in accordance with the provisions set forth in the remedy sertion of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Boston, Massachusetts facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[2] See *Ohio Valley Graphic Arts*, 234 NLRB 493 (1978).

[3] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

WILFORD W. JOHANSEN, concurring in part and dissenting in part.

I agree with my colleagues that the General Counsel failed to sustain her burden of establishing a prima facie case of discriminatory motivation in the Respondent's discharge of Lesley E. Warren. Unlike my colleagues, however, I find based on the credited testimony that the Respondent did not violate Section 8(a)(3) of the Act by the timing of Warren's discharge. Accordingly, I dissent from the finding of a violation and would dismiss the complaint in its entirety.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT accelerate the timing of termination of our employees because of their activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL make Lesley E. Warren whole for any loss of earnings and other benefits resulting from the unlawful acceleration of her discharge, less net interim earnings, plus interest.

HEMISPHERE BROADCASTING CORPORATION (WBCN)

Anthony D. Dadalt, Esq., for the General Counsel.
Mary L. Marshall, Esq. (Stoneman, Chandler & Miller), of Boston, Massachusetts, for the Respondent.
John J. McDonough, Esq. (DiMento & Sullivan), of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge. This case was tried before me on various dates between 29 January and 19 February 1986 in Boston, Massachusetts.[1]

The charge was filed by Lesley E. Warren against Hemisphere Broadcasting Corporation (WBCN) (the Employer) on 5 August 1985.[2] The case was heard pursuant to a complaint that issued on 7 October.

In substance, the complaint, as amended at the hearing, alleges that the Employer violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discriminatorily discharging Warren on 15 May.[3]

All parties were afforded the opportunity to present oral and documentary evidence, examine and cross-examine witnesses, and to present oral argument. Posthearing briefs have been received from counsel for the General Counsel and from the Employer.

On the entire record, including my observation of the demeanor of the witnesses,[4] I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Jurisdiction is uncontested. The Employer, a corporation, at all material times, has been engaged in the operation of a radio broadcasting station, WBCN, with a place of business, and offices, in Boston, Massachusetts. The Employer's gross revenues exceed $100,000 annually; and in the same period, it purchases and receives at its WBCN facility products, goods, and materials exceeding $5000 in value directly from points outside Massachusetts. Also, at all material times, the Employer was a member of, or subscribed to, various interstate news services and advertised nationally sold products.

The Employer admits, the record reflects, and I find it has been, and is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties agree, the record reflects, and I find that Local 262, United Electrical, Radio and Machine Workers of America (UE) (Local 262) has been, at all times, a labor organization within the meaning of Section 2(5) of the Act.

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[1] The parties completed presentation of evidence on 19 February, but the hearing was adjourned for administrative purposes. The hearing was closed by my written order issued 3 March 1986.

[2] All dates are in 1985 unless otherwise stated.

[3] The complaint contains no allegation that the Employer engaged in conduct independently violative of Sec. 8(a)(1).

[4] All witnesses, except Warren and Robert Mendelsohn, the Employer's general sales manager, were sequestered. I perceive no critical credibility conflicts between Warren and Mendelsohn, although each presented extensive testimony as a witness for opposing parties.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[5]

Warren was hired as an account executive in the Employer's sales department on 4 September 1984.[6] At that time, the salespeople were represented by Local 262 for collective-bargaining purposes. The Employer and Local 262 were parties to a collective-bargaining agreement, which became effective in May 1982. The termination date of the agreement was 17 March. The bargaining unit consisted of all nonsupervisory WBCN employees, including the salespeople.

Warren and Marc Woolf both became salespeople in September 1984. Seven other individuals were then employed as salespeople. They are Stephen Berger, Judy Carlough, Tracie Christmas, Jeff Messerman, O'Connell, Helene Wexler, and Scott Zeien.

In September 1984 the Employer's relevant supervisory hierarchy at WBCN consisted of Tony Berardini, general manager, and Mendelsohn. Mendelsohn was the immediate supervisor of the salespeople. In May, Berger, Carlough, and Messerman became supervisors.

The effective date of Berger's and Carlough's supervisory status is important. In part, the General Counsel's prima facie case relies on the knowledge possessed by Berger and Carlough of Warren's protected activity and on their purported hostility toward her. I find that Berger and Carlough became supervisors on 10 May. Berardini issued a memorandum to that effect to the Employer's staff on that date (G.C. Exh. 8). Berger testified Mendelsohn advised him of the promotion a day or two before Berardini's memorandum was issued. The record shows, also, Berger and Carlough attended and participated in management meetings immediately after announcement of their appointments as supervisors. All relevant evidence regarding the promotion date is undisputed.

Berger, Carlough, and Wexler advocated changes in the sales department for years before the 1985 contract negotiations. A principal objective was the creation of management positions. Another was to disseminate some of the Employer's confidential financial information among the salespeople. Removal of salespeople from the Union was urged by Berger and Carlough to accomplish these goals. These objectives were discussed among the salespeople during prenegotiation meetings conducted on 7 and 11 January. Warren openly opposed the objectives. These matters also were discussed during meetings conducted among all bargaining unit employees on 8 and 17 January.[7]

The Employer and Local 262 engaged in negotiations between the third week of February and 15 March. On the latter date, Mel Karmazin, president of WBCN's parent company, met with all employees. Berardini and Mendelsohn were present. This meeting preceded the collective-bargaining session of that date.

Later, on 15 March, the Employer and Local 262 reached tentative accord on terms of a new collective-bargaining agreement. Thereafter, Local 262 conducted a ratification meeting among its membership. Warren said she was expressly opposed to the contract. She was the only person who voted against ratification. The contract was ratified by membership vote 2 or 3 days later. The new contract is effective 17 April through 17 March 1988.

On 15 May, Mendelsohn discharged Warren. She has not worked for the Employer since that date. The Employer admits its refusal to reinstate Warren at all times after her discharge.

B. *The Instant Dispute*

1. Warren's employment and termination

The operative facts are substantially undisputed.[8] Revenues derived from sale of advertising comprise the Employer's principal income source. The salespeople are responsible for selling advertising, servicing advertisers, and collection of accounts. Salespeople are compensated on a commission basis. When Warren was first employed, the salespeople's commission rate was established in the 1982–1985 collective-bargaining agreemen..

Salespeople develop their workload in two ways: (1) assignment of particular accounts by the Employer's management; and (2) acquisition of accounts as "new business" by personal solicitation. Two methods generally result in new business. In one, salespeople use personal initiative to identify and solicit potential advertisers. In the second method, salespeople nurture the interest of new advertisers by following up on inquiries regarding advertising made by the potential customer. This second method is known as "call-ins."

Warren applied for her position with the Employer in late summer 1984. At that time, she had at least 2-1/2 years' experience as a radio advertising account executive. Mendelsohn interviewed Warren three times. They discussed a variety of matters relevant to the functions and expectations of salespeople. Mendelsohn told Warren salespeople needed to maintain sales levels and relationships with existing accounts and to develop new business. Mendelsohn said that Warren's emphasis should be to attract and retain stable and established businesses. Warren told Mendelsohn she had prior experience servicing concert accounts. Specifically, Warren named two such major accounts: Tea Party (also called Don Law) and Gemini Concerts. Warren said she thought her experience with those accounts would be useful to WBCN. She asked Mendelsohn to assign those accounts to her.

During Warren's third interview, she and Mendelsohn discussed Local 262. Mendelsohn said, "Oh, by the way, did I tell you about the Union?" Warren answered that she had been on strike, but reluctantly, at one of the radio stations of previous employment. Warren said she did not want to be on strike. Mendelsohn responded it was "as though there were no union" at WBCN; that ev-

[5] Derived from admitted or unrefuted evidence.

[6] Hereafter, account executives will be called salespeople.

[7] Details of the union meetings will be reported below.

[8] Not every bit of evidence, or argument of counsel, is described. However, each has been considered. Omitted material is deemed irrelevant, superfluous, or of little significant probative worth. Unless otherwise stated, events and conversations reported by me are unrefuted, admitted, or corroborated by opposing witnesses or documentary evidence.

erything was "very amicable"; and that "the only thing that the Union did was lock in your commission rates and that it also prohibited management from having house accounts."[9] Warren said this assurance from Mendelsohn was "very acceptable" to her.

Mendelsohn assigned a group of accounts to Warren when she assumed her position as a salesperson. Tea Party Concerts was among those accounts. That account represented the largest sum of advertising revenue among those assigned to Warren.

Neil Jacobsen is and, at all material times, has been employed by Don Law. He is responsible for all the advertising placed for Tea Party. Jacobsen resisted Warren's assignment to the Tea Party account. Salesperson Wexler formerly serviced that account. Jacobsen told Mendelsohn he was satisfied with Wexler's performance and did not want a new salesperson assigned to him. Mendelsohn prevailed on Jacobsen to accept Warren as the Tea Party representative. Jacobsen agreed.

Jacobsen was consistently unhappy with the way Warren serviced his account. Jacobsen testified that "fairly soon" after Warren took charge of his account, he felt she was not going to work out. Specifically, Jacobsen reported to Mendelsohn that Warren failed to play advertising commercials for his review before they were played on the air. He also told Mendelsohn Warren had not reserved advertising space as Wexler had done.

Mendelsohn received adverse comments from salespeople Wexler and Christmas about Warren's personal appearance in late September or October 1984. Each complained that Warren was not dressing professionally. Wexler personally advised Warren her appearance was the subject of discussion among other employees. Wexler suggested Warren improve her appearance on the job and offered to assist Warren in selecting appropriate clothing. Wexler reported her conversation with Warren to Mendelsohn. Mendelsohn did not personally confront Warren concerning her appearance, although he claimed, in testimony, he was not pleased with it. Mendelsohn claimed he was satisfied that Wexler had addressed the subject with Warren. The discussion between Wexler and Mendelsohn occurred in October or November 1984.

In mid to late December 1984, Jacobsen told Mendelsohn that he would not renegotiate the Tea Party contract in Warren's presence. In the past, WBCN's salesperson designated to service the Tea Party account participated in the annual rate-setting negotiations for an advertising contract in the ensuing year. In fact, the 1984 negotiations took place in December only among Jacobsen, Mendelsohn, and Don Law, the owner of the Tea Party account.

Mendelsohn conferred with Warren on the day following the Tea Party negotiations. He told Warren that Don Law and Jacobsen were not pleased with how she serviced their account. Mendelsohn told Warren to do whatever necessary to improve her relationship with Jacobsen and the Tea Party account. Warren said that she would try to do so.

During the first week of January, Mendelsohn again conferred with Warren. He told her that he was dissatisfied with the amount of new business she had generated. Advertising rates quoted by salespeople to new clients regularly were reviewed by Mendelsohn. By the end of 1984, Mendelsohn concluded that Warren was not aggressively pursuing new business. His conclusion was derived from the dearth of requests from Warren for Mendelsohn to review quoted advertising rates. After their discussion, Warren apparently made lists of certain prospective clients. Warren personally called on several business establishments in the suggested areas of new business, but was unable to bring any of them into the station as new accounts.

Also, in early January, Warren gave her sales projection for the first quarter of 1985 to Mendelsohn. They reviewed these projections together. He told Warren the dollar amounts were disappointing. Mendelsohn also said that the sources from which she anticipated revenue were not the most remunerative.

On 18 January Mendelsohn discussed sales performance with Warren. He said he was concerned about her sales performance on a project known as "expo." Salespeople were responsible for selling booth space. Mendelsohn told Warren he expected her to sell more than only two booths.

Warren raised Local 262 during the 18 January conversation. Warren told Mendelsohn she found "the whole union procedure very distracting."[10] Mendelsohn gave no suggestions. He merely told Warren he did not want those distractions to interfere with Warren's performance of her job.

On approximately 30 January, Mendelsohn and Jacobsen met. Jacobsen requested the meeting. He again told Mendelson he was unhappy with the way Warren serviced his account. Jacobsen reiterated earlier objections to how Warren handled the account. Mendelsohn agreed that Jacobsen's complaints were valid. He said they would be relayed to Warren. Mendelsohn told Jacobsen, however, that he believed that Warren yet could satisfy Jacobsen's requirements with more effort on Warren's part.

Later, on 30 January, Mendelsohn met with Warren. He told Warren that Jacobsen was still complaining about how she handled the Tea Party account. Warren told Mendelsohn she believed she was complying precisely with Jacobsen's requests, and could not understand why Jacobsen was still not content. Mendelsohn said it was her job to assuage a client's perception. Mendelsohn said he was concerned when a major account perceived inadequacies in service. Warren said she believed she was already doing everything she could to keep Jacobsen's account happy.

In early March, Berardini asked Mendelsohn to investigate the reasons for a shortfall in achieving the sales department revenue projections for the first calendar quarter in 1985. Mendelsohn compared actual sales to the

[9] The quoted phrases are words attributed by Warren to Mendelsohn.

[10] The quoted phrase is an apparent reference to the union meetings which had been conducted on 7, 8, 11, and 17 January concerning the issue of the salespeople withdrawing from Local 262. The relevant contents of those meetings will be described in the text below.

projected sales of each of the Employer's salespeople, except Christmas.[11]

Mendelsohn's analysis revealed unexpected deficiencies in the amount of business actually generated. To offset these deficiencies, most salespeople showed unanticipated increases in advertising among existing accounts or acquired unexpected new business that had not been projected (R. Exhs. 10(a)–(f)). Mendelsohn then factored in his personal knowledge of the reasons certain of the projections were deficient.

Mendelsohn's comparison of Warren's first quarter projections to actual sales for the period led him to conclude that there existed more disappointing, than positive, statistics. Specifically, Mendelsohn observed the sources of new business developed by Warren were (1) from the less preferable, "life-style" business; (2) derived mostly from call-ins, previous accounts of the Employer, or leads developed by individuals other than Warren; and (3) of low volume.

Mendelsohn combined these observations and conclusions together with his knowledge of Warren's overall sales level throughout her employment as a salesperson with WBCN (R. Exhs. 2 and 3). He concluded Warren was not succeeding as a salesperson. Mendelsohn ascribed this conclusion to the following factors: (a) overall sales; (b) lack of new business; (c) unable to satisfy existing clients; (d) inability to get along with other salespeople; and (e) continued unprofessional appearance.[12]

The General Counsel challenges Mendelsohn's method of evaluating Warren's performance. Specifically, the General Counsel contends comparing Warren's projected sales to her total sales is only one *possible* measure of her performance and should "*not* be a valid basis" of judging her. I have assessed the various reasons propounded by the General Counsel to support the quoted assertion (G.C. Br. 21–32). Those reasons are numerous and varied. To enumerate each in this decision would serve no useful purpose. It would unduly lengthen this decision. It suffices that I conclude, in combination, the General Counsel's contentions concededly create suspicious circumstances. However, I find them unpersuasive when viewed in the totality of relevant circumstances.

Some of the General Counsel's contentions complain that Warren inappropriately was held to standards that are inapplicable to her. Such arguments are not impressive. They improperly seek to substitute the personal judgments of the trier of fact for those managerial judgments exercised by WBCN supervision. In this connection, I have considered the General Counsel's arguments that Warren's sales statistics and laudatory comments from certain accounts, compiled and received after Mendelsohn conducted his March evaluations, "may well have changed his judgments." I acknowledge that these events are complimentary to Warren. Conceivably, if a review of Warren's work occurred in May, the decision to discharge her (which I shall find was actually made in March) could have been reversed. But the failure to reevaluate the situation, at best, can be said to be unreasonable.

Unreasonableness, in the instant context, I find cannot be equated with unlawfulness. I recognize that there may be circumstances in which an employer's failure to consider an employee's job performance until the very moment of discharge casts suspicion on the employer's motivation. I have earlier noted that there is no contention the Employer engaged in any conduct independently violative of Section 8(a)(1) of the Act. In the absence of proven direct evidence of unlawful motivation, I am unable to use whatever suspicious circumstances exist as a basis for either making an inference that Mendelsohn's analysis and conclusions are a sham; evidence of unlawful motivation; or that the Employer's stated reasons for Warren's discharge are pretextual. Suspicions, alone, "cannot serve as a basis for finding a violation." See *Mason & Hanger-Silas Mason Co.*, 270 NLRB 383, 385 and cases cited at fn. 7 (1984).

Mendelsohn testified that he decided to discharge Warren. He asserted his decision was based on the five factors described above. I find it unnecessary to analyze the validity of each reason attributed by the Employer to warrant discharge. That task would be required only to establish whether the Employer satisfied its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). I shall find, below, that the preponderance of evidence is insufficient to establish the requisite prima facie case. Accordingly, the Employer is relieved from showing it would have discharged Warren even absent her having engaged in protected activity.[13]

The Employer claims (as noted above) Mendelsohn's decision to discharge Warren was made in March. The General Counsel contends the discharge decision was made on or about 14 May, a few days after Berger and Carlough became supervisors. The Employer asserts the decision was independently made by Mendelsohn. The General Counsel also contends Berger and Carlough, as supervisors, were instrumental in the discharge decision.

Resolution of the date on which the Employer decided to discharge Warren is, perhaps, the most critical and seminal issue in this case. A conclusion in favor of the General Counsel's position would provide a substantial, legitimate base for an inference that Warren's discharge was unlawfully motivated. This is so because I conclude, in agreement with the General Counsel, that the evidence shows that Berger, at least, harbored animosity toward Warren because (as will be described below) she opposed the separation of salespeople from Local 262. I find Warren's opposition might have, but did not, prejudice Berger's and Carlough's promotional opportunities. This latter finding tends to support the General Counsel's position.

[11] I accept Mendelsohn's uncontradicted assertion that Christmas was omitted because her retention as a salesperson was part of a continuing obligation of the Employer to maintain certain minority composition on its professional staff.

[12] The Employer adduced evidence purporting to show Warren exhibited an inability to get along with other salespeople and neglected to enhance her professional appearance. I shall not evaluate this evidence because I consider it not critical to the disposition of this case.

[13] By finding the evidence does not establish a prima facie case, I do not mean to convey there is any validity to the Employer's contention that Warren was less than a satisfactory worker.

A determination consistent with the Employer's contentions renders impotent the argument that Warren's protected activities were connected with, or a consideration in, the discharge decision.

I conclude the decision to terminate Warren's employment was made in March by Mendelsohn. I find it was based on his perception and judgment of Warren as a salesperson. The following bases exist for this result.

a. *Documentary evidence supports a finding that the discharge decision was made in March*

At approximately the time Mendelsohn reviewed sales projections against actual sales, he also was asked by Berardini to prepare various configurations for the sales department that would reflect the potential agreements that might emanate from the collective-bargaining negotiations then in progress.

Mendelsohn complied. He submitted a draft of such alternatives to Berardini in mid-March. Mendelsohn's proposal is entitled "Sales Department Scenarios for 4/1/85" (Exh. 9). It included three alternatives. Each alternative explicitly included language that encompasses a decision to terminate Warren. Thus, Mendelsohn's mid-March memorandum explicitly contains the phrase "replace Leslie Warren" in the first alternative; and the phrase "replace Leslie, as above" in the second and third alternatives.

A second document, generated later, bears the same import, namely, that the Employer had decided to operate without Warren's services. Mendelsohn prepared this memorandum (R. Exh. 14) after the 1985–1988 collective-bargaining agreement was ratified by the membership of Local 262. This memorandum, dated 29 April, is entitled "Restructuring of Sales Department." This document reflects the earlier decision to operate without Warren on its last page. There, Mendelsohn listed each of the salespeople who would be employed in the restructured department. Warren's name was not listed. Instead, the document contains the letters A, B, and C. These letters indicate it was Mendelsohn's intention to add three, yet unknown, salespeople to the staff.

b. *Mendelsohn's deferral of Warren's discharge is logical*

The General Counsel strongly urges the delay of Warren's discharge until 15 May makes it unlikely the decision was made in March. However, Mendelsohn's testimony reflects his decision was made before the Employer and Local 262 had concluded their negotiations for a new collective-bargaining agreement. Mendelsohn claimed he deferred implementation of Warren's discharge because the new commission rates were still unresolved in negotiations and any replacement for Warren would need to be informed of the new rate of hire. I find Mendelsohn's explanation reasonable. It is consistent both with the cessation of negotiations and the Employer's efforts to develop structural changes in the sales department through Mendelsohn's memoranda.

There is no evidence Warren was such a disruptive force in the Employer's operations as to raise the expectation her discharge should have been effectuated concurrent with the decision to take that action. Indeed, the uncertanties of the collective-bargaining results, I conclude, militate in favor of delaying implementation of Mendelsohn's discharge decision until new commission rates were established and a final revised configuration of the sales staff was adopted.

c. *The timing of preemployment interviews of individuals for positions as salespeople tends to confirm the Employer's contention that the decision to terminate Warren was made before Berger and Carlough became supervisors*

Mendelsohn testified, without contradiction, that three persons were interviewed before 10 May for salesperson positions. He explicitly identified each by name. That three individuals were interviewed is significant. That number exactly corresponds to the potential individuals identified in Mendelsohn's 29 April memorandum as A, B, and C (R. Exh. 14). Undisputedly, the interviews occurred before the dates Berger and Carlough were advised they were promoted to their managerial positions and before those promotions were announced to the other salespeople. I conclude that these interviews, coupled with the omission of Warren's name in Mendelsohn's second reconfiguration memorandum, support the conclusion that the decision to terminate Warren's services preceded the promotion of Berger and Carlough.[14]

Mendelsohn's proposal for restructuring the sales department became operational during the first week in May. The 10 May promotions of Berger and Carlough to supervisory positions resulted from those revisions.

On 14 May, Mendelsohn, Berger, and Carlough together met with each sales person. They met with Warren that day. She was the last salesperson scheduled. Mendelsohn outlined the structural revisions, advised Warren of new commission rates and that all salespeople would be assigned either to Berger or Carlough, but the specific supervisory assignments were still uncertain. Mendelsohn told Warren she could continue to deal directly with him in the interim. The meeting lasted only approximately 5 minutes. There is no evidence Warren said anything significant to the litigated issues.

Later, on 14 May, Mendelsohn met with Berger and Carlough. Mendelsohn told them that Warren would be terminated. They asked when Mendelsohn planned to take that action. He said he intended to discharge Warren when he had replacements. Berger and Carlough told Mendelsohn the delay was cruel and unfair to Warren. They urged Warren's immediate termination. Mendelsohn said he had deferred telling Warren of his termination decision to avoid a gap between the termination and hiring of replacement personnel to represent the Employer's accounts. Berger and Carlough offered to be responsible for Warren's accounts until replacements could be hired.

On 15 May, Mendelsohn conferred with Warren. Mendelsohn discharged Warren on this occasion. Each of

[14] This conclusion disposes of the General Counsel's claim that Berger and Carlough were at all involved in the decision to terminate Warren or that the discharge occurred because Berger and/or Carlough impressed their bias against Warren on Mendelsohn.

them testified as to what was said during this conference. I found each of them forthright, candid, and spontaneous. They gave consistent versions of events when testifying regarding identical subject matter. Warren's testimony was more comprehensive. Accordingly, my factual findings concerning the 15 May conversation track Warren's account.

Mendelsohn began the 15 May conversation. He told Warren "I'm afraid the news isn't good. I'm going to have to ask you to leave." Warren asked, "You're firing me?." Mendelsohn answered, "I'm afraid so."

Warren told Mendelsohn she thought this was a sudden move. She asked whether she would get any warnings. Mendelsohn said "No." Warren remarked she did not understand the reason for Mendelsohn's action. He said that he did not believe Warren would fit into the new system. Warren noted that the system was in effect for only 1 day and they had not yet given it a chance. Mendelsohn said the decision had been made the previous evening during a meeting attended by Berardini, Berger, and Carlough.

Warren testified that Mendelsohn "was trying to be nice about" discharging her. In this connection, Mendelsohn related how he had been terminated from a job several years earlier and "it wasn't the end of the world."

Warren asked whether her difficulties with the Tea Party (Don Law) account "had anything to do with " her discharge. Mendelsohn said "No, it didn't."

Finally, Warren and Mendelsohn discussed severance pay and recommendations that would be made to any of Warren's potential employers.

Warren's last day at work for WBCN was 15 May. Warren continued to receive commission payments for any orders placed by her and aired before 24 May.

2. Warren's protected activities

Union activity increased among the salespeople in January. They were anticipating the forthcoming collective-bargaining negotiations. One of the issues debated among the bargaining unit employees concerned what position Local 262 negotiators should take during negotiations regarding the inclusion of salespeople. This issue was inextricably connected to the objectives of creating management positions and obtaining the Employer's confidential financial information to which I have alluded in section II,A, above. The meetings at which this issue was raised, and Warren's participation, are summarized below.

7 January: The salespeople met among themselves, separate from other bargaining unit employees. They discussed the possibility of withdrawing from the bargaining unit. Warren said she did not agree the salespeople should leave the Union. A majority of the group voted in favor of asking the membership to permit the salespeople to withdraw from the Union. Warren abstained from voting.

8 January: The Union conducted a general membership meeting. The issue of withdrawal of the salespeople from the Union was among the matters discussed. Open debate ensued on that issue. Salespeople spoke for and against the proposal. A vote was taken by a show of hands. The proposal was defeated. Warren abstained.

11 January: The salespeople met among themselves. They discussed whether to ask the Union's general membership to reconsider the issue of salespeople's withdrawal from the Union. Warren credibly testified that Berger and Carlough said they were unhappy with the results of the 8 January union meeting. Other salespeople orally agreed.

Warren (in her words) "repeated . . . [her] . . . opinion" (Tr. 121). The salespeople voted to request the union membership to permit them to present their withdrawal proposal at another general membership meeting scheduled for 17 January. Warren abstained from voting on 11 January.

17 January: The Union conducted another general membership meeting. The salespeoples' withdrawal proposal was discussed. Berger presented prepared specific arguments to support the withdrawal. He fielded questions.

Warren addressed the withdrawal issue.[15] Warren said she agreed with the employees who said they were opposed to the withdrawal proposal. (That opposition was expressed basically by unit employees who were not salespeople.) Warren declared it was she, among the salespeople, who abstained from voting on the issue. She asked for the 17 January vote to be cast by secret ballot. The withdrawal proposal was again rejected.

Berger spoke with Warren two or three times between 8 and 17 January regarding the withdrawal proposal. He tried to convince Warren that withdrawal from the Union would benefit the salespeople. During these conversations, Warren questioned and opposed Berger's viewpoint. These conversations generally occurred in Warren's work area approximately between 5:30 to 6 p.m. Occasionally, those discussions progressed in a loud tone of voice.

Mendelsohn and Berardini regularly met in Berardini's office at times that coincided with the Berger-Warren discussions. Berardini's desk was located about 2 feet from Warren's desk. However, an 8-foot-high wall approximately 6 inches thick separated them. The wall did not reach from floor to ceiling. About 2 to 3 feet of open space existed between the wall's top and the ceiling.

Carlough testified, that she heard Berger and Warren engaged in the 8 to 17 January conversations. Carlough was at her desk, about 12 to 15 feet from Warren's desk, at those times. Carlough, however, claimed only that she heard Berger and Warren talking in loud voices. She said she was "not aware of the exact conversation" (Tr. 713).

Mendelsohn unequivocally denied he knew of Warren's position on the withdrawal issue at times critical to establishing Employer knowledge of her protected activity. Warren testified she could hear voices from Berar-

[15] The General Counsel claims the record does not clearly show whether Warren spoke during the meeting of 8 or 17 January. I find she did so on 17 January.

Warren's recollection of the occasions on which certain events occurred was not as specific as other witnesses'. For example, the Employer's Traffic Director Hahesy (a unit employee) was more comprehensive and sure about what took place on 17 January.

I accept Hahesy's recollection that Warren spoke at that meeting. Hahesy's account is consistent with that part of Warren's testimony that Warren asked that the 17 January vote be conducted by secret ballot.

dini's office when voices were raised. There is no evidence the precise words were discernible.[16]

15 March: The Employer conducted a general meeting among the employees. Mel Karmazin, the Employer's president, addressed the attendees. Mendelsohn and Berardini were present.

There was some discussion regarding the proposition of salespeople being removed from the Union. (The *Employer* had proposed, during collective-bargaining negotiations then pending, that salespeople be eliminated from the bargaining unit. When Karmazin spoke, the Union already had rejected that proposal. The rejection, presumably, was pursuant to the 17 January general membership vote.) Karmazin gave his reasons in support of the Employer's proposal. Warren expressed an opposite view. She said she believed that Karmazin's goals could be achieved even if the salespeople were involved in a union contract.

Later on 15 March, the Employer and Union held a negotiating session. Union negotiating committee members Carlough and Wexler proposed creation of new sales department management positions. The Employer agreed. Further, the parties agreed the new positions would be funded by house accounts. This agreement effectively removed the prohibition against house accounts. Also, the parties agreed to modify the contract's economic terms for salespeople. Specifically, the Union agreed to the Employer's proposal that salespeoples' commission rates no longer be established in the collective-bargaining agreement.

Thereafter, the Union conducted a meeting for ratification of the new collective-bargaining agreement. Warren vigorously objected to ratification. She said she was surprised that the union negotiators agreed to the above-mentioned terms. Warren expressed disbelief that the contract contained nothing regarding sales commissions "except that it's up to somebody." Warren also said she thought it was dangerous for the salespeople to "open up house accounts as a means of compensation for managers." (Tr. 133.) The ratification vote was taken by raise of hands. Warren was the only unit employee to vote against ratification.

I find that the preceding discussion regarding Warren's activities provides ample evidence that she was engaged in protected union activities between 7 January and 15 March; and that activity was open, notorious, and reasonably could not have escaped Mendelsohn's attention before he decided to discharge Warren.[17]

3. Analysis

The General Counsel must prove the Employer was motivated by unlawful considerations in its discharge of Warren. Discriminatory motivation is a critical element and essential ingredient of a prima facie case. *WMUR-TV Co.*, 253 NLRB 697, 703 (1980).

I have stated above, in various places, that the evidence is viewed in a light most favorable to the General Counsel, for analysis purposes. I conclude the preponderance of evidence does not sustain a finding that Warren's discharge was discriminatorily motivated, even when all critical questionable areas are resolved consistent with the General Counsel's arguments and contentions.[18]

Concededly, there are two factors that militate in favor of finding Warren's discharge was motivated by discriminatory considerations. Those factors are

1. Mendelsohn's denial to Warren during her 15 May termination interview that her handling of the Don Law account was a factor in the discharge contradicts the vast evidence adduced by the Employer designed to show that Warren failed in her responsibility to service that account; and

2. The discharge appears to be precipitous because it occurred without warning only 1 day after new rates and supervisory changes were discussed by Mendelsohn with Warren.

In other circumstances, these elements would be strong and persuasive factors on which I would make an inference that discriminatory reasons caused Warren's discharge. However, in the entire context of the instant case, I conclude the above factors present only suspicious conditions. They do not convincingly support an inference adverse to the Employer because they are rebutted by the more direct and tangible evidence, which demonstrates Mendelsohn made the discharge decision in March. I find Mendelsohn's deferral of implementing his decision supported by extrinsic events; the need to settle new contract terms with Local 262 and to develop revisions of the Employer's sales department.

I find Mendelsohn's failure expressly to warn Warren her job was in jeopardy, and to engage her in a review of the department's revisions a day before the discharge, fully plausible as consistent with his overall demeanor.

The General Counsel characterizes Mendelsohn as possessing and exhibiting a "nonconfrontational personality." I agree with this description. Mendelsohn was soft-spoken, mild-mannered, and of moderate temperament during his lengthy testimony at the instant hearing. The record reflects Mendelsohn transmitted these traits to his managerial style. For example, Mendelsohn personally avoided criticism of Warren's appearance at work. Apparently, Mendelsohn was content that Wexler had raised that issue with Warren.

I find, contrary to the General Counsel's contention, that Mendelsohn's personality is consistent with deferral of Warren's discharge beyond the date of decision and

[16] There is no direct evidence to show either Berardini or Mendelsohn became aware of Warren's activity or her position as a result of these conversations between her and Berger. Nonetheless, for purposes of assessing the nature of a prima facie case, I shall assume that the Employer knew of Warren's activity at least as early as 17 January.

[17] Also, for analysis purposes, I find the record shows Warren's views on exclusion of salespeople from the Union were firmly opposite from those shared by Berger and Carlough. They were similarly inconsistent with the views expressed by the Employer's president.

[18] I find all other elements of a prima facie case *have* been proved by at least the evidence indicated below

(a) Protected activity: Warren's conduct regarding withdrawal of salespeople from the Union;

(b) Employer knowledge: By inference derived from the notorious character of Warren's activity and directly from her 15 March challenge to Karmazin;

(c) Unlawful effect of discharge: Warren's discharge signaled to others their employment might be in jeopardy unless they remained, or wanted to remain, in the Union.

also accounts for his 14 May failure to advise Warren of the decision.[19]

Mendelsohn's character, personality, and demeanor make it reasonable to expect he would have denied the discharge was related to how Warren serviced the Don Law account. Warren's question, which elicited that response from Mendelsohn, was asked *after* Mendelsohn told Warren she was being fired.[20] Clearly, a negative answer to Warren's question was less likely to induce controversy than giving an answer that would raise the spectre of factual disagreement. In view of Mendelsohn's undisputed character, I find his denial that Don Law was involved in the discharge a remark reasonably anticipated. In the total scenario of events, that denial bears no sinister import.

In making my conclusions I am mindful that, on 15 May, Mendelsohn told Warren the discharge decision had been made the previous night. I consider that remark, also, one which is readily anticipated to come from Mendelsohn. In all the instant circumstances, I conclude this statement is another way Mendelsohn avoided controversy. To ascribe the decision to the previous evening establishes an implied explanation for including Warren in his 14 May review of the new sales commissions and system. The record as a whole does not warrant me to find, from Mendelsohn's false statement about when the discharge decision was made, either that Mendelsohn is generally not credible or that he admitted he had not decided to terminate Warren until 14 May.

On the foregoing, I am unwilling, and virtually unable, to infer the existence of unlawful motivation from either of the two best factors presently under discussion.[21]

I find the following additional evidence and arguments relevant to the element of discriminatory motivation noteworthy. But, I find each unpersuasive.

(a) The General Counsel contends that Berger and Carlough disliked Warren, and their animosity may be imputed to the Employer. Unquestionably, Berger and Carlough were in the forefront of the effort to withdraw the salespeople from the Union. Considerable evidence was adduced to show that their attitude toward Warren changed after she expressed her opposition to withdrawal from the Union. I need not decide either the nature of Berger's and Carlough's attitude changes (if any) or whether their attitudes can be imputed to the Employer.

However, even assuming Berger and Carlough harbored actionable animus toward Warren, I find it improper to transmit their hostility and animus to the Employer. This is so because the evidence clearly shows the decision to discharge Warren was made long before Berger and Carlough became supervisors. I conclude neither of them had any effective input on the discharge decision. I simply find neither of them was involved in the decision to terminate Warren.[22]

(b) The General Counsel claims that the Employer's failure to warn Warren that her job performance jeopardized her employment is evidence of unlawful motivation. In other circumstances, this would be true. In the present circumstances, I find this argument contrary to the facts. I concede there is no evidence that Warren received explicit warnings that she might be discharged. However, the undisputed evidence shows that Mendelsohn counseled Warren on various occasions (enumerated above in section II,B(1)) as early as December 1984. Those discussions involved, among other things, Mendelsohn's expressions of disappointment with Warren's revenue production and ways and means by which she could improve it. Income production is a salesperson's principal objective. In my view, explicit criticism of results regarding that objective bears the implication that the producer's tenure is tenuous unless there is improvement in production.

(c) The General Counsel asserts that Warren was treated in a disparate manner, and that treatment is evidence of unlawful motivation. I conclude the evidence does not show Warren was subjected to the claimed disparate treatment. The claim is based on a comparison of Warren's performance to that of salesperson Christmas.

In fact, a comparison of the total sales of Warren and Christmas between October 1984 through April 1985 shows that Warren outsold Christmas by an average of approximately $8000 per month. Nonetheless, I find no merit to the claim of disparate treatment.

Two reasons exist for my conclusion. First, I have noted earlier in this decision that Christmas was maintained by the Employer on its sales staff to achieve and maintain compliance with requirements for minority employment. Mendelsohn excluded Christmas' production from the performance evaluations that Berardini required him to make in early 1985. I credit Mendelsohn's testimony this omission reflected Christmas' special status. In any event, Warren was a considerably more experienced salesperson than Christmas. It is reasonable that the Employer would have expected her to produce more than she did.

Second, I find a more appropriate comparison of sales statistics would be to compare the production between Warren and Woolf. As earlier stated, both of them began their sales careers with the instant Employer in September 1984. Woolf essentially worked from September through December 1984.[23] Woolf's total sales during the

[19] I reject the General Counsel's argument that the decision was tentative until 14 May. Mendelsohn's personality does not necessarily affect his ability to make aggressive, prompt decisions (R. Exh. 9), where Mendelsohn unequivocally definitively recommended, three times, that Warren be replaced.

[20] Mendelsohn's personality was evident in the language used to inform Warren of the discharge. He only said he was asking "her to leave"; and, even when Warren asked whether "You're firing me?", Mendelsohn characteristically answered, "I'm afraid so."

[21] I have considered the absence of any allegation or evidence of an independent 8(a)(1) violation in making this conclusion.

[22] I need not deal with the General Counsel's alternate theory (expounded in his posthearing brief) that Berger's and Carlough's hostility prompted them to urge Mendelsohn, on 14 May, to terminate Warren immediately and thus the discharge was accelerated by their hostility at a time when they were clearly supervisors. In the absence of direct evidence of unlawful motivation or independent 8(a)(1) activity, and in all the instant circumstances, I find the request for immediate termination a sincere and legitimate benevolent expression.

[23] Based on the Employer's records (R. Exh. 3), I presume Woolf worked very little in January 1985. There is no evidence to show the circumstances of Woolf's departure.

last calendar quarter of 1984 exceeded Warren's by $3000. Interestingly, Christmas' last quarter, 1984, sales exceeded Warren's by $77,303 (R. Exh. 2). These statistics negate the validity of the contention that Warren was treated in a disparate manner.

I find, based on the foregoing analysis, that the record contains insufficient evidence on which to conclude there exists a prima facie case of discrimination against Warren.[24]

[24] As earlier stated, this conclusion renders it unnecessary to decide whether the evidence shows that the Employer satisfied its burden of persuasion under *Wright Line*, supra.

On the above findings of facts, and on the entire record in the case, I make the following

CONCLUSIONS OF LAW

1. Hemisphere Broadcasting Corporation (WBCN) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Employer has not committed any of the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

Pacemaker Driver Service, Inc., Carrier Corporation, Carrier Trucking Service *and* Robert C. Barnes, Teamsters Local Union No. 519, AFL-CIO.[1] Case 10-CA-16850

July 29, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On July 20, 1987, Administrative Law Judge J. Pargen Robertson issued the attached supplemental decision.[2] The Respondent Carrier and the General Counsel filed exceptions and supporting briefs, and Carrier filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified, and to adopt the Supplemental Order as modified.

We agree with the judge, for the reasons set forth in his decision, that Carrier is not obligated to reopen its Knoxville domicile because it has shown that it would have closed the domicile for legitimate business reasons at a time subsequent to the unlawful closing on March 31, 1981. Contrary to the judge, however, we find that Carrier is not obligated to offer reinstatement to the four discriminatees and that Carrier's backpay liability to these individuals was tolled as of February 10, 1985.[4]

In finding that Carrier was under a continuing obligation to offer reinstatement to the four discriminatees, the judge found that Carrier had failed to establish that it had a policy of terminating employees when a truck domicile closed. Specifically, the judge found that Carrier failed to show that its current drivers had not been transferred from one of its closed domiciles. We find, contrary to the judge, that in the circumstances of this case Carrier has successfully met its burden of proof showing that the discriminatees would have been terminated for economic reasons.

According to facts set forth in the underlying Board decision, Carrier is operated as an in-house transportation service, leasing both the trucks and drivers. Although Carrier at one time utilized its own employee-drivers, in 1977 it contracted with Pacemaker Driver Service, Inc. (Pacemaker) to provide drivers for a number of its domiciles, including Knoxville. At the time of the events in question, the four Knoxville drivers were leased from Pacemaker.

Carrier's testimony at the backpay hearing, as set forth in the judge's decision, shows that Carrier did not normally relocate drivers when it eliminated or redomiciled equipment; rather, the driver-leasing company generally reassigned them to another account.[5] Carrier also presented evidence that since March 1981 it permanently has reduced the fleet of trucks necessary for its operations.

We find that this testimony, when viewed in the context of Carrier's practice of using drivers who are leased from and employed by another company, demonstrates that Carrier has, in fact, no transfer policy.[6] In the absence of evidence of a transfer policy and in light of Carrier's reduction in its fleet of trucks, we find that Carrier has established that it would have terminated the Knoxville drivers in conjunction with a legitimate closing of the Knoxville domicile.[7] Accordingly, we find that Carrier is under no current obligation to offer reinstatement to the four discriminatees.

Carrier further contends that the discriminatees' backpay should be tolled as of the date their jobs would have been eliminated by a legitimate closing of the Knoxville domicile. It also contends that the judge erred in failing to find that the Knoxville domicile would have closed by November 1982 at the latest, with the expiration of the lease of the last truck domiciled in Knoxville. We find no merit to Carrier's contention that the Knoxville domicile would have been closed as early as November

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] The original Decision and Order is reported at 269 NLRB 971 (1984). On July 30, 1985, the Sixth Circuit granted enforcement of the Board's Order, but limited backpay liability to Respondent Carrier Corporation, Carrier Trucking Service. 768 F.2d 778.

[3] The evidence shows that the Mansfield, Ohio domicile was closed on May 1, 1983, rather than May 1, 1985, as set forth in the judge's decision. We correct this inadvertent error.

[4] Member Johansen would adopt the judge's rulings, findings, and conclusions regarding the reinstatement, backpay, and benefits of employees Gates, Ridley, Bales, and Donaldson.

[5] We note, in this regard, that the testimony of Pacemaker's manager, Joe Weisenburger, set forth by the judge, substantially corroborates the testimony of Carrier's manager, Henninger.

[6] Although Carrier and Pacemaker have been found to be joint employers of the discriminatees, we do not find that this relationship, by itself, necessarily establishes that Carrier is responsible for transferring leased Pacemaker drivers once Carrier has made a decision—in which Pacemaker played no part—to eliminate a certain domicile. Rather, we find that the evidence demonstrates that Carrier has no transfer policy and that it was Pacemaker's responsibility and practice to reassign its drivers located at a particular Carrier domicile in the event Carrier closed that domicile.

[7] Regarding the burden of proof on this issue, we find that it was initially incumbent on Carrier to produce evidence regarding its termination policy with respect to the leased Pacemaker drivers. Here Carrier presented evidence that it did not transfer the drivers in the event of a closing of a domicile. With the presentation of this evidence, the burden then shifted to the General Counsel to show that a transfer policy existed. We find that the General Counsel has not made this showing. Compare *Boland Marine*, 280 NLRB 454 (1986).

1982. We agree, however, that Carrier's backpay liability should be tolled as of the date the domicile would have closed for legitimate reasons, which we find is February 10, 1985.

The record fails to establish that the expiration of truck leases automatically resulted in Carrier's decision to close a domicile. Rather, and as argued by Carrier in its brief to the judge, the selection of the current domiciles was based on several factors, including the locale's capability of servicing Carrier's assembly and distribution program as well as the amount of less-than-truckload freight generated in a particular area. Although the judge found that these factors did not establish a certain date for the closing of the Knoxville domicile, he nevertheless found that they established that the Knoxville domicile would have been closed on or before February 10, 1985—the date on which Carrier closed its Springfield, Massachusetts domicile, the last of the domiciles which were adapted to Carrier's reorganized assembly and distribution programs.[8] In view of the uncertainty regarding the date of a legitimate closing of the Knoxville domicile, and because it is the Board's policy to construe any uncertainty against the wrongdoer, we find that the Knoxville domicile would have closed as of the latest of the possible dates, i.e., February 10, 1985. Accordingly, we shall toll the discriminatees' backpay as of that date.[9]

ORDER

The National Labor Relations Board orders that the Respondent, Carrier Corporation, Carrier Trucking Service, Knoxville, Tennessee, its officers, agents, successors, and assigns, shall

Make whole each of the employees named below by payment to them of backpay in the amounts set forth opposite their names, plus interest computed in the manner described in *New Horizons for the Retarded*,[10] and accrued to that date of payment, minus tax withholdings required by Federal and state laws:

Jonah C. Gates	$ 70,983
Hickman S. Ridley Jr.	59,012
Donnie Bales	26,710
David Donaldson	64,910

[8] The record shows that Carrier had operated 12 domiciles, not counting Knoxville, in March 1981. It opened an additional domicile in Springfield, Massachusetts, in November 1982. The judge found that the six domiciles still operating as of the date of the hearing (Indianapolis, Nashville, Memphis, Syracuse, Cleveland, and Atlanta) were selected to remain open because of "their unique ability" to handle the LTL shipments generated through Carrier's assembly and distribution programs. Between 1981 and 1985, Carrier had closed its domiciles in Fort Wayne, Indiana; Tyler, Texas; Cincinnati; Morrison, Tennessee; Detroit; and Mansfield, Ohio. As noted, the Springfield, Massachusetts domicile was opened in 1982 and closed on February 10, 1985.

[9] The judge recommended that the discriminatees be made whole in the amounts set forth in the attachment to his decision marked "Appendix," which represents backpay owed through December 1985. In light of our decision to toll backpay as of February 10, 1985, we shall direct Carrier to make the discriminatees whole in the amounts set forth in the "Appendix" through December 1984, and leave to further compliance proceedings the computation of any amounts due to the discriminatees for the period January 1 through February 10, 1985. We also make the following corrections to the backpay amounts owed through December 1984. For Jonah C. Gates, net backpay for the second quarter of 1981 is $8778, rather than $8497. For David Donaldson, the amount of interim earnings for the third and fourth quarters of 1982 in both instances is $2981, rather than $2891; the amount of net interim earnings for the fourth quarter of 1984 is $4187, rather than $3340; and net backpay for the fourth quarter of 1984 is $3340.

[10] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Richard P. Prowell, for the General Counsel.
James W. Malarney, of Indianapolis, Indiana, for the Respondent.
Beatrice Chan Hubbard (Ogletree, Deakins, Nash, Smoak & Stewart), of Nashville, Tennessee, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This is a proceeding for determination of backpay liability. On 30 March 1981, Respondent (CTS) and Pacemaker Driver Service, Inc. illegally discharged four employees at CTS' truck domicile in Knoxville, Tennessee. That action was found to violate Section 8(a)(1) and (3) in an administrative law judge's decision that issued 12 October 1982, and by the National Labor Relations Board in a 13 April 1984 decision (269 NLRB 971).

On 30 July 1985 the Sixth United States Court of Appeals granted enforcement and directed CTS only (not Pacemaker) to comply with the Board Order. *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985).

As noted in the underlying decision, Carrier Corporation operates CTS as part of its corporate operations. Carrier Corporation is primarily engaged in the manufacture and sale of heating and air-conditioning units. CTS handles a portion of the total freight transportation needs of Carrier and Carrier's affiliated companies. CTS is headquarters in Knoxville, Tennessee.

On 30 March 1981, CTS operated 22 trucks from 12 cities. Two of those trucks, each with a crew of two drivers, operated out of Knoxville. On that date CTS illegally terminated four Knoxville drivers and removed the domicile of the two trucks from Knoxville to Cincinnati. Before that date Cincinnati was not the domicile of any of Respondent's 22 trucks. CTS did not own any of its trucks, all were leased.

Through the above-mentioned Board and court orders, CTS was directed to reinstate the four Knoxville drivers (Jonah C. Gates, Hickman S. Ridley Jr., Donnie Bales,

and David Donaldson) with backpay and to reopen its Knoxville truck domicile.

CTS has not complied with the Board and court orders. Instead it disputes whether it is now obligated to reopen its Knoxville truck domicile or to reinstate the four discriminatees.

Before 30 March 1982 CTS operated what is known as a "truckload" private carrier operation. The term truckload indicates that there is one consignee and one consignor, and a truckload of goods is taken from a shipper to a designated location. A private carrier is an in-house carrier. One that works exclusively or almost exclusively, for a parent corporation that is generally engaged in an enterprise other than trucking.

Carrier operates CTS in order to move goods at a cost below the available cost of for-hire trucks. Until after March 1981, CTS found that it could operate most efficiently as "truckload" as opposed to "less than truckload" (LTL). LTL operations involve several consignees and/or consignors with several loads per truck. Truckload operations do not require extensive terminal facilities whereas LTL operations necessitate terminals with distribution facilities. CTS contends that because of a required change from being a TL (truckload) operation to becoming an LTL operation, it would have closed its Knoxville trucking operation after 30 March 1981 for reasons not protected by the NLRA. Additionally, CTS alleges that because it was not its practice to transfer drivers on closing its facilities, it would have legally terminated the four discriminatees when it legally closed its Knoxville facility. For that reason, Respondent argues, it no longer has a reinstatement obligation and its backpay obligation terminated on the date it would have legally removed the respective Knoxville trucks from Knoxville.

The court granted full enforcement to the Board Order, which included, inter alia, a requirement that CTS:

> Offer immediate and full reinstatement to its employees, Jonah C. Gates, Donnie Bales, David Donaldson, and Hickman S. Ridley, Jr., to their former positions of employment or, if those positions no longer are available, to substantially equivalent positions . . . .

The enforced Order requires that Respondent offer reinstatement to Gates, Bales, Donaldson, and Ridley absent a showing that neither their former positions nor any substantially equivalent positions exist.

The record shows that Respondent has not offered Gates, Bales, Ridley, or Donaldson reinstatement to their former positions or to substantially equivalent positions.[1]

Respondent, in a backpay proceeding, has the burden of demonstrating that unlawfully discharged employees would have been terminated for economic reasons. *Midwest Hanger*, 221 NLRB 911, 917 (1975).

In support of its position Respondent contends that it did not transfer drivers to another city when it closed a domicile. Respondent's evidence is found in the following testimony:

> Pacemaker's Manager Weisenburger testified:
>
> Q. What happened to the drivers at the location where the truck was eliminated?
>
> A. They usually were laid off. And we recruited—put new drivers on the new location. Normally . . . .
>
> Q. To your recollection, was there an instance where Carrier transported employees from one location to another as a result of redomiciling of trucks?
>
> A. I don't believe so.
>
> Respondent's manager Henninger testified:
>
> Q. In the process of trimming the fleet, what happened to the drivers whose trucks were eliminated from the system in the process?
>
> A. Their respected employer or driver leasing company would generally assign them to another account.

I find that the above testimony does not establish a policy of Respondent terminating drivers when a tractor was redomiciled. That testimony shows only that drivers were usually reassigned by the truck lessor.

As held by the Board in *Boland Marine*, 280 NLRB 454 (1986), in which evidence of Respondent's practice is "peculiarily in the possesssion of and available to Respondent," the burden falls to Respondent to prove by convincing evidence that the discriminatees would have been terminated at a subsequent date for legitimate business reasons. Respondent currently employs about 25 to 26 drivers using 13 tractors. The record does not show that those drivers were transferred to their current domicile from one of Respondent's closed domiciles. It is not the General Counsel's burden to show that he discriminatees would have been permitted to transfer to one of the six current domiciles when Knoxville closed. Respondent failed to show that any of its current drivers have not previously transferred from another domicile.

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[1] Respondent argues that the discriminatees were offered employment by Pacemaker Area Manager Joe Weisenburger. All the discriminatees denied that Weisenburger offered employment at any time after they were discharged.

Weisenburger testified:

> I talked to each of them shortly after I'd sent them a letter and I'd called them or left word for them to call me to tell them that it was being closed and that we didn't have anything in the immediate area. If they wanted to work on the casual board or a possible reassignment whould probably require a relocation at that particular time and they probably should touch base with either my office or out of other office in Greenville since it was closer, actually, to this location.

Weisenburger also testified that he believed J. C. Gates told him in a telepone conversation that Gates could not work for Pacemakers:

> Because it would jepordize the case or something to that effect.

I credit the testimony of the discriminatees, including Gates, who all denied that they were offered employment by Weisenburger. Their testimony in that regard was positive. On the other hand Weisenburger admitted that his recollection was not good.

Moreover, even if I should credit Weisenburger's testimony, it is clear from the above quoted testimony that Weisenburger did not extend an offer of employment. Weisenburger simply held out the hope of casual or permanent employment.

Respondent presently operates 13 tractors at 6 locations; Indianapolis, Indiana (3 tractors); Nashville, Tennessee (2); Memphis, Tennessee (2); Syracuse, New York (2); Cleveland, Ohio (3); and Atlanta, Georgia (1). As was the case during 1981, teams of drivers are employed to operate Respondent's 13 tractors.

Regarding the question of Respondent's obligation to reinstate the discriminatees in locations other than Knoxville, the Board has traditionally ordered that type reinstatement in cases where it finds that an employer need not return its business to the former location. See for example *Garwin Corp.*, 153 NLRB 664 (1955), enfd. in part 374 F.2d 295 (D.C. Cir. 1967); *Burroughs Corp.*, 214 NLRB 571 (1974).

As shown below, I find that Respondent would have closed its Knoxville domiciles at some time after 30 March 1981 for legitimate business reasons. Nevertheless, that finding is speculative. It cannot be established with certainty that Knoxville would have closed if in fact the Knoxville domiciles had existed when Respondent switched from TL to LTL operations. Correspondingly, it cannot be established with certainty that the discriminatees would not have been terminated when the Knoxville domiciles closed for legitimate business reasons. In situations of this nature it is the normal practice to decide in favor of the innocent party and against the wrongdoer. Here the discriminatees continue to suffer substantial harm because of Respondent's unlawful action.

I find that the record does not show that the discriminatees would have been terminated for economic reasons. Therefore, Respondent's mandate to reinstate all alleged discriminatees continues regardless of Respondent's obligation to reopen its Knoxville truck domicile.

Is Respondent Obligated to Reopen its Knoxville Truck Domicile?

In response to the above query, the Sixth Circuit agreed that Respondent has a right "to move the domicile for legitimate business reason . . . ." (*Carrier Corp. v. NLRB*, 768 F.2d 778, 784 fn. 5 (1985)). Therefore, I shall apply the test inherent in the court's comment, i.e., does the record prove that Respondent would have removed its Knoxville domicile at some point after March 1981, for legitimate business reasons.

Respondent argues that because of business factors it changed from a TL (truckload) operation to an LTL (less than truckload) operation. The record shows that the Motor Carrier Act of 1980 had a deregulation effect on the trucking industry. Because of that law more entities were able to qualify as interstate motor carriers.

The evidence illustrates that from 1980, the number of TL carriers significantly increased. TL carriers frequently operate with little more capital investment than their trucks because it is not necessary to have extensive terminal or distribution facilities. Because of added competition as a result of more carriers, the TL rates have decreased since 1980.

The record shows that truckload rates available to Carrier Corporation decreased from $1.37 per mile in 1981, to $1.30 in 1982, to $1.28 in 1983, to $1.14 in 1984, up to $1.19 in 1985, and to $1.08 in 1986.

However, the 1980 Motor Carrier Act did not have a similar effect on LTL operations, LTL revenues have varied from $2.97 per mile in 1981, to $2.57 in 1982, to $3.27 in 1983, to $2.48 in 1984, to $2.23 in 1985, and to $2.66 in 1986.

During the same period Respondent's operating costs have increased from a $1.15 per mile in 1981, to $1.21 in 1982, to a $1.33 in 1983, to $1.37 in 1984, down to a $1.34 in 1985, and to $1.36 in 1986.

Respondent argues, and the above figures support, that from 1983 the available rates for which it could use for-hire TL truckers, were less than its costs. Therefore, from that point in time, Respondent was unable to justify continuation of its TL operations. It simply costs more to run its own trucks than it would cost to pay outside TL operators.

In interoffice communications as early as 6 July 1981, Respondent recognized that CTS could not continue as a viable truckload operation. During July 1981 it was announced that CTS would increase its LTL operations by 65 percent. Although LTL rates were also falling in July 1981, there remained a wide range of profit opportunity in LTL operations (i.e., verses the cost of $1.15 per mile at that time, LTL rates were running about $2.97 per mile.

In 1981 Respondent decided that its increased LTL operations[2] could be handled with 13 trucks. Respondent established through record evidence that it followed the most economical procedure to reduce its fleet from 22 to 13 tractors by simply returning the 9 excess tractors as their leases expired. Therefore, on 2 August 1981, 3 trucks were turned in as their leases expired and Respondent's fleet was reduced to 19 tractors; on 24 August 1982 the leases expired on 3 additional tractors and the fleet was reduced to 16; and on 20 November 1982 Respondent's fleet was finally reduced to 13 when the leases of 3 tractors expired.

As it reduced its tractor fleet Respondent closed its trucking domiciles in several cities.

Manager Clyde Henniger testified that the six current domiciles of CTS were selected due to their unique ability to provide service to LTL assembly and distribution programs. In selecting the six domiciles Henninger testified that he also considered the volume of LTL traffic generated in various cities including Knoxville and other former domiciles.

The evidence shows that Carrier's distribution warehouses are located in Syracuse, 444,000 sq. ft.; Nashville, 1,049,000 sq. ft.; Memphis, 666,000 sq. ft.; Indianapolis, 434,000 sq. ft.; Tyler, 303,000 sq. ft.; City of Industry, 303,000 sq. ft.; Little Rock, 101,000 sq. ft.; and Knoxville, 75,000 sq. ft. In 1981 Respondent had distribution center warehouses located in Syracuse, 707,000 sq. ft.; Nashville, 1,074,000 sq. ft.; Memphis, 666,000 sq. ft.; Indianapolis, 281,000 sq. ft.; City of Industry, 333,000 sq. ft.; and Tyler, Texas, 214,000 sq. ft. Distribution programs have been established by Respondent in Syracuse,

[2] Respondent's current operations function as LTL operations even though a portion of its business remains "truckload." The truckload operations are primarily backhauls, used to provide some offset to the cost of returning the trucks to their originating terminal.

Cleveland, Indianapolis, Memphis, and Atlanta plus two on the west coast, Los Angeles and Oakland. Carrier's assembly programs are located in Memphis, Nashville, Indianapolis, Cleveland, and Syracuse. As shown above the current domiciles of Respondent are located in Indianapolis (three trucks); Nashville (two); Memphis (two); Syracuse (two); Cleveland (three); and Atlanta (one).

Additionally, the record shows that during 1981 and 1982 when the decisions were being made to close the former domiciles, Knoxville generated a low volume of LTL shipments. In a selected 3-month period in 1981 Knoxville generated significantly fewer LTL shipments than Tyler, Cincinnati, or Fort Wayne (267,529 as opposed to 592,329, 1,766,772, and 4,895,027, respectively). During 3 months in 1983 Knoxville generated 300,512 LTL shipments; Tyler, 447,110; Cincinnati, 1,481,098; Memphis, 2,631,346; Indianapolis, 4,697,788; and Syracuse, 5,518,312. It is noteworthy that Respondent no longer has domiciles in Tyler, Cincinnati, or Fort Wayne.

On 10 February 1985, Respondent closed the last of its former domiciles, one in Springfield, Massachusetts. Before that it closed Mansfield, Ohio, on 1 May 1985; Cincinnati, Detriot, and Morrison, Tennessee, on 20 November 1982; Tyler, Texas, on 1 May 1982; and Fort Wayne, Indiana, on 2 August 1981.

Although Respondent moved its Knoxville domicile to Cincinnati illegally on 30 March 1981, I am convinced from the record, that factors that led to the close of the Cincinnati domicile do not accurately indicate that the Knoxville domicile would have closed when Cincinnati actually closed. Cincinnati closed when anticipated local business failed to materialize. That factor was unique to Cincinnati and would not have been present in Knoxville. However, in view of the evidence showing the LTL shipments that were generated in Knoxville and elsewhere, and in particular in view of the evidence regarding assembly and distribution programs, I find that the Knoxville domicile would have been closed for legitimate business reasons at some point on or before the date Respondent closed its Springfield domicile, 10 February 1985. In view of that finding I recommend that Respondent should not be required to reopen its Knoxville domicile.

Backpay

The pleadings developed several issues relating to the amount of backpay.

(a) *Pension credits.* The General Counsel amended paragraph 8(a) of the backpay specification to allege:

> In addition to the amounts computed pursuant to paragraph 6 above, Respondent would have continued payments to its pension plan on behalf of the discriminatees, and Respondent is obligated to restore the credits they would have earned toward their pensions absent the illegal discrimination against them.

Respondent answered:

> Respondent Carrier admits that it made regular pension contributions on behalf of its employees with over one year service. Respondent Carrier denies the remaining allegations contained in Paragraph 8(a). Respondent Carrier denies any backpay liability as the discharged employees failed to mitigate damages by making reasonable and diligent searches for interim employment.

I find below that the record evidence did not show that the discriminatees "failed to mitigate the damages by making reasonable and diligent searches for interim employment."

In view of Respondent's answer and the record evidence, I find Respondent must make payments necessary to restore all pension funds and credits lost by each of the four discriminatees during the period 30 March 1981 through 31 December 1985, to the extent each discriminatee would have been entitled to pension contributions if he had continued working for Respondent after 30 March 1981; and to continue those payments until Respondent's backpay obligation is terminated.

(b) *Vacation pay.* Respondent contends that the General Counsel seeks vacation pay for days when the discriminatees would have worked and received regular pay. However, the General Counsel has shown that the backpay computations contained in its backpay specifications include weekly averages based on total quarterly earnings and do not purport to include vacation pay for weeks the employees would have actually worked.

I find that the General Counsel's inclusion of vacation pay in its backpay computation is appropriate. *Central Freight Lines*, 266 NLRB 182 (1983).

(c) *Interim earnings.* Although Respondent contended in its answer that the four discriminatees failed to make reasonable and diligent search for interim employment, the record failed to support Respondent's position.

The entire backpay period should be examined in consideration of "reasonable search." *C-F Freight*, 276 NLRB 481 fn. 3 (1985).

The General Counsel admitted in the backpay specification, that each of the four discriminatees accumulated substantial interim earnings. Moreover, all four discriminatees were presented at the hearing here. When questioned about search for work, J. C. Gates adequately explained extensive efforts to find work while traveling 2500 miles.

Respondent has the burden of showing that the discriminatees failed to seek work, *Highview, Inc.*, 250 NLRB 549 (1980); *Sioux Falls Stock Yards Co.*, 236 NLRB 543 (1978).

Here the record does not show that any of the discriminatees failed to diligently seek work.

(d) *Interim earnings not reported.* Respondent answered about all four discriminatees to the effect that the specification contained only a portion of each discriminatee's gross interim earnings. Respondent's claim that the discriminatees had unreported earnings is rejected in view of the absence of any supporting evidence. Respondent failed to produce any evidence of interim earnings by any of the discriminatees other than those shown in the specifications. *Sioux Falls Stock Yards*, supra.

(e) *Change in method of computing mileage.* Respondent contends drivers' mileage computations changed in 1985. The record shows only the following:

> Q. Mr. Weisenburger, there was a wage increase for the Carrier employees sometime in 1985, is that correct?
>
> A. Yes. Took a while.
>
> Q. Alright. Do you remember if the computation for the mileage run, is the same after the increase in 1985?
>
> MR. PROWELL: Objection, Your Honor, leading.
>
> JUDGE ROBERTSON: I'll permit it. You may answer.
>
> A. I'm sorry, I didn't understand the question.
>
> Q. Do you recall if that increase, wage increase, also resulted in a different computation, or a different measure of mileage run by the employees? run on a different . . . .
>
> A. If the pay miles were computed differently?
>
> Q. Yes
>
> A. Okay, if I'm correct, it was '85 that we changed the mileage computation from a hub to household movers guide.
>
> Q. Okay, will you please explain for the Judge what is a household mover's guide and what is a hubometer mile?
>
> A. Well, a hubometer is the mileage tracking instrument on a truck that keeps an accurate track of miles and the household movers guide is a published book that says the miles from point A to point B are X amount miles. There's usually a variance because—the household movers guide is based on straight lines and it's usually lesser than hub miles.

Respondent offered no evidence that the household movers guide resulted in actual changes in pay. Because the record failed to show that Respondent's 1985 change in mileage computation "from a hub to household movers guide" specifically changed the backpay specifications, I have no basis to recompute gross backpay.

(f) *Mileage allowance for J. C. Gates.* J. C. Gates testified that he drove 2500 miles in search of work. On cross-examination Gates supported his mileage estimate by citing various cities and employers he visited in search of work. No evidence was offered that would rebut Gates' testimony.

I find that Gates' testimony was credible, and his estimate reasonable. I shall award the claimed mileage at the rate of 22.5 cents per mile. See *Evans Plumbing Co.*, 278 NLRB 67 (1986).

(g) *Did the discriminatees refuse employment with Pacemaker.* As shown above Respondent alleged that Pacemaker Manager Joe Weisenburger made offers of employment to the discriminatees after 30 March 1981. I credit the denial of each of the discriminatees that Weisenburger made such an offer. Moreover, even Weisenburger's testimony fails to illustrate that he actually offered employment to any of the discriminatees. (See above.)

Weisenburger, at best, simply held out the hope that casual or permanent work may be available. I find that the record shows that none of the discriminatees refused an offer of employment from Pacemaker.

(h) *Gates medical and dental records.* If the discriminatees had continued their employment they would have been covered by Pacemaker's medical and dental insurance plans. J. C. Gates documented that he incurred the following medical and dental expenses for which he was not compensated by insurance or other means:

1981–$204 ($68 per quarter–three quarters)
1982–$1280 ($302 per quarter)
1983–$1736 ($434 per quarter)
1984–$1024 ($256 per quarter)
1985–$836 ($209 per quarter)

I find that Respondent is obligated to reimburse Gates for those expenses. *Plasterers Local 90 (Southern Illinois Builders)*, 252 NLRB 750 (1980).

(i) *Health insurance premiums.* Discriminatee Donnie Bales documented health premiums he paid while working with an interim employer. Had Bales continued working for the Respondent after 30 March 1981 those premiums would have been paid by the Employer. Therefore, Bales should be reimbursed from the premiums paid by him *Sioux Falls Stock Yards*, supra.

(j) *Donnie Bales sick pay.* In support of this contention General Counsel's Exhibit 2(g), page 6, shows that Bales was paid $150 in sick pay during the billing week ending 8 November 1980. In view of Bales receipt of sick pay while employed by Respondent, it is proper to award sick leave pay.[3]

(k) *Holiday pay.* The General Counsel's Exhibit 2(j) and (n) show that each discriminatee received holiday pay of $150.60 and $211.20 during the representative periods.[4] It is proper to award prorated holiday pay on the basis of established practice.

Conclusions

To the extent shown above, I conclude that the formulas used in the amended backpay specifications were reasonable and appropriate and that the mathematical calculations based on the formulas are accurate.

As to the discriminatees Jonah C. Gates, Hickman S. Ridley Jr., Donnie Bales, and David Donaldson, Respondent's backpay/reinstatement obligations were shown to be continuing and, to the extent backpay entitlement for Gates, Ridley, Bales, and Donaldson may be specified for periods after 1985, I recommended that I shall retain jurisdiction of this matter to properly consid-

[3] The General Counsel's computations set out in its brief indicate that the weekly figure of $11.11 may be incorrect. It appears that the sick pay figure of $150 divided by 27 weeks (representative period) should be $5.55 rather than $11.11. If incorrect, the General Counsel's figures should be corrected, as well as the resulting backpay entitlement figures.

[4] The General Counsel's computations set out in its brief indicate that the weekly figures of $13.69 for Bales, Gates, and Ridley and $15.38 for Donaldson, may be incorrect. The brief shows that Bales, Gates, and Ridley should receive a prorated share computed by dividing $316.80 by 27 weeks, which would equal $11.73; and that Donaldson's weekly entitlement should be arrived at by dividing $16.80 by 24 weeks, for a total of $13.20. If incorrect the General Counsel's figures should be corrected as well as the resulting backpay entitlement.

er appropriate specifications which the General Counsel may submit in the future.[5]

[Recommended Order omitted from publication.]

[5] As shown above, the backpay entitlement for the period before and after 31 December 1985 includes payment of appropriate amounts into the pension funds for Gates, Ridley, Bales, and Donaldson.

APPENDIX

	1	2	3	4	5	6	7
Yr./Qtr.	Gross Backpay	Health Insurance Claims or Premiums	Vacation Pay	Expenses	Interim Earnings	Net Interim Earnings	Net Backpay
				HICKMAN S. RIDLEY JR.			
1981/2	$8,380	0	0	0	0	0	$8,380
1981/3	8,491	0	0	0	$1,515	$1,515	6,976
1981/4	8,757	0	0	0	4,056	4,056	4,701
1982/1	8,757	0	$337	0	2,417	2,080	6,677
1982/2	8,757	0	337	0	6,002	5,665	3,092
1982/3	8,757	0	337	0	6,002	5,665	3,092
1982/4	8,757	0	337	0	6,002	5,665	3,092
1983/1	8,757	0	337	0	2,862	2,525	6,232
1983/2	8,757	0	337	0	7,132	6,795	1,962
1983/3	8,757	0	337	0	7,132	6,795	1,962
1983/4	8,757	0	337	0	7,132	6,795	1,962
1984/1	8,757	0	337	0	6,373	6,036	2,721
1984/2	8,757	0	337	0	6,373	6,036	2,721
1984/3	8,757	0	337	0	6,373	6,036	2,721
1984/4	8,757	0	337	0	6,373	6,036	2,721
1985/1	8,757	0	337	0	6,309	5,972	2,785
1985/2	8,757	0	337	0	6,309	5,972	2,785
1985/3	8,757	$91	337	0	6,309	5,972	2,876
1985/4	9,285	91	357	0	6,309	5,952	3,434
						Total	$70,892
				JONAH C. GATES			
1981/2	$8,429	$68	0	$281	0	0	$8,497
1981/3	8,541	68	0	281	$ 512	$231	8,378
1981/4	8,809	68	0	0	2,548	2,548	6,329
1982/1	8,809	302	$339	0	5,196	4,857	4,254
1982/2	8,809	302	339	0	5,196	4,857	4,254
1982/3	8,809	302	339	0	5,196	4,857	4,254
1982/4	8,809	302	339	0	5,196	4,857	4,254
1983/1	8,809	434	339	0	5,914	5,575	3,668
1983/2	8,809	434	339	0	5,740	5,401	3,842
1983/3	8,809	434	339	0	5,740	5,401	3,842
1983/4	8,809	434	339	0	5,740	5,401	3,842
1984/1	8,809	256	339	0	5,582	5,243	3,822
1984/2	8,809	256	339	0	5,582	5,243	3,822
1984/3	8,809	256	339	0	5,582	5,243	3,822
1984/4	8,809	256	339	0	5,582	5,243	3,822
1985/1	8,809	209	339	0	5,652	5,313	3,705
1985/2	8,809	209	339	0	5,652	5,313	3,705
1985/3	8,809	209	339	0	5,652	5,313	3,705
1985/4	9,347	209	360	0	5,652	5,292	4,264
						Total	$86,081

	1	2	3	4	5	6	7
Yr./Qtr.	*Gross Backpay*	*Health Insurance Claims or Premiums*	*Vacation Pay*	*Expenses*	*Interim Earnings*	*Net Interim Earnings*	*Net Backpay*
				DONNIE BALES			
1981/2	$6,777	0	0	0	$1,921	$1,921	$4,856
1981/3	6,867	0	0	0	1,921	1,921	4,946
1981/4	7,081	$156	0	0	1,921	1,921	5,316
1982/1	7,081	156	$272	0	6,027	5,755	1,482
1982/2	7,081	156	272	0	6,027	5,755	1,482
1982/3	7,081	156	272	0	6,027	5,755	1,482
1982/4	7,081	156	272	0	6,027	5,755	1,482
1983/1	7,081	156	272	0	6,519	6,247	990
1983/2	7,081	156	272	0	6,519	6,247	990
1983/3	7,081	156	272	0	6,519	6,247	990
1983/4	7,081	156	272	0	6,519	6,247	990
1984/1	7,081	156	272	0	7,083	6,811	426
1984/2	7,081	156	272	0	7,083	6,811	426
1984/3	7,081	156	272	0	7,083	6,811	426
1984/4	7,081	156	272	0	7,083	6,811	426
1985/1	7,081	168	272	0	6,816	6,544	705
1985/2	7,081	168	272	0	6,816	6,544	705
1985/3	7,081	168	272	0	6,816	6,544	705
1985/4	7,481	228	272	0	6,816	6,528	1,181
						Total	$30,006
				DAVID DONALDSON			
1981/2	$7,196	0	0	0	$1,969	$1,969	$5,227
1981/3	7,293	0	0	0	4,125	4,125	3,168
1981/4	7,527	0	0	0	3,516	3,516	4,011
1982/1	7,527	0	$289	0	0	0	7,527
1982/2	7,527	0	289	0	0	0	7,527
1982/3	7,527	0	289	0	2,891	2,692	4,835
1982/4	7,527	0	289	0	2,891	2,692	4,835
1983/1	7,527	0	289	0	4,211	3,922	3,605
1983/2	7,527	0	289	0	4,211	3,922	3,605
1983/3	7,527	0	289	0	4,211	3,922	3,605
1983/4	7,527	0	289	0	4,211	3,922	3,605
1984/1	7,527	0	289	0	4,476	4,187	3,340
1984/2	7,527	0	289	0	4,476	4,187	3,340
1984/3	7,527	0	289	0	4,476	4,187	3,340
1984/4	7,527	0	289	0	4,476	4,187	3,340
1985/1	7,527	0	289	0	4,840	4,551	2,976
1985/2	7,527	0	289	0	4,840	4,551	2,976
1985/3	7,527	0	289	0	4,840	4,551	2,976
1985/4	7,943	0	306	0	4,840	4,534	3,409
						Total	$77,247

City Disposal Systems, Inc. *and* James Brown. Case 7-CA-16792

July 29, 1988

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On July 14, 1987, Administrative Law Judge Donald R. Holley issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief. Both the Charging Party and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board orders that the Respondent, City Disposal Systems, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall make whole James Brown by paying him the sum of $7,505.38, plus interest computed in the manner prescribed in *New Horizons for the Retarded*.[3]

Joseph Canfield, Esq., for the General Counsel.
Theodore R. Opperwall, Esq. (Dickinson, Wright, Moon, Van Dusen & Freeman), for the Respondent.

SUPPLEMENTAL DECISION

DONALD R. HOLLEY, Administrative Law Judge. On 9 June 1981, the National Labor Relations Board issued its Decision and Order in this case directing, inter alia, that City Disposal Systems, Inc. (Respondent or City Disposal), offer James Brown immediate and full reinstatement to his former job or, if that job no longer exists, to a sub-

[1] Counsel for the Charging Party, who did not enter the case until after the hearing, has filed a motion to remand out of time to take evidence concerning Respondent's alleged liability for pension contributions and health plan benefits. The Respondent opposes the motion. The motion alleges that the General Counsel failed to include in the backpay specification any amounts for pension contributions and health plan benefits. The motion asserts that because Charging Party Brown entered no appearance and proceeded without counsel at the hearing, he was not in a position to raise these issues at that time. Our review of the record indicates, contrary to the Charging Party's assertion, that Brown entered a formal appearance on his own behalf. He therefore had the opportunity to raise these issues at the hearing. Furthermore, we find no evidence in the record that pension contributions or health plan benefits exist or should have been included in the backpay specification. Accordingly, the motion to remand is denied.

The General Counsel and the Respondent jointly move to correct a perceived clerical or technical error in the judge's decision relating to his determination that the earnings of Best Wrecking Company driver Steve Brousseau should be used as an offset from the gross backpay for claimant Brown because Brown had incurred a willful loss of earnings by rejecting an offer of employment by Best Wrecking Company. These parties allege that the judge's decision contained a chart setting forth the calculation of backpay due, which included information found in R. Exh. 25. This exhibit listed Brousseau's earnings. The judge's chart omitted the "ADP payroll earnings" listed in quarter 4 of 1980 for Brousseau. The General Counsel and the Respondent contend that the judge should have included these earnings, which would have resulted in a zero net backpay figure for quarter 4 of 1980. The Charging Party originally declined to join in the motion and now opposes it. We believe that the General Counsel and the Respondent have failed to explain adequately the nature of the "ADP payroll earnings" or to establish that claimant Brown would have been eligible for or entitled to the "ADP payroll earnings." Therefore, the joint motion is denied.

We correct the following inadvertent errors in the judge's decision:

1. The heading of sec. B. should read: "B. Employment during period 14 May 1979 through 1 April 1980."

2. In the last sentence of the section entitled "The Failure to Accept or Retain Comparable Employment," par. 4, "1972" should read "1982."

3. In par. 5 of the same section, "28 December 1982" should read "28 December 1981" and "28 December until 13 February 1983" should read "28 December 1981 until 13 February 1982."

[2] We correct the following errors in the judge's calculation of backpay due:

1. Quarters 3 and 4 of 1979 should be excluded from the calculation because the amended backpay specification excluded these quarters.

2. The record establishes that Brown was disabled and thus unable to work for 6 weeks during quarter 1 of 1982. For this reason the judge reduced the amount of gross pay due Brown for this quarter by $2707. This was the amount that the judge thought applied to the 6 weeks during which Brown received workmen's compensation. However, the judge erroneously reduced quarter 1 of 1983 by that amount rather than quarter 1 of 1982. The correct gross backpay amount for the 6 weeks of quarter 1 of 1982 in which Brown received workmen's compensation is $2902. Further, the judge failed to reduce the interim earnings offset for those 6 weeks. Thus, the judge included $1899.81 as interim earnings based on the amount Brousseau earned during that period. Because the backpay has been reduced based on Brown's inability to work during the 6-week period, it appears that the projected interim earnings based on the job Brown turned down should also be reduced for the same period. Accordingly, we have reduced the gross backpay for quarter 1 of 1982 by $2902 and we have reduced the amount of interim earnings for that period by $1889.81. This reduction results in net backpay of $388.07 for that quarter. These changes do not affect the net backpay due for quarter 1 of 1983 (0).

We find the judge's denial of backpay to Brown for the 6 weeks during which he was disabled to be proper under *American Mfg. Co.*, 167 NLRB 520, 522 (1967). The evidence shows that an excludable period of absence from work took place during the 6 weeks Brown was disabled. The General Counsel has not established by showing that the nature of the interim employment that Brown was performing was so unusual or so dissimilar from work he performed for the Respondent that Brown's injury would not have occurred in the absence of the Respondent's discrimination against him. Thus, in fact, the record reflects that, although Brown's injury occurred in the course of interim employment, that employment as an over-the-road truckdriver did not pose hazards that were different or greater than the hazards presented by Brown's job with the Respondent, in which he drove a tractor-trailer back and forth over a 37-mile route between Detoit and Belleville, Michigan.

3. Regarding quarter 4 of 1982, the interim offset amount was greater than the gross backpay; therefore, the net backpay should be zero.

In sum, the corrections we make to the judge's backpay calculations affect the quarterly net backpay amounts by reducing the net backpay to zero for quarter 4 of 1979 and quarter 4 of 1982 and reducing the net backpay to $388.07 for quarter 1 of 1982. This results in the total net backpay being reduced to $7,505.38.

[3] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 29 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

stantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed, and to make Brown whole for any loss of earnings since his discharge on 14 May 1979, with interest. On 22 July 1982, Sixth Circuit issued its order in Case 87–1406 denying enforcement of the Order of the Board. Thereafter, on 21 March 1984, the U.S. Supreme Court reversed the judgment of the court of appeals, remanded the case to the Sixth Circuit, and on 9 July 1985, the Sixth Circuit enforced the Order of the Board.

On 6 December 1985, the Regional Director for Region 7 issued a backpay specification and notice of hearing alleging that James Brown was due a certain sum as backpay. Thereafter, Respondent filed an answer to the backpay specification, and at the commencement of the hearing held on 9 and 10 June 1986, the General Counsel amended the backpay specification by substituting new schedules C and D for those attached to the backpay specification.[1]

I. FACTS

The backpay period commences on 14 May 1979, the date Brown was discharged, and ends on 18 July 1985, the date he was offered reinstatement.

A. *The Best Wrecking Company Offer and Refusal*

The record reveals Brown was offered a truckdriver position by Best Wrecking Company, Inc. at some unstated time in May 1979.[2] Steve Mardigan, 50-percent owner of Best, testified Teamsters Local 247, the Union that also represents City Disposal's drivers, represents his drivers. In 1979, Best's drivers were paid approximately $12 an hour, a sum S. Mardigan estimated to be 30-percent higher than union scale, and $4 to $5 more an hour than garbage men were then receiving. Local 247's contract with Best provided for vacations and a few paid holidays. S. Mardigan testified Brown would have been immediately below Best driver Steve Brousseau if he had accepted Best's offer. Thereafter, he indicated Brousseau was paid the following amounts for driving in Detroit during the period 1 January 1979 through 30 May 1982: 1979—$23,522.25; 1980—$27,906.07; 1981—$29,556.62; and 1 January through 30 May 1982—$10,972.52.

In early June 1982, Best's Detroit drivers were transferred to demolition jobs located in Minneapolis and Austin, Minnesota. David Mardigan, also a 50-percent owner of Best, testified the drivers were paid the scale called for by Best's contract with Local 247 while working in Minnesota, and he indicated the drivers sent to Minneapolis worked an average of 60 hours a week until early April 1983, while those transferred to Austin worked 40–45 hours per week through the month of September 1984.[3]

B. *Employment During Period 14 May 1974 Through 1 April 1980*

Brown testified he was unemployed from the time he was terminated by Respondent until he obtained a laborer position at Plymouth Hills Mobile Home Park in early 1980. However, in a job application filed with Midwestern Distribution, Inc., dated 11 August 1980, he indicated he had been employed by W. L. Moore Trucking during the period 27 May 1979 through 10 April 1980.[4] Brown claimed during his testimony that he falsely indicated on the Midwestern application that he had worked for Moore Trucking during the period indicated, that he indicated the employment to show he had driving experience.

Regarding to his claimed employment by Plymouth Hill, Brown indicated he could not fix the time of the employment, but he recalled it occurred during a change of seasons as he shoveled snow and also performed tasks performed in warm weather such as mowing grass. Joe Ruggerello, the owner of Plymouth Hills, indicated he was not absolutely sure when he employed Brown, but he felt it must have been during June, July, or August 1979 or 1980 because he hired persons to perform labor type work such as street cleaning, sidewalk cleaning, or general cleanup only during summer months. He testified laborers were not used to remove snow during winter months because equipment operated by his park manager or a four-wheel drive vehicle operated by a resident of the park accomplished all snow removal.

Brown testified he was paid $250 a week while working at Plymouth Hill, and he estimated his interim earnings as a result of that employment to be $1948. The backpay specification attributes $1700 of these earnings to be the first quarter of 1980, and $248 to be the second quarter of 1980.

The 1979 and 1980 Federal income tax returns filed by Brown fail to indicate he earned $1948 (or any other amount) while working for Plymouth Hill.[5]

C. *Employment During the Period 21 April Through 2 July 1980*

The record reveals that Brown was employed as a local truckdriver by Detroit City Dairy at a rate of $5 an hour on 21 April 1980. After working for that company for 4 weeks, his hourly rate was increased to $7.20 an hour. Brown testified, and the record reveals, that considerable overtime, which was paid at time-and-a-half the

[1] See G.C. Exh. 2.

[2] Prior to the hearing, the Region informed Respondent, by letter dated 30 May 1986, that Brown had rejected an offer of interim employment made by Best Wrecking Company "in around May, 1979" and that rendered Brown ineligible for backpay until in or about April 1980, when he secured employment at Plymouth Hill Mobile Home Court. Thereafter, at the outset of the hearing, the backpay specification was amended to exclude any claim for backpay for Brown during the third and fourth quarters of 1979. Although Brown denied having received the offer under discussion and claimed during the hearing he was not qualified to drive Best's equipment, David Mardigan, part-owner of Best, testified he had observed Brown in City Disposal equipment which was similar to the equipment used by Best. As indicated, supra, Brown has little regard for the truth and sanctity of an oath. Noting Brown has been a truckdriver for almost 30 years, I credit Mardigan's described testimony. I do not credit Brown's claim that he was not offered the position, and I do not credit his claim that he was not qualified to operate Best's equipment.

[3] Best's Detroit drivers were paid living expenses while working in Minnesota.

[4] See R. Exh. 12.

[5] See R. Exh. 15.

normal hourly rate was available on that job.[6] Brown quit his job at Detroit City Dairy on 2 July 1980. He testified he quit because they would not give him a raise.[7]

Richard Brower, Detroit City Dairy's controller during the entire backpay period, testified his company employed 15–16 drivers in 1980, and the number had climbed to 24–25 by 1985. Its drivers were represented by Teamster Local 337, and their hourly contract rate was increased by 50 cents to $7.70 in 1981, $7.80 in 1982, $7.90 in 1983, and $8 in 1984. In 1985, the hourly rate remained the same when the contract was renegotiated, but drivers employed a full year were to receive a $750 bonus, which translated to an additional 25 cents an hour. He indicated the drivers worked 60–65 hours a week during the backpay period. Brower testified Detroit City Dairy advertised for drivers in *The Detroit News* or *The Free Press*, local newspapers, approximately once every other week during the 1980–1985 time period.[8]

On 18 August 1980, Brower, acting for Detroit City Dairy, responded to Midwestern Distribution, Inc.'s inquiry about Brown's work history by indicating, inter alia, the company would reemploy Brown. Brown testified that at some unstated time during 1982 or 1983 he telephoned Detroit City Dairy to seek employment and he was told there were no openings. Noting the company was advertising for drivers during 1982 and 1983, and it considered Brown reemployable, I do not credit Brown's vague unsupported claim that he sought work at Detroit City Dairy during 1982 or 1983.

D. *Employment with Midwestern Distribution, Inc.*

Brown was unemployed from 3 July until 14 August 1980. He testified that, while he was still employed by Detroit City Dairy, he visited the Michigan Employment Security Commission to seek other work and was advised that, if he was willing to work out-of-town, Midwestern Distribution, Inc., located in Fort Scott, Kansas, was seeking over-the-road drivers.[9] At some unstated time, Brown contacted Midwestern by phone and he was apparently advised to report to Fort Scott on or about 11 August 1980. He filed an application with Midwestern on 11 August, and started driving for an unnamed owner-operator utilized by Midwestern on 14 August (Tractor 8518, Inc.). Thereafter, during the fourth quarter of 1980, Brown obtained his own tractor and was employed by Midwestern as an owner-driver until he was terminated on 14 February 1982, allegedly because he had experienced a preventable accident that damaged Midwestern equipment or property.[10] Thereafter, when Brown filed an unemployment compensation claim with the Kansas Department of Human Resources, Division of Employment, that agency initially denied him benefits for the period 14 February through 3 April 1982. Brown appealed and the agency sustained the appeal and found the accident was unavoidable on 22 April 1982.[11]

During his employment at Midwestern, Brown earned, after expenses, approximately the same weekly amount he had earned while working as a laborer for Plymouth Hill Mobile Home Park—$250 a week and/or $1000 a month.

E. *The Period 28 December 1981 Through 13 February 1982*

Brown was injured in the accident that occurred on 28 December 1981. He performed no work during the period extending from 28 December to 13 February 1982. On 9 February 1982 the doctor who treated him indicated he would be released to return to work on 13 February 1982.[12] Brown indicated during his testimony that he received workmen's compensation benefits in an undisclosed amount for his period of incapacity.

F. *Calendar Years 1982 and 1983*

In a backpay questionnaire submitted to the Regional Office on 5 April 1984, Brown indicated he was unemployed and had no interim earnings during the period January 1982 to January 1984.[13] His Federal income tax returns for years 1982 and 1983, which were placed in the record as Respondent's Exhibit 15, reveal he claimed income in 1982 in the amount of $303 from Tractor 8566, Inc.[14] and that he claimed he had no income from any source during calendar year 1983.

The record reveals Brown was employed by Reitzloff Disposal Company when he completed the above-mentioned questionnaire, but his then current employment was not noted on the document submitted. The record further reveals that in 1982 Brown commenced to use the alias James Hunter, and, regarding the use of this name, he utilized his deceased mother's social security number—419–14–5639. When Brown obtained employment at Reitzloff, he used the name James Hunter, and he initially used his mother's social security number.[15]

On 25 July 1985 the compliance officer for Region 7 mailed Brown a second backpay questionnaire. Brown apparently informed the compliance officer at that time that he was employed by Reitzloff and he would furnish the Region with his earnings while so employed. Thereafter, the record reveals he obtained a "To Whom It May Concern" document placed in the record as Re-

[6] See R. Exh. 13, which reveals that Brown regularly worked between 13–20 hours of overtime a week.

[7] Drivers at City Disposal were making $6.50 an hour at the time.

[8] His claim is substantiated in part, by R. Exh. 20, which reveals, inter alia, that Detroit City Dairy placed ads for drivers in *The Detroit News* on 7 March, 16 May, and 27 June 1982.

[9] R. Exh. 21, MESA forms that reveal the dates Brown visited that agency, do not reveal any 1980 visits. I do not credit Brown's claim that he visited the employment agency while still employed by Detroit City Dairy.

[10] See R. Exh. 14.

[11] See R. Exh. 14 and G.C. Exh. 7.

[12] See R. Exh. 14.

[13] See R. Exh. 3.

[14] The amount was apparently earned in 1981, but actually paid in 1982.

[15] Brown claimed he decided to use an alias and a different social security number because unidentified persons were asking his neighbors where he worked, when he got home, what kind of car he drove, and details concerning his children. In agreement with Respondent's counsel, I conclude his use of the alias and his mother's social security number concerning his employment at Reitzloff and his failure to inform the Region of his actions indicate he had an ulterior motive also.

spondent Exhibit 4 from Reitzloff and caused it to be delivered to the Region. The document sets forth Brown's earnings at Reitzloff during the four quarters of 1984 and quarters first and second of 1985. Kevin Reitzloff, general manager of Reitzloff, testified he learned James Hunter was actually James Brown around the time Brown asked that his 1984 and 1985 earnings be furnished to the Region, and he indicated Brown requested that the name Brown be used when supplying the information.[16]

Significantly, Brown did not tell Regional personnel prior to the issuance of the original backpay specification that he worked for Reitzloff under the alias James Hunter.

In February 1986, counsel for Respondent served Reitzloff with a subpoena duces tecum. In response to that subpoena, Reitzloff supplied Respondent's counsel and the Regional Office with payroll records that revealed Brown had been carried on Reitzloff's payroll since 7 September 1983 under the alias James Hunter. The records revealed he earned the amounts set forth in General Counsel's Exhibit 2 while employed during quarters third and fourth of 1983.[17] Additionally, Reitzloff relinquished the contents of Brown/Hunter's personnel file at that time to both Respondent's counsel and to the Regional Office. The file, which was placed in the record as General Counsel's Exhibit 11, reveals, inter alia, that Brown executed W-4 forms on 7 September 1983, using the alias James Hunter and the social security number 419–14–5639 (his mother's number); that a request for verification of employment document sent Reitzloff by Allied Mortgage Association, Inc. signed by Betty Donovan, Reitzloff's office manager, on 10 October 1984, indicates James Hunter's date of employment as 7 September 1983; and that a request for verification of employment by Allied Mortgage Association, Inc. signed by Donald Reitzloff, supervisor, on 21 January 1985, indicates James Hunter's date of employment as 12 April 1982, and gives his 1983 earnings as $31,270.[18]

In an attempt to show that James Brown, a/k/a James Hunter, was actually employed by Reitzloff prior to 7 September 1983, Respondent's counsel placed the following documents in evidence: Respondent's Exhibit 7—an NBD Mortgage Company loan application signed by Brown as James Hunter on 3 June 1985, which indicates he had been employed by Reitzloff for 3 years; Respondent's Exhibit 8—the above-described Allied Mortgage document signed by Donald Reitzloff and James Hunter, indicating Hunter's date of hire to be 12 April 1982, and his 1983 earnings to be $31,270; Respondent's Exhibit 10—an automobile loan application signed by James Hunter on 25 April 1985 which, inter alia, indicates he had been employed by Reitzloff for 3 years; Respondent's Exhibit 11—an automobile loan application dated 23 May 1984 and signed by James Hunter, which indicates he had been employed by Reitzloff for 2 years and 6 months; and Respondent's Exhibit 12—a copy of the application Brown filed with Midwestern Distribution on August 11 1980, which reveals, inter alia, he was employed by W. L. Moore Trucking from May 27 1979 to 10 April 1980.[19]

Noting the 5 April 1984 backpay questionaire indicated Brown applied for employment at only five firms during 1982 and 1983, Respondent's counsel sought to show the discriminatee had failed to look for a job during those calendar years. To accomplish that objective, he produced Respondent's Exhibit 20, photocopies of ads for truckdrivers appearing in the Sunday editions of *The Detroit News* and *The Free Press* during calendar years 1982 and 1983, and asked Brown if he had seen and responded to five specific ads. Brown indicated he either had not seen or had not responded to three of the ads, and that he had seen and responded to two of the ads, but had not been hired. Additionally, Brown indicated he had sought employment at 50–100 firms that he had not listed in the 5 April 1984 questionnaire because of the limited space provided. Finally, he indicated he had repeatedly visited the Michigan Employment Security Commission during 1982 and 1983 to seek work.[20]

G. *Employment by Enviroquip*

Kevin Reitzloff was called by the General Counsel as a rebuttal witness. During cross-examination, Reitzloff indicated that, starting in what he recalled to be late 1984 or early 1985, Brown periodically drove new garbage trucks to Knoxville, Tennessee, for Enviroquip, a corporation owned by his father (K. Reitzloff's). Reitzloff indicated one Paul Ewart, a salesman, is the sole employee of Enviroquip. K. Reitzloff indicated Enviroquip sells sanitation vehicles and Ewart normally obtained Brown's services by asking him if Reitzloff Disposal could spare him for the time required to transport a vehicle to or from Knoxville. Brown was paid $200 for each delivery by check from a separately maintained Enviroquip account. K. Reitzloff testified he and Ewart had authority to sign Enviroquip checks and he signed at least one of that corporation's checks made out to Brown and/or Hunter. On occasion, K. Reitzloff physically handed Enviroquip checks to Brown.

Brown testified on rebuttal that he did not report his Enviroquip earnings to the Regional Office because he was under the impression that his work for that corporation was essentially work performed for Reitzloff Disposal. He claimed he thought Reitzloff Disposal had included his Enviroquip earnings when furnishing counsel for Respondent and the Regional Office his Reitzloff Disposal earnings.

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[16] Kevin Reitzloff testified he ejected a reporter from the company's premises around the time the information was requested, and during that incident he learned Brown was using the alias Hunter.

[17] 3d quarter—$624.38 and 4th quarter—$4,099.42.

[18] Kevin Reitzloff testified Donald Reitzloff, his cousin, is employed as a dispatcher at Reitzloff, but the signature on the 21 January 1985 document is not Donald Reitzloff's signature.

[19] Brown sought to disclaim responsibility for the content of the mortgage and loan application documents by claiming they were blank when he signed them. It is clear he either supplied the information set forth in R. Exhs. 10 and 11 or personally placed Reitzloff hire date information on such documents. Similarly, he either furnished or placed the W. L. Moore Trucking information on R. Exh. 12.

[20] Interestingly, the MESA cards, which appear in the record as R. Exh. 21, reveal Brown uniformly visited MESA at 8:15 a.m.

H. *The Subpoenaed Documents*

Prior to the hearing, counsel for Respondent served Brown with a subpoena duces tecum, which required that he produce, inter alia, his banking records, his Federal and other tax returns, and any documents revealing his attempts to obtain interim employment. In response, with exception of a few bank statements covering limited periods, Brown indicated he had no records other than those that had been delivered to the Regional Office. Interestingly, when producing bank statements, he inadvertently included a statement that indicated one Albert Mensah, whose address was indicated to be 20190 Riopelle, Detroit, Michigan 48234 (Brown's address), had maintained an account at the First of America Bank in Detroit.[21] Brown denied knowledge of the Mensah account and claimed the statement was among his personal papers because the bank had incorrectly mailed it to his address. Regarding its production, he stated, inter alia: "If I would have thought it was offensive to myself, I would not have brought it in and given it to you."

Although Brown was requested to produce a copy of his 1985 Federal income tax return at the outset of the hearing, he failed to contact the tax service he had utilized to obtain a copy of the return before the hearing was recessed. A copy of the return obtained by counsel for Respondent after the hearing was recessed was received in the record as Respondent's Exhibit 27. Brown did not report earnings received from Enviroquip in the 1985 return.

I. *Contentions of the Parties*

Respondent first contends that the record reveals Brown has "clearly engaged in a scheme to defraud City Disposal and to misuse the Board's processes" and he should therefore be denied any backpay under the rationale expressed in *Ad Art, Inc.*, 280 NLRB 985 (1986), and *American Navigation Co.*, 268 NLRB 426 (1983). Second, it contends Brown "had a legal duty to accept the Best Wrecking job" and he should receive no backpay while that job lasted, or at minimum until such time as other comparable or better employment arose. Third, it contends Brown's job at Detroit City Dairy was comparable to his job at City Disposal and he should be denied backpay from 3 July 1980 until 7 September 1983 because he quit the Detroit City Dairy job for invalid reasons and did not obtain comparable employment until he was hired by Reitzloff Disposal. Finally, it contends Brown should not be awarded backpay for quarters 3 and 4 of 1983, or for quarters 1 and 2 of 1985 because he intentionally failed to report interim earnings during those quarters. Regarding computation of any backpay, Respondent contends the formula used by the Regional Office is inappropriate; that the correct formula would entail use of the gross earnings of all seven drivers employed by City Disposal during the backpay period.

The General Counsel contends the formula used to compute backpay due is appropriate. As reflected by the backpay specification, as amended, he contends Brown should be denied backpay as a result of refusing the Best Wrecking employment from only 1 June 1979 until he obtained employment at Plymouth Hill during quarter 1 of 1980. He contends that from quarter 1 of 1980 until the end of the backpay period, Brown should be awarded the amounts indicated as due and owing in the backpay specification.

Analysis and Conclusions

In *Great Plains Beef Co.*, 255 NLRB 1410 (1981), and *M. J. McCarthy Motor Sales Co.*, 147 NLRB 1605 (1964), the Board denied all backpay to discriminatees who had persisted in the concealment of earnings when the Board also found their deception constituted an abuse of the Board's processes and rendered the ascertainment of interim earnings impossible. Subsequently, in *American Navigation Co.*, 268 NLRB 426 (1983), the Board stated at 428

> We think that in fashioning a remedy in cases where a discriminatee has intentionally concealed employment from the Board, two matters must be considered: (1) the Respondent's liability for the consequences of its unlawful conduct, and (2) the Board's administration of its compliance proceedings consistent with the public interest.

In *American Navigation*, the Board indicated (fn. 6 at 428) that it would continue to deny all backpay to claimants whose intentionally concealed employment cannot be attributed to a specific quarter or quarters because of the claimant's deception. It found, however, that the following principles are appropriate when the concealed employment can be attributed to specific quarters (at 428)

> We find that a remedy which denies backpay for the quarters in which concealed employment occurred will discourage claimants from abusing the Board's processes for their personal gain and will also deter respondents from committing future unfair labor practices. This remedy will be applied, of course, only in cases where the claimant is found to have willfully deceived the Board, and not where the claimant, through inadvertence, fails to report earnings.

In *Ad Art, Inc.*, supra, the Board affirmed Judge Taplitz' decision and order which denied a discriminatee any backpay when the judge found that "Wydner abused the Board's processes by withholding relevant evidence, by testifying falsely, by destroying records to cover up his misstatements, and by attempting to prevent a witness from testifying truthfully." In affirming the judge's finding, however, the Board again indicated that, as a general rule, the Board should deny backpay for only those quarters in which a discriminatee intentionally concealed interim earnings from the Board.

In the instant case, the quarters during which Brown may have concealed interim earnings are readily ascertainable. Thus, the record reveals Brown asserted in the application he filed with Midwestern Distribution on 11 August 1980 that he was employed by W. L. Moore

[21] See R. Exh. 18.

Trucking from 27 May 1979 to 10 April 1980; it reveals through residential loan applications, requests for verification of employment forms, and applications for automobile loans that Brown may have been employed by Reitzloff Disposal as early as quarter 1 or 2 of 1982; it reveals that although working under the alias James Hunter, Brown failed on 5 April 1984 to report interim employment at Reitzloff Disposal to the Regional Office, and he thereafter failed to report interim earnings at Reitzloff applicable to quarters 3 and 4 of 1983, when he provided interim earning information for calendar years 1984 and 1985 and; it reveals he failed to report Enviroquip earnings received at undisclosed times during late 1984 and the first three quarters of 1985.

During his testimony, Brown explained the W. L. Moore Trucking entry on his Midwestern application by claiming he indicated he was employed by Moore from late May 1979 until 10 April 1980 simply to establish the fact that he had truckdriving experience. He denied he actually worked for W. L. Moore during the period indicated, and Respondent offered no evidence to disprove his claim. Although I found much of Brown's testimony to be suspect, and I am reluctant to credit his uncorroborated testimony, I am unwilling to find the record reveals Brown was employed by W. L. Moore during the above-described period and that he earned moneys that he intentionally concealed. In short, I credit his assertion that he did not actually work for W. L. Moore during the period described.

Similarly, I find unconvincing the indications in Respondent's Exhibits 7 through 11 that Brown may have been employed by Reitzloff as early as the first or second quarter of 1982. Kevin Reitzloff credibly testified Brown was not employed by Reitzloff until 7 September 1983. Although it appears Brown and/or Young supplied prospective lenders with false information to induce them to lend him money when completing the loan applications placed in the record, I am unwilling to find he was actually employed by Reitzloff or was paid moneys by that firm prior to 7 September 1983.

Although Brown denies he sought to conceal the fact that he was employed by Reitzloff during quarters 3 and 4 of 1983, the record convinces me the discriminatee intentionally sought to conceal his interim earnings during those quarters. As indicated, supra, Brown obtained employment at Reitzloff using the alias James Hunter and he failed completely when completing a backpay questionnaire on 5 April 1984 to indicate he was then employed by Reitzloff. The record establishes to my satisfaction that he thereafter directed Kevin Reitzloff to supply the Regional Office with his 1984 and 1985 earnings only, and informed Reitzloff to indicate his name as James Brown rather than James Hunter when supplying the information.

Significantly, the record reveals Brown failed to report his 1983 earnings while employed by Reitzloff Disposal in his 1983 Federal income tax return. Moreover, the record reveals he failed to indicate to Regional Office personnel that he had used the alias James Hunter in concerning his employment until some undetermined time in 1985 or 1986. Additionally, I note Brown failed to indicate, when he was asked to complete a second backpay questionnaire on or about 25 July 1985, that he had earnings while employed by Reitzloff in 1983 that he had not revealed to the Regional Office. Finally, I note Brown's 1983 earnings while employed by Reitzloff did not become known until Respondent's counsel obtained information from Reitzloff pursuant to subpoena in early February 1986. In the circumstances described, I find Brown intentionally sought to conceal his earnings while employed by Reitzloff Disposal during quarters 3 and 4 of 1983. In accordance with the rule set forth in *American Navigation Co.*, supra, I find the discriminatee is entitled to no backpay for quarters 3 and 4 of 1983.

Turning to earnings received by Brown from Enviroquip Corporation, the record reveals the discriminatee received $200 on an unstated number of occasions commencing in late 1984 or early 1985 for driving equipment to or from Knoxville, Tennessee. The earnings were not reported to the Regional Office, and they were not included in the Federal income tax returns filed by Brown for years 1984 or 1985. Although Brown testified he assumed his Enviroquip earnings were included in W-2 statements supplied him by Reitzloff Disposal, he indicated during his testimony he was aware that the checks given him by Enviroquip were drawn on that corporation's bank account. Moreover, although he claimed he could not recall how many trips he made or when they were made, he admitted one trip must have been made during a holiday period, possibly in July 1985. In my view, Brown was legally obligated to ascertain and report the extent of his earnings when performing work for Enviroquip. That information was available to the discriminatee at the time of the hearing, but he made no attempt to produce it to enable the Regional Office and/or undersigned to compute the backpay due him during quarter 4 of 1984 and quarters 1, 2, and 3 of 1985. I conclude the earnings were intentionally concealed, and find no backpay should be awarded to Brown for the quarters indicated.

A. *The Failure to Accept or Retain Comparable Employment*

In *Mastro Plastics Corp.*, 136 NLRB 1342 (1962), the Board discussed the result that obtains when a discriminatee refuses an offer of comparable employment, stating at 1350

> Finally, if a claimant does willfully incur losses by either unjustifiably quitting or refusing substantially equivalent employment, he is not deprived of his entire claim, but only so much of it as he would have earned had he retained or obtained the interim job.

Earlier, in *Knickerbocker Plastics Co.*, 132 NLRB 1209 (1961), the Board indicated how the backpay of a claimant who incurred willful loss of earnings would be affected, stating at 1215

> We further find that, as a result of such quitting, each of these claimants shall be deemed to have earned for the remainder of the period for which each is awarded backpay the hourly wage being

> earned at the time such quitting occurred. Therefore, an offset computed on the appropriate rate per hour will be deducted as interim earnings from the gross backpay of each of these claimants. This offset shall be made applicable from the date of the unjustified quitting throughout the remainder of the backpay period for each particular claimant. In this connection, where the claimant has secured other employment during the time that the offset is applicable, and if, on a quarterly basis, she earned a greater amount than the offset, the offset will not be applied, but the actual interim earnings will be deducted from gross backpay. If she earned less than the offset at employment secured subsequent to the quitting, also on a quarterly basis, the amount of the offset will be applied.

Recently in *KSLM-AM & KSD-FM*, 275 NLRB 1342, 1343 (1985), the Board reaffirmed the continuing offset against gross backpay rule citing *Knickerbocker Plastics Co.*, supra.

The facts in the instant case cause me to conclude that Brown incurred willful loss of earnings on two occasions during the backpay period. He first incurred what I deem to be willful loss of earnings when he refused the driving job offered him by Best Wrecking.[22] As indicated, supra, Brown was employed by Detroit City Dairy in April 1980, and he quit that job on 2 July 1980, allegedly because that company refused to give him a raise. Noting that Brown had completed his probationary period at Detroit City Dairy and that he was making $7.20 an hour when he quit,[23] I find his quitting of the Detroit City Dairy job was unjustified, and that by quitting he thereby incurred willful loss of earnings.

Having reached the conclusions stated above, I must next decide how to apply the principles set forth in *Knickerbocker Plastics* and *American Navigation* to the instant facts. Obviously, the earnings Brown could have expected to receive if employed by Best Wrecking cannot be offset against his actual earnings during the entire backpay period because the record reveals Best Wrecking had no jobs for truckdrivers in Detroit after the second quarter of 1982, and its Minnesota work was completed by the fall of 1984. In my view, the willful loss of earnings attributable to the discriminatee's refusal of the Best Wrecking offer ended when Best Wrecking's Detroit drivers were transferred to Minnesota. No one knows whether Brown would have accepted employment out of his normal job market area, and I am disposed to resolve that issue in the discriminatee's favor and find that work for him with Best Wrecking was not available after the end of the second quarter of 1982. Noting that S. Mardigan testified Brown would have been second in seniority had he accepted the May 1979 job offer, and further noting that he indicated Brown's earnings through the second quarter of 1982 would have been approximately the same as the earnings experienced by driver Brousseau, I find the moneys earned by Brousseau in each quarter during the period extending from 1 June 1979 through 30 June 1972 should be used as an offset to be deducted as interim earnings from gross backpay.[24]

Having concluded the willful loss of earnings resulting from the refusal of the Best Wrecking offer should not extend beyond 30 June 1982, I turn to the willful loss incurred by Brown as a result of his unjustifiably quitting the Detroit City Dairy job. As indicated, supra, after leaving Detroit City Dairy, Brown drove for Midwestern Distribution until 28 December 1982. He was disabled and unavailable for work while receiving workmen's compensation from 28 December 1982 until 13 February 1983. Thereafter, he claims he was unemployed until he was hired as a driver by Reitzloff Disposal on 7 September 1983. Finally, he remained employed by Reitzloff Disposal from 7 September 1983 through the end of the backpay period—18 July 1985.

Although the General Counsel claims Brown is entitled to the difference between his actual earnings and the estimated earnings he would have received had he remained employed by City Disposal (plus expenses) during calendar years 1982, 1983, 1984, and through 18 July 1985, I find the earnings he could have expected to receive had he not quit the Detroit City Dairy job should be offset against his actual interim earnings from 1 July 1982 forward. In this connection, in addition to the fact that I have concluded Brown incurred willful loss of earnings by quitting the Detroit City Dairy job, I note the record clearly reveals Detroit City Dairy needed and advertised for drivers throughout the period 1 July 1982 to 18 July 1985.[25] Moreover, Brower, that company's controller, testified Brown was considered reemployable by his firm even though he had quit July 1980. In the situation described, I find it reasonable to assume that Brown would have been rehired by Detroit City Dairy if he had sought reemployment with that company. Even in the absence of that record evidence which reveals Brown unjustifiably quit his Detroit City Dairy job, I would find he incurred willful loss of earnings by failing to seek reemployment with that company after he lost his Midwestern Distribution job.

In sum, for the reasons stated, I find Brown incurred willful loss of earnings during the entire period extending from 1 June 1979 through 18 July 1985. I conclude the estimated earnings he would have received had he accepted the Best Wrecking job should be used as an offset from 1 June 1979 through 30 June 1982, and that the estimated earnings he would have received had he remained employed by Detroit City Dairy should be used as an offset from 1 July 1982 through 18 July 1985.

B. *The Formula*

The formula used by the General Counsel to determine gross backpay was based on the weekly gross earn-

[22] The General Counsel clearly concluded that Brown refused an offer of a comparable job by Best Wrecking in May 1979. As indicated, supra, I do not credit Brown's claim that he was not qualified to operate Best's equipment.

[23] Brown's hourly rate when he was terminated by City Disposal was $6.50.

[24] Appropriate calculations are set forth, infra.

[25] See R. Exh. 20, which reveals Detroit City Dairy advertised for drivers, inter alia, on 7 March 1982, 16 May 1982, and 27 June 1982.

ings of what the Region deemed to be a representative group of four respondent drivers. Vacation moneys received by the drivers were included, but no allowance was made for time drivers spent away from work on vacation because Respondent's records do not reveal when vacations were actually taken by drivers.[26] When a driver failed to work at least 24 of 40 hours in a workweek, or earned less than 60 percent of the average weekly gross salary of drivers in the representative group, no gross earnings for that driver were included in the computation of average gross earnings for that week.

Respondent contends the formula used was inappropriate because vacation moneys were included in the computation, and the representative group was inappropriate. It contends the appropriate formula should be based on the gross earnings of all seven drivers employed by Respondent during the backpay period. In the alternative, it contends the Region erred by using an inappropriate representative group; that the appropriate group would be composed of the two drivers more senior than Brown and the two drivers who were immediately less senior. In either computation, it would exclude vacation pay as it contends inclusion of such payments artificially inflates the resulting weekly gross earnings of employees. Its preferred formula would ignore the so-called 60-percent rule and divide the weekly gross salaries of all drivers by seven to obtain the average weekly gross salary figure. Its alternative formula would follow the same procedure, but it would have me use seniority as described rather than the four drivers used by the Region. It notes that the four drivers used by the Region in its representative group (Collins, Hamilton, Davis, and Scott) earned more than its remaining three drivers, and each of the employees included in the Region's representative group were junior to Brown in seniority.

Field Examiner Marion Muma, the individual who was primarily responsible for preparing the backpay specification, testified the Region decided to use the above-named drivers as its representative group because she was under the impression Collins and Hamilton were more senior than Brown, while Davis and Scott were less senior. She explained she based her supposition on a list of drivers that Respondent supplied that had the names of Collins and Hamilton immediately above Brown's name, and the names of Davis and Scott immediately below the discriminatee's name. Although Muma testified the list she used had been supplied by Respondent, Respondent's counsel established that Respondent's payroll records that were supplied to the Region and were placed in the record as Respondent's Exhibit 1 contain the dates of hire of the drivers and reveal that each driver in the representative group used by the Region is junior to Brown.[27] Additionally, the records reveal the gross wages received by Collins, Hamilton, and Davis during the backpay period were higher than those received by Travis, Hill, and Johnson.[28]

The General Counsel defended the Region's decision to include vacation pay in its computations without attributing such payments to weeks drivers were actually absent from work for vacation by observing it was unable to determine when, if ever, employee absences were attributable to vacation. It is undisputed that such information cannot be gleaned from inspection of Respondent's records. Although Respondent is factually correct when it contends that inclusion of vacation payments with the gross weekly salary of a driver during a given workweek inflates the average weekly gross backpay figure used by the Region in weeks when vacation payments were made, inclusion of such payments would appear to distort the amount of backpay due Brown very little if the matter is viewed on an annual basis. This is true because Brown was also entitled to vacation pay and the amount he would have been entitled to receive would have been an amount very close to the sum total of the vacation moneys that are included in the Region's calculations.

Although Muma admitted during her testimony that the Region was of the view, when preparing the backpay specification, that the two drivers more senior than Brown, and the two drivers just below him in seniority would be a representative group, the General Counsel made no attempt during or after the hearing to recalculate gross backpay by using the earnings of Travis, Hill, Johnson, and Collins, rather than Collins, Hamilton, Davis, and Scott. Instead, in his brief, the General Counsel contends that, during his period of employment prior to his discharge, Brown was the second highest earner employed by Respondent and the Region could have justifiably utilized only Davis' earnings to determine gross backpay due during the backpay period as he was the second highest paid employee during the period. That being the case, he argues Respondent should not be permitted to complain because the use of weekly earnings of the four employees in the representative group used produces figures that are more favorable to Respondent than those that would have resulted had Davis' wages only been utilized. Inspection of Respondent's pay records reveals Brown was Respondent's highest paid driver in 1977 and he was its second highest paid driver in 1978.[29]

After careful review of the record, I conclude the formula used by the Region to estimate weekly gross backpay is an appropriate formula. Noting the record reveals Respondent utilizes an incentive system to compensate its drivers, it is clear it would be impossible to predict the precise monetary gross weekly earnings Brown would have earned during each week of the backpay period because his earnings would have been determined by the

[26] Drivers are entitled to take their vacation pay without taking days off as vacation time, and the record reveals many drivers exercise that right.

[27] The record reveals the dates of hire for the seven drivers and Brown are: Travis, 3 March 1972; Hill, 9 October 1973; Brown, 1 November 1976; Johnson, 27 December 1976; Collins, 3 January 1977; Hamilton, 7 November 1977; Davis, 10 April 1978; and, Scott, 11 November 1978.

[28] See R. Exh. 3, which shows the gross wages during the entire period to be: Travis, $151,691; Hill, $151,783; Johnson, $152,738; Collins, $157,856; Hamilton, $189,171; Davis, $171,949; and, Scott, $146,627.

[29] See R. Exh. 1. The figures for 1977, rounded off to whole dollar amounts, are: Travis-$15,063; Hill-$16,140; Brown-$23,263; Johnson-$19,420; Collins-$16,936; and Hamilton-$11,297. The figures for 1978 are: Travis-$16,956; Brown-$22,409; Johnson-$17,335; Collins-$18,629; Hill-$19,173; Hamilton-$26,750; Davis-$12,750; and, Scott-$1162.

number of loads he hauled. The record reveals, however, that he was a hustler while employed by Respondent, as evidenced by the fact that he was the highest paid driver in 1977 and was the second highest paid driver in 1978. That being the case, I find the representative group used by the Region was an appropriate representative group. Similarly, my review of the record causes me to conclude that the Region was justified in using its 24-hour and/or 60-percent rule in making its calculations. In this respect, the record reveals that some of the drivers employed during the backpay period experienced lengthy absences from work.[30] On the other hand, it reveals that Brown missed no time whatsoever during calendar year 1978, and he missed no work in 1979 through the date of his discharge. Patently, it would be unfair to include lengthy absences of drivers employed during the backpay period when computing the weekly gross backpay Brown would have probably earned. Finally, as noted, inclusion of vacation moneys in the Region's formula did not materially distort the estimated weekly gross backpay that would have been earned by Brown as he, too, was entitled to vacation pay in the approximate amount that was entered into the calculations.

For the reasons stated, I find the formula utilized by the Region to compute estimated weekly gross backpay was appropriate.

C. *Calculation of Backpay Due*

In accordance with the above stated findings and conclusions, the backpay due James Brown is computed in the manner set forth.

Since the record merely reveals Brown was offered a job by Best Wrecking in May, and the specific date the offer was made was not established, I resolve the resulting ambiguity in favor of the discriminatee and treat the offer as having been made on 31 May 1979. If the offer had been made at that time, Brown would have normally commenced work with Best Wrecking on 1 June 1979. In the situation described, the discriminatee would be entitled to the net backpay for quarter 2, 1979, set forth in the backpay specification, as amended.

Regarding to quarters 3 and 4, 1979, all quarters in 1980 and 1981, and quarters 1 and 2, 1982, the actual quarterly earnings of Best Wrecking employee Steve Brousseau will be used as an offset that is deducted as interim earnings from the gross backpay amount set forth in the backpay specification, as amended, with the following exception. As the record reveals, Brown was incapacitated during the period extending from 29 December 1981 through 12 February 1982, and received workers compensation for that period; no backpay is awarded for the six week period described.

Regarding to quarters 3 and 4, 1982, and all quarters in 1983, 1984, and 1985, with the exception of those quarters during which I have concluded no backpay is due because Brown intentionally concealed earnings, the record reveals Detroit City drivers worked 60–65 hours a week and earned the following hourly rates: 1982—$7.80; 1983—$7.90; 1984—$8; and 1985—$8.25. Accordingly, I compute the offset for the applicable periods by using the following formula: hourly rate x 40 + 1 hourly rate x 20 x 13 = quarterly interim earnings/offset.

For the reasons stated, I compute the net backpay due James Brown, excluding interest, is as follows

Period	*Gross Backpay*	*Interim Earnings/Offset*	*Net Backpay*
1979/2	$1,124.45	0	$1,124.45
1979/3	5,839.92	$7,324.25	0
1979/4	6,253.50	5,716.50	564.21
1980/1	5,108.45	6,347.77	0
1980/2	5,802.67	7,665.00	0
1980/3	6,012.35	6,573.00	0
1980/4	6,253.50	4,093.96	2,159.54
1981/1	5,935.64	6,648.19	0
1981/2	7,036.79	7,058.75	0
1981/3	7,096.83	8,278.64	0
1981/4	7,409.86	7,571.04	0
1982/1	6,162.34	4,762.08	1,400.26
1982/2	7,625.38	6,210.44	1,414.94
1982/3	7,799.53	7,098.00	701.53
1982/4	7,043.29	7,098.00	34.42
1983/1	[31] 3,162.00	7,189.00	0
1983/2	7,247.17	7,189.00	58.17
1984/1	7,148.10	7,280.00	0
1984/2	8,407.09	7,280.00	1,127.09
1984/3	7,811.59	7,280.00	531.59
Total			$9,416.20

Accordingly,[31] I find the total backpay due Brown by Respondent is $9416.20, exclusive of interest.

[Recommended Order omitted from publication.]

[30] See schedule A of the backpay specification, which reveals, inter alia, the following employee absences: 1979—Scott—16 weeks, Collins—8 weeks; 1980—Scott—7 weeks; 1981—Collins—11 weeks, Scott—4 weeks; 1982—Davis—3 weeks; 1984—Hamilton—15 weeks; 1985—Davis—4 weeks.

[31] Gross backpay figure set forth in G.C. Exh. 2 reduced by $2707 which represents 6 weeks during which discriminatee was incapacitated and received workers compensation.

Image Convention Services, Inc., Image International, Inc., and D.C. Enterprises, Inc. *and* International Alliances of Theatrical Stage Employees and Moving Picture Operators, Local No. 631. Case 12–CA–10211(E)

July 29, 1988

ORDER DENYING PETITION TO INCREASE MAXIMUM RATE OF ATTORNEY FEES

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

Pursuant to Sections 102.124 and 102.146 of the National Labor Relations Board Rules and Regulations, on June 23, 1988, Image International, Inc. and its Attorney Charles Robinson Fawsett filed a petition to increase the maximum rate of attorney fees payable under the Equal Access to Justice Act (EAJA) from $75 per hour to rates of $95, $100, and $120 per hour for fees charged and paid between July 1, 1982, and September 1, 1983.[1]

The petition alleges that such an increase is justified on the grounds that the work performed by Fawsett was "highly specialized work in the field of labor relations law," that Fawsett was one of only approximately six attorneys in central Florida qualified to perform the work, and that the petitioned-for rates are in accordance with rates charged by management labor relations attorneys in central Florida for similar work during the relevant period.

Having duly considered the matter, we find that the petition should be denied. EAJA, 5 U.S.C. § 504(b)(1)(A), provides that attorney fees shall not be awarded in excess of $75 an hour "unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee."[2] The petition here does not allege that an increase in the cost of living justifies a higher fee. Nor does it identify a "special factor" within the meaning of the statute which would justify a higher fee. As recently indicated by the Supreme Court, the "special factor" exception was intended to be applied narrowly; an increase is not justified under the exception merely because a distinctive knowledge or specialized skill would be useful, as opposed to needful (as in patent law), in litigating the case, because lawyers having such a useful knowledge or skill are in short supply, or because the prevailing market rate for the tendered legal services is higher than the maximum rate.[3]

Accordingly, as the petition fails to allege any basis permitted under the statute for an increase in the maximum rate, the petition is denied.

[1] An application for fees and expenses incurred in the underlying unfair labor practice proceeding (288 NLRB 1036 (1988)) was filed simultaneously with the petition. By order dated June 27, 1988, the Board referred the application to the administrative law judge for appropriate action.

[2] See also Sec. 102.146 of the Board's Rules and Regulations.

[3] See *Pierce v. Underwood*, 56 U.S.L.W. 4806, 4811–4812 (June 27, 1988) (interpreting identical provision in 28 U.S.C. § 2412(d)(2)(A)).

Castro Village Bowl *and* Hotel Employees and Restaurant Employees and Bartenders Union, Local 50, affiliated with Hotel Employees and Restaurant Employees and Bartenders International Union, AFL–CIO. Case 32–CA–8722

July 29, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On January 20, 1988, Administrative Law Judge Burton Litvack issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions with supporting brief and a brief in response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Contrary to the dissent, we adopt, for the reasons stated by the judge, his conclusion that the Respondent did not violate Sec. 8(a)(5) of the Act by refusing to execute the draft contract submitted to it by the Union. In so doing, we agree with the judge that the Union's "acceptance," based on that draft contract, of the Respondent's final offer, seriously altered the intent and meaning of the Respondent's final offer with respect to both the issue of pension plan language and the issue of the preamble language concerning the Association's contract amendment dates. We also agree with the judge that the submission of the draft contract was calculated to suit the Union's purposes. The dissent concedes that the Respondent was not obligated to execute the draft contract the Union submitted, contrary to the alleged violation in the complaint and the theory on which the General Counsel proceeded at the hearing. In the circumstances here, we cannot agree with the dissent's implicit finding that there was a true meeting of the minds between the parties on the terms of a collective-bargaining agreement. Nor can we subscribe to the dissent's apparent view that a binding agreement was reached without regard to the Union's draft contract, merely because the Union indicated it accepted the Respondent's offer, or that the discrepancies between the draft contract and the Respondent's offer simply constituted minor deviations from an agreement previously reached.

Accordingly, we further agree with the judge's finding that the Respondent did not later unlawfully withdraw recognition from the Union based on the subsequent receipt by the Respondent of the employee petition and by its subsequent conduct.

MEMBER CRACRAFT, dissenting.

Contrary to my colleagues, I would find that the parties reached agreement on the Respondent's contract proposal and, therefore, the Respondent violated Section 8(a)(5) of the Act by refusing to execute a contract embodying the agreed-on terms.

The judge found that after several bargaining sessions, the Respondent on August 6, 1986, presented its final proposal in writing through a mediator. Reluctantly, the Union submitted the proposal for a ratification vote in September 1986. The employees overwhelmingly accepted the proposal. On September 21 or 22, 1986, the Union mailed a letter advising the Respondent that "your offer has been accepted."

On December 1, 1986, the Union delivered to the Respondent a document purporting to incorporate the terms on which the parties had agreed. In fact, this draft contract differed from the parties' agreement in several respects. On December 12, 1986, the Respondent received a petition signed by a majority of employees stating that they did not wish the Union to represent them. The Respondent thereafter refused to recognize the Union as the employees' bargaining representative.

The judge found that two of the differences between the Union's contract draft and the Respondent's final proposal evidenced that there was no meeting of the minds between the parties, and he concluded that the Union's acceptance did not reflect a true agreement. The judge also found, however, that the Respondent's proposals concerning the two differences (specific language for the pension clause and the preamble) were clear, consistent, and unchanging, and that the Union's representative understood or reasonably should have understood these proposals. I agree with the General Counsel that the judge's conclusion is inconsistent with his factual findings.

The Respondent's final written proposal was a complete package. The document referenced an earlier written proposal, which explicitly stated the Respondent's position on the two items over which the judge finds there was no agreement. The Union specifically accepted the Respondent's final offer. In light of the offer and acceptance, there was a binding agreement between the parties.[1]

[1] The judge made what appears to be contradictory credibility resolutions concerning the union agent's conduct. The resolutions, however, pertain to the agent's actions after accepting the Respondent's final proposal. Despite the judge's confusing credibility resolutions, one thing remains constant: the Respondent's proposal was clear on the pension language and the preamble. Whether the Union misremembered or deliberately attempted to change the agreement when it typed the draft contract is irrelevant.

The Respondent, of course, is not obligated to execute the draft contract the Union submitted.[2] However, once reaching agreement, the Respondent was statutorily obligated to assist the Union in reducing it to writing.[3] Instead of pointing out the discrepancies to the Union, the Respondent subsequently refused to recognize the Union. By its conduct in withdrawing recognition and failing to assist in reducing the agreement to writing and signing the agreement, the Respondent has violated Section 8(a)(5) of the Act. I would find this conduct, as well as the Respondent's subsequent direct dealing, unilateral changes, and failure to provide requested information, violated Section 8(a)(5) of the Act.

[2] My colleagues state that the complaint and the General Counsel's litigation strategy limit the issue in the case to whether the Respondent violated the Act by refusing to execute the draft contract the Union submitted. This is too restrictive a reading of the complaint in light of the record. Even the judge recognized that the General Counsel's case encompassed whether the Union accepted the Respondent's final proposal. Further, as the majority concedes, the hearing fully aired the meeting of the minds issue.

[3] See, e.g., *Georgia Kraft Co.*, 258 NLRB 908, 911–912 (1981), enfd. 696 F.2d 931 (11th Cir. 1983). My colleagues misunderstand the purpose of this citation. Given the judge's findings, which I believe support the conclusion that the Union accepted the Respondent's final proposal, the Respondent was obligated to work with the Union in reducing the final proposal to writing, whether the discrepancies between the Union's draft contract and the final proposal were minor deviations.

Valarie Hardy-Mahoney, Esq., for the General Counsel.
Tom Davenport, Esq. (Finkle & Stroup), of Walnut Creek, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Based on an unfair labor practice charge filed on February 18, 1987, by Hotel Employees and Restaurant Employees and Bartenders Union, Local 50, affiliated with Hotel Employees and Restaurant Employees and Bartenders International Union, AFL–CIO (the Union), the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint in this matter on March 20, 1987, alleging that Castro Village Bowl (the Respondent) had engaged in, and was engaging in, acts and conduct[1] violative of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer, denying the commission of the alleged unfair labor practices. The matter was scheduled for trial and heard by me on July 29 and 30, 1987, in Oakland, California. At the trial, all parties were afforded the opportunity to examine and cross-examine the witnesses, to offer into the record all relevant evidence, to argue their legal positions orally, and to file posthearing briefs. The latter documents were filed by counsel for the General Counsel and by counsel for Respondent and have been carefully considered. Accordingly, based on close scrutiny of the entire record, including the briefs, and my observation of the testimonial demeanor of the several witnesses, I issue the following

[1] The Regional Director issued an amendment to the complaint on May 29, 1987, substituting a new par. 10. Respondent timely denied those allegations.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation and has an office and place of business in Castro Valley, California, where it is engaged in the operation of a bowling alley/snackbar/lounge facility. During the 12-month period immediately preceding the issuance of the instant complaint, in the course and conduct of its business operations, Respondent derived gross revenues in excess of $500,000 and purchased and received goods and service valued in excess of $5000, which originated outside the State of California. Based on the foregoing, Respondent admitted that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The parties stipulated that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The General Counsel contends that, after bargaining for a successor collective-bargaining agreement, Respondent submitted a final offer to the Union on August 6, 1986; that after the bargaining unit employees ratified the offer the Union, by letter to Respondent, accepted it; that the Union thereafter drafted and delivered to Respondent on December 1, 1986, a contract, embodying the terms of Respondent's final offer, and a cover letter that invited the latter to inform the Union of any drafting errors; and that Respondent subsequently embarked on acts and conduct violative of Section 8(a)(1) and (5) of the Act, including (1) refusing to execute the memorialized agreement, (2) withdrawing recognition from the Union as the exclusive collective-bargaining representative of certain of its employees, (3) refusing to honor the hiring hall provisions of the expired and new agreements, (4) bypassing the Union and dealing directly with its bargaining unit employees concerning a new health and welfare plan, (5) making unilateral changes in the employees' terms and conditions of employment, and (6) failing to provide necessary and relevant information to the Union. Denying the commission of any unfair labor practices, Respondent argues that the Union never notified it of the acceptance of the August 6, 1986 final offer and that, assuming arguendo, the Union did inform Respondent of the acceptance of the latter's final offer; the memorialized version of such contains significant errors of substance so as to establish that there never was a meeting of the minds on the terms of Respondent's final offer and to relieve Respondent of the obligation to execute the delivered contract. Therefore, according to Respondent, inasmuch as it entertained a good-faith doubt

of the Union's status as the majority representative of its bargaining unit employees, it lawfully withdrew such recognition from the Union on or about December 19, 1986, and was no longer under any duty to bargain with it as the representative of its employees. Regarding the latter contention, the General Counsel contends that a binding agreement was reached between the Union and Respondent and, assuming arguendo, the latter was not obligated to execute the contract that was delivered to it on December 1; Respondent remained obligated to recognize the Union's status as the bargaining representative of its employees.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent operates a bowling alley/snackbar/lounge facility in Castro Valley, California. Alan Held is the president and manager of the entity, a California corporation. On March 14, 1979, Held executed a memorandum agreement, recognizing the Union as the collective-bargaining representative of a unit, including all full-time and regular part-time cocktail waitresses, bartenders, and culinary employees and excluding all other employees, guards, and supervisors as defined in the Act, and agreeing to be bound by the terms and conditions of employment established by the then-existing collective-bargaining agreement between the Union and the East Bay Restaurant Association. There is no dispute that Respondent remained bound to successive contracts between the Association and the Union with the most recent expiring, by its terms, on August 6, 1986. Exercising its contractual right to do so, Respondent, by letter dated May 22, 1986, informed the Union that it wished to terminate or modify the existing contract and to commence bargaining for a successor agreement. By return letter dated June 6, the Union stated it was willing to enter into contract negotiations with Respondent.

The record establishes that representatives of the Union and of Respondent met and bargained on five occasions during July and August 1986.[2] The main spokesperson for the Union was its secretary/treasurer and business manager, Peggy Turner, and the spokesman for Respondent was its labor relations consultant, H. Sanford Rudnick. As the negotiations progressed, according to Turner, the main areas of dispute were readily apparent: seniority (Respondent demanded that an employee's ability to perform be equated with his date of hire as criteria), wages (Respondent proposed a two-tier wage system), the pension plan, vacation pay (Respondent proposed straight time rather than the existing time and a half), cost-of-living, health and welfare, successorship, and contract term. With obvious disagreement over each of these issues, the parties met on August 6, 1986, the expiration date of the East Bay Restaurant Association contract, with a mediator. Rather than meeting across the table, the parties were placed in separate rooms, with all bargaining conducted through the mediator who shuttled back and forth from one party to the other. Rudnick submitted a document, Joint Exhibit 3, to the union representatives, which document set forth Respondent's positions on the major issues. As the bargaining progressed, Respondent modified some of the positions and remained steadfast on the others. Ultimately, through the mediator, Rudnick informed Turner that she should consider the document as Respondent's "Final Proposal" in the negotiations,[3] with such noted on the document. Because Respondent's positions were not acceptable to the Union, Turner informed Rudnick that the entire offer was rejected. However, she also told Respondent, through the mediator, that its entire proposal would be submitted to the bargaining unit employees albeit with a recommendation to reject it.[4] Finally, Held, who was present, testified that he was informed by the mediator that the Union would notify him of the result of the ratification vote.

Whatever commitment she may have given Respondent, the record reveals that Turner clearly did not consider the holding of an employee ratification vote her highest priority and did nothing, at first, about scheduling one. Indeed, believing that Respondent had engaged in bad-faith bargaining, Turner instructed the Union's attorney to file an unfair labor practice charge against Respondent, and he did so on August 28.[5] Asked during cross-examination if she meant to hold the ratification vote, Turner conceded that "I was waiting to see what happened with the charge" and that it would have been against her wishes. Further influencing her reluctance to schedule such an event were pending contract negotiations "in other houses," which may have been influenced by the terms of Respondent's final offer if ratified, and an ongoing strike by union-represented employees against the employer-members of the East Bay Restaurant Association. Ultimately, however, Turner was pressured into changing her mind. Thus, at the September monthly membership meeting, "the manager's wife and another girl had shown up and kept insisting that they had the right to a ratification vote."[6] After consulting with the Union's attorney, who advised her to do so, Turn unenthusiastically scheduled a ratification vote. The record further reveals that the voting occurred during separate sessions on September 18 and 19. As she had stated to Respondent, Turner, at each meeting, told Respondent's employees "to turn [the offer] down for right now." Nevertheless, Respondent's "Final Proposal" was ratified by its employees by a vote of 8 to 1.

Turner testified that as the bargaining unit employees had accepted Respondent's final offer the Union had no option but to likewise accept it. Accordingly, "I pre-

[2] The specific meeting dates were: July 14, 22, and 24 and August 4 and 6.

[3] It apparently was understood that incorporated with the final proposal were Respondent's prior positions on all other areas of the contract, areas of minor significance, no disagreement, or over which there had been little, if any, discussion.

[4] There is no evidence that ratification was to be the established method by which Respondent's contract proposal would be accepted or rejected. Turner testified, without contradiction, that the matter was never discussed. She added that the offer was submitted to Respondent's employees only because such was the Union's "standard operating procedure."

[5] The charge alleged that Repsondent engaged in conduct violative of Sec. 8(a)(1) and (5) of the Act.

[6] The manager's wife is Pam Phippen. She is a bartender and is included in the bargaining unit.

pared a letter to Mr. Held," accepting Respondent's "Final Proposal." She testified that, on Sunday, September 21,[7] in the course of completing work at the Union's office she typed a letter to Held, "made copies for our files and then put it in an envelope," on which she had typed Repsondent's address. Thereupon, Turner added, she placed the envelope on top of the office postage meter.[8] An alleged photocopy of this letter was offered and placed in evidence as General Counsel's Exhibit 5 and states in part: "Please be advised [the bargaining unit employees] voted on and ratified the final offer. This means your offer has been accepted." Barbara Horton, who has worked as Respondent's office clerical employee for more than 10 years, testified that Peggy Turner often works in the office on Sundays, that Turner sometimes types letters, and that Turner "probably puts [any such letters] on the mail machine." Horton further testified that it is customary in Respondent's office that the daily outgoing mail is placed on top of the postage machine; that each day at approximately 4:30 p.m. she puts the envelopes through the postage meter machine; that she bunches the mail and takes the bundle to the post office on her way home; and that any envelope that Turner may have placed on the postage machine Sunday would have remained there until 4:30 p.m. on Monday. While testifying to the foregoing customary procedures, Horton had no recollection of observing any mail on top of the postage machine on the morning of Monday, September 22. However, she also testified that she followed her customary practice that day with regard to placing postage on and depositing the outgoing mail at the post office. Alan Held, who is apparently the only individual at Respondent's facility authorized to open mail, denied receipt of the a forementioned letter and asserted that he first became aware of it at the instant hearing.[9] Finally, whether the letter was received by Respondent,[10] there is no dispute that the Union withdrew the August 28 good-faith bargaining unfair labor practice charge.

Subsequent to assertedly indicating its acceptance of Respondent's final proposal by the above-described September 21 letter, according to Turner, the Union received no response from either Held or Sanford Rudnick.[11] Nonetheless, Turner had no doubt that Respondent was aware its bargaining unit employees had ratified the final offer,[12] and she began the task of preparing a draft collective-bargaining agreement, encompassing what Respondent proposed on August 6. Turner testified that at "the end of November" she combined the expired 1983 to 1986 collective-bargaining agreement, the new East Bay Restaurant Association contract, the "best last and final offer" (included in this were the August 6 single-page proposal and Respondent's last detailed proposal, given to the Union on August 4) and a "cover sheet," on which she wrote drafting instructions. She left these documents for the office clerical worker, Barbara Horton, "to make the corrections and modifications" and merge the foregoing documents into a draft agreement, covering Respondent's employees. Admitting that she does not know who typed the document, Turner further testified that, at some point, the draft agreement, between Respondent and the Union, General Counsel's Exhibit 9, came to her desk,[13] that she reviewed the draft for accuracy, utilizing the "same documents" that the secretary used in preparing the contract; and that she prepared a cover letter, which would accompany the contract when such was submitted to Respondent for signature and/or corrections. Thereafter, Turner prepared a manila envelope for mailing to Respondent's fa-

[7] Turner testified that she often works on Sundays to do "catch up work, the work I hadn't gotten to during the week."

[8] Turner stated that it is "her custom for the things that I typed that after I've made the copy and put them in the envelope, I take them back to the top of the machine."

[9] Turner admitted neither sending the original or a copy of the September 21 letter to Rudnick, Respondent's labor relations consultant. Asked to explain why, she explained that she did not believe he was actually Respondent's representative for labor relations and, instead, believed that Rudnick had been helping Respondent out of mere friendship.

[10] Turner readily admitted that the September 21 acceptance letter could have been sent by certified mail but that "I wouldn't normally on a ratification notice." She added that certain types of mail, such as contract reopener letters or draft agreements, are normally sent certified, but not this type. If mail is to be sent certified, rather than doing so herself ("I've never been able to figure that one out. I've tried"), she will "just give [Barbara Horton] a note saying please see to it this goes out certified return receipt."

[11] Turner testified that she telephoned Respondent's facility and left messages for Held to return the calls, but he never did. The latter denied receiving any messages that he return Turner's telephone calls. There is no evidence that either Turner or Held encountered any difficulties, prior to September 1986, reaching each other by telephone.

[12] Based on the fact that Pam Phippen, the wife of the night manager, had attended the ratification vote and knew the result, Turner believed that Respondent likewise knew. In this regard, Held admitted "I heard rumors, yes," and he also admitted informing Rudnick. According to Held, his information never got beyond the rumor stage and remained unsubstantiated. Asked why he never followed up on what concededly was an important matter to him, Held averred that on August 6 the mediator said "that we would hear back from the Union." He added that "Respondent, at all times, was waiting to hear back from them." Therefore, Held continued, he did nothing to corroborate the above rumors.

[13] Asked if she typed G.C. Exh. 9, the secretary, Barbara Horton, said "I don't believe I did. That doesn't look familiar at all." She added that there are typing assignments she is unable to do and that, in such cases, "anybody who's available," including business agents, can type necessary documents. Neither of the business agents who testified at the hearing, Joe Regacho or Joelan Diephius, admitted typing it; thus, the identity of the typist remains a mystery. Assuming that the typed document did not materialize out of some dark void, someone obviously typed it, but I shall not speculate as to the person's identity.

G.C. Exh. 9, which Turner stated is the Union's file copy of the document, bears the signature of Business Agent Joelan Diephius. Turner testified, during cross-examination, that the latter's signature was already on the document when she, Turner, found the newly typed document on her desk. Turner added that it is a normal practice to have a business agent, who is involved in the negotiations and in representing an employer's employees, execute a contract with the company. Turner admitted, however, that Diephius had not been involved in the negotiations with Respondent and that "at the time she was very inexperienced." During redirect examination, Turner testified that she told Diephius to "proof the contract, the prepared document, and if it's okay, sign it and give it back to me." She added that Diephius accomplished her review by "going through my notes."

Contradicting Turner, Diephius stated emphatically that "in late November," Peggy Turner gave her the original version of G.C. Exh. 9, instructing her "to review the contract." Accordingly, using no other documents, Diephius read through the contract mainly "to know what it contained" rather than to check on its accuracy. After reading through it, a task that took her 2 or 3 days, she testified, Turner asked if she had signed it yet. Thereupon, Diephius executed the purported contract and returned it to Turner. Diephius added that she had nothing, at all, to do with the negotiations and did not know why Turner had her review the document or sign it.

cility; however, as she was uncertain how to do certified mail, she held the draft agreement for the regularly scheduled staff meeting the next day at which she would give it to a business agent "to handle."[14] Turner stated that she reviewed the document and prepared the accompanying cover letter[15] on the "Sunday after Thanksgiving," November 30, 1986.[16]

Turner next testified that, as scheduled, a regular Monday morning staff meeting was held at the union office on December 1. Besides herself, present were Business Agents Diephius and Regacho. The meeting occurred in a conference room, and Turner placed the manila envelope, to which the draft contract and cover letter were attached by a paperclip, on the conference table. According to Turner, "I gave [the draft agreement] to Joelan and told her to hand deliver" it to Respondent. The latter placed the documents inside the previously addressed manila envelope.[17] Diephius and Regacho also testified as to the December 1 staff meeting. Initially, each recalled that another business agent, John Quintera, was also present at the meeting. According to Diephius, the meeting began with Turner reviewing the Union's dues delinquency lists, pointing out which delinquencies were in each agent's assigned geographical area of responsibility. In doing this, Turner became "quite upset with Joe Regacho" because "he hadn't collected his dues in quite awhile." Diephius described Regacho as "getting chewed out" by Turner. While the meeting progressed, Diephius observed a cover letter, bearing the Union's letterhead, and a stack of papers beneath it on the conference table in front of Turner. An envelope was next to the documents. Turner placed the papers inside the envelope, handed the closed envelope to Diephius, and "asked me to deliver the contract, the Castro Village Bowl contract and hand-deliver it to the Castro Village Bowl." She added that the envelope was addressed to Respondent. Diephius thereupon left the meeting, went to her desk, compiled a list of her stops for that day, and left the building. Regacho testified that he recalled this particular staff meeting inasmuch as "I got my butt chewed out royally for not picking up dues I was assigned to pick up." He further testified that, at the start of the meeting, he observed a cover letter, addressed to Respondent, a contract, and an envelope on the conference table; that Turner handed these to Diephius; and that Turner instructed the former "that she was to deliver the contract to the employer at the bowl."

Subsequent to the staff meeting, according to Diephius, she spent the remainder of the day "making the rounds" of facilities, at which employees were represented by the Union, in her assigned geographical area, east Concord and Castro Valley. She testified that she arrived at Respondent's facility at 2:15 p.m. and had with her the envelope obtaining the draft contract. "I walked into the north entrance. The door that's in the parking lot. And walked up to the front desk." There were two women behind it. "I asked one of the ladies there to please make sure that Mr. Held gets this, and when I did that . . . I put the envelope on the counter and turned around so that she could read it. She said okay. And then I left out the same door that I came in." As corroboration of Diephius' testimony, counsel for the General Counsel offered as Exhibit 11 Diephius' daily activity report for 12/1/86. On it are listings for "houses visited" and for "purpose/description." For item 10 on the first page, Diephius noted a visit to "C.V. Bowl" at 2:15 p.m. for the following purpose: "Drop off contract." Leora Memory, who works for Respondent at the facility's "main control desk," testified that she would have been on duty at 2:15 p.m. on December 1, that one of her duties is the receipt of mail and other package deliveries, and that "I do not recall anything other than the [regular] mail being delivered" on the above day. Alan Held, as he had regarding the purported final offer acceptance letter, denied ever seeing the originals of either General Counsel's Exhibits 9 or 10 prior to the instant hearing.

The record discloses that, 18 days subsequent to the above-described alleged delivery of the draft collective-bargaining agreement and the cover letter to Respondent's facility, Respondent withdrew recognition from the Union as the collective-bargaining representative of the former's waitresses, bartenders, and culinary employees. Alan Held testified that the basis for this act was an employee petition, Respondent's Exhibit 7, which he received on December 15, 1986. According to him, "This was slipped under my door when I walked in on a Monday morning." The document, bearing six signatures, which Held recognized as being names of bargaining unit employees, had the following wording above the signatures: "We the undersigned employees of Castro Village Bowl, members of Culinary Workers, Local 50, as of this date, 12-14-86, no longer wish to be represented by Local 50." Held immediately telephoned Sanford Rudnick to inform him of the petition and, he testified, both men agreed that neither had, as yet, heard from the Union "about our contract." Rudnick then advised Held to authenticate the six signatures, and the latter did so.[18] Four days later, Rudnick, on behalf of Respondent, sent the following letter to the Union:

> Dear Ms. Turner:
>
> On August 6, 1986 Castro Village Bowl gave the Union its final proposal. Since that date Castro Vil-

[14] During cross-examination, Turner stated that Joelan Diephius was the business agent whom she had in mind to ask to hand-deliver the draft document to Respondent the next day.

[15] A photocopy of the draft document is G.C. Exh. 10. The letter, addressed to Alan Held, reads as follows: "Enclosed please find the prepared signature ready contract between Local 50 and Castro Village Bowl. Please contact me immediately if corrections are needed."

[16] During cross-examination, Turner contradicted herself as to when the asserted draft agreement was prepared. Thus, she stated that she worked at the Union's office on Thanksgiving Day, Friday, Saturday, and Sunday, preparing for numerous NLRB hearings, answering correspondence, and "preparing this contract." She added that the typed contract came back to her "sometime during the week after Thanksgiving. So it would be Monday through Wednesday." She further confused matters, testifying that from the time she prepared the contract until the day the typed draft was returned, "probably" 2 weeks passed by.

[17] Subsequently, Diephius reported to Turner that she had, in fact, delivered the contract to Respondent's facility.

[18] Respondent's payroll records establish that, as of December 14, it employed 11 individuals in the bargaining unit represented by the Union.

lage Bowl has not heard whether or not the Union has accepted or rejected its final offer.

However, recently Castro Village Bowl received a petition from the majority of its employees that they do not wish to be represented by your local Union. Since the contract has expired on or about August 6, 1986 and there is no contract in existence, Castro Village Bowl is withdrawing recognition from your Local Union, by virtue of the fact Castro Village Bowl has objective evidence that your Union does not represent the majority of the employees.

Moreover, Castro Village Bowl's, bargaining obligation has ended since your Union no longer represents the majority of the employees.

Thus, Castro Village Bowl will cease making pension and health welfare contributions since it is a violation of federal labor law to make contributions wihtout a negotiated and written labor agreement.

In addition, Castro Village Bowl will be happy to cooperate with the National Labor Relations Board to show its objective evidence.

Turner stated that the Union, in fact, received the aforementioned letter. Believing that the letter's initial paragraph "was more than a lack of communication that right there was a bald-faced lie" and that what came after was also untrue, Turner experienced what she described aa "a temper tantrum" on reading it and knew then that Respondent would likely not execute the draft contract. She testified that, "because I felt that there was a very definite violation of the law here by denying the contract," she contacted the Union's attorney,[19] who told her that he would contact Rudnick. Turner did not know if the attorney ever did so. Asked why she did not contact Held or Rudnick herself, Turner replied that "I hadn't been getting return calls from the employer" and that, in any event, such would have been futile.

There exists no dispute that, subsequent to withdrawing recognition from the Union, Respondent engaged in several acts and conduct consistent with that act. Thus, the parties stipulated that, on or about January 20, 1987, Respondent, via the posting of a notice to bargaining unit employees from Held, solicited the employees to apply for coverage under a new health insurance plan, which was to be implemented by it on February 1, 1987; that, on or about February 1, Respondent made changes in the bargaining unit employees' terms and conditions of employment, including the cessation of health and welfare and pension trust fund contributions on behalf of the employees and the institution of a new employee health insurance plan;[20] and that, since on or about February 18, 1987, Respondent has refused to honor a union request for the names of all current bargaining unit employees. Moreover, in January, Diephius visited Respondent's facility to ascertain whether the latter was employing individuals who were in the bargaining unit but who had not been required to join the Union. She spoke to Held and asked if this was true. Held replied that Respondent no longer had a contract with the Union. On January 16, Rudnick wrote to the Union that Respondent had no contract with the Union, had withdrawn recognition, and was not obligated to adhere to any contractual provisions. In addition, during his testimony, Held admitted that Respondent no longer informs the Union of new hires; nor does it any longer utilize the Union's hiring hall for prospective employees.

In further support of its contention that no unfair labor practices have been committed, Respondent offered the testimony of Sanford Rudnick who described several discrepancies between the draft contract, which was submitted to it for signature by the Union (G.C. Exh. 9), and the August 6, 1986 final offer, the existence of which assertedly abrogate any obligation Respondent may have been under to execute the document. Initially, Rudnick stated that the wording of part (b) of section 36, the pension plan provision of the purported draft agreement, erroneously states: "New Hires will not receive said bonus until they have completed one year of service with the Employer." According to Rudnick, at the parties' negotiating session on August 4, 1986, he presented the union representatives with Respondent's proposal 4, which included a revised pension plan proposal. Rudnick testified that prior to the commencement of the meeting he noticed that the language proposal for part (b) was incorrect and instructed his secretary to type a corrected version of the proposal, changing the word "bonus" to "pension."[21] Thereupon, he entered the meeting room with both the incorrect and corrected versions of proposal 4 and inadvertently distributed the incorrect versions to the union representatives.[22] Rudnick continued, stating that he immediately informed the union representatives of the correct wording of part (b) of the pension plan proposed language, and "I believe I gave them the

[19] Asked if she was certain that she spoke to the Union's attorney with regard to Rudnick's letter, Turner said such would have been "standard operating procedure" in this type of case. Asked again if she was certain, Turner averred "not without looking in our file." She reiterated that she did speak to the attorney because the instant unfair labor practice charge was filed.

[20] In arguing that the Union never informed it of the acceptance of its final proposal and never either drafted or delivered a draft agreement to its facility, Respondent offered the testimony of Kathy Corcoran, who is employed by the administrator of the restaurant and tavern health and welfare trust fund. She testified that, pursuant to negotiations, the employer-members of the East Bay Restaurant Association commenced paying an increased health and welfare rate per employee during the fall of 1986. Aware that Respondent was continuing to make payments at the expired contractual rate, Corcoran advised the Union that Respondent had become delinquent in payments. On January 21, pursuant to a memo from Diephius and Turner, Corcoran was informed that the contract between Respondent and the Union provided for no increase in the monthly contribution rate. This was the first instance that Corcoran learned of the existence of a new agreement between the parties. Asked by me if it was usual or unusual that the Union would delay informing her of the existence of an independent contribution rate, Corcoran stated, "It's usual that I would not have been notified by the Union right away." She added that the Union "eventually" would have done so and did do so in this case.

[21] Of course, the language of part (b) as it appears in G.C. Exh. 9 makes no sense in the context of part (a). However, Respondent's initial pension proposal was to delete the expired contractual language and replace it with a monthly bonus payment to employees in lieu of a pension plan.

[22] Rudnick explained that he probably distributed the incorrect version "because they just got mixed up. I had about 15 different proposals together at the same time."

corrected copy as well. Because I always in negotiations, try to give the [Union] the exact proposals which I make up."[23] In Rudnick's view, the failure of General Counsel's Exhibit 9 to include the change from "bonus" to "pension" constituted a "major" error because Respondent had initially proposed "giving the employees a bonus in lieu of a pension," and the Union had rejected it. Peggy Turner, during rebuttal examination, specifically denied that Rudnick ever advised her that in part (b) of Respondent's proposal 4 pension plan language the word "bonus" should be changed to "pension," either orally or in writing. She added that the only form of the proposal she was given is General Counsel's Exhibit 7, and that it was utilized in the drafting of the contract for Respondent. Analysis of it establishes that the pension plan part (b) language is identical in both documents. Turner further stated that her understanding of part (b) is as follows: "It's saying the new hires wouldn't be getting a pension. They get a bonus."[24]

According to Rudnick, another serious discrepancy between the purported contract and Respondent's final proposal exists with regard to the pension plan. Thus, Respondent's proposal 4 pension plan language reads in part: "No change in Pension Plan, the Employer will contribute $11.00 per month to each employee for pension. There will be no increase in pension contribution." General Counsel's Exhibit 9 does not contain the words, "There will be no increase in pension contribution." As to this, Rudnick testified that the foregoing "was a proposal to be put into the contract." He added that the sentence was orally proposed by him at the parties' July 29 bargaining session as an insertion after the sentence defining Respondent's contribution rate. Rudnick explained that he proposed this language "because I didn't want the pension trustess to make any further increases during the term of the contract. So I thought that would be an important aspect of the pension provision." He claimed that the sentence clearly was part of Respondent's final offer and its absence a "major" mistake in General Counsel's Exhibit 9, inasmuch as "it would have been a possibility" that the pension fund trustees could conclude that the Employers' contributions be increased. Peggy Turner did not dispute the existence of the above language in Respondent's proposal 4 but denied that Rudnick said he wanted the words to be included in the formal agreement—"[Rudnick] just said that they would continue to pay the $11 a month." She conceded, however, that Rudnick did say that there would be no increase in the pension contribution; she interpreted Rudnick as meaning "just that we would continue with the current language and current contribution rates." Turner further denied that Rudnick ever expressed a concern that the trustees would ever raise Respondent's contractual contribution rate and disputed the latter's stated fear that the trustees were empowered to do so. Thus, she testified, there are no provisions in the pension trust fund's declaration of Trust, granting trustees the authority to raise the levels of employer contributions as set forth in collective-bargaining agreements.[25] Turner, who is a trustee of the pension trust fund, conceded that from time to time the fund's trustees do amend the trust agreement, but did not know if they were empowered to amend the provisions of article IV, section 4.4(b).[26] She also admitted, during cross-examination, that Rudnick was concerned with trustee actions that would raise Respondent's health and welfare trust fund contribution, but denied that he expressed a like concern regarding to the pension contribution.

The third alleged discrepancy between the draft collective-bargaining agreement and Respondent's August 6 final offer concerns the preamble to the contract. Thus, the preamble to General Counsel Exhibit 9 reads, as follows:

> THIS AGREEMENT made and entered into by modifiction and amendment August 7, 1986 and is previously amended August 7, 1983, August 7, 1982, August 7, 1981, August 6, 1977, September 12, 1973, July 7, 1970, July 7, 1967, July 7, 1964 and July 7, 1958 by CASTRO VILLAGE BOWL (hereinafter referred to as the "Employer") and

[23] Analysis of the record establishes that Rudnick never exhibited certainty as to presenting to the union negotiators corrected copies of proposal 4, in which the pension plan proposal part (b) contained the word "pension" rather than "bonus." Pressed on the matter, he would qualify his answer with such phrases as "To the best of my knowledge . . . I believe . . . and I can't remember specifically." In contrast, he continually expressed certainty that he orally communicated the language change to the union representatives.

[24] During cross-examination, Turner conceded only that Respondent's bonus language proposal was withdrawn as to part (a) of the pension proposal. In support of her position, she added that, "A union representative wouldn't give up the pension and give a bonus instead we would want more money going into the pension for the fund to be stronger."

[25] The pension trust, established under the East Bay Restaurant Association successive collective-bargaining agreements with the Union and to which Respondent would have remained bound under the purported agreement, was created in 1971. Art. IV, sec. 4.4 reads, in part

Section 4.4. The trustees shall receive and collect all contributions due and payable by Employers to the Trust Fund.

. . . .

(b) The amount of the contributions for each employee covered by a collective bargaining agreement shall be determined by the collective bargaining agreement and such amount shall be subject to change under amendment to the collective bargaining agreement and under subsequent collective bargaining agreements. The amount of the contributions for each employee not covered by a collective bargaining agreement shall be subject to the determination and discretion of the Trustees.

[26] Art. VII, sec. 7.1 of the pension trust fund declaration of trust reads, in part

ARTICLE VII
AMENDMENT AND TERMINATION

Section 7.1. The terms of this Agreement or the Trust or the Plan may be amended at any time by an instrument in writing executed by the Signatory Association, or its successors and the Union; provided, however, that the Trustees are hereby authorized and empowered, subject to the limitations hereinafter set forth, to amend this Declaration of Trust, as hereinbelow provided. Amendment of the Trust shall require approval by resolution of the Board of Trustees at a meeting duly called and held and for which five (5) days' written notice has been given, including notice that an amendment of the Trust, stating its general purpose, will be on the agenda. The amendment shall become effective only upon execution thereof, or consent thereto, by a majority of the Trustees. No amendment shall be adopted by the Trustees which:

. . . .

(d) Affects the obligations of an Employer or a Union under a collective bargaining agreement.

> HOTEL EMPLOYEES RESTAURANT EMPLOYEES AND BARTENDERS LOCAL UNION 50, hereinafter, referred to as the UNION.

In contrast, the preamble language of Respondent's proposal 4, which Rudnick testified and the record reveals, is identical to the preamble language proposed by Respondent throughout the negotiations with the Union, and reads as follows:

> This Agreement entered into by CASTRO VILLAGE BOWL (hereinafter referred to as the "Employer") and HOTEL EMPLOYEES RESTAURANT EMPLOYEES AND BARTENDERS LOCAL UNION 50 (hereinafter referred to as the "Union").

Regarding Respondent's proposed preamble language, Rudnick testified that the above-quoted language from the purported draft agreement is similar to that of the prior East Bay Restaurant Association contracts in that the preamble incorporates all the prior agreements between the Association and the Union. He stated, "We wanted an independent agreement without any of the prior amendments that were applicable to the [East Bay Restaurant Association]." He testified further that he expressed this concern to Turner at the "first negotiation" and, subsequently, "I must have addressed that concern throughout." Rudnick added that he told the Union's representatives "that it was irrelevant to have the prior language in the prior years in this particular contract, by virtue of the fact that we wouldn't want to be subject to past practice, and we wanted to start anew." Moreover, according to Rudnick, he meant that Respondent's preamble language should be considered as a proposal by the Union—"that's the reason why I had the preamble." Although conceding that the erroneous preamble language is of "minor significance" in comparison to the pension plan language mistakes, Rudnick stressed its importance as the prior amendments to the East Bay Restaurant Association agreements "could have related to past practice and various other activities that [Respondent] didn't want to be privy to and the language would be interpreted for a collective-bargaining agreement between Local 50 and [Respondent]."[27] Contrary to Rudnick, Peggy Turner testified that the former only demanded that references to the East Bay Restaurant Association be deleted from the agreement's preamble—"That's all I remember of it." Although admitting that Respondent's proposed language never changed, she stated that Rudnick "never said anything about taking [the existing preamble language] out." During cross-examination, she also admitted that Rudnick emphasized Respondent's desire to have a separate agreement, one not tied to the association—"I understood it would be an independent contract."[28] As to the preamble language in General Counsel's Exhibit 9, Turner further admitted that she was responsible for composing it—"I felt that throughout that that's why they were intending, and this is what I perceived the correct preamble to be." She added that the language is consistent with what Respondent proposed, inasmuch as all references to the East Bay Restaurant Association were deleted.

Rudnick pointed out another apparent discrepancy between the draft contract and Respondent's final offer regarding seniority, one of the significant areas of disagreement between the parties during the bargaining. Thus, section 6(a) of General Counsel's Exhibit 9 reads as follows:

> *SECTION 6. SENIORITY*: (a) In the event the Employer finds it necessary to lay off employees due to slackness of business, such layoffs shall be on the basis of seniority and the ability to perform shall prevail.

In contrast, section 6(a) of Respondent's proposal 4, General Counsel's Exhibit 7, reads in part as follows:

> Section 6. SENIORITY: (a) In the event the Employer finds it necessary to lay off employees due to slackness of business, such layoffs shall be on the basis of seniority and the ability to perform. If employees have the same length of service ability to perform shall prevail.

It is readily apparent that except for the fact that portions of two contiguous sentences were left out of the draft agreement's seniority language, the two above-quoted seniority excerpts are identical. Neither is there no evidence to establish that the discrepancy resulted from a typographical error, which would prove that such was a deliberate rewording of the provision. However, the record does establish that the Union continually refused to accept Respondent's proposed seniority language, arguing, according to Rudnick, "that seniority was a very important part of the contract." Asked how the erroneous language alters the meaning of Respondent's proposed phrasing, the witness replied "this language is confusing. And my language is more specific." Rudnick added that the intent of Respondent's proposal was to enable it to select people for layoff on the combined factors of length of service and ability to perform,

[27] Another alleged discrepancy between the draft contract and Respondent's final offer follows from the allegedly erroneous preamble language. Thus, a listing of the amendment dates to the agreement, between the Union and the East Bay Restaurant Association, is found at 21 of G.C. Exh. 9. According to Rudnick, none of Respondent's proposals incorporated such a listing, and while the specific listing was not addressed, the parties' discussion of the preamble language would have indicated that the dates were not meant to be included in a final agreement. He added, "I impressed upon the Union in the very beginning that we wanted to have an independent agreement that was separate and apart from the East Bay Restaurant Association. And prior amendments were ineffective towards this particular agreement." Turner testified that there just was no discussion of removing the amendment dates from the back page.

[28] Nevertheless, asked if she believed that the draft agreement was just one more amendment to a longstanding amended agreement, Turner responded in a manner suggesting what her intent was in drafting revised preamble language—"I felt that that's what we had agreed to at the bargaining table. And that's what I was trying to respect in the final document."

With regard to the listing of previous contract amendment dates, the record established that the practice of the Union and the East Bay Restaurant Association was to list these in the successor contracts' preamble and preceding the signature spaces at the end.

with the latter predominant in cases of equal length of service. In contast, the draft agreement language seems to imply that length of service may be disregarded—"I think that it says you look at the length of service . . . but then you can disregard [it] and [lay off] on ability to perform." However, during cross-examination, when asked if anything in the language of General Counsel's Exhibit 9 would prevent Respondent from considering ability when there is equal length of service in a layoff situation, Rudnick conceded, "[T]here's no prohibition of that." Turner stated that the Union accepted the exact language of proposal 4 and that what appears in the draft contract is the result of a typographical error.

As a final discrepancy between the draft contract and Respondent's final offer, Rudnick pointed to the employer contribution rate per employee to the contractual health and welfare plan as set forth in General Counsel Exhibit 9—$121.21 per month. In contrast, the rate, as set forth in Respondent's final proposal of August 6, was to be frozen at the then current level, which was $181 per month. The record establishes that the amount, set forth in the draft agreement, was identical to that set forth in the 1983–1986 East Bay Restaurant Association contract. Turner conceded that the figure in General Counsel's Exhibit 9 was wrong, asserting that the typist misunderstood what was meant by the instruction, "freeze current level," which language appears, on Joint Exhibit 3, the "Final Proposal." She further testified that the mediator explained what that language meant, and "I took it to be the 181 figure."

B. *Analysis*

Based on the allegations of the complaint and Respondent's answer, the initial issue for consideration is the matter of the Union's asserted acceptance of Respondent's August 6, 1986 "Final Proposal." At the outset, it is well-settled law that in deciding questions such as involved here, the Board need not adhere to the "technical rules of contract law" and that the rules "do not necessarily control the making of collective-bargaining agreements." *NLRB v. Donkin's Inn*, 532 F.2d 138, 141–142 (9th Cir. 1976); *Ben Franklin National Bank*, 278 NLRB 986 fn. 3 (1986); *Pepsi-Cola Bottling Co.*, 251 NLRB 187, 189 (1980). More pertinent to the issues here, a complete package proposal, which is made by one of the parties during collective bargaining, remains viable and, on acceptance in toto, must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn prior to such acceptance or "defeased" by an event on which the offer was expressly made contingent at a time prior to acceptance. *Ben Franklin National Bank*, supra at 992. In the instant matter, there is no dispute that Respondent's August 6, 1986 "Final Proposal" to the Union, although incorporating by reference an earlier proposal, was a complete package contract proposal and one capable of being accepted by the Union. Further, there is no record evidence of any condition precedent to eventual acceptance by the Union. Thus while Peggy Turner through the mediator on August 6 informed Respondent that the latter's offer would be presented to its bargaining unit employees for ratification, her testimony was uncontroverted that such a procedure was never a topic of discussion during the parties' contract negotiations. Accordingly, at all times material, it was within the province of the Union to either accept or reject the August 6 offer.

The General Counsel contends that subsequent to employee ratification of the final offer the Union expressed its acceptance by both Turner's September 21, 1986 letter (G.C. Exh. 5) and the cover letter (G.C. Exh. 10), which accompanied the purported draft agreement and whcih was delivered to Respondent by Joelan Diephius on December 1. Regarding to the September 21 letter, the credibility of Peggy Turner is at issue. Generally, her demeanor while testifying was that of an honest and forthright witness; she impressed me with her candor,[29] particularly regarding her lack of knowledge as to who typed (G.C. Exh. 9) the draft contract, and her authorship of the preamble language in the document. Accordingly, I credit her testimony that on September 21 she composed and typed the aforementioned contract acceptance letter to Respondent, addressed an envelope to Respondent's facility, placed the letter in the envelope, and left the envelope, with the enclosed acceptance letter, on the office postage meter machine, the normal place of deposit for outgoing mail.[30] Although she had no specific recollection of handling a letter addressed to Respondent on September 22, the Union's office clerical employee, Barbara Horton, testified most convincingly as to her normal and routine practice regarding the processing of outgoing mail. Given the undoubtedly large volume of mail that the Union sends each day, it is not surprising that 10 months later she could not recall one particular piece of mail. Notwithstanding my reservations stated during the hearing, there is absolutely no reason to believe that Respondent's letter was not processed in the standard way, and I am convinced that General Counsel's Exhibit 5 was, in fact, deposited in the United States mail by Horton while she was on her way home from work. As in *Ben Franklin National Bank*, supra, in which a union's acceptance of a contract offer became "operative" on the dispatch of a mailgram, notwithstanding that normal contract law rules are not controlling, I conclude that the Union's acceptance of the August 6 "Final Proposal" became operative when the foregoing letter was placed in the mail. Id. at 986 fn. 3; *General Asbestos & Rubber Division*, 183 NLRB 213, 218 (1970).[31]

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[29] I am mindful of inconsistencies and contradictions in her testimony, particularly with regard to the preparation of the draft contract. Nevertheless, her demeanor was that of a truthful witness, and I so find.

[30] Corroboration for the testimony of Turner comes from her subsequent withdrawal of the refusal to bargain in good faith unfair labor practice charge, then pending before the Board. Certainly, the only event that would have been the Union's acceptance of an offer, which she clearly found objectionable.

[31] I shall not speculate whether Alan Held actually received and read the acceptance letter. Suffice it to say, I was not at all impressed with his explanation for not acting to substantiate the "rumors" he admittedly heard regarding employee ratification of Respondent's offer. Contrary to Held's testimony, I believe it likely that Respondent was well aware of the Union's acceptance either from the September 21 letter or from employee statements. Such would more reasonably account for Held's admitted lack of interest in such an important matter during September and October 1986.

Because of the significant amounts of time consumed by litigation of the matters, the critical issue at this point is not whether Joelan Diephius, in fact, subsequently hand-delivered a draft contract, which embodied Respondent's final offer, to Respondent and, which event I find occurred,[32] or whether Respondent was thereafter obligated either to execute it or, at least, to assist in making necessary corrections, but rather whether the Union's stated acceptance is truly reflective of an agreement by the parties as to the exact terms and conditions of the final proposal. Thus, while acknowledging that the duty to bargain includes the obligation to execute or to assist in reducing an oral agreement to writing, the Board cautions that the "obligation, however, arises only after a meeting of the minds on all substantive issues has occurred." *Luther Manor Nursing Home*, 270 NLRB 949 fn. 1 (1984); *Automatic Plastic Molding Co.*, 234 NLRB 681, 682 (1978). Moreover, if, as argued by counsel for the General Counsel, the parties truly were in agreement as to all aspects of the August 6 final offer, Respondent's withdrawal of recognition from the Union as the bargaining representative of its cocktail waitresses, bartenders, and culinary employees on December 19 would not have been lawful; for "[O]nce final agreement on the substantive terms was reached, and regardless of the status of any written instrument incorporating that agreement, the Respondent was not free to refuse to bargain even if [the Union] had subsequently lost its majority status." *North Bros. Ford*, 220 NLRB 1021, 1022 (1975); *Belcon, Inc.*, 257 NLRB 1431 (1981); *Utility Tree Service*, 215 NLRB 806 (1974). Therefore, I now consider whether, in fact, a true agreement between the parties existed when the Union mailed its purported "acceptance" letter. At the outset, I note that the only objective evidence of an alleged meeting of the minds on the terms of Respondent's final offer is the purported memorialized version of its (G.C. Exh. 9). H. Sanford Rudnick,[33] Respondent's labor relations consultant and its representative during the contract negoitations, testified that the document differed from the terms of the final offer in, at least, six critically important areas. In considering the impact of the discrepancies on the parties' alleged meeting of the minds, I bear in mind the admonition of the Board that it is not the function or responsibility of the administrative law judge to conjure an agreement between the parties. *Interprint Co.*, 273 NLRB 1863, 1864 (1985).

The Board has long held that one party's "inadvertent errors" in a draft agreement or "some minor deviation" therein from proposals submitted by the other party are not indicative of any lack of agreement between the parties to collective bargaining. *Taylor Bus Services*, 284 NLRB 530 (1987); *Fashion Furniture Mfg.*, 279 NLRB 705 (1986); *Shawn's Launch Service*, 261 NLRB 836, 837 (1982); *Georgia Kraft Co.*, 258 NLRB 908, 912 (1981). On the other hand, when a draft contract contains discrepancies that "seriously [alter the] meaning" of a respondent's proposals or when discrepancies "may be traced to ambiguity for which neither party is to blame" or to "differences in the understanding of the parties," the Board will unhesitatingly find a lack of a meeting of the minds and, hence, no true agreement between the parties. *Automatic Plastic Molding Co.*, supra; *Oil Workers Local 7-507 (Capital Packaging Co.)*, 212 NLRB 98, 108 (1974). Analysis of the apparent discrepancies[34] discloses that two discrepancies constitute seemingly inadvertent errors of drafting—mistakes of the type not indicative of a lack of agreement. Thus, General Counsel's Exhibit 9 establishes

[32] Bearing in mind her testimonial contradictions, I credit the generally honest and forthright testimony of Peggy Turner regarding to the preparation of the original version of (G.C. Exh. 9) the draft agreement, and to her directions to Joelan Diephius on December 1 regarding the hand-delivery of it to Respondent. Likewise I credit the mutually corroborative testimony of Business Agents Diephius and Joe Regacho regarding the Union's staff meeting on the morning of December 1. Both impressed me as being honest witnesses and are credited herein. Further, I credit the testimony of Diephius regarding the delivery of an envelope, which contained a copy of the draft agreement and a cover letter, to Respondent's facility on that day, and the leaving of the envelope at the main desk. Regarding this, I note that counsel for Respondent did not contest the authenticity of Diephius' activity report sheet for December 1, 1986, a notation on which corroborates her delivery of the contract to Respondent's facility that afternoon. Finally, Respondent's witness, Leora Memory, who is in charge of the "main control" desk, did not deny the delivery of the contract. Rather, she could not recall any delivery that day other than the normal mail.

Although I believe, therefore, that Diephius delivered the draft agreement to Respondent's facility, I note Alan Held's denial of ever having seen G.C. Exh. 9 prior to the instant hearing. As with the September 21 letter, I shall not speculate whether he, in fact, saw it on delivery; nor shall I speculate about what may have occurred at Respondent's facility on December 1 to prevent Held from receiving the draft agreement. I must state, however, that given the alleged discrepancies that exist in the draft agreement, I can perceive of no reason for Sanford Rudnick to have lied to Turner by stating in his December 19 letter that Respondent never received the document. Clearly, as one apparently experienced in labor relations, Rudnick would have immediately recognized the implications of the asserted errors and would not have needed to resort to fabrication about receipt of the document.

[33] As with Peggy Turner, Rudnick's testimonial demeanor generally was that of an honest and forthright witness. I note, however, that the testimony of each was in conflict regarding alleged discrepancies between the draft contract and Respondent's final offer. In such instances, I have credited the testimony of one over the other based on analysis of whose testimony best comports with the record as a whole. It is, of course, not out of the ordinary—and, indeed, quite consistent with human judgment—to credit portions of a witness's testimony and not credit the remainder.

[34] Contrary to Respondent, I do not view the appearance of the word "bonus" in part (b) of the pension plan provision of G.C. Exh. 9 as a discrepancy from Respondent's final offer on that subject; for I do not believe that Rudnick ever advised Turner that the word "pension" shall be substituted for "bonus." Thus, I credit Turner that, during the August 4 bargaining session, Rudnick did not, either orally or by document, state that such a word substitution be made. Noting that the word "bonus" is clearly inconsistent with what comes before it, I found Turner's statement that she would have favored such a change convincing support for my belief that she would have noted the substitution if stated by Rudnick. Furthermore, Rudnick's testimony regarding what he did or said on this subject at that bargaining session was, at best, confused. Moreover, if Rudnick had instructed his secretary to type a revised proposal, which incorporated the word change and which was distributed to Respondent, one would expect that either Rudnick or Turner would have it. No such document was ever offered into the record, supporting my belief that it does not exist. Also, had the union representatives been advised of the word substitution, one would expect Turner to have noted it on G.C. Exh. 7, her copy of Respondent's proposal 4. No such change appears thereon, and I do not believe Turner was ever advised to do so. Accordingly, I believe that, however illogical it seems, Respondent's final offer contained the word "bonus," and that Rudnick never informed Turner that the word should be changed. Essentially, then, the draft contract contained the exact language proposed by Respondent, and if Rudnick meant to substitute "pension" for "bonus," he never so advised the Union.

Respondent's monthly contribution rate per employee to the health and welfare trust fund at $121.21 rather than the amount proposed on August 6—$181, the contribution rate in effect on that date. I credit Turner that she understood that the notation "freeze current level," which appears on the "Final Proposal," meant the $181 figure, and I find that the individual who typed the draft contract obviously misunderstood the language and mistakenly utilized the amount as set forth in the expired East Bay Restaurant Association agreement. Next, the error in the seniority language of General Counsel's Exhibit 9, in which two sentences of Respondent's proposal are combined into one with some language left out, appears to be a simple typing mistake. That is, the typist clearly left out an entire line of Respondent's proposal, not realizing the error inasmuch as the omitted line and the next one both began with the words "perform." Clearly, neither of the foregoing discrepancies bear on the matter of the parties' meeting of the minds, and I so conclude.

Turning to the remaining discrepancies, I am of the firm view that each represents a clear disagreement between the parties over the terms of Respondent's August 6 final proposal. Initially, as to the sentence of Respondent's final offer allegedly not included by the Union in the draft agreement's pension plan provision, "There will be no increase in pension contribution," I note that the sentence appears in Respondent's proposal 4, a document utilized by Turner in preparing the purported draft agreement. Analysis of the respective testimony of Rudnick and Turner on the issue of inclusion reveals profound disagreement. Thus, Rudnick testified that on July 29 he orally proposed that the sentence be included in Respondent's pension proposal and that he, at all times, meant that the above sentence be included in the final contractual pension language "because I didn't want the pension plan trustees to make any increases during the term of the contract." Turner, on the other hand, denied that Rudnick ever said that the disputed sentence should appear in the parties' contract and assertedly understood the sentence as meaning "that we would continue with the current language and current contribution rates." Turner further denied that Rudnick, in presenting Respondent's pension proposal, ever expressed a concern that the pension plan trustees would raise the employees' contribution rate during the contract's term. However, Turner did admit that Rudnick expressed such a concern with regard to potential health and welfare trust fund contribution increases and, believing it likely that Rudnick was similarly concerned with potential actions of the pension plan trustees, I believe Turner was not being entirely candid on this point and do not credit her denial in this regard or as to Rudnick's insistence on including the disputed sentence in the parties' contract. Further, I doubt her asserted understanding that the sentence merely redundantly restated that which preceded it within the pension proposal. Expanding on this dubious contention, counsel for the General Counsel argues that the disputed phrase was "simply instructional" and never intended by Respondent to be included in the contractual pension plan language. I find no merit to this contention. The sentence, in my view, refers not to the stated pension contribution rate, which according to the first sentence of Respondent's pension proposal, would remain unchanged, but to possible future rate increases by the pension plan trustees during the term of the contract. Further, based on Rudnick's credible testimony, the sentence was designed to alleviate his expressed concerned about such a contingency. Clearly, without the inclusion of this or similar language, it might well be successfully argued that the parties never intended to prohibit such future pension rate increases. Therefore, the disputed language appears to have been functional rather than "simply instructional." Nevertheless, counsel, citing *Trojan Steel Corp.*, 222 NLRB 478 (1976), echoing points made by Turner while testifying, argues further that Respondent's above concern was groundless as the draft agreement's pension plan provision specifically refers to the underlying declaration of trust which, it is argued, precludes rate increases not set forth in a collective-bargaining agreement. Counsel for Respondent argues, to the contrary, that the pension plan trustees are empowered to amend this provision and, on their own initiative, increase employer contribution rates beyond established contractual rates and that, therefore, the disputed sentence would protect against this. Turner testified that the trustees have never done so, and counsel for the General Counsel contends that the declaration of trust expressly limits the trustees' power to amend the agreement if such conflicts with the terms of collective-bargaining agreements. While noting on the merits of these opposing views, I need not decide which is the proper interpretation of th declaration of trust; for the disparate arguments conclusively establish the depth of the parties' disagreement over the necessity for the inclusion of the disputed sentence, and, in my view, it is not within the authority of or the function of an administrative law judge either to pass judgment on the rationale underlying Respondent's desire to include contractual language clearly designed to protect its interests or to, as counsel for the General Counsel would apparently have me do, rewrite Respondent's final offer by concluding that the proposed sentence is unnecessary or superfluous. Accordingly, based on consideration of the record as a whole, I conclude that Rudnick, on Respondent's behalf, not only orally specifically proposed the sentence "There will be no increases in pension contribution" as part of the August 6 final proposal on pension plan language but also, at all times, meant that the above-quoted words be included in the parties' final agreement on the provision. I have no doubt and further conclude that Peggy Turner misunderstood or ignored Respondent's desire to have the disputed sentence included in the final offer's pension plan language; either, at the most, ignored Respondent's desire to protect itself from increases in the pension contribution rate by the trustees or, at the least, mistakenly believed that the disputed sentence redundantly reinforced Respondent's proposals that the existing pension plan language and contribution rate remain unchanged; and acted under the assumption that, notwithstanding Rudnick's proposal to include the disputed sentence, such was unnecessary given the wording of the declara-

tion of trust and the trustees' past practice.[35] Accordingly, it cannot be said that the Union's stated acceptance reflected a true agreement—a meeting of the minds—on this aspect of Respondent's final proposal.

Perhaps even more compelling to my conclusion that no true agreement existed between the parties as to the terms of Respondent's final offer is that the East Bay Restuarant Association contractual amendment dates are set forth in the preamble language and at 21 of General Counsel's Exhibit 9, the draft contract. Initially, in this regard, I note that, in prior collective-bargaining agreements between the Union and the East Bay Restaurant Association, the contractual amendment dates were always set forth in the preamble language and immediately preceding the signature spaces; that throughout the instant negotiations for a successor agreement Respondent's preamble language proposals were consistent and unchanging—naming only itself and the Union as the contracting parties and containing no references to the prior Association contracts; that the preamble language was discussed in detail only on one occasion early during the bargaining; that the listing of the prior amendment dates preceding the signatures was not a subject of bargaining; and that Turner composed the preamble language of General Counsel's Exhibit 9, revising what had been Respondent's consistently proposed language. This latter point, I think, is of critical import and brings into question Turner's motivation in revising what was Respondent's clear final offer language. In this regard and as to including the Association contracts' amendment dates in the instant preamble language, Rudnick and Turner gave contradictory testimony. According to the former, he informed Turner that Respondent wanted an "independent" agreement without reference to the prior amendments applicable to the East Bay Restaurant Association, that such were "irrelevant" to the agreement between Respondent and the Union, and that Respondent did not wasn't Association contract past practices to have any precedential value for its contract with the Union. Turner denied that Rudnick wanted anything but the name East Bay Restaurant Association deleted from the preamble language, and stated that the preamble of the draft contract was consistent with what Respondent proposed. Inasmuch as, consistent with Rudnick's testimony, Respondent's preamble language proposals contained no references to the Association contract amendment dates and as she admitted that Rudnick stated he wanted an independent agreement, one not bound to agreements of the East Bay Restaurant Association, I credit the testimony of Rudnick on this point, believing that, at all times, Turner was aware that Respondent desired to have no mention of the East Bay Restaurant Association or of its prior contracts with the Union in the preamble language or anywhere else in the parties' agreement. Further, in stating that she believed the preamble language of General Counsel's Exhibit 9 to be consistent with the intent of Respondent's proposed preamble language, I find that Turner was decidedly disingenuous. Thus, when asked if she believed that the contract between Respondent and the Union was just one more amendment of a longstanding amended contract, Turner replied "that that's what I was trying to represent in the final document." Consistent with this admission and my perception of her as an experienced and knowledgeable union representative, I find that Turner must have been acutely aware that including the prior contractual amendment dates in the draft agreement would enhance her above-stated position and an argument that past practices under the Association contracts were, in fact, of precedential value, a matter about which, I have concluded, Respondent was quite concerned. Based on the foregoing, I find that the preamble language of the draft contract seriously altered the intent and meaning of Respondent's proposed language, was obviously calculated to suit the Union's purposes, and was not inadvertently inconsistent with what Respondent had proposed. In these circumstances, contrary to the argument of counsel for the General Counsel, I cannot conceive that Turner, acting on the Union's behalf, ever, in fact, acceded to Respondent's final offer on this issue, and clearly there was no agreement between the parties on contractual preamble language—despite the Union's stated acceptance of Respondent's final offer.[36] It necessarily follows, I further find, that the Union's listing of the Association contract amendment dates on 21 of the draft agreement likewise was a calculated act and is demonstrative of a lack of a meeting of the minds over their relevancy to a collective-bargaining agreement between only Respondent and the Union[37] and, therefore, over the terms of Respondent's final offer. The foregoing analysis of the parties' significant differences with regard to the disputed sentence of Respondent's proposed pension plan and the inclusion of the East Bay Restaurant contractual amendment dates in the preamble language and elsewhere in the draft agreement conclusively establishes, that, notwithstanding the Union's stated acceptance of the terms, the parties never reached a true agreement—reflective of a meeting of the minds—on the terms of Respondent's August 6 final proposal. Accordingly, Respondent was under no obligation—and com-

[35] Counsel for the General Counsel asserts that as Turner seemingly acquiesced at the hearing to the inclusion of the disputed sentence in the contract, I must find that the parties are in agreement on this issue. However, "the willingness of the union at the hearing to concede that certain [language] should have been included in the contract does not convince [me] that there was a meeting of the minds [at the time of the alleged agreement]." *Interprint Co.*, supra at 1864.

Further, while Turner may have informed the trust fund administrator that the parties' purported contract called for no pension contribution rate increase, such is reflective of no more than the fact that Respondent's final offer proposed the then-existing rate and does not relate to future rate increases.

[36] Contrary to counsel for the General Counsel, Rudnick conceded that the matter of the preamble was of "minor significance" only when compared with the problems with the pension plan. He adequately, in my view, expressed the seriousness of the draft agreement's discrepancy in terms of the precedential value inherent in past practices under the Association contract. Also, contrary to counsel for the General Counsel, Rudnick expressed no indecision as to whether he expressed these concerns to the Union. If he was uncertain of anything, such went to the particular bargaining session at which the subject was discussed.

[37] Although the particular subject of listing the amendment dates at the end of the contract was not discussed by the parties during negotiations, based on the testimony of Rudnick, who I credit on this point, he clearly expressed his opposition to the inclusion of the dates in the parties' contract when he and Turner discussed the preamble language.

mitted no violation of Section 8(a)(1) and (5) of the Act by refusing—to execute the draft contract, General Counsel's Exhibit 9. *Interprint Co.*, supra; *Automatic Plastic Molding Co.*, supra at 632; *OCAW Local 7-507*, supra.

Nineteen days after receiving the draft contract, Respondent withdrew recognition from the Union as the bargaining representative of its cocktail waitresses, bartenders, and culinary workers. According to the uncontroverted testimony of Alan Held, on December 15, he received a petition, bearing the signatures of 6 of the 11 individuals then employed in the bargaining unit, in which the signatories stated their desire to no longer be represented by the Union. Subsequently, on verifying the six signatures as those of the named employees, Respondent withdrew recognition from the Union on the basis of "objective evidence that your Union does not represent the majority of the employees." Board law in this area is straightforward and of longstanding validity. Thus, "the existence of a contract, gives rise to a presumption that the union was the majority representative when the contract was executed and through the life of the contract." *Petroleum Contractors*, 250 NLRB 604, 607 (1980). Following the expiration of the contract, here, this presumption continues, though rebuttable, and the burden of rebutting it rests with the Employer. To overcome the presumption, attack a union's majority status, and meet its burden of proof, the employer must establish, in a context free of unfair labor practices, either that the union no longer, in fact, enjoys majority status or that the employer has a reasonably based good-faith doubt as to the union's continued majority support. Further, petitions, such as that which was received by Respondent on December 15, 1986, may form the basis for either of the above assertions. *Century Papers*, 284 NLRB 1151 (1987); *Rockwood & Co.*, 281 NLRB 862 (1986); *Master Slack Corp.*, 271 NLRB 78, 84 (1984); *Guerdon Industries*, 218 NLRB 658 (1975). Here, Respondent, in its December 19, 1986 withdrawal of recognition letter to the Union, states as the basis for its conduct the Union's actual loss of majority status, as evidenced by te aforementioned petition. Counsel for the General Counsel has neither questioned the sufficiency of the petition nor offered any evidence that such was distributed in an atmosphere contaminated by unfair labor practices, and I find that, inasmuch as the petition was executed by more than half of the bargaining unit employees, Respondent has established that the Union, in fact, lost its majority status. *Master Slack Corp.*, supra. Accordingly, Respondent did not violate Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union as the bargaining representative for its cocktails waitresses, bartenders, and culinary workers.[38]

The remainder of the allegations of the complaint—that Respondent violated Section 8(a)(1) and (5) of the Act by directly dealing with the bargaining unit employees and, thereby, bypassing the Union; by implementing unilateral changes in the terms and conditions of employment of the employees; and by failing and refusing to provide information to the Union—are predicated on the Union's continued status as the bargaining representative of Respondent's cocktail waitresses, bartenders, and culinary workers. Inasmuch as the prior contract, to which Respondent and the Union were bound, had expired and as I have previously concluded that there was no meeting of the minds between the parties on the terms of a successor agreement, that Respondent was not obligated to execute the draft agreement, that the Union lost its majority status amongst the bargaining unit employees, and that Respondent lawfully withdrew recognition from the Union as the bargaining representative of the above employees, Respondent was no longer under any obligation to bargain with the Union. Accordingly, it did not engage in conduct violative of Section 8(a)(1) and (5) of the Act by no longer utilizing the Union's hiring hall, by soliciting the above employees to apply for coverage under a Respondent-sponsored health plan, by implementing changes in their working conditions, or by refusing to honor the Union's request for information as to bargaining unit employees.

CONCLUSIONS OF LAW

1. Respondent, Castro Village Bowl, is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2),(6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not estasblished that Respondent engaged in any unfair labor practices herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The complaint is dismissed.

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[38] Inasmuch as I have concluded that there was not a meeting of the minds regarding Respondent's August 6 final offer, no agreement was reached on the terms of a successor collective-bargaining agreement. Accordingly, the Board's decisions in *North Bros. Ford*, supra, and *Utility Tree Service*, supra, are, of course, not controlling.

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Southern Indian Health Council, Inc. *and* San Diego Medical and Office Employees Independent Union, Petitioner. Case 21–RC–18093

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Roberto G. Chavarry on November 25, 1987. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, this case was transferred to the National Labor Relations Board for decision. Thereafter, the Petitioner and the Employer filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error.

The Board has considered the entire record in this proceeding, including the Petitioner's and the Employer's briefs, and makes the following findings.

The Employer, a nonprofit California corporation, is a health care clinic operated by a consortium of seven Indian tribes. The Petitioner seeks to represent a unit including all professionals and nonprofessionals excluding managerial, guards, and supervisory personnel.[1] The Employer filed a motion to dismiss the petition on the basis that it is exempt from coverage under the Act as a governmental entity.

The Employer provides health services for its members and the Indian community in south San Diego County. It receives funding from the Federal Indian Health Service under Public Law 93–638, the Indian Self-Determination Act. It annually purchases goods valued in excess of $50,000 directly from outside the State of California and it grosses revenues in excess of $1 million.

Membership in the corporation is limited to federally recognized Indian tribes in San Diego County. The governing body of each of the seven member tribes appoints one director and one alternate to the board of directors. Directors must be members of a federally recognized tribe in San Diego County. Once appointed, a director can be removed at any time by the tribe that appointed him or her.

The board of directors is the governing body of the Employer. It elects a chairman who has general supervision, direction, and control of the business and affairs of the Employer. The board of directors also hires a program director, who controls day-to-day operations. The current acting program director does not belong to any of the seven member tribes.[2]

The board of directors' personnel committee has the power to review employment policies and approve the hiring or termination of certain individuals. The board of directors, as the policymaking body of the Employer, has adopted certain employment policies concerning hiring, promotions, grievances, discipline, terminations, pay, and benefits, which appear in the program administration manual. The grievance procedure makes the board of directors the ultimate arbiter of discipline, termination, and other employment disputes. The board of directors also sets the Employer's salary schedule, pursuant to the Federal general schedule. The board of directors has a policy of giving preference in hiring to Indians, and most of the 31 nonprofessional employees are Indians.

The Employer has all its facilities on the Barona Indian Reservation in San Diego County. The Barona Tribe is one of the members of the consortium. The stated purposes of the Employer are to promote and improve Indian health through a comprehensive health care system provided to members of consortium tribes and other eligible Indians in its service area, to improve environmental health and sanitation conditions on the reservations, and to provide public health services and education to the reservations and the Indian community.

The Employer contends that it is exempt from coverage under the Act because it is controlled by Indian tribes, operates on an Indian reservation, and provides governmental services to tribal members and the Indian community. The Employer states that the result in this case is controlled by *Fort Apache Timber Co.*, 226 NLRB 503 (1976), in which the Board declined to assert jurisdiction over an enterprise owned and entirely controlled by an Indian tribe.

The Petitioner contends that the Employer is not a tribal government entity and thus is under the coverage of the Act. In support of its argument, the Petitioner states that unlike the circumstances in *Fort Apache*, where employees were on the tribe's payroll and the tribe established all working conditions, here the Employer has a separate pay-

[1] The parties stipulated that professionals will be allowed to vote for inclusion or exclusion in the overall unit, in the event an election is directed.

[2] The program director, at times in conjunction with the department heads, is responsible for hiring nonprofessional staff, granting overtime and annual leave, evaluating employees, disciplining employees, and terminating clinical support staff.

roll from the tribes, and working conditions are set by the program director and the department heads, who are not members of the seven consortium tribes. The Petitioner further argues that article 4, section 6.04 of the Employer's bylaws, which sets forth the qualifications for the board of directors, does not state that a board member must be a member of one of the seven consortium tribes, but states only that a board member must be a member of a federally recognized tribe in San Diego County. Thus, the Petitioner contends that it is conceivable that the board of directors could consist of individuals who do not have a direct interest in the Employer, and that, therefore, the Employer may not necessarily be controlled by tribal entities.

The Petitioner further argues that *Devils Lake Sioux Mfg. Corp.*, 243 NLRB 163 (1979), is controlling here. In that case, a tribal council owned 51 percent of the employer, a manufacturing corporation, and Brunswick Corporation owned 49 percent. The Board concluded that it could assert jurisdiction over the employer because, even though the tribal council owned a majority of the stock, Brunswick controlled the corporation, especially with regard to labor relations policies; thus, the corporation was not a wholly owned tribal enterprise that was completely controlled by the tribal council.

We agree with the Employer that the result in this case is controlled by *Fort Apache*, and that the Employer is exempt from coverage under the Act. In *Fort Apache*, the employer was wholly owned and completely directed by a tribal council. All the employees were paid by and worked for the tribe, not the employer, and the tribal council completely controlled the employer's operations and labor policies, although contracting out with an individual person for management services to run the company. The employer operated on the tribe's reservation.

In the instant case, the only members of the Employer are federally recognized Indian tribes, and the directors of the Employer are directly appointed by, and subject to removal by, the governing bodies of the member tribes. Further, the board of directors sets and controls the labor policies of the Employer, and is the final arbiter of discipline and termination issues. Although the Petitioner contends that the Employer's program director and department heads set working conditions, we find that it is the board of directors that establishes and controls significant employment policies. We also note that although the program director controls day-to-day operations, in *Fort Apache* the tribal council contracted out to a private individual to run the company's daily affairs. Further, although the Petitioner argues that this case differs from *Fort Apache* in that here the Employer has a separate payroll from the tribes, we do not find this to be a significant difference because the Employer here is still controlled by tribal entities.

In response to the Petitioner's argument that article 4, section 6.04, of the Employer's bylaws does not require that a member of the board of directors be a member of one of the seven consortium tribes, we note that it is the seven consortium tribes that have the power to appoint and to remove the directors and, therefore, we find that the tribal entities have ultimate control over the Employer. Finally, we note that this case is distinguishable from *Devils Lake* because in that case officials of a private corporation comprised a majority of the board of directors and controlled the company at issue, especially with regard to labor relations policies, whereas here the Employer's policies are controlled by the seven member tribes, who also control the board of directors.

In *Fort Apache*, the Board found that a tribal council is a "government," and thus that an entity administered by individuals directly responsible to a tribal council is exempt from the Act as a "governmental entity." In the instant case we similarly conclude that the seven-member consortium of tribes, and its enterprise on the reservation that is here asserted to be an employer, are implicitly exempt as governmental entities within the meaning of the Act. *Fort Apache*, 226 NLRB at 506 fn. 22. Accordingly, we grant the Employer's motion and shall dismiss the petition.

ORDER

The petition is dismissed.

York International Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local No. 1872. Case 4–CA–15760

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

Upon a charge filed by the Union, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local No. 1872, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing alleging that York International Corporation, the Respondent, has violated Section 8(a)(5) and (1) of the Act.

The Respondent filed an answer and the Regional Director issued an order postponing hearing indefinitely. Subsequently, the Union, the Respondent, and the General Counsel entered into a stipulation of facts in which they, inter alia, waived a hearing and indicated their desire to transfer this proceeding directly to the Board for findings of facts, conclusions of law, and issuance of an order. On June 4, 1987, the Board, through the Deputy Executive Secretary, issued an Order approving stipulation and transferring proceedings to the Board. Thereafter the parties submitted briefs in support of their positions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, engages in the manufacture, sale, and distribution of air-conditioning equipment at various plants and facilities throughout the United States, including plants in the York, Pennsylvania area, where it annually ships goods valued over $50,000 directly outside the State. The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges and the Respondent admits that the Union, International Union Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local No. 1872, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Reuben R. Barker Sr. was employed as a production employee by the Respondent and was a member of the bargaining unit covered by the collective-bargaining agreement between the Union and the Respondent. In September 1984, Barker was suspended for violation of the Respondent's rules.[1] On September 28, 1984, Barker was terminated after a discharge hearing. On October 3, 1984, Barker filed two grievances over his termination under the then applicable collective-bargaining agreement. The first, Grievance 84–683, alleged that Barker had been unjustly discharged. The second, Grievance 84–685, claimed that the Respondent had allowed various discriminatory practices to continue. Union representative Haven May filed a third grievance, No. 84–689, on October 8, 1984. It alleged that Barker's termination letter was inadequate because it did not state with specificity the reasons for Barker's termination. A fourth grievance, No. 84–681, was filed by employee James T. Hardy Jr. and alleged that Hardy had been reprimanded twice for the same rule infraction.[2]

On October 15, 1984, Barker filed a complaint with the Pennsylvania Human Relations Commission (PHRC) alleging that he had been suspended and discharged because of his race and national origin. On January 22, 1986, Barker amended the PHRC complaint to allege that he had been suspended and discharged also because of his age. On September 28, 1985, Barker, through private legal counsel, filed a complaint in the United States District Court for the Middle District of Pennsylvania. The complaint alleged that Barker had been suspended and discharged on the basis of his race, age, and national origin, in breach of his employment contract, and in violation of Title VII of the Civil Rights Act of 1964. The complaint also alleged that Barker's suspension and discharge were outrageous, defamatory, and libelous and caused him emotional distress.

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[1] Barker alleges he was discharged for various discriminatory reasons (see infra) and the Respondent alleges he was discharged for threatening to shoot a fellow employee, having a handgun on the Respondent's premises, and falsifying his employment application by failing to list his last employer.

In reaching our decision in this case, we have considered only the evidence contained in the stipulated record. Accordingly, we grant the General Counsel's motion to strike a portion of the Respondent's brief.

[2] Hardy allegedly made a "false, vicious or malicious statement" about Barker.

During March 1986, Barker and his legal counsel held settlement discussions with the Respondent.[3] On March 19, 1986, Barker, his attorney, and the Respondent executed a settlement agreement by which Barker, inter alia, agreed to waive and release all claims he had filed surrounding his termination (including the grievances). Paragraph 10 of the agreement also requires Barker to keep the terms of the agreement confidential.

Arbitration of Barker's grievances was scheduled for March 19, 1986. At the arbitration hearing, immediately before the hearing was opened by the arbitrator, Barker and his attorney informed the Union and the arbitrator that they had resolved all of Barker's pending claims with the Respondent to Barker's satisfaction and, in view of that fact, Barker wished to withdraw the grievances.

The Union requested disclosure of the terms of the settlement agreement, but Barker and the Respondent refused, citing the confidentiality provisions of the agreement.[4] The Union requested the arbitrator to require the Respondent to disclose the terms of the agreement, and on April 18, 1986, the Union filed the charge that resulted in the instant complaint. Subsequently, the arbitrator ruled he did not have the authority to require disclosure.[5] On or about September 11, 1986, the Respondent revealed all the terms of the settlement agreement with the exception of the monetary amount paid Barker and the provision dealing with the type of employment recommendations the Respondent would give Barker. The Union maintained that this disclosure did not satisfy its request for information and the instant complaint issued on September 30, 1986.

Initially, we must determine whether the requested information is presumptively relevant. Certain types of information (e.g., wages of bargaining unit members) are deemed "so intrinsic to the core of the employer-employee relationship that the information is considered presumptively relevant."[6] In such cases the employer has the burden of showing a lack of relevance, or otherwise must justify its refusal to provide the information. The Union, however, must demonstrate the relevance of information, which is not so obviously related to its performance as a bargaining representative, but which allegedly has become so owing to unusual circumstances.[7]

We do not view the information requested in this case (i.e., the monetary amount and type of employment references given a former bargaining unit member as part of a settlement agreement of various claims including a state administrative complaint and a Federal district court complaint) as being so obviously related to the Union's duty as bargaining representative that it justifies a finding of presumptive relevance.[8] Thus, the General Counsel has the burden of establishing the information's relevance.

The standard for determining the relevancy of the requested information "is a liberal, discovery type test whether the information bears on the union's determination to file a grievance or is helpful in evaluating the merits of the grievance and the propriety of pursuing the grievance to arbitration."[9] Further, we need only find a "probability that the desired information is relevant . . . and that it would be of use to the union in carrying out its statutory duties and responsibilities."[10]

In attempting to establish the relevancy of the requested information, the General Counsel and the Union essentially make two arguments. First, they state that the information is relevant to determining whether the Union should prosecute the grievances. They, of course, make no claim that information about the settlement terms in issue here has any bearing on the merits of the grievances. Thus, even granting that the Union may have an interest in obtaining an arbitral ruling on the substantive and procedural propriety, under the contract, of the Respondent's discharge of Barker, the information at issue here will in no way assist the Union in determining how it might fare before the arbitrator on that question. The General Counsel and the Union argue, rather, that the Union cannot properly decide whether to pursue the grievance on Barker's behalf unless it knows whether the Respondent has already offered him a fair settlement. The problem here, however, is that, as already noted (fn. 3, supra), so far as the record shows, the Union made no objection to the initiation of private settlement discussions between Barker, his attorney, and the Respondent in which the contractual grievances

[3] We are not here presented with the issue of whether the Union was unlawfully excluded from the settlement discussions, or any issue of direct dealing. The stipulations do not show that the Union raised any objection to the conduct of the private settlement discussions. Cf. *Postal Service*, 281 NLRB 1013 (1986), in which the Board held that a respondent violates Sec. 8(a)(5) and (1) of the Act by not affording the Union an opportunity to be present at the contractual grievance adjustments as required by Sec. 9(a) of the Act.

[4] The Union also claimed that Barker could not withdraw the grievances.

[5] The arbitrator also ruled that the Union had the right to pursue Barker's grievances and that Barker had the right to withdraw from the process.

[6] *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977).

[7] *Southwestern Bell Telephone Co.*, 173 NLRB 172 (1968).

[8] Assuming arguendo that the requested information is presumptively relevant, we would reach the same result in this case by finding that the Respondent has rebutted the presumption.

[9] *United Technologies Corp.*, 274 NLRB 504, 506 (1985).

[10] See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

could be coupled with Barker's numerous other noncontractual claims—including ones that had already become the subject of court litigation. It could also have been reasonably anticipated that all the claims might be resolved. Those settlement discussions in fact produced a settlement that satisfied Barker, so the Union's real claim as to a continuing interest in how the Barker grievances were settled consists of the impact on the remaining bargaining unit employees of a decision not to pursue those grievances further in the face of the settlement.

That potential impact essentially forms the basis for the second relevancy argument advanced by the General Counsel and the Union. They contend that the settlement may set a precedent for future grievance settlements. The stipulated record in this case shows, however, that in addition to the two contractual grievances filed by Barker, he also filed a Federal district court complaint alleging constitutional, statutory, and common law violations, and a state administrative complaint alleging discrimination based on race, national origin, and age. These multiple claims, involving as they do different forums and divergent issues, preclude a determination of which portion of the monetary settlement, if any, pertains to the contractual grievances and which does not. Thus, the amount of the monetary settlement is of little precedential value to the Union in processing future grievances. As for the term of the settlement agreement dealing with employment references, it is apparent that this is a response to the allegation in the Federal court complaint that the Respondent gave Barker adverse and false employment references, a matter not within the purview of the filed grievances. Consequently, the circumstances of this case are unique, and thus make the requested information insignificant for purposes of future grievance settlements. Therefore, requiring the Respondent to disclose the requested information does not enhance the Union's ability to represent the employees in future grievance settlement negotiations.[11]

Thus, although we need only find a "probability that the desired information was relevant . . . and that it would be of use to the union in carrying out its statutory duties and responsibilities,"[12] we do not reach such a conclusion on the facts of this case.[13]

Accordingly, we grant the Respondent's motion and dismiss the complaint.[14]

ORDER

The complaint is dismissed.

MEMBER BABSON, dissenting.

I cannot agree with my colleagues that the Respondent lawfully refused to furnish the Union with the complete terms of an agreement that purported to resolve two grievances under the parties' collective-bargaining agreement. I would find that the information sought by the Union, the clauses relating to the monetary settlement and future employment references, is presumptively relevant and that the Respondent has failed to rebut that presumption. Further, even if it can be said that the information is not presumptively relevant, I would find that the General Counsel has established the relevancy of the information sought in this case.

[11] Cf. *Columbus Products Co.*, 259 NLRB 220 (1981) (disclosure of information not required when it added "nothing to the union's ability to evaluate the grievances or intelligently pursue it"); *American Standard*, 203 NLRB 1132, 1133 (1973) (information of "such picayune significance that there is no basis whatever for concluding that failure to supply it would impede the [u]nion in its proper functioning or that its possession might enable the [u]nion to represent the employees more effectively," need not be disclosed.

[12] See *Acme Industrial Co.*, supra, 385 U.S. at 437.

[13] Because we have found that the requested information is not relevant, we find it unnecessary to address the Respondent's confidentiality and deferral defenses.

[14] In taking issue with us on the merits of this case, the dissent posits that, because the resolution of contractual grievances is "intrinsic to the core of the employer-employee relationship," the information sought is presumptively relevant. However pertinent that observation is in cases limited solely to contractual grievances, we do not find it apt in this one. Here, we are not concerned with the resolution of a contractual grievance so much as we are with a private settlement that has been reached on matters some of which are related to the subject of the grievances filed and some of which are not. Given that mixture, as we have explained above, the terms of the settlement throw no appreciable light either on whether Barker received fair compensation for his contractual claims (and thus on whether the Union should pursue the grievance because of inadequate compensation) or on what position the Union should take on similar contractual grievances in the future. That the parties have not apportioned among the numerous claims the monetary amount of the settlement does not lessen the validity of our conclusion that the employment reference provision of the settlement is in response to the Federal court complaint. That conclusion reasonably flows from the fact that the employment reference provision addresses an allegation made only in the Federal district court complaint and not in the grievances. Moreover, the amount of the settlement, apportioned or not, and the provision relating to future employment references for Barker, have no bearing, other than tangentially, on the merits of the grievances—which, we are constrained to note, will not likely be decided to the Union's satisfaction without Barker's further participation. This last notation is of interest to the issue of presumptive relevance; for without Barker's cooperation, the information sought, even if provided, is unlikely to resolve the grievances or add to their resolution.

Regarding the dissent's assertion that the requested information is relevant even in the absence of the presumption, we note that in such circumstances it is the union's burden to establish the relevance of the requested information. In this regard, unlike the union in *East Dayton Tool & Die Co.*, 239 NLRB 141 (1978), the Union here has not "expressed concern that it may be required to defend against a charge of unlawful discrimination based on alleged acquiescence in the Respondent's hiring practices. . . .' Essentially, this aspect of the dissent's argument states that the requested information is relevant because the Union must assess the settlement's fairness. As previously stated, there is no indication before us that the Union objected to the settlement negotiations. In any event, we fail to perceive the relationship between the requested information and a possible breach of fair representation claim, especially in light of Baker's approval of the settlement agreement.

The information sought is presumptively relevant because it concerns the settlement of contractual grievances that purportedly arose under the bargaining agreement in effect between the Union and the Respondent.[1] The resolution of contractual grievances is "intrinsic to the core of the employer-employee relationship"[2] and is of vital concern to the parties that *negotiated* that agreement and are responsible for its administration. To hold that the Union is not entitled to this information is particularly inexplicable, inasmuch as an arbitrator already has ruled that the Union has the absolute right to pursue the grievances notwithstanding Barker's settlement.[3] For the Board to permit the Respondent to withhold from the Union information the Union needs to make an informed decision concerning its further obligations respecting the grievances undermines the Union's ability to intelligently administer the grievance provisions of the collective-bargaining agreement.[4]

Furthermore, the majority's decision understates the practical reality that the settlement of Barker's grievances may serve as precedent to the settlement of future grievances. Settlements of grievances regarding discharge often involve monetary payments and provisions relating to future employment references. Although Barker agreed to keep the terms of the settlement confidential, the Respondent has *not*, and there appears to be no reason why it cannot use this settlement to its advantage in the future.[5] Although the settlement agreement encompasses several of Barker's claims, contractual and otherwise, this fact goes to show much weight the parties will give the settlement as precedent in future negotiations. In this regard, the majority inappropriately equates the "relevance" of the information to the "importance" of the information and, because the majority concludes that the information is of "picayune" and "insignificant" importance, finds that it is not relevant and the Union is not entitled to it.

Even if the information sought by the Union were not presumptively relevant, I would conclude that the Union has established the relevancy of the information in this case. In *East Dayton Tool & Die Co.*, 239 NLRB 141, 142 (1978), the Board stated that:

> [T]he [u]nion's expressed concern that it may be required to defend against a charge of unlawful discrimination based on alleged acquiescence in [a r]espondent's hiring practices is not inconsistent with its representative function.

This concern implicity supported our conclusion in that case that the information sought was relevant. See also *Westinghouse Electric Corp.*, 239 NLRB 106 (1978), enfd. in relevant part 648 F.2d 18 (D.C. Cir. 1980). The rationale and logic of *East Dayton Tool* is applicable here.[6] The bargaining agreement between the Respondent and the Union contains a nondiscrimination clause, and Barker's grievances allege that the Respondent has engaged in discriminatory employment practices. Although Barker has settled his claims against the Respondent, Barker did not waive any claim he may have against the Union if he can establish that the Union violated its duty of fair representation.[7] Thus, the Union has the right to review the terms of the settlement agreement in this case to enable it to satisfy its statutory obligation to fairly represent Barker.

As I conclude that the information sought by the Union is both presumptively relevant and relevant to the facts presented in this case, I would find that the Respondent violated the Act when it refused to furnish the Union with the complete terms of the settlement agreement.

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[1] Although the majority contends that this case is "not concerned with the resolution of a contractual grievance so much as . . . a private settlement" of a variety of causes in several forums, which is hardly an unusual phenomenon these days, the practical reality is that this settlement nonetheless affects the Union's ability to pursue grievances filed under the contract. When contractual grievances are involved, the union has a responsibility to exercise its judgment respecting pursuit of those grievances and a continuing obligation to the unit employees to administer the contract. Moreover, whether the light shed by the information requested is "appreciable" is, under the circumstances, a judgment better made by the Union than by the Board. It is apparent here that the Union preferred "some light" to none at all.

[2] *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977).

[3] I note that the majority does not rely on the Respondent's asserted defenses that the information is confidential or that the Board should defer this case to arbitration. In this regard, I would find those defenses to be without merit. I also would find that the Union has not waived its right to the information.

[4] In this regard, the majority errs when it asserts that it is "apparent" that the clause in the settlement agreement relating to future employment references is in "response" to Barker's Federal court complaint and thus this information, impliedly, would be of no use to the Union. Because the parties were unwilling or unable to apportion the settlement terms among Barker's claims, the Board has no basis for assuming that the employment reference clause relates solely to Barker's lawsuit rather than his grievances. The Board should not apportion the settlement agreement when the parties have not seen fit to do so.

[5] See *Culinary Workers Local 226 (Caesars Palace)*, 281 NLRB 284 (1986) (in which the Board found that the union violated the Act by refusing to turn over to the employer copies of unpublished arbitration decisions because those decisions could serve as precedent in future arbitrations).

[6] Both the General Counsel and the Union contend that the information is relevant to determining whether the Union should proceed with processing these grievances. That decision can only be made after reviewing the settlement agreement between Barker and the Employer in light of various factors, including the Union's continuing legal obligation to Barker.

[7] Barker's settlement with the Employer obviously does not affect any claims he may have against the Union.

Host International, Inc., a wholly-owned subsidiary of Marriott Corporation *and* Virgilio Rizzo. Case 29–CA–11748

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On September 25, 1986, Administrative Law Judge Winifred D. Morio issued the attached decision. The Respondent filed exceptions, a supporting brief, and a motion for oral argument. The General Counsel filed cross-exceptions and a supporting and answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, briefs, and motion[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.[3]

We agree with the judge's finding that the Respondent violated Section 8(a)(1) and (4) of the Act by refusing to hire Virgilio Rizzo and Joseph Sarubbi in 1985, when it took over the operations of Gladieux Corporation at JFK Airport where they were working. We do not agree with the judge, however, that we should set aside the settlement agreement resolving earlier unfair labor practice charges filed by Rizzo and Sarubbi against the Respondent concerning their 1981 discharges from the Respondent's operations at La Guardia Airport. Although the Regional Director could have vacated the settlement agreement because of the later independent unfair labor practices alleged in the complaint here and consolidated both cases for hearing,[4] that is not what he did. Rather, the Regional Director issued a complaint in this case that merely referred to the Respondent's earlier conduct as background for the 8(a)(4) allegations here, and the General Counsel stated a similar position when presenting evidence about the 1981 events at the hearing. As the Respondent had no notice that it might be held accountable for any illegality connected with these earlier discharges, we find no violation of the Act based on the 1981 discharges of Rizzo and Sarubbi.[5] We shall modify the recommended Order, conclusions of law, and remedy accordingly.

Even though we are not setting aside the settlement agreement in the earlier case, we agree with the judge that the Respondent's presettlement conduct may properly be considered as background evidence to establish the motive for the Respondent's postsettlement conduct in this case.[6] Thus, although the 1981 discharges of Rizzo and Sarubbi cannot be made the basis of a remedial order because of the settlement, the events surrounding those discharges can be used to shed light on the Respondent's reasons for refusing to hire them in 1985.[7] We also agree with the judge's finding that the Respondent's refusal to hire Rizzo and Sarubbi in 1985 was not simply the natural result of their original discharges, but rather was a new and independent act of discrimination that occurred after the settlement and, therefore, could be litigated.[8]

Further, we agree with the judge that the facts here do not establish either that Rizzo and Sarubbi waived all rights to future employment with the Respondent during negotiations for a settlement in the earlier case or that the Respondent relied on a mistaken understanding of their waiver when it refused to hire them later. We note that, even if the evidence did show Rizzo and Sarubbi had agreed to such a waiver, we cannot conclude the parties intended the waiver to cover a situation where Rizzo and Sarubbi did not approach the Respondent for employment but rather the Respondent took over another business where they had found jobs. Clearly, this unusual course of events would not normally be within the parties' contemplation when they agreed to such a waiver.

Finally, we agree with the judge that the Respondent refused to hire Rizzo and Sarubbi in 1985, not because they had previously been terminated for cause, but rather because of Rizzo's protected

[1] The Respondent's motion for oral argument is denied as the record and the briefs adequately present the issues and the positions of the parties.

[2] In sec. D, par. 2, of the "Discussion" portion of her decision, the judge incorrectly stated that the decision not to hire Rizzo and Sarubbi was made in March 1983 rather than in March 1985. We, therefore, correct this inadvertent error.

[3] The General Counsel has requested us to include a visitatorial clause in the Order that would authorize the Board to obtain discovery from the Respondent under the Federal Rules of Civil Procedure in order to monitor the Respondent's compliance with this Order. We find it unnecessary to include such a clause in the Order in this case. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988). Accordingly, we deny the General Counsel's request.

[4] See, e.g., *Norris Concrete Materials*, 282 NLRB 289 (1986).

[5] Because we are reversing the judge's finding of violations as to the 1981 discharges, we find it unnecessary to pass on whether deferral to the arbitration awards concerning these 1981 discharges would be warranted. Deferral to the prior arbitration awards would not be warranted as to the 1985 refusal to hire, of course, because those events occurred after the awards issued and thus the arbitrator could not have considered them in making his awards. *Litton Systems*, 283 NLRB 973 (1987).

[6] *Universal Textured Yarns*, 203 NLRB 713, 717 (1973), and *Steves Sash & Door Co.*, 164 NLRB 468, 476 (1967), enfd. in relevant part 401 F.2d 676, 678 (5th Cir. 1968). See also *Gulf States Mfrs. v. NLRB*, 598 F.2d 896, 905 at fn. 14 (5th Cir. 1979).

[7] *Steves Sash & Door Co.*, supra at 476.

[8] In adopting this finding, however, we do not rely on the judge's discussion of *Leeward Nursing Home*, 278 NLRB 1058 (1986), and *Ventura Coastal Corp.*, 264 NLRB 291 (1982).

concerted activity in filing a lawsuit against the Respondent in 1981 with other employees and because Rizzo and Sarubbi had filed charges with the Board about their 1981 discharges. We find, based on the following facts, that the Respondent's stated reason for refusing to hire Rizzo and Sarubbi was merely a pretext.

The Respondent's general manager at JFK Airport, Robert Kouba, testified that he made the decision whether to hire the former Gladieux employees during the Respondent's takeover of Gladieux operations at JFK. Kouba testified that the reason Rizzo and Sarubbi were not hired was that they had previously been terminated for cause by the Respondent;[9] however, their termination letters do not mention this reason and the supervisor who gave Sarubbi his letter also did not rely on this reason when questioned. Although Kouba testified that the Respondent had a policy against hiring employees who had been terminated for cause, there is no record evidence of any written statement of this policy. Further, the record shows that the Respondent rehired three employees at JFK Airport in 1982 and 1983 who had been discharged by the Respondent for failure to collect money and ring up sales, and that it retained Gladieux employee Gladys Alvarez in the 1985 takeover despite her 1983 discharge by Gladieux for failure to ring up sales and her continued cash-handling violations in 1984 after she was rehired by Gladieux. Finally, Kouba testified initially that, in making the decision whether to hire the former Gladieux employees, he only looked at the employees' personnel records at Gladieux and their 1985 applications for employment with the Respondent. However, these records do not reveal that Rizzo and Sarubbi were ever terminated for cause.

Clearly, the reason given at the hearing in this case was not the Respondent's real reason for refusing to hire Rizzo and Sarubbi during the 1985 takeover. We do, however, have some direct evidence of the Respondent's real motive. Thus, Gladieux Supervisor Kowalsky testified that at a management meeting on March 22, 1985, the day before the official takeover and about 1 week after Rizzo and Sarubbi got their termination letters, Respondent Director of Security Christie told him that "Sarubbi was tied in with 'The Magnificent Seven'" and that the Respondent had "no use for these people because they were troublemakers." It is undisputed that "The Magnificent Seven" was a name commonly used by management to refer to the civil lawsuit concerning working conditions that was filed against the Respondent in 1981 by seven employees working at the Respondent's La Guardia Airport operations. Although Rizzo was one of the named plaintiffs in this lawsuit, Sarubbi was not involved in it. The uncontradicted record evidence shows, however, that several of the Respondent's supervisors told employees in 1981 that Christie wanted to get rid of Rizzo and the other employees who filed the lawsuit and that Christie planned to fire Sarubbi, who was not involved in the lawsuit, to make the other discharges look legitimate.[10] Rizzo and Sarubbi were discharged by the Respondent in 1981 and filed Board charges about their terminations.

We also have other evidence from which we can infer the Respondent's real motive in refusing to hire Rizzo and Sarubbi during the 1985 takeover. Thus, Respondent General Manager Kouba, who made the decision not to hire Rizzo and Sarubbi, admitted that he had heard about the lawsuit and the Board charges at La Guardia Airport around the time they were filed and that he had become familiar with Rizzo's and Sarubbi's names when they were still working at La Guardia. Kouba testified further that in early 1985, before he began screening the Gladieux employees for hire, Christie brought it to his attention that Rizzo and Sarubbi were working for Gladieux at JFK. Kouba also admitted that Christie may have told him at that time that Rizzo and Sarubbi were the ones who had filed Board charges and the lawsuit at La Guardia. Finally, although Kouba stated he made the final decision on whether to hire the Gladieux employees, he testified that he consulted with labor relations officials at the Respondent's headquarters in California before he made the decision not to hire Rizzo and Sarubbi; Kouba did not explain why this was necessary.[11]

We conclude, in agreement with the judge, that the Respondent's real motive in refusing to hire Rizzo and Sarubbi was to retaliate against their previous protected concerted activities in filing a lawsuit and their filing of Board charges. Therefore, we find that by refusing to hire Rizzo and Sarubbi in 1985 the Respondent violated Section 8(a)(1) and (4) of the Act.

[9] In his testimony, Kouba did not mention their supposed waiver of future employment rights as playing any part in his decision not to hire Rizzo and Sarubbi. Moreover, the record does not reveal that Kouba even knew their Board charges had been settled, much less the terms of that settlement.

[10] Christie was a named defendant, along with the Respondent, in the lawsuit.

[11] All these findings about the Respondent's real motive in refusing to hire Rizzo and Sarubbi are based on admissions by Respondent Officials Kouba and Christie that are uncontradicted. In light of this evidence supporting a violation, we find it unnecessary to pass on whether the Respondent and Gladieux were joint employers during the several months just before the official takeover on March 23, 1985, or whether the Gladieux supervisors were agents of the Respondent during that period.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 2.

"2. By refusing to hire former Gladieux employees Virgilio Rizzo and Joseph Sarubbi in March 1985 because of their protected concerted activities and filing of Board charges, the Respondent violated Section 8(a)(1) and (4) of the Act."

AMENDED REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (4) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having refused to hire two employees in violation of Section 8(a)(1) and (4), it must offer them employment as bartenders or other equivalent positions and make them whole for any loss of earnings and other benefits resulting from its refusal to hire them, computed on a quarterly basis from the date of the refusal to hire to the date of a proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*.[12]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Host International, Inc., a wholly-owned subsidiary of Marriott Corporation, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Refusing to hire Virgilio Rizzo and Joseph Sarubbi because of their protected concerted activities and filing of charges with the Board."

2. Substitute the following for paragraph 2(b).

"(b) Remove from its files any reference to the unlawful refusals to hire and notify the employees in writing that this has been done and that the refusals to hire will not be used against them in any way."

3. Substitute the attached notice for that of the administrative law judge.

[12] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to hire Virgilio Rizzo and Joseph Sarubbi because of their protected concerted activities and filing of charges with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Virgilio Rizzo and Joseph Sarubbi employment at our facility at the JFK Airport as bartenders or substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make Virgilio Rizzo and Joseph Sarubbi whole for any loss of earnings and other benefits they may have suffered by reason of our refusal to hire them, less any net interim earnings, plus interest.

WE WILL remove from their records any reference to our refusal to hire them, and WE WILL notify them in writing that this has been done and that our refusal to hire them will not be used against them in any way.

HOST INTERNATIONAL, INC., A WHOLLY-OWNED SUBSIDIARY OF MARRIOTT CORPORATION

David S. Cohen, Esq., for the General Counsel.
Courtney B. Wheeler, Esq., of Bethesda, Maryland, for the Respondent.

DECISION

STATEMENT OF THE CASE

WINFRED D. MORIO, Administrative Law Judge. This case was tried at Brooklyn, New York, on 19, 20, 21, 22 May, 26, 27 June; and 2 July 1986. On 19 December 1985, the Acting Regional Director for Region 29 issued the original complaint in this proceeding. Thereafter, an amended complaint was issued on 25 March 1986 and a second amended complaint was issued on 2 May 1986. This last complaint alleged that Host International, Inc., a wholly-owned subsidiary of Marriott Corporation (Host/Company), violated Section 8(a)(1) and (4) of the Act when it discharged its employees Virgilio Rizzo and Joseph Sarubbi because they filed a lawsuit against Host in the United States District Court, Eastern District of New York, and engaged in other concerted activity for

the purpose of collective bargaining and other mutual aid and protection.[1] The Company filed an answer in which it denied the alleged violations and set forth several affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by both counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

During the past year, which period is representative of its business operations, Host, in the course and conduct of its business operations, derived gross revenues from bar and restaurant sales valued at in excess of $500,000 and purchased and caused to be transported and delivered to its Queens Airport facility food, beverages, bar supplies, and other materials valued at in excess of $50,000, of which goods and materials in excess of $50,000 were transported and delivered to it in interstate commerce directly from States of the United States other than the State of New York. The parties admit, and I find, that Host is an employer within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Rizzo began his employment as a bartender with Host at its LaGuardia Airport restaurant in October 1973, and Sarubbi commenced his employment with Host in the same capacity and at the same location in November 1974. Insofar as this record indicates, the two continued as bartenders at that location without any difficulties until 14 December 1980. On that day, subsequently referred to as "Black Sunday," Host closed all its bars at LaGuardia Airport, physically detained six bartenders and one waiter, and interrogated them regarding alleged violations of Host's cash-handling policies. Rizzo was one of the bartenders who was detained, Sarubbi was not detained. The employees who were detained were told by Charles Newman, the regional vice president for Host, that they were all suspended indefinitely. The following day Rizzo was recalled to work, he did not receive a warning, nor did he suffer a pay loss.

As a result of this detention, charges were filed on 31 December 1980 by Local 6 Hotel, Restauant, Club Employees and Bartenders Union, AFL–CIO (the Union) on behalf of those employees with the National Labor Relations Board (the Board) in Case 29–CA–8532. Basically, the Union alleged that Host had violated Section 8(a)(3) and (5) of the Act by interrogating, imprisoning, and suspending its employees because of their union activities and by refusing to allow the employees to contact and have present their union representative when the employees requested such representation at disciplinary meetings.

On 13 April 1981, the Regional Director for Region 29 dismissed the portion of the charge that alleged that the employees had been detained or disciplined because of their union membership. Host entered into an informal settlement agreement regarding that portion of the charge that alleged that Host had required its employees to participate in disciplinary interviews without union representation when the employee had requested such representation.

In addition to the charge filed with the Board about their detention, the employees also filed a lawsuit in the United States District Court, Eastern District of New York, on 21 April 1981.[2] In this suit, the employees claimed that Host had physically assaulted and searched them, detained and interrogated them, and deprived them of the rights, privileges, and immunities guaranteed to them by the Constitution and the laws of the United States. The suit referred, specifically, to the seven individuals, including Rizzo, who had been detained. The details of the settlement of this suit will be discussed below.

The lawsuit, which requested monetary compensation in the amount of $7 million, was well publicized in local newspapers and the individuals who filed the suits were referred to by fellow employees and supervisors as the "Magnificant Seven."

In February 1981, Host changed the system by which bartenders bid for a job. Rizzo filed a charge on 9 February 1981, in Case 29–CA–8633, in which he alleged that Host had violated Section 8(a)(3), (4), and (5) of the Act, because the change was made unilaterally and arose because the employees had assisted the Union and had given testimony under the Act. In addition to the charge, Rizzo also sent a letter to Scott McDougal, a supervisor, in which he mentioned the events of "Black Sunday" and stated that the change in the bid schedule had been made to harass and intimidate the employees. This charge was withdrawn by Rizzo, according to him, because Host returned to the original system of bidding.[3]

Dallas Swingle, had been employed by Host, at various times between 1980 and 1985, as a supervisor[4] at the Host facilities at LaGuardia Airport. Respondent admitted that Swingle was a supervisor and its agent at the time of the incidents. According to Swingle, after the lawsuit was filed by the seven employees he had several conversations about the lawsuit with Scott McDougal, who was the food and beverage manager and his supervisor. Swingle could not recall the exact times when these conversations were held but they occurred after the lawsuit was filed and before September 1981. Swin-

[1] During the hearing the counsel for the General Counsel stated that it was his position that Host violated Sec. 8(a)(1) and (4) when it discharged and/or refused to hire Rizzo and Sarubbi.

[2] The lawsuit was filed by Rizzo, whose name was first on the caption, James Terrence Weir, Frank Monaghan, Juan Fung, Vincent Fattizzi, Gilberto Munoz, and Charles O'Neill.

[3] It was the Company's position that it was permitted to make such a change according to the collective-bargaining agreement in existence between the parties.

[4] Swingle was not employed by Host at the time of the hearing. He testified that the Company told him that he had an absentee problem and he had to decide whether he wanted to continue his association with the Company and he decided to leave. However, he admitted that when he asked to be rehired, about February 1985, Host stated that they were not interested in rehiring him.

gle testified that McDougal told him on several occasions that Host planned to "get rid of the seven bartenders who filed the lawsuit," the Company "was going to blow them out of the water." Swingle claimed that McDougal also told him that it was Newman's idea to fire these employees. Newman, a vice president, had been named, specifically, in the lawsuit. Swingle stated that the lawsuit was constantly the topic of conversation among supervisors and the employees and that the company representatives generally did not make "kind" statements about the seven employees who filed the lawsuit. Swingle also testified that after the seven employees were detained he had several conversations with Fred Christie, who was head of security for Host, and the "high point of the conversation was usually how many bartenders were gone out of the original 7, how many were left." According to Swingle, Christie told him on several occasions that the bartenders who filed the lawsuit and were still employed would be "shopped."[5] Christie was named, specifically, in the lawsuit.

In the affidavit given to the Board during the investigation, Swingle stated that he heard McDougal say, "that the people who initiated the lawsuit would be gotten rid of" and that McDougal indicated that the way Host would get rid of them would be through shopping reports and mistakes in cash handling procedures." Swingle did not state in the affidavit that McDougal told him that the idea to fire the employees came from Newman; rather Swingle stated that McDougal indicated that the decision came from higher-ups and Swingle perceived that the idea originated with Newman. Swingle also stated in the affidavit that McDougal did not indicate that additional "shopping" had been ordered for the seven individuals who had filed the lawsuit.

Swingle testified, on cross-examination, that Christie had spoken to him on occasion "about shopping" employees other than those involved in the lawsuit and Swingle admitted that Christie never said, specifically, that he would use "shoppers" to fire the seven employees. According to Swingle, Christie said that these employees would violate company rules and thus give the Company the grounds to terminate them.

According to Rizzo, he had a conversation with Swingle in July 1981 during which Swingle told him that McDougal said that if the seven employees did not drop the lawsuit McDougal would flood the bar with shoppers and California would back him up.[6] McDougal was not called to testify. Rizzo also claimed that he had a conversation with Daryl Easterling, an admitted supervisor, in August 1981, during which Easterling told him that the Company had a hit list and his name and that of the others involved in the lawsuit were on the list. Rizzo testified that Easterling told him that Sarubbi's name was also on the list and when Rizzo expressed surprise that Sarubbi's name had been included, Easterling replied that the Company was firing Sarubbi because they did not want it to appear obvious that they were firing the plaintiffs in the lawsuit.[7] Rizzo testified that from his conversation with Easterling he had the impression that the Company would use "shoppers" fo find grounds to discharge the employees. Rizzo viewed the statements by Swingle and Easterling as "friendly warnings." Easterling was not called to testify.

Sarubbi testified that in August 1981 he had a conversation with McDougal, during which McDougal told him that Christie had a hit list and his name was at the top of the list. When Sarubbi questioned McDougal as to why his name was on the list, because he was not involved in the lawsuit, McDougal responded that Christie wanted to get Rizzo and the others involved in the lawsuit and to do that it would be necessary first to fire Sarubbi. McDougal stated that if they fired Sarubbi, who had a clean record and was not involved in the lawsuit, allegedly for some infraction of company rules, then there would be no questions raised when they fired the others, also for some alleged infraction of company rules. McDougal also told Sarubbi that Newman had said that if the employees did not back off the lawsuit he would harass all the bartenders and try to get them all fired. Newman, Christie, and McDougal were not called to testify.

On 11 September 1981 Host suspended and, thereafter, on 15 September 1981, it discharged Sarubbi, allegedly, because he violated company procedures. On 17 September 1981 Host suspended and, thereafter, on 24 September 1981 it discharged Rizzo, allegedly because he violated company procedures. In December 1981, the Union filed a request for arbitration about these discharges and about the discharges of Debbie Fryer, a waitress who had been discharged with Sarubbi, also allegedly for violating company rules, and Lorraine Charest, a waitress, who had been discharged with Rizzo, also allegedly for violating company rules.

Host conceded that Sarubbi had been a satisfactory employee from 1974 until on or about 10 September 1981. According to Sarubbi, on 9 September 1981 he arrived at work at 2:30 p.m. and went to the fourth floor to get his bank, which was the money he put into the register at the start of his shift. McDougal was present when he arrived and McDougal told him not to take the bank, they did not have a register for him. McDougal then told Sarubbi to go home and to return for work the next day. Sarubbi asked McDougal why he could not work with an open drawer as he had in the past when they did not have a register for him and McDougal responded that Christie did not want him to work that day.[8] On 10 September 1981, Sarubbi reported for work at 2:30 p.m. and again saw that there was no register for him. Sarubbi called Easterling, his supervisor, and explained the problem and Easterling said he would locate a register for him, which he did about 4 p.m. It was not

[5] The word "shopped" is a term used in this type of business to describe a situation where security guards, employed by outside firms, come to an employer's premises to observe whether employees are following company rules. It appears that in order to conduct these observations the security guards pose as customers and order food or drink from the employees under observation.

[6] The main offices of Host were located in California.

[7] Rizzo testified that he did not know why Sarubbi was discharged. According to Rizzo, Sarubbi could have been discharged both as a cover and because he mishandled cash.

[8] Sarubbi claimed that Christie was present when McDougal said this but McDougal whispered when he made this remark.

the register usually used in West Wing Bar, the section where Sarubbi normally worked. This register, which came from the East Wing Bar, had a plastic shield covering one side and the back and Sarubbi placed the machine so that the other side of the register was against a wall. Therefore, according to Sarubbi, on 10 September 1981 the only part of the register that would be visible was the front of the machine where Sarubbi stood when he rang up the sales. Sarubbi claimed that during the evening the register did not consistently issue receipts when he rang up the sales, the machine would jam, and he had to physically pull the tape. After continuing to experience difficulty with the tapes, Sarubbi notified Easterling about the problem. Easterling was unable to check the problem until about 7 p.m., at which point there was no tape left in the register. There were few customers present when Easterling arrived and so Easterling decided to close the bar. Sarubbi was not accused at that point of giving drinks to the waitress, Debbie Fryer, without collecting for them, which would be a violation of company rules. However, later that evening Sarubbi was told that both he and Debbie Fryer, who had worked with him that evening, had been shopped and Sarubbi was given a pink slip by Pat Trench, a manager. Sarubbi asked Trench why he was being suspended and Trench responded that he did not know, he had not received a report.[9] Sarubbi asked Trench how he could be suspended in view of the fact that Trench had not received the shopper's report and the further fact that Trench had counted Sarubbi's receipts and examined the tape and had not found a discrepancy. When Sarubbi persisted in questioning Trench why he had received a pink slip when Trench had not received the shopper's report, Trench responded that he had to do it. Later in September 1981, a meeting was held with Host's general manager, James Allen, about the discharges of both Sarubbi and Fryer. Present, in addition to Allen and the discharged employees, was Al Farin, a union business agent. During the meeting, Allen presented the shopper's report and the tape to Farin for his examination. Allen claimed that Sarubbi had failed to ring up drinks but Farin disputed that assertion and he stated that the tape proved that Sarubbi had, in fact, rung up all the drinks. According to Sarubbi, eventually Allen agreed that the tape did establish that all the drinks had been rung up. Allen said he would consider the matter and he would give Sarubbi his decision in a few days. Within a few days, Farin advised Sarubbi that the Company refused to change its decision, he was fired.[10] Allen was not called to testify in this proceeding. The Union filed for arbitration for both Sarubbi and Fryer's discharges.

On 18 January 1982, Burton Turkus, the arbitrator, issued a six-page decision based on the testimony of Sarubbi, Fryer, and the two shoppers, employed by an outside agency, who had shopped Sarubbi and Fryer on the evening of 10 September 1981. According to the arbitrator's decision, Fryer, on at least two occasions, ordered drinks from Sarubbi and did not tender money to Sarubbi in payment for these drinks. Fryer gave the drinks to the customers who had ordered them, the customers paid for the drinks, and Fryer placed the money she received from them in her cash caddy.[11] He also found that Sarubbi did not ring up sales for these drinks. The arbitrator credited the shopper's testimony and did not credit the explanation offered by Fryer and Sarubbi that Fryer initially had left a sum of money at the service bar from her cash caddy to pay for drinks and that Sarubbi took the money for the drinks that Fryer had ordered from the money that she had left at the service bar. The arbitrator concluded that the two individuals had acted in concert and, therefore, their discharges were justified.

Sarubbi testified that he did not tell either the union attorney who represented him at the arbitration or the arbitrator about his conversation with a Host supervisor in which he was told that he was on a hit list and that he was set up for discharge because the Company wanted to cover the fact that it planned to fire the seven employees who had filed the lawsuit. Nor did Sarubbi tell his attorney or the arbitrator that another employee, Fattizzi, who had been one of the plaintiffs in the lawsuit, told him that Christie was going to get him and another employee, Monahan, also one of the plaintiffs. Sarubbi claimed that he failed to do so at the suggestion of the union business agent who told him that the supervisors would not testify in support of him, and, therefore, such statements by him would not help his case. Sarubbi also did not tell his attorney or the arbitrator about the charges that had been filed by Rizzo and the Union with the Board. The arbitrator's award does not contain any reference to the NLRB charges or to the fact that Sarubbi believed that he was discharged to cover the discharge of the plaintiffs in the lawsuit.

On 17 September 1981, Rizzo was working as a bartender in the West End Bar with Vincent Gonzalez, another employee. Gonzalez left work about 7:30 p.m. to attend a funeral service.[12] Rizzo testified that around 8 p.m. he became aware that he was being shopped. Rizzo claimed that he took three orders at about this time, a procedure he claimed was not unusual when the bar was busy. It was a practice known to the supervisors. He then collected for all three drinks at the same time, rang them up separately, and gave each party whatever change was due. Rizzo observed the two men, who had been standing at the bar, leave the bar and move to a nearby standup table. He was suspicious because the men were keeping an eye on the register. The men asked for scotch, they did not name a brand and he gave the waitress bar scotch to give to the two men. The waitress, Lorraine Charest, took the money from her caddy for the drinks and left it on the service bar; then she served the customer and collected the money for the drinks

[9] The disciplinary action memo stated that Sarubbi was suspended indefinitely because he was observed by a shopper "mishandling company funds and improper issuing of receipts."

[10] Host did not call the shoppers, Trench or Easterling, as witnesses. Neither were the shopper reports or the tapes presented during this hearing.

[11] Waitresses are treated as customers and they are required to pay for drinks as they order them. A waitress will usually pay for a drink when she receives it from the bartender from her own money, which she carries in a cash caddy. When she serves the drink to the customer and he pays she is reimbursed for the money she has paid to the bartender.

[12] There was only one register in the bar that evening.

from the customer, which money she put in her cash caddy. Rizzo conceded that he might not have rung up the drinks immediately because he was busy making more drinks but he testified that he rang up all the drinks that he served that evening. At 8:30 p.m., Easterling told Rizzo he had been shopped that evening. Easterling then counted the money and told Rizzo that the amount was correct. Later, Easterling told Rizzo that Christie wanted Rizzo's tape for that evening. He then gave Rizzo a pink slip, which stated that Rizzo was suspended indefinitely for violation of the company policies, "as per the shopper's report." The memo was signed by Christie. About a week after the suspension, there was a meeting in Allen's office about the suspension. Present, in addition to Allen and Sarubbi, were Christie, Lorraine Charest, the waitress who had been suspended with Rizzo, and a union representative. The shopper's report was discussed and Rizzo stated that he knew he was being shopped and he explained his actions that evening. Rizzo asked to see the tape for the register of that evening in order to verify that he had rung up all the sales. When he looked at the tape Rizzo claimed it had been stapled together and there was an overlapping of figures. Allen explained that the tape had caught in the register and it had been necessary to pull the tape, which had caused it to tear. At the conclusion of the meeting, Allen said he would give his decision in a few days. Subsequently, the Union told Rizzo that he was fired. The matter went to arbitration on 3 December 1981. Within a few days after the arbitration, Rizzo drafted a memo concerning certain events that had occurred during the arbitration. Basically, the memo dealt with Rizzo's dissatisfaction with the manner in which the union attorney had represented him during the arbitration. The memo does not state that Rizzo told his attorney, prior to the arbitration, that he believed the Company had fired him in retaliation for his filing of the lawsuit. Nor does the statement contain a reference to his attempts to tell the arbitrator about the charges filed with the Board or about the lawsuit and it does not state that the arbitrator rejected these attempts. The memo does contain the statement that Rizzo believed that the Company wanted to obtain a favorable result from the arbitration, "so that they can offer it as a reason for the dismissal of any damage suit against them."

On 19 January 1982, Burton Turkus, the arbitrator, issued his decision based on the testimony of Rizzo, Charest, and the two shoppers, employed by an outside security service, who had "shopped" the two employees. According to this decision, the shoppers testified that they ordered two Dewars and soda from Charest, Charest secured the drinks from Rizzo, she did not tender him any money, and Rizzo did not pick up any money from the service bar. Rizzo did not ring up the two drinks. Charest gave the drinks to the shoppers, collected money for the drinks from them, and she put this money in her money caddy. This process was repeated. Turkus discredited the explanation advanced by Rizzo and Charest, which was that Charest had left money for the drinks on the service bar and Rizzo had taken the money from that area when Charest ordered the drinks. The arbitrator found that the two had been discharged for cause. In both decisions, the arbitrator stated that the four employees were familiar with the Company's cash-handling policies, which required a waitress to pay for drinks when she received them from the bartender and required the bartender to ring up each sale. Rizzo and Sarubbi testified that there was no set way to handle cash. Thus, they claimed that if a bartender was busy he might take an order from a customer or a group of customers at one time, and ring up all sales at one time, although the drinks for each customer or group of customers would be rung up separately. According to Swingle, bartenders were to take orders separately and ring up sales separately, they were not to "double up" and he admitted that he has spoken to employees about following this procedure. However, he also admitted that bartenders did "double up" on orders and did ring up more than one sale at a time when the bar was busy and this practice was known to supervisors.

Rizzo testified that he told the union attorney, prior to the arbitration proceeding, about the charges he had filed with the Board but the union attorney appeared to be more concerned with the shopper's report and he told Rizzo that he could give his own account about the charges. Rizzo claimed that at the arbitration proceeding he attempted to explain to the arbitrator about the civil suit; that had been filed and about the NLRB charges; the arbitrator then asked what had happened to the charges, and Rizzo explained that one charge had been withdrawn and the other charge was settled. At this point, the arbitrator stated that he did not see a connection between the lawsuit, the NLRB charges, and the discharges. Rizzo claimed that he did not tell the arbitrator about the conversations he had with Swingle and Easterling because the arbitrator did not appear to be interested. In the affidavit secured from Rizzo during the investigation of the case, he stated that he attempted to tell the arbitrator about the lawsuit, but the arbitrator said the matter was irrelevant. According to the affidavit, when he told the arbitrator about the charges the arbitrator was concerned and asked about the status of the cases and Rizzo explained that one had been settled and the other was withdrawn. The arbitrator then stated that he did not see a connection between the charges and the grievance presented to him. According to Rizzo's testimony and affidavit, the union attorney requested that the NLRB charges and documents relating to the lawsuit be received into evidence to demonstrate the atmosphere at the airport. The arbitrator agreed to the receipt of these documents but stated that he would not give them any weight. According to Rizzo, the union attorney did not give any details about the unfair labor practice and he did not brief the unfair labor practice or lawsuit issue. It does not appear that there was a transcript of these proceedings and the arbitrator's decisions do not refer to the Board charges, the lawsuit, or the retaliation or coverup reason for Rizzo and Sarubbi's discharges. It is unclear whether the arbitrator did receive any documents relating to the charges or lawsuit.

It is the position of the General Counsel that Rizzo and Sarubbi were given substantially harsher discipline than was given to other employees who violated the

Company's cash-handling rules, and this fact indicates that their discharges in September 1981 were due to the NLRB charges and the lawsuit that had been filed. Numerous exhibits were received into evidence in support of this position by the General Counsel during the hearing and the parties stipulated to the authenticity of other records in an off-the-record meeting.[13] Insofar as this record indicates, the alleged infractions of company rules in September 1981 were the first offenses by Rizzo and Sarubbi since the commencement of their employment with Host. An examination of the personnel records of several employees does establish that some employees who allegedly violated the Company's cash-handling rules were not discharged. Thus, a bartender, Mario Mancini, was given a warning on 30 September 1982 for violation of cash-handling procedures; Victor Rohan, a bartender, received a warning on 11 March 1985 for failing to ring up sales, among other violations; John Wheeler, a bartender, received numerous warnings for violations of company rules, including his failure to ring up drinks and for cash shortages, but he was not discharged; Juan Ochoa, a bartender, Manuel Bande, a waiter, and Clara Santa Cruz were all suspended on 6 December 1982 for violations of cash-handling policies, which included underringing sales and not ringing sales but they were reinstated on 9 December 1982. Ochoa was suspended again on 21 April 1983 for cash-handling violations but he was reinstated on 13 May 1983; Vincent DiGiorgio, a bartender, was suspended for 2 weeks in 1977 and was told that it was a serious violation of company rules to fail to ring up sales and to ring up a no-sale; DiGiorgio was warned again about a cash shortage on 30, May 1979; and Dorothy Longworth, a cashier, was warned after she was observed taking money from a cash register and putting it in her pocket. In addition, the record reveals that bartenders Felenes, Battala, and Gonzalez, who were terminated for failure to ring up sales were subsequently reinstated. Battala has been warned on several occasions for cash-handling violations but he has not been discharged.

B. *The Settlement*

Sarubbi and Rizzo testified that their efforts to appeal the arbitrator's decision were rejected by the Union and, therefore, on 12 February 1982 they filed unfair labor practice charges in Cases 29–CA–9486–1 and 29–CA–9486–2, respectively, alleging that Host had violated Section 8(a)(3) and (4) of the Act by discharging and refusing to reinstate Rizzo and Sarubbi because they assisted the Union, filed charges or gave testimony under the Act, and engaged in protected concerted activities. On 21 October 1982, the Regional Director for Region 29 issued an order consolidating the above charges in one complaint that alleged, basically, that Host had violated Section 8(a)(1) of the Act when it discharged and refused to reinstate Rizzo and Sarubbi because they filed the lawsuit and engaged in other protected concerted activities. In June 1983, an administrative law judge approved requests by Rizzo and Sarubbi to withdraw the charges and dismiss the complaint because the parties had entered into an out-of-Board settlement. The parties agree that they entered into a settlement but they are in dispute as to the nonmonetary aspects of this settlement, which disposed of both the charges and the lawsuit.

Although the settlement was an out-of-Board settlement, the actual offers and counteroffers made by the parties were channeled through the Board agents. It appears that during much of the negotiations the parties were in separate rooms and the Board agents conveyed the proposals of one side to the other side. The Board agents were not called to testify. Carlton Trosclair, the attorney who represented Host during these negotiations, testified that he rejected the Board agents' requests for reinstatement and specifically told the agents and Rizzo and Sarubbi that Host would not reemploy Rizzo and Sarubbi under any condition. Initially, Rizzo testified that the settlement discussions centered around what amount of moneys would be necessary to settle the case. Subsequently, he stated that he did not recall a discussion about the issue of reinstatement. He further stated there were no face-to-face meetings with the Company's representatives during the negotiations. However, when called as a rebuttal witness, Rizzo testified that during the final negotiation meeting Trosclair did say that the Company was not interested in reinstating the two men, but Trosclair did not say that Host would not reemploy them under any condition. Rizzo also stated that he did not know if he could have applied for a position with Host the day after the settlement. Sarubbi recalled that he was told by the Board agents that he would not be reinstated to the position that he had lost, but Trosclair never said that he would not be reemployed again by Host. Sarubbi admitted that he did not believe that he could seek reemployment with Host in a day, week, or month after the settlement. A letter prepared by a Host attorney after the settlement discussions referred only to the monetary aspects of the settlement.[14] Rizzo and Sarubbi both stated that at the time of the settlement discussions reinstatement was not a prime concern to them because they were then employed.

C. *The Present Case*

After their discharge by Host, Rizzo and Sarubbi commenced employment as bartenders with the Gladieux Corporation (Gladieux) in about March 1982 at the Delta Northwest terminal at the JFK Airport. In late 1984, Gladieux announced to its employees that Host would begin to operate the facility at the Delta Northwest terminal sometime after January 1985. On 3 January 1985, Gladieux became a wholly owned subsidiary of the Marriott Corporation. Host had been a wholly owned subsidiary of the Marriott Corporation since March 1982.[15]

[13] Host objected to the receipt of any personnel record but did agree that the records that were received were authentic. By order dated 30 July 1986, Exhs. 44 g, h, and i, which were offered by the General Counsel, were rejected and Exh. 45 was received.

[14] According to Rizzo, Host had agreed to provide them with reference letters, but it failed to do so.

[15] In additon to Host International, there is also a Host Services of New York, Inc. It appears that the two corporations constitute a single integrated business enterprise.

According to Robert Kouba, who was general manager for Host at the JFK Airport in February and March 1985, Host had planned to take over the Gladieux operation at the Delta Northwest terminal on 1 March 1985, but the actual takeover did not occur until 23 March 1985.[16] The record reveals that it was on that day that the Gladieux employees were transferred to the Host payroll. The financial aspects of the sale of the Gladieux assets to Host were not completed until July 1985 when Host paid Gladieux by a check that was processed through an intercompany account.[17] According to Paul Matoba, director of accounting for Host, Host's records show that Gladieux sold its assets to Host on 23 March 1985, and the Host's records do not show any entries for the Delta Northwest facility before that day. Joseph Fabiano, Host's director of labor relations from January 1985 to January 1986, testified that neither the Host personnel department nor its labor relations department were involved with the operation at the Delta Northwest terminal until after 23 March 1985. He further testified that Gladieux did not seek and he did not give any assistance about personnel or labor relation matters at any point to Gladieux representatives.

Although, according to Kouba, Host did not commence its operations at the Delta Northwest terminal until 23 March 1985, he admitted that he was frequently at that location beginning in February 1985. Kouba testified that he came to the facility to examine the existing operation, to survey the facility, to ascertain the number of employees, and to prepare for the transition from the Gladieux method of operation to the Host method of operation. Kouba denied that, at this point, he had supervisory authority over Gladieux personnel, but he did admit that he held a meeting in about mid-February 1985 with Gladieux employees, with the acquiescence of Gladieux supervisors,[18] on worktime during which he explained the advantages of being a Host employee, and showed the employees a Host orientation film. Kouba also admitted that around this time Host application forms and name tags were distributed to the Gladieux employees by both Host's personnel manager and Gladieux supervisors. These application forms were completed by the Gladieux employees, including Rizzo and Sarubbi, in about mid-February 1985, and the employees began to wear the name tags with the Host logo. Rizzo and Sarubbi testified that from about mid-February 1985 they considered themselves to be employees of both corporations. According to Mary Grady, a former Gladieux employee who is presently employed by Host, Kouba told the employees in February 1985 that they would be Host employees and Host would recognize their union contract. Kouba did not deny, specifically, this testimony.

Peter Kowalsky was employed as a supervisor for Gladieux from May 1984 until March 1985 at which time he began his employment with Host as a supervisor and continued in that position until 20 May 1986. At that time, William Powers, his supervisor, told him he was being put on paid leave and would remain on such leave until a Mr. Katengail, the general manager for Host at JFK Airport, had an opportunity to review the transcript of the hearing in this case[19] and to make a determination concerning Kowalsky's future. The hearing, which began on 19 May 1985, was adjourned after several days and resumed on 26 June 1985. Kowalsky testified when the case resumed and by that point he had been terminated. Counsel for Host objected to the receipt of testimony by Kowalsky. This objection will be discussed below.

Kowalsky testified that in February 1985, Powers introduced him to Kouba at the Delta Northwest terminal and told him that Kouba would be his new supervisor. After that introduction, Kowalsky saw Kouba, at the Gladieux facilities, about four or five times a week in late February and early March 1985. Sometime in February 1985, after Kouba began to come to the premises, Gladieux started to sell bottled beer, something which had not been done before that time. When Kowalsky questioned Powers about this change, Powers told him that Kouba wanted the change made and it had been made. In late February 1985, according to Kowalsky, Kouba told Powers to remove the Gladieux signs and the signs were removed. On one or two other occasions Powers directed Kowalsky to make changes with respect to the removal and cleaning of certain machines and Powers told Kowalsky that the changes were made at Kouba's direction. According to Kowalsky, in late February 1985 Powers told him that they could not hire directly as they had done, applicants would be sent from the Host personnel department. However, Kowalsky could name only two individuals who were hired in this manner, both were hired as bartenders around 21 or 22 March apparently to replace Rizzo and Sarubbi. Kowalsky also testified that in late February 1985, Fred Christie, head of Host security, set up a new procedure at the Gladieux facility on how to issue money and make deposits. Christie did not testify.

William Powers, who had been the general manager for Gladieux at the terminal and who became a supervisor for Host, testified that Kouba did visit the Delta Northwest terminal on several occasions before 23 March 1985, but he denied that Kouba gave directions or orders to any Gladieux employees and he further denied that Gladieux signs and machines were moved at Kouba's direction before 23 March 1985. David Blanco, who had worked for Gladieux and who became a Host supervisor, testified that he personally removed the Gladieux signs after Host took over the operation. He also testified that Kouba never directly gave him orders until after 23 March 1985.

[16] Marriott Corporation, apparently, decided that all restaurant facilities of Gladieux at airports would be operated by Host because Host had all the other corporate restaurants at the airports.

[17] This apparently is an account to which all the companies send moneys to pay other companies either owned or controlled by the Marriott Corporation.

[18] On cross-examination, Kouba testified that if the Gladieux supervisors had not been cooperative he would have referred the matter to Host International.

[19] The hearing in this case began on 19 May 1986, and by that time it appears that Kouba had been transferred to another location.

It is undisputed that Host application forms and name tags were distributed to Gladieux employees before 23 March 1985. The record establishes that Sarubbi and Rizzo completed such application forms, respectively, on 13 and 16 February 1985 and received name tags at that point. Robin Kreitner, who was a Host personnel director at that time, stated that it was a usual procedure when Host took over a facility to have employment application forms completed by employees of the former company and to distribute name tags to them. It also was usual, acording to Kreitner's testimony, to request these employees to call the New York Department of Labor about receiving a job tax credit. Kreitner claimed that these procedures did not indicate that the employee would automatically become Host employees.

On or about 14 March 1985 both Rizzo and Sarubbi were advised, in writing, by Kouba that in the company transition they would not be hired and their services would not be needed after 23 March 1985.

Kouba testified that he made the decision not to hire Rizzo and Sarubbi and DiGiorgio, a third bartender. According to Kouba, after the application forms were completed, they were screened first by Kreitner, Host's personnel manager. Kreitner then brought the applications, which she considered favorable, to him for his consideration. After he reviewed the applications, he decided that he would not hire DiGiorgio, Rizzo, and Sarubbi and he was concerned about hiring an employee, Ms. Grady, because she was a union delegate at another location where she was also employed. It was Kouba's opinion that if Grady was hired by Host while employed at another location there could be a conflict because she would be a union delegate at two locations. He claimed that he discussed the Grady problem with the union representative and told him that Grady would have to choose, she could not work and be a delegate at two locations. As a result of this discussion, Kouba claimed that Grady ceased her employment at the second location and she then was employed by Host. Grady denied that the Union told her that she had to choose between Host and the other employer. She testified that she ceased working at the other location because that employer lost the service contract it had and she, therefore, did not have a job.

Kouba stated that he refused to hire DiGiorgio because he had worked for him at JFK Airport and he had terminated him for violating the Company's cash-handling policies and that it was against company policy to rehire an employee who had been terminated for cause.

According to Kouba's testimony, he did not personally know Rizzo or Sarubbi, they had not worked for him, but he was aware, through company communications, that both men had worked at the Host facility at LaGuardia and that they had been discharged for cause. According to Kouba, he decided that he could not hire these two who had been discharged for cause because it would be against company policy.[20] Kouba claimed that in making the decision not to hire Rizzo and Sarubbi he examined the Host application forms and Gladieux's personnel records. When he was advised that those records did not disclose that the men had been discharged for cause, he stated that he knew before he looked at the files that the two men had been discharged. Kouba conceded that he had heard about the lawsuit and the charges that had been filed with the Board. Although Kouba claimed that he did not know the names of the employees involved in the charges or the lawsuit, he did admit that he had heard that seven employees were involved and he was familiar with the names of Rizzo and Sarubbi. At one point, Kouba stated that he did not know that Rizzo was involved with the charges and the lawsuit. At another point, Kouba testified that Christie knew who had filed the charges and the lawsuit and he may have told him that Rizzo and Sarubbi filed them. Kouba also testified that sometime before March 1985 Christie told him that DiGiorgio, Rizzo, and Sarubbi were working at the Gladieux facility and he told Kouba that the three had been discharged for stealing. According to Kouba, he consulted with California before he decided not to hire Rizzo. Kouba did not explain why he did this.

Kowalsky testified that he first heard the term the "Magnificent Seven" from Powers a few months after he started to work for Gladieux. Powers told him that the bartenders had a case and it was in that context that Powers referred to the term "Magnificent Seven." In January 1985, Powers told Kowalsky that he had met with Christie, head of security for Host, and during this meeting Christie told Powers that Powers had part of the "Magnificent Seven" working for him, that he should keep an eye on them, they were troublemakers. Christie did not testify and Powers did not refute this testimony. At about this time, Powers also told Kowalsky that McCarthy, a vice president for Host, had told Powers that there would be no changes when Host took over the Gladieux operation. However, according to Kowalsky, later in January 1985 Powers told Kowalsky that Kouba had said that there would be changes in the bar but Kouba did not disclose what the changes would be. In March 1985, Powers told Kowalsky that Kouba said that the Company was going to discharge the bartenders. When Kowalsky asked Powers how Host could do that after they had shown the Gladieux employees the Host orientation film and had given them application forms and name tags, Powers responded that the matter had been checked with the attorney for Host and the attorney had advised that Host could fire these people. Powers said they had a case with these employees at LaGuardia and they did not want them, they were troublemakers. Both Powers and Kouba testified but they did not refute this testimony.

On 14 March 1986 Powers gave a letter to Sarubbi, which had been signed by Kouba and stated "that in the company transition you will not be hired." When Sarubbi asked Powers why this was being done, Powers responded that they had not given him a reason. A similar letter was given to Rizzo, at Powers' direction, on 15 March 1986.

[20] Counsel for Host stated that one of the reasons the Company refused to hire Rizzo and Sarubbi when Host took over the Gladieux operation stemmed from the fact that these two individuals had waived all rights to future employment with Host as part of the settlement negotiations.

On 22 March, according to Kowalsky, he attended a meeting with Powers and Christie. During this meeting, Christie stated that Sarubbi "took book" and was connected with the "mafia." Christie stated that another bartender, DiGiorgio, who also had not been hired, had been "canned" when he worked for Host, that the bartenders were troublemakers, and that Sarubbi was part of the "Magnificent Seven," and the Company had no use for these men.

III. DISCUSSION

A. *The Status of Host*

It is the position of the General Counsel that in February 1985 Host began exercising daily control over the operations at the facility at the Delta Northwest terminal and "identified itself as the owner of the premises" and "was sufficiently in control of the facility operations and personnel to be considered *at a minimum* a joint employer of the Delta Northwest terminal employees." In support of this position, he relies on the following facts: Kouba, Host's general manager, was at the Delta Northwest facility on a frequent basis beginning in mid-February 1985, and he directed that certain changes be made with respect to items to be sold, removal of Gladieux signs, and the placement of certain machines and these directions were followed; Kouba and other Host personnel held a meeting with Gladieux employees during worktime without objection by Gladieux management; Host and Gladieux supervisors distributed Host employment application forms to Gladieux employees, and these forms were completed by these employees during worktime; Host name tags also were distributed to Gladieux employees and they were directed to and did wear these tags beginning in mid-February 1986; Host employment procedures, rather than Gladieux procedures, were followed with respect to at least two employees hired prior to 23 March 1985; and Christie, a Host supervisor, instituted a new method for cash handling at the Gladieux facility sometime in February 1985. As further evidence of the joint relationship between the two corporations, the General Counsel notes that Host and Gladieux are wholly owned subsidiaries of the Marriott Corporation, and that because of that fact Host was not required to pay Gladieux for its assets until several months after Host took over those assets. Host contends that the two are separate entities, and that Host did not begin operations at the terminal until 23 March 1985.

Although not entirely clear from statements made by counsel during the hearing or from arguments advanced in their briefs, it appears that the General Counsel's position is that Host and Gladieux were joint employers from January to 23 March 1985, while Host contends that the two corporations did not constitute a single-integrated enterprise. In *TIL, Inc.*, 271 NLRB 798 (1984), the Board stated that the standard for determining whether two corporations are joint employers and the standard for determining whether they constitute a single-integrated enterprise are not the same. The joint employer concept recognizes that two separate enterprises can be joint employers if they share or codetermine those matters relating to essential terms and conditions of the employees' employment. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). The Board in *Laerco Transportation*, 269 NLRB 324 (1984), held that to establish such a status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. In *Laerco*, one corporation, CTL, provided labor to another corporation, Laerco, a company engaged in the trucking industry. At issue was whether the two corporations were joint employers. Although, the Board found that Laerco informed the CTL employees of their job duties, exercised minimal day-to-day supervision over them, and resolved minor grievances of the CTL employees, the Board concluded that Laerco was not a joint employer with CTL because the major elements of the employees' terms and conditions of employment were decided by CTL. Similarly, the Board did not find a joint employer relationship in *H&W Motor Express*, 271 NLRB 466 (1984), in which one corporation, Lin Rol, provided labor to H&W, a common carrier. In that case, a Lin Rol supervisor, who supervised the Lin Rol-supplied employees on a daily basis at the H&W terminal, also used a business card that identified him as the terminal manager for H&W, he entertained H&W customers, acted as H&W's representative for customer complaints, and signed timecards for H&W employees who were on H&W's payroll. Despite the identification as an H&W representative, the Board did not find a joint employer relationship. In the instant case, the evidence also is insufficient to establish that Host either identified itself as the owner of the Delta Northwest terminal or was a joint employer with Gladieux during the period between January and 23 March 1985. It is unclear from this record whether Kouba actually directed Powers to remove the signs or machines or made suggestions concerning these items. However, assuming that he gave directions, rather than made suggestions, this would not establish that Host meaningfully affected matters relating to the employees' terms and conditions of employment. Nor does the fact that the Gladieux employees completed application forms for Host or wore Host name tags establish that Host had control over the employees' terms and conditions of employment, particularly when the employees continued to be on the Gladieux payroll and under the day-to-day supervision of Gladieux supervisors.

In *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255, 256 (1965), the Supreme Court stated the criteria to be used to determine whether separate enterprises constitute a single employer:

> The controlling criteria set out and elaborated in Board decisions are interrelating of operations, common management, centralized control of labor relations and common ownership.

This record does not establish that the operations of the two corporations are interrelated, or that they have common officers or directors, or common supervisors, or a common labor policy. It does establish that the two corporations maintain separate payrolls and have sepa-

rate labor policies, different operating procedures, different supervisory personnel, and different personnel procedures. The fact that Host and Gladieux are wholly owned subsidiaries of the Marriott Corporation does not warrant a finding that the two corporations constitute a single employer. In *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 NLRB 303 (1970), the Board held that even divisions of the same corporation can be considered as separate persons if the parent corporation or the subsidiary does not exercise actual or active control as opposed to potential control over the day-to-day operations or the labor relations of the other. In the instant case, there is no evidence that either Host or the Marriott Corporation exercised actual control over the day-to-day operations or the labor relations policies of Gladieux. Nor does the instant case present the type of situation that existed in *Teamsters Local 560 (Curtin Matheson Scientific)*, 248 NLRB 1212 (1980), in which the Board found that the operations and management of two branches of the same corporation were so integrated that the union did not violate Section 8(b)(4)(B) of the Act when it picketed at the location of one branch in furtherance of its dispute with another branch at a different location. Accordingly, I do not find that Host was a joint employer with Gladieux for the Gladieux employees,[21] nor do I find that the two corporations constituted a single enterprise during the period between January and 23 March 1985. Therefore, I do not find that Host discharged Rizzo and Sarubbi.

B. *Kowalsky's Testimony*

It is the position of counsel for Host that Kowalsky's testimony should be struck, in accordance with the provisions of 18 U.S.C. § 3500 and Section 102.118(b)(1) and (2) of the Board's Rules and Regulations because the General Counsel failed to produce notes he secured during a conversation with Kowalsky on 28 May 1986, although he had been directed by the judge to produce the notes for purposes of cross-examination. Counsel further argues that it was incumbent on the General Counsel to explain why the notes could not be produced and this he failed to do. Although the General Counsel did state on the record that he destroyed the notes after he incorporated them into an affidavit that he subsequently took from Kowalsky, counsel maintains that such a statement does not constitute evidence. Counsel further argues that it was improper and a violation of rule 4.2 of the Model Rules of Professional Conduct[22] for the General Counsel to secure an affidavit from Kowalsky, without Host's permission, while Kowalsky was employed as a manager for Host.

Kowalsky testified that after he was informed that he would be on paid leave while the transcript of the hearing in this case was being examined by Host supervisors, he decided to contact the Board attorney who was responsible for Rizzo and Sarubbi's case. Kowalsky claimed that he had wanted to cooperate sooner because he thought the two men were "blackballed," but he was concerned about his job. It is clear that Kowalsky voluntarily contacted the General Counsel because he believed that his discharge was imminent. Kowalsky secured the telephone number of the General Counsel from Rizzo; he called the General Counsel and arranged a meeting with him at a diner in Queens. During this phone conversation, the General Counsel asked Kowalsky if he had permission from Host to meet with him, and Kowalsky responded that he did not need Host's permission, he wanted to cooperate with the Government. The Board attorney told him that he could not speak to him if he was still employed by Host without Host's permission and Kowalsky responded that he did not know how long he would be on leave but as far as he was concerned he had been terminated.[23] Kowalsky testified that "he almost forced himself on Mr. Cohen and I told him that I did not have any attachments with anyone."

According to Kowalsky, he first met with the General Counsel on 28 May 1986 and during this meeting the Government attorney took notes of their conversation, showed him the notes, and asked if they reflected what he had said and Kowalsky agreed that the notes were correct. Kowalsky met again with the same Government attorney on 4 June 1986 and during this meeting the attorney took an affidavit which, according to Kowalsky, incorporated the notes taken during his first meeting with the General Counsel.

In *Campell v. U.S.*, 365 U.S. 85, 102 (1961), the Court stated the following:

> Nothing in the legislative history of the Act [i.e., Sec. 3500] remotely suggests that Congress' intent was to require the Government, with penalizing consequences, to preserve all records and notes taken during the countless interviews that are connected with the criminal investigation by the various branches of the Government.

The Court in *Killian v. U.S.*, 368 U.S. 231 (1961), also stated that if records were destroyed in good faith by Government agents in accordance with their normal practice it would be clear that their destruction did not constitute an impermissable destruction of evidence, nor deprive a petitioner of any rights. A similar statement was made in *U.S. v. Augenblick*, 393 U.S. 348, 356 (1963), when tapes made by an agent of the Government during a conversation he had with a defendant were lost. The Court stated:

> The record is devoid of credible evidence that [the tapes] were suppressed. Whether Mendelson[24] should have been recalled is a matter of debate and perhaps doubt. But questions of that character do not rise to a constitutional level.

[21] I do not consider the fact that Powers gave the discharge letters to the two individuals sufficient evidence to establish that a joint employer relationship existed prior to 23 March 1985.

[22] Rule 4.2, Model Rules of Professional Conduct states:

> In representing a client, a lawyer shall not communicate about the subject of a representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so under law.

[23] Kowalsky was at the time still on Host's payroll but he was not working.

[24] Mendelson was the Federal agent.

The Court went on to note that a constitutionally unfair trial occurs only when barriers and safeguards are so relaxed or forgotten that the proceeding is more a spectacle or trial by ordeal than a disciplined contest. In *U.S. v. Hinton*, 719 F.2d 711 (4th Cir. 1983), the court concluded, after a detailed examination of numerous cases, that both the Supreme Court and a majority of circuit courts have indicated that rough interim notes of a Government agent that are later incorporated into the agent's formal interview report are not written statements within the meaning of the Jencks Act and need not be preserved. In the instant case, although the General Counsel did not testify he did state that he destroyed the notes after he incorporated them into Kowalsky's affidavit, and Kowalsky did testify that the notes were incorporated into the affidavit. Thus, it appears that the instant case presents the type of situation where the notes would not be considered a statement that must be produced. Moreover, after having had the opportunity to consider the language in the Supreme Court's decision in *Goldberg v. U.S.*, 425 U.S. 94 (1976), which deals, in part, with what constitutes the type of statement that must be produced, I am convinced that the notes in question are not statements that must be produced. The Court in *Goldberg* held that an agent's notes can be considered a statement of a witness only on a finding that the notes reflected the witness' own words fully and without distortion and only on a finding of an unambiguous and specific approval of the specific notes by the witness. The evidence in this record does not establish that Kowalsky thoroughly examined the notes and gave an unambiguous and specific approval of those notes. In addition, the Court has stated that the administration of the Jencks statute must be entrusted to the good sense and experience of the trial judge subject to appropriate limited review by the appellate courts. *Palermo v. U.S.*, 360 U.S. 343, 353 (1959). In the instant case, as noted, Kowalsky testified that what he told the Board attorney during the meeting on 28 May 1986 was incorporated into his affidavit. This affidavit was produced and was used by counsel during his cross-examination of Kowalsky and, therefore, I am not persuaded that counsel was prejudiced by the lack of the notes. Furthermore, although Kowalsky's affidavit and testimony referred to statements by Host representatives, those representatives were not called to testify or did not refute these statements. In these circumstances, it is unlikely that possession of the notes would have been of assistance to counsel.

Under paragraph 10056.5 of the Casehandling Manual of the Board, a Board agent is not precluded from receiving information from a supervisor or agent of the charged party when the individual comes forward voluntarily, and when it is specifically indicated that the individual does not wish to have the charged party's counsel or representative present. That paragraph, counsel for Host maintains, is inconsistent with rule 4.2 of the Model Rules of Professional Conduct and with the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). In that decision, counsel claims that the Court established three guidelines to test the propriety of agency regulations; promulgation of the regulations must not exceed the agency's statutory authority, regulations must not be arbitrary, and the agency must follow necessary procedural requirements. Despite counsel's argument, the Board, with Court approval, has continued to consider evidence received from a supervisor when the supervisor comes forward voluntarily and has indicated that he does not want respondent's counsel present. *Aeroglustics, Inc.*, 228 NLRB 1157 (1977), enfd. 610 F.2d 455 (6th Cir. 1979); *B. C. Hawk Chevrolet*, 226 NLRB 527 (1976), enfd. 582 F.2d 491 (9th Cir. 1978). In the present case, the record clearly establishes that Kowalsky came forward voluntarily and did not seek to have Host's counsel present during the interview. It was Kowalsky who contacted the General Counsel and "forced" himself on that representative and Kowalsky certainly indicated that he did not want Host's counsel present during the interview when he told the General Counsel that he did not need Host's permission to talk to him and that he had no attachments to anyone.[25] Accordingly, Kowalsky's testimony will be considered.

C. *Whether Deferral to the Arbitrator's Award is Warranted*

The General Counsel asserts that the arbitration awards should not be deferred to for three reasons: the awards concern Host's discharge of Rizzo and Sarubbi in 1981 and are not dispositive of the events in 1985; the arbitrator was not presented with the unfair labor practice issue and, therefore, he did not consider it; and the Board does not defer to an arbitrator's decision when an 8(a)(4) violation is alleged. Counsel for Host argues that the arbitrator's awards are binding because the Charging Parties failed to reasonably raise the unfair labor practice issue during the arbitration proceedings and failed to utilize the statutory procedures available to vacate the awards. He further argues that the Charging Parties settled their earlier cases and have made no attempt to reopen those cases and, therefore, the General Counsel is estopped from relitigating those cases. Counsel also argues that although the General Counsel stated that he was not attempting to relitigate the earlier cases but was merely introducing the earlier cases as background evidence, paragraph 23 of the second amended complaint states otherwise. However, if the General Counsel seeks to introduce the evidence surrounding the 1981 discharges only for purpose of background evidence, he should not be permitted to do so because records which would support Host's position that the two individuals were discharged for cause have been destroyed and are not available and, therefore, Host will be denied due process.

As the counsel for the General Counsel notes, the instant case involves events that occurred in 1985 while the arbitrator's awards deal with matters that occurred in 1981. Assuming that deferral was proper in connection with earlier discharges, it cannot be held that the awards encompass events that had not occurred at the time of the arbitration proceeding. Host's argument that the

[25] In fact, during the hearing Host's counsel attempted on several occasions to meet with Kowalsky and Kowalsky refused to meet with him.

events in 1985 are intertwined with the events of 1981 will be discussed below.

Furthermore, I am not convinced that deferral to those awards would be proper even with respect to the events that occurred in 1981. In this connection, it should be noted that despite the arbitrator's award the Regional Director issued a consolidated complaint in Cases 29–CA–9486–1 and 29–CA–9486–2, wherein he alleged that the discharges of Rizzo and Sarubbi in 1981 were in violation of the Act. And despite the arbitrator's awards, Host agreed to and did pay moneys to settle the allegations of those complaints. Thus, it appears that the Regional Director did not defer to the arbitrator's decision and Host, by its agreement to settle the complaints, accepted the Regional Director's decision not to defer to the arbitrator's awards.

Assuming, that Host did not waive its defense based on the issue of the awards, it should be noted that the arbitrator's awards did not refer to the unfair labor practice issue that occurred in 1981. In *Olin Corp.*, 268 NLRB 573 (1984), the Board adopted the standards that it would apply for deferral to arbitration. The Board stated that they would find that an arbitrator adequately considered the unfair labor practice if (1) the contractual issue were factually parallel to the unfair labor practice issue and (2) the arbitrator were presented generally with the facts relevant to resolving the unfair labor practice issue. In the instant case, the unfair labor practice issue was not presented to the arbitrator. Rizzo testified that he attempted to introduce the issue but the arbitrator did not appear to be interested. Sarubbi testified that he did not raise the issue because he was advised not to do so by the union business agent. In these circumstances, where the issue was not raised, it is clear that the arbitrator could not have adequately considered it because he did not have the facts relevant to the resolution of the unfair labor practice issue. Counsel for Host concedes that the arbitrator did not have the facts relevant to the unfair labor practice issue. However, he argues that the only reason the arbitrator did not have the relevant facts was because Rizzo and Sarubbi chose not to present those facts to the arbitrator despite being afforded the opportunity to do so. Rizzo, credibly, testified that he did attempt to discuss the unfair labor practice issue but the arbitrator expressed disinterest. In any event, the Board has indicated that the fact that there is an opportunity to present the relevant facts on the unfair labor practice issue is not sufficient, absent evidence that the facts were presented. In *Electronic Reproduction Service Corp.*, 213 NLRB 758 (1974), the Board had held that when the arbitration forum was available for the discussion of the unfair labor practice issue and a party chose not to use it and because of that fact the arbitrator did not consider the issue it would, nevertheless, defer to the awards. In *Olin*, supra at fn. 10, the Board stated, "we are not returning to *Electronic Reproduction Service*, 213 NLRB 758 (1974), in its entirety . . . . We do not resurrect that part of *Electronic Reproduction* which required no more than an 'opportunity' to present the unfair labor practice issue to the arbitrator to warrant deferral." In *Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986), the court refused to enforce a Board order where the Board had deferred to an award by an area grievance committee when there was no showing that the committee had considered any facts relevant to the unfair labor practice.

The evidence in this record establishes that Host decided to discharge Rizzo because he filed the lawsuit and decided to discharge Sarubbi as a coverup for Rizzo's discharge. Swingle, credibly, testified that statements to that effect were made by Supervisors McDougal and Christie on several occasions and both indicated the "shoppers" would be used in order to effect those discharges. Neither McDougal nor Christie was called to refute that testimony. Rizzo, credibly, testified, that Easterling, another supervisor, told him that his name was on a hit list with the names of other employees involved in the lawsuit and that Sarubbi's name was put on the list as a cover for Rizzo's discharge. Easterling was not called to refute that testimony.[26] Based on this unrefuted testimony, I find that Rizzo was discharged because he joined with other employees to file a lawsuit after they were physically restrained on Host's premises because of alleged violation of company rules, without being afforded the opportunity for union representation. I also find that Sarubbi was discharged to cover the discharge of Rizzo.[27] The Supreme Court, in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978), has held that employees are engaged in mutual aid and protection when they seek to improve working conditions by resort to judicial forums.

Although, I have found that the arbitrator's awards are not binding and that Rizzo was discharged because he filed the lawsuit and Sarubbi was discharged as a cover for Rizzo's discharge, I note that there was an out-of-Board settlement regarding those discharges. There is no dispute that during a hearing on the discharges the parties decided to settle the complaint allegations. Host agreed to pay a certain sum of money to Rizzo and Sarubbi and they agreed to withdraw the charges and the lawsuit. However, the parties disagree about whether Rizzo and Sarubbi waived their right to reinstatement and/or reemployment. The parties did not reduce their agreement to writing and much of the discussions concerning the settlement were not conducted in face-to-face meetings. Rather, the Host representatives were in one room and Rizzo and Sarubbi in another room with the Board agents shuttling back and forth with proposals and counterproposals. Due to the manner in which the negotiations were conducted, it appears that the parties misunderstood each other and that there was no true meeting of the minds between the parties. The Board has stated that when there is no meeting of the minds, a settlement agreement may be set aside and the underlying

[26] The fact that the waitresses who worked with Rizzo and Sarubbi also were shopped is insufficient to outweigh the testimony given by Swingle, Rizzo, and Sarubbi, particularly when Host failed to call witnesses to refute that testimony and offered no explanation for its failure to do so. When a party fails to call a witness to refute testimony the trier of the facts can presume that they could not refute the testimony. *Laredo Coca Cola Bottling Co. v. NLRB*, 613 F.2d 1338 (5th Cir. 1980).

[27] Host's contention that it was denied due process because it did not have available certain records to rebut the prima facie case established by the General Counsel is without merit. Host failed to call witnesses to rebut the testimony on which I relied to decide that the discharges were in violation of the Act.

issues may be litigated. *Stage Employees Local 659 (MPO-TV)*, 197 NLRB 1187 (1972); *Boilermakers Local 5 (Regor Construction)*, 249 NLRB 840 (1980). However, assuming that the settlement agreement should not be set aside, the Board has stated that presettlement conduct may be considered in assessing Respondent's motive or object in its postsettlement activities. *Lawyers Publishing Co.*, 273 NLRB 129 (1984). *Vore Cinema Corp.*, 254 NLRB 1288, 1291 (1981); *Laborers (Joseph's Landscaping)*, 154 NLRB 1384 (1965), enfd. 389 F.2d 721 (9th Cir. 1968).

D. *Whether Host's Claim that Rizzo and Sarubbi Waived Their Right to Future Employment is Relevant*

As noted, it is Host's position that during the negotiations to resolve the earlier discharges in Cases 29–CA–9486–1 and 29–CA–9486–2, Rizzo and Sarubbi waived all rights to future employment with Host. Counsel for Host contends that even if there was a misunderstanding about whether Rizzo and Sarubbi waived all rights to future employment, such an honest disagreement does not preclude a good-faith reliance by Host on its understanding of the agreement in determining whether to offer employment to Rizzo and Sarubbi.

Assuming arguendo, that Trosclair had stated during the negotiations that the Company would not reemploy Rizzo and Sarubbi at any time in the future, I do not consider that fact relevant to the issues in this case. The decision not to hire Rizzo and Sarubbi in March 1983 was not made by Trosclair. That decision, according to the evidence in this record, was made solely by Kouba. Kouba testified that he did not know Rizzo or Sarubbi personally, neither had worked for him. He expressed a limited knowledge about either the lawsuit or the charges that had been filed by Rizzo and Sarubbi. In fact, at one point he testified that he did not know that Rizzo had filed a lawsuit or charges and insofar as this record discloses there is no evidence that he knew that the lawsuit and the charges had been settled, nor does it disclose that he knew the details of the settlement. There was no testimony that Trosclair disclosed the details of the settlement to Kouba. Kouba testified that he decided not to hire Rizzo and Sarubbi solely because he knew that they had been discharged for cause and it was against company policy to hire employees who had been discharged for cause. At no point in his testimony did Kouba claim that the alleged waiver of future employment entered into his decision not to hire the two individuals. In these circumstances, it is difficult to understand the relevancy of the alleged waiver to Kouba's decision not to hire Rizzo and Sarubbi.

E. *Whether Host Refused to Hire Rizzo and Sarubbi in Violation of the Act*

Host contends that under Board law a postsettlement violation cannot be proven by presettlement violations when charges relating to presettlement allegations were withdrawn by a charging party or dismissal by the Board and when the postsettlement violation is inextricably intertwined with the withdrawn or dismissed charges. In support of this position, counsel cites *Leeward Nursing Home*, 278 NLRB 1058 (1986); and *Ventura Coastal Corp.*, 264 NLRB 291 (1982).

In *Ventura*, an employee filed a charge in May 1978 alleging that during a union organizing campaign an employer coerced and restrained employees by promising benefits and threatening plant closure. That charge was amended to add additional allegations concerning an overbroad nonsolicitation policy, surveillance, and granting of benefits. Between 29 and 31 July 1978 the employee who had filed the charge was advised by a supervisor that the employee had been denied a promotion and a transfer because of his activities on behalf of a union and because he had filed a charge with the Board. The employee did not then file a charge based on these disclosures. Thereafter, the Regional Director, over the objections of the employee, approved a settlement in August 1978 of the charges that had been filed in May 1978. The employee forwarded a letter to the Regional Director in October 1978 wherein he objected to the Regional Director's failure to require the company to post notices in Spanish and in which he advised the Regional Director that the union planned to file new charges. In December 1978, the union did file charges based on the information that the employee had gained from the supervisor about the company's failure to promote and its refusal to transfer him for discriminatory reasons. By the time the charges were filed, the employee had been laid off, not because he was discriminatorily selected for layoff, rather his layoff was the direct result of the company's discriminatory practice against him some months before the layoff. The administrative law judge (*Ventura*, supra at 298) concluded that under the rule in *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978), "a settlement agreement bars subsequent litigation of presettlement conduct alleged to constitute unfair labor practices," unless the violations that occurred prior to the settlement agreement were unknown to the General Counsel, not readily discovered by investigation or specifically reserved from the settlement by mutual agreement of the parties. The administrative law judge concluded in *Ventura*, with Board approval, that the exceptions did not apply because at the time that the Regional Director approved the settlement agreement the employee was aware of the alleged discrimination against him but failed to disclose it, and before the compliance with the terms of the settlement agreement had been completed the employee had put the Regional Director on notice about the Union's plan to file new charges. In these circumstances, the judge found that the presettlement discrimination against the employee was known to the employee and was readily discoverable by the Regional Director and therefore the exceptions to the general rule in *Hollywood* were not applicable. He also held that the eventual layoff of the employee was a natural consequence of the settlement-barred demotion, there was no independent evidence concerning the unlawful nature of the layoff, it was necessary to look to the settlement barred demotion to establish that the layoff was discriminatory.

In *Leeward*, during an organizing campaign, the schedule of an employee, Chang, was changed. As a result of

this change in her schedule, Chang was unable to arrive at work on time and she was disciplined for this failure. The union filed charges about this change in Chang's schedule and the discipline in which they alleged that the change in her schedule had been made for discriminatory reasons. Subsequently, the union and the company entered into a settlement agreement to resolve the allegations of this charge and this agreement was approved by the Regional Director on 28 October. On 4 November, the union filed a new charge in which it alleged that the company violated Section 8(a)(3) in relation to Chang because of her changed work schedule. This charge was withdrawn and the withdrawal was approved on 19 November. Chang eventually was discharged on 17 December because of her continual failure to arrive timely to work. It is undisputed that her failure to arrive timely was due to the change in her work schedule, which had been made for discriminatory reasons. On 3 January the union filed new charges but these charges did not mention Chang by name, nor did they contain language that facially covered her work schedule change, her discipline, or eventual discharge. The General Counsel, prior to trial, amended the complaint, which had issued on the basis of the charge filed on 3 January, to allege that the company had violated Section 8(a)(3) of the Act by its discharge of Chang on 17 December. It is undisputed that there were no independent discriminatory acts by the company in relation to Chang, her discharge was the direct result of the change in her work schedule some months before. The administrative law judge, with Board approval, dismissed the complaint in its entirety. In connection with the dismissal of the allegation, which related to Chang, the judge made two points, first the charge that specifically related to Chang had been withdrawn in November and the charge which had been filed in January was unrelated to the allegations concerning Chang. The Judge, in accordance with the holding in *Winer Motors*, 265 NLRB 1457, 1458 (1982), found that the withdrawn charge had not been reinstated within the 10(b) period and concluded that Section 10(b) barred consideration of the incidents relating to Chang, which had preceded the withdrawn charges. He also concluded that consideration of the suspension and discharge of Chang were barred by Section 10(b) because the finding of a violation regarding those actions was "inextricably linked to a finding of illegality in the time-barred event."[28]

The second point made by the judge concerning his dismissal of the allegations that related to Chang concerned the effect of the settlement agreement on those allegations. The judge, as he had done in *Ventura*, concluded that the rule in *Hollywood Roosevelt* controlled, and none of the exceptions to that rule were applicable and, thus, the presettlement events that surrounded the change in Chang's schedule could not be litigated. He further stated that in a limited number of cases a settlement may have a certain "prospective" reached in that it will bar efforts to litigate alleged postsettlement violations, which are themselves inescapably grounded in presettlement actions that would be barred from litigation by the settlement. He concluded that there were no independent violations of the Act committed by respondent, Chang's discharge was the direct result of the discriminatory change in her schedule, and that issue could not be litigated. Therefore, there was no evidence to support the allegation of discriminatory discharge.

Although, as noted, I do not believe that there was a meeting of the minds with respect to the settlement agreement and, therefore, do not believe that the agreement bars litigation of the 1981 discharges, I note that there are significant differences between the cases cited by counsel for Host and the instant case. In *Leeward*, the administrative law judge found that the charge, which alleged a violation of Section 8(a)(3) concerning Chang, was withdrawn and no new charge was filed in the 10(b) period. This is not the situation in the instant case. The charge in this case alleged violations based on events that occurred in March 1985 and the charge was filed, timely, with respect to those events. The charge, which was withdrawn in May 1983 after the settlement was reached related to acts by Host that occurred in September 1981. Further, unlike the situation in *Ventura* and *Leeward*, I do not find that the discriminatory conduct of Host in March 1985 is "inextricably intertwined" with the events of September 1981. The layoff in *Ventura* and the discharge in *Leeward* were the natural consequences of the original discriminatory conduct of the respondents in those cases, those respondents did not commit additional discriminatory acts. This is not the situation in this case. Host's representatives did engage in further discriminatory acts, they refused to hire Rizzo and Sarubbi because they had trouble with them at LaGuardia.[29] This refusal was not the natural flow of the original discriminatory conduct, it was a new act of discrimination within the 10(b) period. Although Powers did not specify what the trouble was that the Company had with Rizzo and Sarubbi when it refused to hire them, it is evident from Board cases that, at the very least, background evidence may be considered to establish what the Company considered the trouble to be. The General Counsel has established that the Company refused to hire Rizzo and Sarubbi because Rizzo had filed a lawsuit and because both had filed charges with the Board. Host failed to rebut that prima facie case. Accordingly, I find that Host has violated the Act. *NLRB v. AA Electric Co.*, 405 U.S. 117 (1972); *NLRB v. Globe Mfg. Co.*, 544 F.2d 1118, 1120 (1st Cir. 1976); *First National Bank & Trust Co.*, 209 NLRB 95 (1974), enfd. 505 F.2d 729 (3d Cir. 1974).

REMEDY

Having found that Host has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action de-

[28] Members Dennis and Johansen did not adopt the judge's decision to the extent that it could be interpreted that the charge filed in January was legally insufficient to support the complaint allegations concerning Chang's postsettlement discipline.

[29] Host contended that it also refused to hire DiGiorgio and that establishes that the refusal to hire Rizzo and Sarubbi was nondiscriminatory. That contention is without merit. DiGiorgio was not one of the "troublemakers" at LaGuardia. DiGiorgio worked at the JFK Airport.

signed to effectuate the policies of the Act, including the posting of remedial notices.

Having found that Host discharged Sarubbi on 15 September 1981 and Rizzo on 24 September 1981 and refused to hire Sarubbi on 14 March 1985 and Rizzo on 15 March 1985, I shall recommend that Host offer them employment and make them whole for any loss of wages or other benefits resulting from their discharges and from the failure of Host to hire them by payment to them of a sum of money equal to the amount they would have earned in wages and other benefits from the date of the discharge and refusal to hire to the date on which employment is offered, less net earnings. The amount of backpay shall be calculated in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977); see also *Isis Plumbing Co.*, 138 NLRB 716 (1962).

I will recommend also that Host rescind and remove all reference in its records to the discharges of Rizzo and Sarubbi and to the refusal to hire them. I shall further recommend that Host preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due to them.

On the foregoing findings of fact and on the entire record, I make the following

CONCLUSIONS OF LAW

1. Host is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Host discharged Sarubbi and Rizzo on 15 and 24 September 1981 and failed and refused to hire them on 14 and 15 March 1985 in violation of Section 8(a)(4) and (1) of the Act.

3. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Host International, Inc., a wholly owned subsidiary of Marriott Corporation, New York, New York, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging Virgilio Rizzo because he filed a lawsuit and Joseph Sarubbi to cover Rizzo's discharge and failing and refusing to hire Rizzo and Sarubbi for the above reasons and because they filed charges with the National Labor Relations Board.

(b) In any like or related manner violating provisions of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Virgilio Rizzo and Joseph Sarubbi employment with Host at its facility at the JFK Airport as bartenders or equivalent positions without prejudice to their seniority and other rights and privileges and make them whole with interest in the manner set forth in the remedy section of this decision.

(b) Rescind and remove all references to their discharges and/or their protected concerted activities and advise them in writing that this has been done and inform them that Host's unlawful conduct will not be used as a basis for further personnel actions concerning them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its JFK facility copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Booneville International Corporation d/b/a KMBZ/KMBR Radio *and* Broadcast Engineers Local 1259, affiliated with International Brotherhood of Electrical Workers, Petitioner. Case 17–UC–143

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On May 30, 1986, the Regional Director for Region 17 issued a Decision and Clarification of Bargaining Unit in the above-captioned proceeding. In his decision, the Regional Director concluded that the existing unit of all full-time and regular part-time news editors employed by the Employer[1] should be clarified to include the position of sports producer/news writer.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review alleging that, contrary to the conclusion of the Regional Director, the sports producers/news writers should be excluded from the unit. The Petitioner filed a statement in opposition, contending that the Regional Director's decision accreting these employees to the unit was correct. By unpublished order dated October 14, 1986, the Board (Member Stephens dissenting) granted the Employer's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Employer operates two radio stations: KMBZ, an AM station with a news, information, and sports format; and KMBR, an FM easy-listening music station which also broadcasts some news. In November 1985 the Employer acquired the right to broadcast Kansas City Royals baseball games and KMBZ, which had always broadcast some sports, made plans to increase its sports coverage with the beginning of the baseball season in the spring of 1986. In March the Employer announced the posting of job openings for two sports producers/news writers. Two news editors, Cook and Poor, were awarded the positions in April 1986.

The news editors, who comprise the existing unit, report to Managing Editor Holderby, who reports to News Program Director Ludlum. They work in the newsroom which they do not leave except in an emergency. Their primary responsibilities are to monitor the broadcasts of the stations on the air, monitor the police "scanners," and "rip" the wire services, that is, tear copy as it comes from the wire service machines and place it in baskets according to topics. News editors must also record certain "audio feeds" or transmissions from the wire services and other sources. They make "beat calls" to police and fire agencies several times each shift looking for news, contact various newsmakers, and conduct telephone interviews. Coordinating this material, the news editors determine what will be heard on the air.[2] Generally the news editors work only 40 hours per week with their schedules being set by Holderby.

Like the news editors, sports producers/news writers Poor and Cook do interviews, but are not heard on the air. Unlike the news editors, they work throughout the studio and are not confined to the newsroom. When the Royals are playing home games, one works at the station and one at the stadium. The sports producer/news writer working at the stadium goes to the locker room and sets up equipment, discusses with the announcer who will be interviewed, and makes arrangements for the interview. Meanwhile, at the station, the other will be putting highlights of the game on tape, monitoring the game to make sure there are no breakdowns, and answering the telephone for the postgame call-in show.

The Employer presented testimony that the sports producers/news writers are supervised by Sports Director Davis who, along with his assistant, Burley, does the sports announcing. Davis is said to have the authority to make recommendations with respect to hiring and firing, but it does not appear whether he is a statutory supervisor. Poor and Cook work with Davis and Burley discussing with them what guests should be interviewed on the shows, making arrangements for the interview, selecting topics for specific programs, and supplying Davis and Burley with interesting facts and background material for the shows.

The sports producers/news writers, conferring with Davis, prepare their own schedules based on the team's schedule and turn them into Ludlum once a week. On occasion, when the team is in town, they work more than 40 hours per week. Like the news editors, they are hourly paid and receive the same benefits. When Cook and Poor became sports producers/news writers they received the same pay rate they had received as news editors with a promise of a review in 90 days.

[1] The Petitioner was certified to represent this unit on March 21, 1986.

[2] News editors themselves are never on the air. The Employer's on-air performers are represented by the American Federation of Television and Radio Artists (AFTRA).

At the time of the hearing, the sports producers/news writers had not as yet performed any news writer functions. According to the Employer, as news writers they will be "reporters" except that they will not be heard on the air. They will be assigned to cover nonsports news such as news conferences, hearings, and special events in the community. In addition to their news writer assignments, in the off-season they will continue to be involved in sports programming.

The Petitioner filed the instant petition seeking to clarify the existing unit of news editors to include the two sports producers/news writers.

The Regional Director granted the requested accretion, noting that when new employees are found to have common interests with members of the existing bargaining unit and would, if in existence, have been included in the certified unit, accretion is proper. Though noting that sports producers/-news writers spend significant time away from the station, the Regional Director found that both the news editors and the sports producers/news writers are housed in the same facility. Both classifications provide support for on-air performers. The Regional Director relied on evidence that the Employer considered rotating the sports producer function among the news editors and eventually selected news editors to fill the positions. He also relied on Ludlum's having the actual supervisory authority over both groups and pointed out that both classifications enjoy the same wages and benefits and frequently share the same working areas. Finally he found that both classifications are instrumental in determining what will be aired and how it will be presented. Thus he concluded that there was a substantial community of interest among these employees that warranted the inclusion of both classifications in the same unit.

In requesting review, the Employer contends that the sports producers/news writers do not do news editors' work and have entirely different job functions. Further, the Employer points out that another producer, Morrison, whose duties are similar to those of the sports producers/news writers, has never been considered to have functions or interests similar to those of the news editors, and is not included in the existing unit. Morrison produces the midday program which airs each day. The record discloses that Morrison's job is "quite similar" or "about the same" as that of sports producer/news writer in that she lines up guests for interviews and arranges for them to appear on the midday show. She provides the two midday hosts with books, press releases, notes, and other material necessary for the broadcasts and sometimes suggests questions for the hosts to use in interviews.

We agree with the Regional Director's conclusion. In determining whether to grant a petition for unit clarification grounded on accretion, the Board examines whether the employees sought to be accreted not only possess a community of interest with the unit employees, but also lack a distinct identity that would warrant placing them in a separate unit.[3] Here the petitioner seeks the inclusion of a new classification—sports producer/news writer—into the existing unit of news editors. Essentially for the reasons stated by the Regional Director, we find that the sports producers, who produce material for the employees who broadcast the sports shows, have a community of interest with the news editors, who produce material for the employees who broadcast the news shows. In fact, as noted above, the two employees who comprise the new job classification were historically included in the unit as two of the five news editors. On obtaining broadcasting rights to the Kansas City Royals baseball games, the station management found that it must have personnel who could devote substantial time and energy to servicing the new sports shows. Because the skills and experience required to broadcast these events were similar to those required for the broadcast of the news shows, it was quite natural for the Employer to give the new assignment to the two news editors who had expressed an interest in it. But the reassignment did not significantly change or erode the community of interest which existed between the newly dubbed sports producers and their news editor colleagues.

With respect to the Employer's suggestion that the two sports producers have a separate identity in a theoretical unit composed of them and an employee known as the midday producer—apparently a preexisting, previously excluded job classification—we find the record evidence too sketchy and insufficient to conclude, as our dissenting colleague does, that the sports producers share a "greater community of interest" with the unrepresented midday producer. Moreover, we believe that the principal authorities relied on by our colleague are distinguishable. In *Armstrong Rubber Co.*, 180 NLRB 410 (1969), the record evidence clearly demonstrated that the two units which the union sought to accrete into a third unit had a long-established and "close" community of interest with a

[3] *Gould, Inc.*, 263 NLRB 442, 445 (1982); accord, *Universal Security Instruments v. NLRB*, 649 F.2d 247, 253 (4th Cir. 1981); *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468 (2d Cir. 1985). See also *Machinists Local 190 v. NLRB*, 759 F.2d 1477, 1481 (9th Cir. 1985) (the fact that the employees proposed to be accreted *do* lack a distinct identity does not necessarily require the accretion be granted; other factors may preclude accretion).

number of the administrative employees who were unrepresented. *United Hospitals*, 249 NLRB 562 (1980), is likewise distinguishable on its facts. There the union sought to accrete into a multiemployer service and maintenance unit (covering 21 employers) a group of admitting clerks and interviewers employed by 2 employers who were consolidating operations. The record showed that while *some* of the admitting clerks employed at one division of one of the consolidating employers were part of the multiemployer unit, the remaining clerks and interviewers working for the second division of the first employer and those working for the second employer were unrepresented. Moreover, an "overwhelming majority" of the admitting clerks and interviewers among all the 21 employing entities comprising the multiemployer association had been historically excluded from the unit. On this basis, the Board declined to accrete those previously unrepresented admitting clerks and interviewers who worked for the two consolidating employers.[4] In contrast, the Union here is not attempting to bootstrap previously unrepresented employees into the unit. Indeed, in a sense, all that is involved is an effort by the Union to maintain continuity of representation in the existing bargaining relationship.

We affirm the Regional Director and clarify the unit to include the two employees now engaged in sports producing/news writing activity.

MEMBER BABSON, dissenting.

Unlike my colleagues, I would not clarify the existing unit of news editors to include the two sports producers/news writers. The Board has traditionally required in accretion cases that the petitioned-for employees share a very strong community of interest with the unit employees.[1] Such is not the case here, where the record makes quite clear that the sports producers/news writers have a greater community of interest with the midday producer, a nonunit employee.[2]

The record shows that the sports producers/-news writers and the midday producer work with hosts to produce shows centered around an interview format, while the unit employees primarily coordinate breaking news for use on newscasts. Employees in both positions deal with background material and interview aids, while the unit employees deal with news. While all three classifications work to support on-air performers, the duties of the sports producers/news writers are more similar to those of the excluded midday producer than to those of the unit employees.

On prior occasions, the Board has not permitted an accretion where the employees sought to be accreted shared a close community of interest with other employees whom the petitioner did not seek to represent. For example, in *Armstrong Rubber Co.*, 180 NLRB 410, 411 (1969), the Board dismissed the clarification petition because the tire laboratory technicians and the scheduling department employees sought to be accreted shared a close community of interest with other nonunit employees who performed similar functions. More recently, in *United Hospital*, 249 NLRB 562, 563 (1980), the Board rejected a similar attempt at piecemeal expansion of the unit.

Based on the foregoing, I would not add the sports producers/news writers to the existing unit without a self-determination election[3] and, therefore, I respectfully dissent.

[4] It appears that those admitting clerks and interviewers who worked for one of the divisions of one of the consolidating employers and were represented by the Union still remained in the unit, despite the fact that after the consolidation they would be working together in a single department and in the same offices with many of the unrepresented clerks and interviewers. See 249 NLRB at 562-563. In other words, the close community of interests which the represented clerks and interviewers might be expected to develop with nonunion fellow clerks and interviewers would not result in exclusion from the multiemployer unit.

[1] *Safeway Stores*, 256 NLRB 918 (1981). See also *Towne Ford Sales*, 270 NLRB 311 (1984), enfd. sub nom. *Machinists District Lodge 190 v. NLRB*, 759 F.2d 1477 (9th Cir. 1985) (the Board "has followed a restrictive policy in finding accretion").

[2] The midday producer position predated the Union's certification, but the record does not disclose why this position was excluded from the unit. The Petitioner does not seek to clarify the unit to include the midday producer.

[3] I find it unnecessary to decide whether a unit consisting of the midday producers and the sports producers/news editors is appropriate because this issue was neither raised nor litigated.

Petroleum Maintenance Company *and* Oil, Chemical & Atomic Workers International Union, AFL–CIO and its Locals 1–19 and 1–128. Cases 31–CA–13517 and 31–CA–14571

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On June 19, 1985, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief. The Union filed limited exceptions and a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, to modify the remedy,[1] and to adopt the recommended Order as modified.

The complaint alleged, inter alia, and the judge found, that the Respondent violated Section 8(a)(5) and (1) of the Act by terminating its collective-bargaining agreement and making unilateral changes without having served the written notices required by Section 8(d)(3) of the Act.

As set forth in *Weathercraft Co. of Topeka*, 276 NLRB 452, 453 (1985), enfd. 832 F.2d 1229 (10th Cir. 1987),[2] Section 8(d)(3) unequivocally:

> provides that the duty to bargain includes serving written notice upon the other party to a collective-bargaining agreement of one's desire to terminate or modify it, with notice also to the Federal Mediation and Conciliation Service and the appropriate state agency.

As also set forth in *Weathercraft*, the Board has long held that:

> [f]ailure of a party desiring to terminate or modify a collective-bargaining agreement to give appropriate notice under Section 8(d)(3) precludes it from altering terms or conditions of the collective-bargaining agreement or engaging in a strike or lockout to enforce its proposed changes. This proscription exists notwithstanding that the expiration date of the agreement has past. [Id. at 453. See *Meatcutters Local 576 (Kansas City Chip Steak Co.)*, 140 NLRB 876 (1963); *United Marine Local 333 (General Marine Transportation Corp.)*, 228 NLRB 1107 (1977).]

Thus, an initiating party violates Section 8(a)(5) and (1) of the Act by changing the terms and conditions of an existing collective-bargaining agreement without having given the requisite 8(d)(3) notice to the Federal Mediation and Conciliation Service and the proper state mediation agency. See also *United Artists Communications*, 274 NLRB 75 (1985).[3]

Here, the parties' collective-bargaining agreement, at article II, section 3, provided that either party had the right to request changes in wage rates, and that if agreement was not reached within 60 days after receipt of written notice of such a request, the agreement would terminate "effective that date." On May 27, 1983, the Respondent sent a letter to the Union, which was received on May 30, 1983, giving 60 days' notice of its desire to renegotiate the existing wage and overtime rates. At that time, no notice was given to the Federal Mediation and Conciliation Service or to the state mediation agency. Although the parties held an initial bargaining meeting on July 18, 1983, no new agreement was reached. A second bargaining session did not occur until September 7, 1983. Thus, the contract, by its terms, could have expired 60 days after

[1] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[2] See also *Mar-Len Cabinets*, 243 NLRB 523, 534 (1974), enfd. in part 659 F.2d 995, 998 (9th Cir. 1981).

[3] We are mindful that some courts have held, in varying contexts involving their jurisdiction to enforce contracts under Sec. 301, that an initiating party's failure to give timely 8(d)(3) notices does not result in an extension of the expired contract. See, e.g., *Proctor & Gamble Independent Union v. Proctor & Gamble Mfg.*, 312 F.2d 181 (2d Cir. 1962); *Communications Workers v. Southwestern Bell Telephone Co.*, 713 F.2d 1118 (5th Cir. 1983). See also *Ottley v. Sheepshead Nursing Home*, 688 F.2d 883 (2d Cir. 1982). We need not decide whether an initiating party's failure to give timely 8(d)(3) notices actually "extends" the contract. However, we reaffirm, as set forth in cases like *Weathercraft*, supra, that an initiating party's failure to comply with Sec. 8(d)(3) extends the time during which it has an independent statutory, not contractual, obligation to refrain from altering terms and conditions of employment established by the contract. See also *NLRB v. Katz*, 369 U.S. 736 (1962). Pursuant to the Board's exclusive jurisdiction to prevent unfair labor practices under Sec. 10, this statutory obligation to refrain from unilateral changes is enforceable through Sec. 8(a)(5) and Sec. 8(b)(3). Indeed, the courts in *Proctor & Gamble*, supra, 312 F.2d at 190, and *Southwestern Bell*, supra, 713 F.2d at 1125, both acknowledged the difference between deciding the pure contract issue in a Sec. 301 suit and determining whether there is a violation of the statutory duty to bargain in good faith. See also *Laborers Fund v. Advanced Lightweight Concrete Co.*, 108 S.Ct. 830 (1988).

Moreover, to the extent that the court precedent cited above may be read as in conflict with the result reached here, we respectfully adhere to the reasoning set out in *Weathercraft*, supra, and *Mar-Len Cabinets*, supra. See also the analysis in *United Marine Division Local 333*, 228 NLRB 1107 (1977); and *Carpenters District Council of Denver (Rocky Mountain Prestress)*, 172 NLRB 793 (1968).

the Union's receipt of the Respondent's reopening letter.

Ultimately, the Respondent delivered a copy of its wage reopener letter to the Federal Mediation and Conciliation Service on November 30, 1983, and it sent a copy of its wage reopener letter to the State Mediation and Conciliation Service on December 12, 1983. Under these circumstances, the Respondent was obligated—by Section 8(a)(5) and (1) of the Act—to continue in full force and effect all the terms and conditions of the contract until January 12, 1984—i.e., 30 days after proper 8(d)(3) notices were given.

However, subsequent to July 30, 1983, but prior to January 12, 1984, and as more fully described by the judge, the Respondent made certain unilateral changes in the employees' terms and conditions of employment. Specifically, the judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) by unilaterally (a) discontinuing the dues-checkoff and union-security provisions of the contract, (b) discontinuing the grievance/arbitration provisions of the contract, and (c) discontinuing the payment of trust fund contributions required by the contract.

With regard to dues checkoff and union security, the General Counsel and the Charging Party argue, in essence, that these provisions remain in effect to present. They seek a make-whole remedy for the Respondent's failure to withhold and transmit dues. The Respondent contends that these provisions became ineffective on or about July 30, 1983—the date on which the contract, by its terms, could have expired. Thus, the Respondent argues that no make-whole remedy is appropriate.

Based on our finding that the Respondent was obligated to maintain the terms and conditions of the contract until January 12, 1984, we conclude that the dues remained effective until that date.[4] Thus, a make-whole remedy for authorized dues not deducted up to January 12, 1984, is proper.[5]

With regard to the Respondent's failure to adhere to the grievance/arbitration provisions, we find that, consistent with the above discussion, the Respondent was obligated to maintain those provisions until January 12, 1984. Subsequent to that date, the standards clarified by the Board in *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987), regarding the scope of the postcontract duty to arbitrate are applicable and define the Respondent's obligations with regard to grievance/arbitration.

The parties stipulated in relevant part that: "At the September 7, 1983 meeting, [the Respondent] confirmed to the Union its position that the contract had expired . . . . [The Respondent] advised the Union that the . . . grievance and arbitration provisions were, therefore, no longer in effect." In subsequent negotiations, the Respondent maintained this position. Accordingly, both before and after January 12, 1984, the Respondent violated Section 8(a)(5) and (1) by refusing to process grievances.[6] See also *Bethlehem Steel Co.*, 136 NLRB 1500, 1503 (1962), enfd. in pertinent part 320 F.2d 615 (3d Cir. 1963). Further, the Respondent's failure to maintain the arbitration provision of the contract until January 12, 1984, violated Section 8(a)(5) and (1) of the Act. Finally, with regard to the period after January 12, 1984, the Respondent's course of conduct demonstrated an across-the-board refusal to arbitrate hiatus grievances and thus constituted a wholesale repudiation of its postcontractual obligation to arbitrate, thereby violating Section 8(a)(5) and (1) of the Act.

Based on the above, we shall order, as a remedy, that the Respondent, on request, process any grievances filed both before and after January 12, 1984. Regarding any grievances filed between July 30, 1983, and January 12, 1984, the Respondent will be ordered to arbitrate them, on request.

However, regarding any grievances filed after January 12, 1984, we cannot determine—based on the evidence before us—whether the rights invoked in those grievances arose under the contract. Accordingly, we shall not order that the Respondent arbitrate any post-January 12, 1984 grievances.

Finally, with regard to the Respondent's unilateral discontinuance of trust fund payments, the Board has long held that the obligation to make such payments survives a contract's expiration. See, e.g., *Parkview Furniture Mfg. Co.*, 284 NLRB 947 (1987); *Hen House Market No. 3*, 175 NLRB 596 (1969). Thus, the judge correctly ordered a make-whole remedy for losses resulting from the Respondent's discontinuance of trust fund payments.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Petroleum Maintenance Company,

[4] The Board has held that dues-checkoff and union-security provisions do not survive the expiration of a contract. See, e.g., *Robbins Door & Sash Co.*, 260 NLRB 659 (1982), and *Peerless Roofing Co.*, 247 NLRB 500, 505 (1980). Similarly, here, the Respondent was obligated to maintain those provisions only until 30 days after it gave the appropriate 8(d)(3) notices.

[5] Interest on the amounts owed is to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

[6] The judge found that, subsequent to July 30, 1983, the Respondent was willing to, and did, discuss grievances with the Union's grievance committee. However, in light of the Respondent's statement that the grievance procedure was no longer in effect, we shall adopt the judge's finding of a violation of the Act.

Lomita, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 2(c) and (d) and reletter the subsequent paragraphs.

"(c) Reimburse the Union for all membership dues which the Respondent failed to withhold and transmit to the Union prior to January 12, 1984, pursuant to signed dues-deduction authorizations, with interest as provided in the Board's decision.

"(d) Notify the Union that the Respondent will, on request, process any grievance filed after July 30, 1983, and will, on request, arbitrate those grievances filed between July 30, 1983, and January 12, 1984."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT terminate our collective-bargaining agreement with Oil, Chemical & Atomic Workers International Union, AFL-CIO, and its Locals 1-19 and 1-128 and make unilateral changes in terms and conditions of employment without giving the proper notices required by Section 8(d) of the Act.

WE WILL NOT unilaterally change bargaining unit employees' terms and conditions of employment prior to offering the terms to and bargaining to a good-faith impasse with the Union.

WE WILL NOT fail and refuse to furnish the Union with information that it requested which is relevant and necessary to the Union's status as exclusive bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of our employees and, if agreement is reached, embody that agreement in a written, signed instrument.

WE WILL restore, to the extent requested by the Union, the wages, hours, and working conditions which were in effect in the bargaining unit at the expiration of the last bargaining agreement on July 30, 1983.

WE WILL reimburse the Union for all membership dues which we failed to withhold and transmit to the Union prior to January 12, 1984, pursuant to signed dues deduction authorizations, with interest.

WE WILL, on request, process any grievances filed after July 30, 1983, and WE WILL, on request, arbitrate those grievances filed between July 30, 1983, and January 12, 1984.

WE WILL furnish the Union, on request, the requested information relevant to the Union's status as collective-bargaining representative.

WE WILL make our employees whole for any losses they incurred as a result of our unilateral discontinuance of the employee benefit trust fund payments and as a result of the unilateral wage decreases, and pay the appropriate interest on such amounts of money.

PETROLEUM MAINTENANCE COMPANY

Raymond M. Norton, Esq., for the General Counsel.
Lana Borsook, Esq. (Kadency, Cohen & Schwaber), of Los Angeles, California, for the Respondent.
Wallace B. Knox, Esq. (Burris, Karp & Mooney), of Beverly Hills, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard these cases in trial at Los Angeles, California, on March 12, 1985. The cases arose as follows: On September 16, 1983, Oil, Chemical & Atomic Workers International Union, AFL-CIO, and its Locals 1-19 and 1-128 (the Union) filed a charge against Petroleum Maintenance Company (Respondent) in Case 31-CA-13517. Pursuant to that charge the Regional Director for Region 31 of the National Labor Relations Board issued a complaint and notice of hearing on November 30, 1983. Thereafter, on October 11 and 24, 1984, the Union filed a charge and an amended charge, respectively, in Case 31-CA-14571 against Respondent. On December 31, 1984, the Regional Director issued an order consolidating cases, consolidated amended complaint and notice of hearing in both cases. The consolidated complaint alleges, in substance, that Respondent engaged in certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

All parties have been afforded full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,[1] on the briefs filed on behalf of the parties, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent has been at all times material a California limited partnership with offices and a principal place of business located in Lomita, California, where it is engaged in the business of providing labor for maintenance and repair of petroleum refineries. During the normal course of its business operations, Respondent annually sells goods or services valued in excess of $50,000 to customers within the State of California, which customers themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standard. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is now, and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Effective March 26, 1974, Respondent and the Union entered into a collective-bargaining agreement concerning rates of pay, wages, hours of employment, and other terms and conditions of employment of employees of Respondent in an appropriate bargaining unit.[2] The collective-bargaining agreement was modified by the parties in June 1982 as set forth in a memorandum of agreement executed on or about June 17, 1982, a schedule "A" dated April 6, 1982, and a letter of understanding executed on or about June 17, 1982. The collective-bargaining agreement, as modified, remained in effect at least through May 1983. Respondent contends that the agreement was terminated on July 30, 1983. The General Counsel and the Union contend that the agreement continued beyond July 30, 1983, until at least January 12, 1984, because Respondent failed to give proper notice to the Federal and State Mediation Services required under Section 8(d)(3) of the Act.[3]

The collective-bargaining agreement provided that it would continue in effect until February 1, 1977, and from year to year thereafter, unless either party gave at least 60 days' notice to the other prior to any February 1 of its desire to modify, amend, or terminate the bargaining agreement. If such notice was given, and if no agreement was reached, then the bargaining agreement would terminate on the following February 1. Either party had the right to request changes in wage rates, and that if agreement was not reached within 60 days after receipt of written notice of such a request, the bargaining agreement would terminate "effective that date."

On May 27, 1983, Respondent sent a letter to the Union, which letter was received by the Union on May 30, giving 60 days' notice of its desire to renegotiate the existing wage and overtime rates. No notice was given to either the Federal Mediation and Conciliation Service or the State Mediation and Conciliation Service. On July 18, 1983, Respondent and the Union met to discuss Respondent's proposed changes to the bargaining agreement. Respondent's proposal read as follows:

> When the company performs work at a location covered by a contract with the Union, the job classifications and working conditions of company employees shall be identical with those of the customers' company. Wage rates will be as listed in Schedule A unless the customer company's contract requires payment of wages identical to customer's contract covering the work location.

No schedule A was attached to the proposal and no progress towards agreement on wage rates took place at this meeting. A second meeting was scheduled for July 26, 1983, but that meeting never took place. The second bargaining session did not occur until September 7, 1983.

In a letter dated August 18, 1983, Respondent, by its attorney, William C. Bottger Jr., notified the Union that the bargaining agreement had expired. Respondent had in fact treated the bargaining agreement as having expired on July 30, 1983. Thus, prior to July 30, Respondent accepted and processed grievances from employees in the bargaining unit. Grievances filed prior to July 30 continued to be processed normally. Respondent took the position that grievances filed after July 30 were not subject to the grievance procedure because the contract had expired. However, Respondent was willing to, and did, discuss such grievances with the Union's grievance committee.

On August 15, 1983, Respondent made its last payments to the health and welfare, vacation/holiday, and pension trust funds provided for in the bargaining agreement. These payments were for the period ending July 30. Thereafter, Respondent made no further payments to the trust funds.

At the September 7 meeting,[4] Respondent again stated its position that the bargaining agreement had expired because 60 days had passed since its wage reopener of May 27 and the parties had failed to reach a new agreement. Respondent advised the Union that the union-security, grievance and arbitration provisions, and trust fund provisions were no longer in effect. The Union denied

[1] On April 12, 1985, counsel for the General Counsel filed a motion to correct the transcript. As the motion is unopposed, the motion is granted and the corrections contained therein are incorporated in the record, sua sponte, as ALJ Exh. 1.

[2] I find the unit described in art. I and schedule "A" of the collective-bargaining agreement to be a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act.

[3] The General Counsel and the Union chose the January 12, 1984 date because Respondent did not give notice to the State Mediation and Conciliation Service until December 12, 1983.

[4] Sometime prior to its September 7, 1983 negotiation session with Respondent, the Union determined that Respondent had not sent a copy of the May 27 letter to the mediation and conciliation services. However, the Union did not notify Respondent of this defect.

that the bargaining agreement had expired. During the meeting Respondent contended that it could not compete with its nonunion competitors who were paying lower wages. Respondent stated that these competitors were underbidding Respondent and thereby causing Respondent a loss of work opportunities.[5] The parties agreed to meet again on September 13.

On September 13, Respondent gave the Union its proposed schedule A, setting forth proposed wage rates. This schedule did not include all job classifications. Further, Respondent stated that it was willing to sign a memorandum of agreement covering the wage rates of employees in the Bakersfield, California area. The Union made no counteroffer on wages. On September 16, the Union filed the first of the instant charges against Respondent alleging that Respondent had "unilaterally amended, modified and/or terminated portions of the current Collective Bargaining Agreement" in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act.

The parties met again on September 20. The Union requested the following information concerning Respondent's competitors: the competitors' rates of pay; their benefit structures; the amount of their bids; and their cost factors. The Union stated it needed the information in order to determine what concessions it would have to make to help Respondent become more competitive. Respondent asked the Union to make a counterproposal regarding wages, but the Union contended that it first needed the information regarding Respondent's competitors.

The parties met again on October 12. Respondent again sought a counterproposal from the Union and the Union again stated that it did not have sufficient information to make a counterproposal. The Union said it was attempting to get the information about the competitors on its own but "that was a lengthy process." The parties again met on October 21 at which meeting Respondent made its second written proposal. Thereafter, the parties met on October 31. At this meeting Respondent provided the Union with a proposed schedule A, which included all job classifications. The parties met again on November 4 and 22. At the November 22 meeting, Respondent amended its wage proposal. Under this proposal, all employees employed prior to 1974 would have no wage reduction. The Union then requested a list of the employees Respondent regarded as having seniority as of 1974. Respondent never provided that list.

On November 30, Respondent delivered a copy of the May 27 wage reopener to the Federal Mediation and Conciliation Service[6] and on December 12, sent a copy to the State Mediation and Conciliation Service.

Bottger, Respondent's counsel, sent the Union a letter dated January 9, 1984, summarizing the events of the preceding 7 months. Respondent took the position that the parties were at an impasse and that Respondent intended to implement, on January 16, its proposals of October 21 and 31, 1983. In response, the Union sent a letter dated January 13, denying the existence of an impasse and indicating its opposition to the planned implementation of Respondent's last proposal. Respondent did not implement its last offer on January 16, but rather waited until May 14, 1984. On May 14, Respondent implemented a new wage scale, which resulted in wage increases for some employees, decreases for others, and no changes for a few.

On April 4, prior to the implementation of the new wage rates, the parties met at Respondent's offices.[7] The parties first discussed the outstanding complaint in Case 31-CA-13517. After a caucus, Respondent's counsel informed the Union's representatives that he had spoken with William A. Thompson, Respondent's general manager, and that Respondent was not prepared to go forward with collective-bargaining negotiations because the Company was contemplating going out of business. Respondent's counsel requested from the Union a statement of Respondent's withdrawal liability under the pension trust fund, should Respondent go out of business. Respondent's counsel also stated that Respondent would resume payments to the trust funds "retroactive to April 1, 1984 with no strings attached."[8] The Union's counsel stated that Respondent could obtain the withdrawal liability directly from the pension trust in Denver, Colorado. The meeting ended with the parties agreeing to discuss these matters again.

On May 14, Respondent put into effect new wage rates. These wage rates reflected a wage structure negotiated by Respondent and one of its customers in May. Contrary to Respondent's position, the wage rate was not the same as that previously offered to the Union.[9] Respondent admits it gave no written notice of the wage changes other than the letter of January 9. Neither did Respondent give the Union any oral notice of this change. Thompson first informed a union agent of the change shortly after the wage rates had been implemented.

Respondent's wage schedule implemented on May 14 resulted in the job classifications of some employees being changed. Over half of the employees received wage increases and slightly less than half of the employees received wage decreases. A few employees had their wages rates unchanged.

In July and August 1984, Respondent agreed to a union request for an audit of its books concerning the new wage rates and Respondent's liability to the trust funds. Audits by both the Union and the trust funds were carried out in August 1984. On August 14, Respondent provided the Union with information concerning its wage rates.

[5] There is no dispute that the number of employees employed by Respondent has steadily declined since 1983.

[6] The complaint in Case 31-CA-13517 also issued on November 30.

[7] The findings regarding the April 4 meeting are based on the credited testimony of Gregory Mooney, the Union's attorney, which was corroborated by Tom Lind, an International representative for the Union. To the extent that the testimony of Ed Hoy, a labor consultant for Respondent, is inconsistent that testimony is not credited.

[8] Payments to the trust funds were in fact not resumed.

[9] The last wage proposal offered to the Union listed 26 job classifications with a high wage rate of $13.50 per hour and a low of $5 per hour. The wage rates placed in effect in May 1984 listed 14 classifications with a high of $14.50 per hour and a low of $7.53 per hour. Of the 12 classifications common to both lists, 10 received wage rates higher than that in the last offer to the Union and 2 classifications received the same wage rates offered to the Union.

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On August 29, Wallace Knox, an attorney for the Union, wrote Bottger, Respondent's attorney, stating that the information provided did not make clear to the Union what changes in wages had taken place. Knox asked for the date of the change as well as a description of each change in wage classifications with an explanation of which classifications had the responsibilities of the new classifications. On September 18, Knox wrote Bottger, stating that he had not received a response to his August 29 request. Knox requested the names; hire dates; job classifications; job locations; and wages of all employees hired, fired, laid off, reinstated, or otherwise terminated or newly employed since January 1, 1984, in addition to the previously requested information. On October 15, Bottger wrote Knox stating that he had forwarded Knox's request to Thompson, Respondent's general manager. Respondent has made no further response.

On November 1, Respondent filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Respondent is now operating its business as a debtor-in-possession. During the course of the bankruptcy proceeding, the Bankruptcy Court ordered Respondent to produce information to the Union regarding its employees and their hours, but not wages. Respondent complied with the order. In November, Ken Lord, an agent of the Union, requested a list of Respondent's current employees and received a list of Respondent's employees for the week ending November 18, 1984.

III. ANALYSIS AND CONCLUSIONS

A. *Failure to Notify the Federal and State Mediation and Conciliation Services*

The General Counsel and the Union argue that Respondent violated Section 8(a)(5) and (1) and Section 8(d) of the Act by terminating the bargaining agreement without giving the proper notice required by Section 8(d). Respondent contends that the bargaining agreement was effectively terminated when the parties failed to reach a new agreement within 60 days after the Union received Respondent's letter of May 27 requesting changes in the wage scale.

Section 8(d) of the Act provided in pertinent part as follows:

> *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

An employer violates Section 8(a)(5) of the Act if it terminates or modifies an existing collective-bargaining agreement without having served the requisite 8(d)(3) notice on the proper state agency. *Mar-Len Cabinets*, 243 NLRB 523, 524 (1974), enfd. in part 659 F.2d 995, 998 (9th Cir. 1981). See also *Ft. Smith Chair Co.*, 143 NLRB 514 (1963), enfd. 336 F.2d 738 (D.C. Cir. 1964).

In *United Artists Communications*, 274 NLRB 75 (1985), the Board recently emphasized that the initiating party must allow mediation efforts to take place for 30 days. When a notice of dispute is untimely filed, the 60-day period of Section 8(d) is tolled so that mediation efforts may take place for the 30-day period envisioned by Section 8(d)(3).

The notice requirements of Section 8(d) also apply to midterm modifications of existing agreements. *Keystone Steel & Wire*, 237 NLRB 763, 765–767 (1978); *Wisconsin Southern Gas Co.*, 173 NLRB 480 (1968).

Applying the governing case law to the facts of this case, I find that the contract could have expired, according to its terms, when the parties had not reached agreement, 60 days after the Respondent's reopening letter. However, Respondent was required to continue in full force and effect all terms and conditions of the bargaining agreement until 30 days after notice to the State and Federal Mediation and Conciliation Services. It is well established that in appropriate circumstances the notice provisions of Section 8(d) apply even when no strike or lockout is involved. *Mar-Len Cabinets*, supra; *United Artists Communications*, supra. Respondent would not have been justified in making the unilateral changes by reason of an asserted impasse in collective-bargaining negotiations. Even if a genuine bargaining impasse had existed, this, on the facts of this case, does not eliminate the necessity of complying with the notice provisions of Section 8(d)(3) of the Act. *Mar-Len Cabinets*, supra; see *NLRB v. Huttig Sash & Door Co.*, 377 F.2d 964, 968 (8th Cir. 1967).

Thus, Respondent's unilateral discontinuance of the contractual dues checkoff and union-security requirements constituted violations of Section 8(a)(5) and (1) of the Act. *Campo Slacks, Inc.*, 250 NLRB 420 (1980), enfd. 659 F.2d 1067 (3d Cir. 1981). Respondent's discontinuance of the payments into the trust funds provided by the contract violated Section 8(a)(5) and (1). *Wayne's Dairy*, 223 NLRB 260, 265 (1976); *Hudson Chemical Co.*, 258 NLRB 152, 157 (1981). Respondent's refusal to abide by the grievance and arbitration clause similarly violated Section 8(a)(5) and (1). See *American Sink Top & Cabinet*

Co., 242 NLRB 408 (1979); *Digmor Equipment & Engineering Co.*, 261 NLRB 1175 (1982).

B. *The Wage Increase of May*

It is well established that an employer violates Section 8(a)(5) of the Act by unilaterally changing a condition of employment that is under negotiation irrespective of whether the action is taken in good faith. *NLRB v. Katz*, 369 U.S. 736 (1962); *J. Hofert Co.*, 269 NLRB 520 (1984); *Western Publishing Co.*, 269 NLRB 355 (1984). The primary exception to this rule is that when negotiations reach an impasse, the employer is free to implement changes in employment terms unilaterally, as long as the changes have previously been offered to the union as a bargaining proposal. *Carlsen Porsche Audi*, 266 NLRB 141 (1983); *Ace Galvanizing, Inc.*, 217 NLRB 144 (1975); *Times Herald Printing Co.*, 221 NLRB 225 (1975).

In the instant case, Respondent could not change the agreement until 30 days after proper notice to the Federal and State Mediation Services, i.e., January 12, 1984. However, before Respondent could lawfully implement any changes there had to have been an impasse. The next question is whether an impasse existed when Respondent implemented its wage changes of May 14, 1984.

In the lead case of *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968), the Board utilized the following guidelines for determining the existence of an impasse:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

In *E. I. duPont & Co.*, 268 NLRB 1075, 1076 (1984), the Board reaffirmed its adherence to the *Taft Broadcasting* guidelines and added the following comment:

> Finally, there need be no undue reluctance to find that an impasse existed. Its occurrence "cannot be said to be an unexpected, unforeseen, or unusual act in the process of negotiations since no experienced negotiator arrives at the bargaining table with absolute confidence that all of his proposals will be readily and completely accepted." *Hi-Way Billboards*, 206 NLRB 22, 23 (1973).

In applying the impasse guidelines to the facts of this case, one cannot overlook the realities of the situation. As it was attempting to implement a wage reduction, it was to Respondent's advantage to arrive at impasse as soon as possible. On the other hand, the Union was in a position where an impasse would result in implementation of a wage reduction. Thus, it was to the Union's advantage to avoid reaching impasse. Moreover, in May 1984, looming over the negotiations were the unremedied unilateral discontinuance of payments to the trust funds and the pending question of whether Respondent would go out of business.

Respondent argues that an impasse existed in May 1984 because negotiations were deadlocked and there were no further efforts to break the deadlock. The General Counsel and the Union argue that no impasse could be reached in May due to the unremedied unfair labor practices.

The bargaining history lends support to a finding of impasse. However, the other factors, particularly Respondent's unremedied unfair labor practices, preclude a finding of impasse.

In *Wayne's Dairy*, 223 NLRB 260, 265 (1976), the Board found that an employer could not parlay an impasse resulting from its own misconduct into a license to make unilateral changes. An impasse attributable to the employer's unlawful failure to restore the status quo ante regarding the unilateral discontinuance of health and welfare trust payments was held not to be a good-faith impasse.

In *Little Rock Downtowner*, 168 NLRB 107, 108 (1967), enfd. 414 F.2d 1084 (8th Cir. 1969), the Board stated:

> It is well settled that where further negotiations appear to be futile, a union is justified in not seeking to continue them. Respondent's unilateral changes of working conditions without consultation with the bargaining agent are violations which strike at the heart of the Union's ability to effectively represent the unit employees. There is no clearer or more effective way to erode the ability of the Union to bargain for the employees than for Respondent to make such changes without consultation with the Union. Respondent, after having committed violations which reasonably resulted in the Union's decision to regard further attempts to bargain as futile, may not seize upon its own wrongs to charge an abandonment by the Union of the unit employees or to infer a loss of employee support.

See also *M. A. Harrison Mfg. Co.*, 253 NLRB 675, 684 (1980); and *Bay Area Sealers*, 251 NLRB 89, 90 fn. 5 (1980), enf. denied in pertinent part 665 F.2d 970 (9th Cir. 1982).

Further supporting the conclusion that Respondent cannot claim an impasse in May 1984 to privilege its wage changes is the fact that Respondent broke off negotiations and refused to bargain in April based on the possibility that it might go out of business. A deadlock caused by a party who refuses to bargain in good faith is not a legally cognizable impasse justifying unilateral conduct. *Bethlehem Steel Co.*, 147 NLRB 977, 978 (1964); *Northland Camps*, 179 NLRB 36 (1969). See also *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1349 (9th Cir. 1978).

More important, even if the parties were at impasse, Respondent could only implement a wage change reasonably comprehended within the proposal Respondent had offered to the Union during the bargaining. See, e.g., *Ace Galvanizing*, 217 NLRB 144 (1975); *Times Herald Printing Co.*, 221 NLRB 225, 229 (1975); *Wayne's Dairy, Inc.*, supra. The last wage offer to the Union froze wages for employees hired prior to 1974 and reduced wages for all other employees. The offer implemented made no dis-

tinction for pre-1974 employees and granted wage increases to a majority of the employees. Of the 12 job classifications common to the last offer and the implemented offer, 10 classifications received wage rates higher than that offered to the Union. Whether Respondent's changed offer would have broken the impasse and/or changed the Union's bargaining position is a matter of doubt. However, it is Respondent's conduct that causes such doubt. Accordingly, as the changes in wage rates were not reasonably comprehended within the proposals Respondent had offered to the Union during the bargaining, I find that Respondent violated Section 8(a)(5) and (1) even if an impasse existed. *Robbins Door & Sash Co.*, 260 NLRB 659 (1982). Cf. *Carlsen Porsche Audi*, supra (where the change implemented was well within the "flexible parameters" discussed with the union).

C. *The Refusal to Furnish Information*

The General Counsel and the Union argue that Respondent violated Section 8(a)(5) and (1) by failing to provide the wage rate and job classification information requested by the Union and that the information revealed to the Union did not clarify the job duties pertaining to particular job classifications. Respondent takes the position that it provided the Union with the information requested to the extent possible.

Following the unlawful unilateral change of wage rates in May, the Union, in August, requested from Respondent information concerning the wage rates paid in each classification at each job location. After a response from Respondent, the Union sought clarification because the job classifications listed by Respondent did not correspond with the job classifications utilized prior to the unilateral change. On August 29, the Union requested the names, hire dates, job classifications, job locations, and wages of all employees hired, fired, laid off, reinstated or otherwise terminated, or newly employed since January 1, 1984. Respondent did not offer this information to the Union. Auditors were permitted to inspect Respondent's books in August. However, the information given the auditors would not show the job functions of the employees. Without such information the Union still could not determine the effect of the changes in wages and classifications implemented in May.

It is well settled that an employer has a statutory obligation to provide a union, on request, with relevant information the union needs for the proper performance of its duties as a collective-bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In determining whether an employer is obligated to supply particular information, the question is only whether there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co.*, supra at 437. As the Supreme Court has stated, the disclosure obligation is measured by a liberal "discovery-type standard," not a trial-type standard, of relevance. Ibid.

Where the requested information deals with information pertaining to employees in the unit, which goes to the core of the employer-employee relationship, the information is "presumptively relevant." *Emeryville Research Center*, 441 F.2d 880 (9th Cir. 1971). Where the information is presumptively relevant, the employer has the burden of proving the lack of relevance. *Prudential Insurance Co.*, 412 F.2d 77 (2d Cir. 1969). Where the requested information concerns wage rates, job descriptions and other information pertaining to employees within the bargaining unit, the information is presumptively relevant. *Pfizer, Inc.*, 268 NLRB 916, 918 (1984); *Boeing Co.*, 182 NLRB 421, 425 (1970). In the instant case, the Union, after unilateral changes in wages and classifications, sought information from which to ascertain the effect of such changes on the unit employees it represents. The changes in classifications, without information regarding job duties, resulted in the Union's inability to determine with any degree of certainty which job classifications received increases and which received decreases. During the Union's audit, certain of the requested information was revealed. However, the information clarifying job duties and job classifications was never provided or revealed during the audits. Accordingly, I find that Respondent violated Section 8(a)(5) and (1) by not furnishing the information requested by the Union.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act. Respondent shall be ordered to reinstate the wages, hours, and working conditions in effect at the expiration of the collective-bargaining agreement, and to maintain such wages, hours, and working conditions in effect until modified by agreement with the Union or reaching a valid impasse in negotiations.[10]

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[10] I find *NLRB v. Cauthorne*, 691 F.2d 1023 (D.C. Cir. 1982), cited by Respondent, does not circumscribe the remedy. In *NLRB v. Cauthorne*, the United States Court of Appeals for the District of Columbia Circuit rejected any presumption that an employer's unilateral change in wages or benefits precludes the possibility of meaningful negotiations and prevents the parties from reaching a good-faith impasse. The Court held that in designing a remedy for an unlawful unilateral change, a crucial variable is the duration of the refusal to bargain. If the refusal persists until the time of the Board's order continuous make-whole relief may be appropriate. But if bargaining was resumed and carried forward at some point between the initial refusal and the time of the Board's order, make-whole relief must be circumscribed—at least in cases where the unilateral change did not violate the terms of a valid collective-bargaining agreement. Thus, the Court held that where an employer and a union have bargained in good faith despite the employer's prior unilateral changes in wages or conditions of employment, the employer's ongoing liability for the unlawful unilateral changes terminates on the date when the parties execute a new agreement or reach a lawful impasse. In the instant case, Respondent did not cure its wrongdoing but rather engaged in further unlawful unilateral changes in the absence of a good-faith impasse. Even assuming that impasse was reached following the first unilateral changes, the wage rates implemented in May, which were not fairly comprehended by the offer to the Union, constituted a further unlawful unilateral change. Thus, Respondent's unfair labor practices appear to be continuous and a continuous make-whole remedy would be appropriate under *NLRB v. Cauthorne*.

Respondent shall be ordered to make whole its employees for any losses that may have resulted from Respondent's discontinuance of payments to the trust funds by proper payments to the trust funds, with interest to be computed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Respondents shall also be ordered to make whole its employees for any losses they may have suffered as a result of the unilateral wage decreases. See, for example, *NLRB v. American National Insurance Co.*, 343 U.S. 395, 400 (1952). Backpay is to be computed in a manner consistent with *Ogle Protection Services*, 183 NLRB 682 (1970), with interest thereon as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).

In the case of the unilateral wage increases, on the other hand, it is the Board's established policy not to require the employer to revoke increased benefits even though they were given unlawfully. See *Stayer's Johnsonville Meats*, 174 NLRB 693 fn. 3 (1969). See also *Carmichael Construction Co.*, 258 NLRB 226, 231 (1981), enfd. 728 F.2d 1137 (8th Cir. 1984).

Respondent will also be ordered to provide the Union, on demand, with the requested information concerning the job classifications.

As noted earlier, Respondent filed a petition under Chapter 11 of the Bankruptcy Code on November 1, 1984. The extent to which Respondent will be able to comply with the remedial order is subject to the jurisdiction of the Bankruptcy Court. See *Airport Bus Service*, 273 NLRB 561 (1984).

CONCLUSIONS OF LAW

1. The Respondent, Petroleum Maintenance Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Oil, Chemical & Atomic Workers International Union, AFL–CIO and its Locals 1–19 and 1–128, is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating its collective-bargaining agreement on July 30, 1983, and instituting unilateral changes in the grievance and arbitration procedure, union security and dues checkoff and payments to the employee benefit trust funds, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act.

4. By unilaterally changing wage rates in May 1984, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By failing and refusing to furnish the Union with the requested information relevant to the Union's status as exclusive bargaining representative, Respondent violated Section 8(a)(5) and (1) of the Act.

6. The bargaining unit described in the last collective-bargaining agreement between Respondent and the Union is an appropriate bargaining unit within the meaning of Section 9(b) of the Act.

7. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Petroleum Maintenance Company, Lomita, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating its collective-bargaining agreement with the Union and making unilateral changes in terms and conditions of employment without giving the proper notices required by Section 8(d) of the Act.

(b) Unilaterally changing bargaining unit employees' terms and conditions of employment prior to offering such terms to and bargaining to a good-faith impasse with the Union.

(c) Failing and refusing to furnish the Union with information that it requested, which is relevant and necessary to the Union's status as exclusive bargaining representative.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action that is necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as the exclusive collective-bargaining representative of Respondent's employees, and if agreement is reached, embody that agreement in a written, signed instrument.

(b) Restore, on request by the Union, the wages, hours and working conditions that were in effect in the bargaining unit at the expiration of the last bargaining agreement on July 30, 1983.

(c) Furnish the Union, on request, the requested information relevant to the Union's status as collective-bargaining representative.

(d) Make its employees whole for any losses they incurred as a result of Respondent's unilateral discontinuance of the employee benefit trust fund payments and as a result of the unilateral wage decreases, and pay the appropriate interest on such amounts of money, as more fully described in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Lomita, California, copies of the attached notice marked "Appendix."[12] Copies of the

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[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

Geo. C. Christopher & Son, Inc. *and* Local Lodge 286, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 17–CA–12952 and 17–CA–13125

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On August 5, 1987, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and brief in support thereof and in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Geo. C. Christopher & Son, Inc., Wichita, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] No exceptions were filed to the judge's failure to find that, assuming Sec. 8(d) did not preclude altering the terms and conditions of the contract, the Respondent's unilateral reduction of wages was still unlawful because the parties had not reached a legal impasse in their bargaining over wages.

[2] In addition to the rationale set forth in the judge's decision concerning the Respondent's failure to give 8(d)(3) notices and its resultant obligation to refrain from making unilateral changes in terms and conditions of employment established by the parties' contract, we rely on the Board's analysis of this obligation in *Petroleum Maintenance Co.*, 290 NLRB 460 (1988).

[3] The General Counsel's exceptions urge modification of the recommended Order to include a provision for a visitatorial clause. Under the circumstances of this case, we find it unnecessary to include such a clause. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

Stanley D. Williams, Esq., for the General Counsel.
Milo M. Unruh and *Stuart R. Collier, Esqs.*, of Wichita, Kansas, for the Respondent.
Robert L. Dameron, Esq. and *Donald L. Spatz*, of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These cases were tried at Witchita, Kansas, on 18–19 December 1986[1] and on 12–16 January and 25–27 February 1987. The charges were filed by the Union 23 April and 16 September, and a consolidated complaint was issued 16 October.

Faced with large financial losses the company in January reopened its 1985–1988 agreement with the Union, seeking a wage reduction. On failing to agree on the amount of the reduction the Company notified the Union on 4 April that it was terminating the agreement, even though it had failed to send the 30-day notices required by Section 8(d)(3) of the National Labor Relations Act.

The primary issues are whether the Company, the Respondent, (a) told an employee that the Union no longer represented the employees and (b) unlawfully failed to continue in effect the terms and conditions of the agreement by reducing wages, making other changes, and laying off employees without honoring the contractual seniority provisions, in violation of Section 8(a)(1) and (5) of the Act.

On the entire record,[2] including my observations of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, fabricates structural steel and operates a steel service center in Wichita, Kansas, where it annually ships goods valued over $50,000 directly outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Failure to Give 8(d)(3) Notices*

1. Statutory requirement ignored

On 1 April 1985 the Company and the Union signed a collective-bargaining agreement effective from then until 1 April 1988 (G.C. Exh. 1E, Exh. 1, art. 29.1 at 33). The 1985–1988 agreement provided (art. 28 at 32) for the following wage reopener:

> 28.6 The Company agrees to meet with the Union during the month of January for the purpose of considering the wage rates to become effective April 1, 1986 . . . .
>
> 28.7 Upon failure on the part of the parties to reach an agreement under 28.6, either party may give notice of intent to terminate this Agreement effective April 1, 1986 . . . .

It is undisputed that there was never any mention of the statutory notice requirements in 1982 when a similar wage reopener was included in the prior agreement, in 1985 when the 1985–1988 agreement was negotiated, or

[1] All dates are in 1986 unless otherwise indicated.

[2] By agreement of the parties an amended seniority list is received as G.C. Exh. 27.

in 1986 during the wage negotiations before 1 April (Tr. 1261–1268, 1295).

On 3 January the Company sent the Union a reopener letter (G.C. Exh. 2). In the wage negotiations that followed the Company proposed a 20-percent wage reduction to be effective 1 April, and the Union proposed an 18- or 20-percent wage *increase*. By their third negotiating session on 31 March the Company and Union reduced their wage demands in a continuing effort to reach agreement. The Union proposed a 7-1/2-percent *reduction* (deferring a wage increase), and the company reduced its demand to a 14-percent reduction. (Tr. 112, 1258; G.C. Exh. 1E, Ledermann's affidavit at 14.)

Meanwhile the Company (Tr. 26) failed to give the 30-day notice of the dispute to the Federal Mediation and Conciliation Service and the Kansas Department of Human Resources as required in Section 8(d)(3) of the Act. *Weathercraft Co. of Topeka*, 276 NLRB 452, 453 (1985).

In the 31 March meeting Union Representative Donald Spatz (the International's director of education) suggested that a Federal mediator be invited to assist in the negotiations, but to no avail. He credibly testified (as confirmed in his 9 April letter discussed below) as follows (Tr. 116):

> A. I think I had made a suggestion during the course of the meeting that a . . . federal mediator might be helpful to us in resolving the difference between us.
>
> Q. Okay. And did the company respond at all to your suggestion?
>
> . . . .
>
> A. Mr. [George] Christopher [the company president] indicated that (inaudible).

(I find it unnecessary to make a finding on the content of this and other "inaudible" testimony—or to correct other errors in the transcript typist's understanding or identifying persons speaking at the trial—resulting from the use of an electronic reporting system in these proceedings.)

Ignoring its failure to give the 8(d)(3) 30-day notices, the Company produced a letter at this 31 March meeting to terminate the agreement at 12:01 a.m. on 1 April if a wage agreement was not reached. It "volunteered," however, to extend the agreement 3 days to give the union membership an opportunity to vote on accepting its last proposal. (Tr. 114, 1260, 1462; Ledermann's affidavit at 14.) It then presented to the Union, and they signed, a previously prepared extension agreement entitled "Interim Agreement" (G.C. Exhs. 1E and 2). It stated that

> Notwithstanding any provision to the contrary appearing in Article 28.6 . . . or in Article 28.7 of the [1985–1988] Agreement . . . the undersigned parties stipulate and agree that if an agreement [on] wage rates . . . is not reached by 11:59 p.m. on April 3, 1986, either of the undersigned shall have the right to terminate the . . . Agreement by notice in writing delivered to the other not later than 11:59 p.m. on April 4, 1986 . . . .
>
> If either of the undersigned terminates the . . . Agreement pursuant to the terms of this Stipulation and Agreement, the effective date of termination shall be 12:01 a.m., April 1, 1986.

On 4 April the Company again ignored its failure to give the 8(d)(3) 30-day notices and the requirement in Section 8(d)(4) that it continue "in full force and effect . . . all the terms and conditions of the existing contract for a period of sixty days after [the Section 8(d)(1) termination or modification] notice [followed by the 30-day notices] is given." After learning that the Union had rejected its last offer, the Company on 4 April sent the Union a notice (G.C. Exhs. 1E and 3) that the 1985–1988 agreement is "declared terminated as of 12:01 a.m. April 1, 1986."

On 9 April Representative Spartz sent the Company a letter (G.C. Exh. 11) responding to the termination notice, requesting continued negotiations, and stating that

> As I stated in our last negotiations, I believe assistance of the Federal Mediation and Conciliation Service may be helpful. May I have your position on this?

On 23 April the company counsel answered (G.C. Exh. 12) stating in part that

> With respect to the company's view on the Federal Mediation and Conciliation Service, our client believes that the mediation service may (and should) *decline* to participate in such mediation until the parties have had sufficient negotiations . . . to define any unresolved issues which may exist between them. [Emphasis added.]

2. Contentions and concluding findings

The Company contends in its brief (Br. 8–9) that "by executing the interim agreement dated March 31, 1986," the Union (1) is "estopped to claim that notice by the Company to the Federal Mediation and Conciliation Service must be given at least 30 days prior to termination," (2) "waived any right it had to claim the Company had not given 30 days prior notice," and (3) "acquiesced in and clearly recognized and acknowledged the company's right to terminate the contact."

The Company argues (Br. 16–17) that

> [T]he interim agreement provides the method of termination of contract. No contention has been made by the General Counsel or the union that the interim agreement is unlawful or that any term [in it] is prohibited by law. Additionally, this writer has researched and can find no statutory prohibition of waiver of the 8(d) notices. Curiously the General Counsel has totally ignored what would appear to be the crux of the whole matter. What were the parties' rights and obligations following execution of the interim agreement? [The Company] suggests . . . that the interim agreement must be enforced as agreed to by the Union; and that to imply into the agreement the 30-day notice provision of 8(d)(3) would totally obliterate what the parties agreed to

> in clear and unequivocable language. General Counsel would have [the Company] do the impossible, i.e., give 30 days notice prior to the termination date called for by the interim agreement (April 3). The parties couldn't have possibly intended such an absurd result. . . . The interim agreement must be enforced as written.

The Company overlooks, or ignores, the often-cited ruling by the Supreme Court that the 8(d) "notice requirement operates wholly independently of whatever notice requirement the parties have fixed for themselves." *NLRB v. Lion Oil Co.*, 352 U.S. 282, 292–293 (1957).

The Board cited this ruling in *United Marine Division Local 333 (General Marine)*, 228 NLRB 1107, 1108 (1977), in which a contractual provision permitted the union to terminate the agreement without notice if the employer became delinquent in making payments to the pension and welfare fund. The Board held that the 8(d)(3) 30-day notices (as well as the 8(d)(1) 60-day termination notice) must be sent.

> The lack of contractual notice requirements for such "mid-term" termination cannot operate . . . as a license to the parties to ignore the statutory notice requirements . . . . In [the *Lion Oil* case] the Supreme Court found that the congressional intent was that parties not be able to avoid the notice requirements of Section 8(d) . . . . Thus, the Supreme Court stated, "One thing the most authoritative gloss of § 8(d), the report of the Senate Committee, makes clear is that the statutory notice requirement operates wholly independently of whatever notice requirement the parties have fixed for themselves."

As held in *Weathercraft Co.*, supra, 276 NLRB at 453, "Failure of a party desiring to terminate or modify a collective-bargaining agreement to give appropriate notice under Section 8(d)(3) precludes it from altering terms or conditions of the collective-bargaining agreement." Whether the 31 March interim agreement is "in substance and form a Collective Bargaining Agreement" and "a binding contract" (as the Company contends in its Br. 9 and 20) or whether it is merely a 3-day extension of the 1985–1988 agreement, the Company was obligated to continue in effect the terms and conditions of the agreement until 30 days after the 8(d)(3) notices were sent. The obligation was a statutory requirement that existed both before and after the interim agreement was signed. The "statutory notice requirement operates wholly independently of whatever notice requirement the parties have fixed for themselves."

The Company, having failed to give the 8(d)(3) 30-day notice to the Federal Mediation and Conciliation Service and the Kansas Department of Human Resources (Tr. 1316, 1461; G.C. Exh. 22), I find that it was required by Section 8(d)(4) to continue in effect "all the terms and conditions" of the collective-bargaining agreement until 30 days after it has given the statutory 30-day notices.

B. *Coercive Statements*

The complaint alleges that about 11 April Vice President George Ledermann and Employee Service Manager Stan Koehler told an employee that the Union no longer represented the employees in the bargaining unit.

Employee Michael Donohue testified that on 11 April, when he and others were called to the office (to be laid off), he asked Koehler for a union representative at the meeting. He recalled (Tr. 152–153) that Koehler said "that I was not entitled at this time to union representation because as far as the company was concerned we no longer had a contract with the union and the union was not our bargaining party." He also recalled (Tr. 153–154) that Ledermann later told him that "the contract being no longer in effect I was not entitled to union representation, that the union was not my bargaining committee anymore." Similarly employee Patrick Bauer (who overheard Donohue's conversation with Koehler) recalled (Tr. 164) that Koehler said, "We no longer recognize the union because we're working without a contract anyway."

Although Donohue and Bauer impressed me as being honest witnesses, I find that they either misunderstood or did not recall correctly why Koehler and Ledermann told Donohue that he was not entitled to union representation at the meeting. Both Koehler and Ledermann recalled telling Donohue that this was not the kind of meeting that required union representation, and Ledermann recalled: "I mentioned to him that the contract was no longer in effect" because "I gleaned from him that he felt that the contract provided for him to have a representative whenever he had to come to Personnel." (Tr. 1342, 1354–1455.)

I credit the denials (Tr. 1371, 1455) and find that this allegation must be dismissed.

C. *Reduced Wages and Other Changes*

Since 4 April the Company has taken the position that it lawfully terminated the 1985–1988 agreement effective 1 April and that none of the contractual provisions have been in effect since then. On 11 April the Company implemented the proposed 14-percent wage reduction contained in its 31 March offer. By letter dated 11 April (G.C. Exh. 5) it notified the employees that the reduction would be effective 14 April.

In addition, without any notice to the Union, the Company in April made other changes on which there had been no bargaining. (1) It failed (Tr. 1444–1445) to abide by the grievance-and-arbitration procedure in the 1985–1988 agreement. (2) It promoted (G.C. Exhs. 10 and 18) fabrication leadmen Stephen Hogg, James Miser, and Mark Throckmorton; maintenance leadman Robert Wellner; material leadman Benny Jackson; parts leadman Francis Newman; and the service center leadman Donald Conrad to the supervisory position of crew chief. The Company admits (Tr. 90) that these seven persons continued to perform the same work even though article 28.1(g) of the agreement (at 31) prohibited crew chiefs from performing bargaining unit work "while employees are laid off in that classification." (3) The Company refused to honor the dues-checkoff provisions in the agree-

ment. (4) The Company discontinued making the pension benefit contribution of 24 cents an hour required in the agreement (art. 6), although it has placed the contributions in an escrow or accrued account (Tr. 95, 97) pending the outcome of this proceeding. (5) It failed to follow the contractual layoff requirements, as discussed below.

The Company admits in its brief (Br. 10) that it reduced the wages, instituted a new grievance procedure, promoted leadmen to crew chiefs, ceased collecting union dues, and ceased making contributions to the future service pension plan. It contends, however, that "upon the termination of the April 1, 1985 agreement the Company had fulfilled its duty to bargain with the Union and lawfully instituted terms and conditions of employment."

As found, the Company was required by Section 8(d)(4) to continue in effect "all the terms and conditions" of the 1985–1988 agreement until 30 days after it has given the 8(d)(3) 30-day notices, which were not given. I therefore find that the wage reduction and the other five changes in the terms and conditions of the agreement were made unlawfully and that the Company refused to bargain in violation of Section 8(a)(5). Its economic difficulties are no defense.

I also find that even if the Company were not required by Section 8(d)(4) to continue "in full force and effect . . . all the terms and conditions" of the 1985–1988 agreement, it unlawfully refused to bargain in violation of Section 8(a)(5) by making most of the changes. Excluding the reduction in wage rates (the "only" purpose of the 1986 wage reopener), the Company made the changes without affording the Union an opportunity to bargain. It therefore made unlawful changes in conditions of employment when it unilaterally instituted a new grievance procedure, allowed promoted supervisors to perform bargaining unit work, discontinued making the pension benefit contributions, and ignored the seniority rules when laying off employees. (The checking off of dues, on the other hand, was not a condition of employment. *Bethlehem Steel Co.*, 136 NLRB 1500, 1501 (1962).) As ruled in *NLRB v. Katz*, 369 U.S. 736, 747 (1962), "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment . . . and must of necessity obstruct bargaining, contrary to the congressional policy."

D. *Failing to Follow Contractual Layoff Requirements*

1. Seniority provisions ignored

In April the Company laid off a total of 46 of its 128 bargaining unit employees: 24 on 14 April, 1 on 15 April, 1 on 18 April, and 20 on 25 April (G.C. Exh. 27). The General Counsel contends that the Company wrongfully laid off 26 of these 46 employees because, as senior qualified employees, they should have been retained under article 14.1 of the agreement (G.C. Exhs. 1E and 1 at 12).

The layoff provision, article 14.1, required that

> Any layoff shall be *on the basis of seniority* on a plantwide basis, provided the senior employees retained for work are *qualified* to perform the work. No employee will be placed on layoff when there is work available in the same or a lower pay level which the employee is *as qualified* to perform and which an employee with less seniority is performing. . . . [Emphasis added.]

Thus the layoff provision requires that employees must be retained on the basis of plant seniority if they are "qualified" to perform the available work, and that they must not be laid off if they are "as qualified" as junior employees performing available work in the same or lower pay level.

The Company admits, however, that when it started making a list on 5 April of employees to be laid off, it did not consider itself bound by any contractual constraints in selecting the employees (Tr. 1470). It took this position when the Union first presented grievances on 15 April. Employees complained in the grievances that they should not have been laid off because they were qualified to perform work in their classifications and "also qualified to perform work in other classifications with less senior employees" (G.C. Exh. 13).

On the morning of 15 April when Union Representative Spatz handed Vice President Ledermann the grievances and sought explanations for the layoff of these senior employees, Ledermann stated "it was the company's prerogative who to lay off" and that seniority "had no application" because the contract had been terminated (Tr. 127, 1463). (Ledermann refused to accept the grievances, except as complaints (Tr. 125), and later refused (Tr. 232) to arbitrate the layoff grievances.) When Employee Services Manager Koehler joined the discussion that afternoon, he informed Spatz that "the decision who to retain was based on which person was most capable" (Tr. 129).

Again on 6 June Vice President Ledermann confirmed the Company's belief tht it was not required to honor the employees' seniority. He stated in a letter to Spatz (G.C. Exh. 16) that

> A review of those grievance forms indicates rather clearly that they suggest the Company did not follow Article 14.1 of [the 1985–1988 agreement]. As you know, Don, the Company's view and position is that Agreement was terminated in total effective April 1, 1986. It follows, naturally, that the Company's view is that all provisions of that Agreement including Article 14.1 were of no force and effect after April 1, 1986.

2. Opposing contentions

The Company asserts in its brief (Br. 27) "that although it did not consider itself bound by the agreement because [the agreement] was terminated, the results obtained from the layoffs were consistent with" article 14.1. Thus it contends that it complied with the contractual requirement that employees must be retained on the basis of their plant seniority if they are "qualified" to perform the available work, or if they are "as qualified" to perform the available work of junior employees in other classifications.

The word "qualified" is not defined in the 1985–1988 agreement. The General Counsel contends that it means "sufficient ability to perform the job" and that "the senior qualified employee will be entitled to preference even though the junior employee possesses greater skill and ability."

The Company contends that qualification should be interpreted to mean "versatility, flexibility, efficiency, proficiency, and skill" and that the laid-off employees were not "qualified to perform the work then available."

President Christopher gave the following explanation why higher employee qualifications are necessary for the Company to reverse its heavy losses in recent years and to become more competitive (Tr. 1280–1281):

> My marketing committee and I developed a plan in the first three months of 1986 that was directed toward heavy bridges . . . complex welding projects . . . the types of projectrs that other people didn't want . . . because they were complicated, high man hour, quality production type projects. We realized that we could not be competitive on shopping centers, simple beam and column jobs.
>
> . . . .
>
> As long as we couldn't do the bread and butter type fabrication anymore, because we weren't competitive, those people who worked for us who were only capable of doing the bread and butter type work were just not going to be able to carry their share of the load.

Christopher further explained the Company's evaluation system, which is devised to pay employees up to 10 percent more than the negotiated base wage rates for superior performance and to encourage the employees to advance to higher levels by enhancing their capabilities. He expressed his feeling that "if all our welders were number 1 welders, we would probably be able to weld better than anybody else that we were dealing against, and that was what was going to be the advantage for the company, by having people in higher paid category." (Tr. 1287.) Under this evaluation system the employees are presently being paid between 7 and 8 percent above the base wage rates (Tr. 1291). The employees' average rating is therefore between 107 and 108, entitling them to be paid 107 and 108 percent of the base rates.

I agree with the General Counsel that the contractual requirement that senior employees be retained if "qualified to perform the work" does not require the senior employee to be the best qualified. That is not what the parties to the agreement negotiated. I agree with the Company, however, that the senior employee must be "qualified to perform the work then available." I also find that for a senior employee to be entitled to bump into another classification, he must be "as qualified" as the junior employee to perform the available work there.

Fortunately it is not necessary to rely solely on the conflicting testimony to determine the qualifications of the 25 senior employees who the General Counsel contends were improperly laid off. I find that the evaluation system, on which the premium wages are based, contains persuasive evidence of the Company's own appraisal of the employees' qualifications.

I find that only 7 of the 26 senior employees were improperly laid off.

3. Rulings on alleged improper layoffs

Welder-Fitters

The following list contains names of laid-off welder-fitters (classes 1 and 2) and junior welder-fitters who were retained. It also shows the dates of layoff, the latest evaluations (if in evidence), and the seniority dates.

WF-1	Melvin Riley	Apr. 14	103	9/9/74
WF-1	Alfred Cox	Apr. 14	101	2/14/77
WF-1	Michael Maddox	Apr. 25		8/18/80
WF-1	Jonathan Meyer		109	8/18/80
WF-1	Delmar Brown		108	1/12/81
WF-1	James Kahre		109	2/9/81
WF-1	Michael McConnell	Apr. 25	104	5/11/81
WF-1	Robert Brown Jr.	Apr. 14	106	9/8/81
WF-1	Phillip Newman	Apr. 14		11/22/82
WF-1	Daniel Schumacker		106	5/13/85
WF-1	Christopher Lacour		103	6/17/85
WF-1	Tom Thomas		106	8/19/85
WF-2	Michael Donohue	Apr. 14	98	10/27/81
WF-2	Cliff Gardner	Apr. 25	107	9/7/83
WF-2	Theodore Phillips			11/14/83
WF-2	Patrick Bauer	Apr. 14	102	7/15/85
WF-2	Edward Randall		107	9/23/85
WF-2	Maurice Gray		105	1/2/86

Melvin Riley. He had a low evaluation of 103 (G.C. Exh. 26V). On a scale of minus 5 to plus 10, he was rated zero on quality and 2 on quantity and job knowledge. Supervisor Eddie Winkle (who appeared to be an honest witness) credibly testified (Tr. 592) that he "was very limited [in] what I could use him on . . . if you got him into more complicated things, he was out of his element and could not perform." I find that the General Counsel has failed to prove that WF-1 Riley was qualified to perform the available work.

Alfred Cox. He had a lower evaluation of 101. He was rated 6 for job knowledge, but only 3 on quality and minus 2 on quantity. (G.C. Exh. 26J.) Supervisor Winkle credibly testified that Cox was weak in interpreting blueprints, and "Al was very limited in what areas we could use him. He had arthritis in his hands," causing him problems in holding a welding stinger. He had trouble climbing on truses, and he could not work in the colder buildings in severe weather (Tr. 518–520, 595–596.) I find that the General Counsel has failed to prove that WF-1 Cox was qualified to perform the available work.

Michael Maddox. On 24 April he made a written request (R. Exh. 13) for a "volunteer layoff to help work load and conditions" at the Company. Complying with his request, the Company laid him off along with others on 25 April (Tr. 269). There is no basis for finding WF-1 Maddox's layoff to be improper.

Michael McConnell. He had recently been promoted from WF-2 to WF-1. His first evaluation of 104 in that higher level (G.C. Exh. 26S) gave him a low rating of 2 on both quality and job knowledge. In the absence of other evidence I find that the General Counsel has failed to prove that WF-1 McConnell was qualified to perform the available work.

Robert Brown Jr. He had a 106 evaluation and rating of 7 and 8 on quality and job knowledge (G.C. Exh. 25I). He was a highly versatile welder-fitter, doing many types of jobs including the fabrication of bridges in the South Shop (Tr. 1126, 1129). He did much full-penetration welding, having earned four welding certificates—two of them state certificates required for doing bridge work. These welding certificates were more than any other welder-fitter had earned with only 5 years of seniority. (Tr. 1117–1119.)

None of the supervisors testified about Brown's work except Supervisor Winkle, who had little familiarity with his accomplishments. Winkle was not familiar with Brown's welding certificates or his work on bridges in the South Shop. Winkle admitted: "I always had a lot of faith in his ability," but testified that he "did not perform as we expected" on certain truss work. (Tr. 529–531, 592.)

I find that the General Counsel has proved that WF-1 Brown was fully qualified to perform the available work.

Phillip Newman. One supervisor gave him a low 3 rating on quantity and quality. Another supervisor rated him 5 on both quantity and quality. In the absence of any testimony about his qualifications I find that the General Counsel has failed to prove that WF-1 Newman was qualified to perform the available work.

Michael Donohue. He was demoted on 9 February from WF-1 to WF-2 (Tr. 1568). With an evaluation of 98, he was the only employee in the plant with an evaluation below 100 (Tr. 1430). On one of the evaluation sheets, which rated him *minus* 3 on quantity and job knowledge, the comments are: "I can't tell if he really knows his job or just doesn't care!" and I don't know *how* he ever got to be a *fitter.*" (G.C. Exh. 25P.) The General Counsel has failed to show that WF-2 Donohue was qualified as a welder-fitter to perform available work or that he was as qualified as a junior employee working in another classification.

Cliff Gardner. In his evaluation of 107 he is given the high rating of 8 on both quantity and quality of work, and the very high rating of 9 on job knowledge, with the notation that this is "E" (exceptional), indicating tht he "Executes all jobs without question on procedure or technique. Advises others." (G.C. Exh. 25V.) The evaluation recommends that he "should be moved to Fitter Welder #1."

Supervisor Winkle did not participate in this 6-month evaluation in January because of unfamiliarity with Gardner's work. (Leadman Mark Throckmorton, who made the evaluation—on which Gardner's premium pay is based—was not called to testify about Gardner's accomplishments that warranted the high ratings.) Gardner was performing simple welder-fitter tasks during the shortage of work before his layoff. Although Winkle found certain faults with his performance (Tr. 520–522, 595), I find that the Company's own evaluation system demonstrates that WF-2 Gardner was qualified to perform available work in his classification.

Patrick Bauer. He had a low evaluation of 102 and was rated (on the scale of minus 5 to plus 10) 1 on quality and 2 on quantity and job knowledge. Supervisor Winkle noted on the evaluation that he was "learning but has a way to go." (G.C. Exh. 26B.) I find that the General Counsel has failed to prove that WF-2 Bauer was qualified to perform the available work or that he was as qualified as a junior employee working in another classification.

Welders

This list contains names of laid-off welders (classes A1, 1, and 2) and junior welders who were retained. It also shows the dates of layoff, the latest evaluations (if in evidence), and the seniority dates.

W-A1	Max Sward	Apr. 25	106	1/19/59
W-A1	Luis Campos		108	3/20/62
W-A1	Baudelio Marquez		110	2/27/63
W-A1	Willie Douglas	Apr. 25	106	5/13/66
W-A1	Leo Hood		110	1/15/75
W-A1	Charles Crump		109	10/27/75
W-A1	Alfred Gallard		108	5/1/79
W-1	Gary Burnett	Apr. 25	105	4/9/73
W-1	Jim Begaye	Apr. 25	107	10/15/74
W-1	Nathaniel Billingsley			2/7/79
W-1	Curtis Langford	Apr. 25	.....	1/30/80
W-1	Mark Bircher		107	1/7/80
W-1	Gene Williams	Apr. 14	105	5/5/80
W-1	Thanh Huynh		110	5/18/81
W-1	Thomas Bealby		110	11/24/82
W-1	Ora Hoogendoorn		109	1/11/83
W-1	Diego Amador			7/1/85
W-2	Arlie Hammar	Apr. 14	106	8/1/79
W-2	Leon Hines		108	9/3/85

Max Sward. Although he was classified as an A-1 welder, he was performing mostly nonwelding work on the squeeze machine in the bridge shop. He was no longer able to do full-pen (full-penetration) welds, but his W-A1 rate was red-circled because "he was a senior employee and a loyal employee." He was laid off when there was no longer full-time work on the squeeze machine. (Tr. 256, 266.) I find that the General Counsel has failed to prove that W-A1 Sward was qualified to perform the available work.

Willie Douglas. His evaluation had dropped from 108 to 106 (G.C. Exhs. 25Q and 26K). Although he had passed the state certifications to perform bridge work as an A-1 welder, he had been transferred from the South Shop because of quality problems, which continued on simpler welding in the Center Shop (Tr. 552, 570, 883,

1572). I find that the General Counsel has failed to prove that W-A1 Douglas was qualified as a welder to perform available work or that he was as qualified as a junior employee working in another classification.

Gary Burnett. He had a 105 evaluation, with a low 3 rating on both quality and job knowledge (G.C. Exh. 26G). Although he was classified as a class 1 welder, Supervisor Winkle credibly testified that he could not be used on full-pen welds (Tr. 594). The General Counsel has failed to prove that W-1 Burnett was qualified to perform the available work.

Jim Begaye. Although classified as a class 1 welder, he had been working primarily on the squeeze machine with W-A1 Sward since 1977, performing mostly nonwelding work and no full-pen welds (Tr. 1020, 1025, 1028). He was laid off with Sward when there was no longer full-time work on the squeeze machine. I find that the General Counsel has failed to prove that W-1 Begaye was qualified to perform the available work.

Curtis Langford. The Company does not dispute that he was a fully qualified class 1 welder, performing such work as full-pen welds on state jobs (Tr. 1074, 1085). The only apparent reason for his layoff was a reprisal for his reinstatement with backpay, ordered by an arbitrator in 1985, following his discharge resulting from a personality clash with a supervisor (Tr. 1076, 1100, 1403–1404). I find that W-1 Langford was fully qualified to perform the available work.

Gene Williams. His work had deteriorated, with his evaluation going from 108 to 105 (G.C. Exhs. 25CCC and 26BB). As Supervisor Winkle credibly testified (Tr. 593); "I . . . have a file on Gene and his continuing ongoing problems with quality, both with full-pen welds and fillet welds. It was just an ongoing problem." I find that the General Counsel has failed to prove that W-1 Williams was qualified to perform the available work.

Arlie Hammar. He had a 106 evaluation. Although he was classified as a welder, he was assigned to making and flattering parts in the parts department, doing welding only occasionally. He wore heavy glasses because of nearsightedness, and the Company apparently had removed him from welding work in the belief that his poor vision interfered with his welding. (Tr. 974–975, 1003–1011.) I find that the General Counsel has failed to prove that W-2 Hammar was qualified to perform the available work.

Machine Operators

This list contains names of laid-off operators (classes I and 2) in Machine Group I and II, as well as junior operators who were retained. It also shows the dates of layoff, the latest evaluations (if in evidence), and the seniority dates.

M1-1	Bradley Lupto	Apr. 14		3/14/77
M1-1	Juan Romero	Apr. 14	108	1/23/78
M1-1	Eddie Blanchard	Apr. 25		10/23/78
M1-1	Randy Berntsen			6/18/79
M1-1	Albert Cagle			6/18/79
M1-1	Naseem Joseph			7/2/79
M1-1	Jeff Wellner			7/23/79
M1-1	Barry Brown			7/30/79
M1-1	John Eisenhour			9/17/79
M1-1	Barney Tucker		108	1/28/80
M1-1	Richard Fagan		106	2/20/80
M1-1	Robert Garrett	Apr. 14	108	3/24/80
M1-1	Richard Murray			6/1/81
M1-1	Vernon Woodruff		110	8/8/83
M1-2	Terry Hendrickson			1/20/86
M2-1	Katheryne Bryant	Apr. 14	108	3/13/74
M2-1	Mike Rausch			11/22/83

Bradley Lupton. Since 1977 he worked at various lesser skilled machine and utility jobs the plant, until he was promoted to welder-fitter 2d class. There, in his words, "I kind of felt like I was a little bit above my head" (Tr. 806). He was returned to the Saw Department, where he was demoted to M1-1 (G.C. Exh. 25II). At the time of his layoff he was working as a helper in the Rebar plant. I find that the General Counsel has failed to prove that M1-1 Lupton was qualified to perform the available work.

Juan Romero. He worked as an M1-1 machine operator in the Saw Department, where Supervisor Roger Cordoba estimated that it would take "five to ten minutes" of instruction to operate the bandsaw and "I would say 15 minutes to 20, to a half hour" to operate the cold saw (Tr. 666–667). Cordola admitted (Tr. 643–644) that an M1-1 operator "would be qualified or possess the necessary skills" to operate a bandsaw, a cold saw, and an Anglematic machine, and that an M1-2 operator should also be able to operate the Anglematic if "they have the necessary skills."

It is undisputed that Supervisor Cordoba promised to train Romero to operate all the machines in the Saw Department and that Romero was eager to learn, but Cordoba kept him busy operating the Do-All bandsaw and continually postponed the training. Romero did operate the cold saw 4 hours on Saturday, when shown by the leadman how to run it. During the last 30 days before Romero's layoff, Coroba apologized for not giving him the training on the Anglematic, drill line, and other machines in the Saw Department. Cordoba told him, "I need you" on the bandsaw because bars were being beveled on the Great Bend project and Romero was "the only one that knew how to set up for that." (Tr. 833–834.)

Supervisor Cordoba admitted that Romero was a "hard worker" (Tr. 666). He gave Romero a high rating of 8 on both quantity of work and job knowledge, a rating of 6 on quality, and a good overall evaluation of 108 (G.C. Exh. 26U). (I note that Vice President Ledermann testified (Tr. 1436–1437) that Romero's earlier 107 evaluation was "above average" for a band saw operator.) Cordoba admitted (Tr. 621) that he promised to put Romero through a training course on the computerized equipment, plus the cold saw, in the Saw Department.

Despite Romero's hard work and good evaluation, the Company laid him off on April 14 and retained less senior M1-1 machine operators. These included Richard Fagan, who had a lower 106 evaluation (G.C. Exh. 26M), who then was "running the band saw or helping

move material," and who was later trained to operate the cold saw, Anglematic, and drill line (Tr. 637)—instead of Romero. I discredit Cordoba's claim that "I got a couple of weeks on the cold saw for [Romero] and he just wasn't up to par for that skill" (Tr. 621) and his claim "that's just my opinion" that Romero "didn't have quite enough talent to put him on equipment like the drill or the Anglematic" (Tr. 666).

There was ample work on the bandsaw and cold saw after the layoff to keep Romero busy. Cordoba grudgingly acknowledged (Tr. 658) that "I assume under close supervision, yes, [Romero] probably could do [cold saw work]." Cordoba admitted that after the layoff the cold saw was running about 90 percent of the time, one of the bandsaws was running about 50 percent of the time, and the other "possibly" 80 percent of the time. (Tr. 645–646.)

Both the General Counsel and the Union suggested at the trial (Tr. 1139) that the Company's knowledge of Romero's upcoming surgery (scheduled the next week, at the Company's expense) "may have been a factor in their decision to lay Mr. Romero off." The Company in its brief (Br. 32–33) acknowledges that Romero had surgery scheduled for 17 April, but contends that "Juan Romero was laid off because the type of work for which he was qualified to perform simply dwindled to nothing. He wasn't qualified to perform any other tasks in the company's opinion. The unrebutted evidence would indicate that Romero was not laid off to avoid Romero's medical expenses." (Senior Vice President James Liddell testified (Tr. 1524–1525) that he *did not remember* any discussion about Romero's going into the hospital before the decision was made to lay him off.)

After weighing all the evidence I find that whether the Company's decision for the layoff was motivated by the expense of M1–1 Romero's surgery, the General Counsel has proved that Romero was qualified to perform the available work and was improperly laid off in violation of his seniority rights under the contractual layoff provision.

Eddie Blanchard. On his January 106 evaluation Supervisor Robert Ketz rated him 6 on quantity, quality, and job knowledge as well as on dependability and commented: "Eddie is getting better on the shears, could improve on quantity also on dependability" (G.C. Exh. 25G). On his April evaluation Ketz gave him the same 6 rating on quantity and dependability and a 7 rating on quality and job knowledge, but Crew Chief Roger Lyon rated him 3 on dependability, 4 on quality, 5 on quantity, and 6 on job knowledge. These were his evaluations as operator of only one of the shear machines (Tr. 917).

Blanchard was a utility employee from 1978 until about 1984, when he began working in Ketz' department mostly as a forklift driver (Tr. 918–919, 1556). There, when operating the one shear machine in 1985, he worked mostly on noncritical template work, not on more accurate regular production work (Tr. 1550). Because of M1–1 Blanchard's limited ability, I find that the General Counsel has failed to prove that he was qualified to perform the available work.

Robert Garrett. He is an able, very versatile employee. On his 108 evaluation he had the high ratings of 8 for quantity and quality and the very high rating of 9 for job knowledge.

His principal job was operating the CNC (computer numerically controlled) drill line (Tr. 1146–1147). He also operated the Airco CNC cutting machine (on which he was trained at the factory before instructing two operators in its use), the CNC Anglematic machine and other machines in the Saw Department, the various shears in the Shears Department, and the vertical mill in the South (bridge) Shop (Tr. 1150–1152, 1161, 1163). He has served as leadman in both the warehouse and the Shears Department (Tr. 1168).

The only apparent reason for the Company's laying off this talented employee was his 1984 back injury. He credibly testified, however, that his back surgery was successful and he had no physical limitations after his recovery (Tr. 1169). I find that M1–1 Garrett was fully qualified to perform the available work.

Katheryne Bryant. She had a 108 evaluation as operator of the bolt threader machine, on which she had worked about 11 years (G.C. Exh. 26F; Tr. 904). When that work fell off the Company was unable to find other regular work for which she was qualified (Tr. 273, 907–910, 1432–1433, 1451). I find that the General Counsel has failed to prove that M2–1 Bryant was qualified to perform the available work.

Other Challenged Layoffs

Luther Friday. He was the most senior of three shipper-checkers. His seniority was 10/20/76, David Brewer's was 6/25/79, and Frederick Smith's was 2/23/81.

It is undisputed that when Smith was promoted to leadman, Friday protested and charged racial discrimination. He then said, "Well, go ahead and lay me off." The Company complied and laid him off with others on 25 April.

Friday did not testify, and there is no contention that he was improperly laid off instead of the junior employee Brewer. His greater seniority did not entitle him to a promotion under the contractual layoff provision. I therefore find no basis for ruling that shipper-checker Friday's layoff was improper.

Lonnie Kemp. He was a machinist in labor grade 2, the second highest labor grade in the plant. He was three levels higher than the M1–1 machine operators, who were in labor grade 5. (G.C. Exh. 1E, Exh. 1 at 35.) In his 15 years of service he was first a laborer and M1–2 machine operator, a M1–1 machine operator in 1974, and a machinist in 1978. Since then he has been the only machinist performing highly skilled machine work in the machine shop, which is located in the South (bridge) Shop. (Tr. 1051–1055, 1058–1062, 1071.) In this skilled work he had a 108 evaluation, with a high 8 rating on quantity, quality, and job knowledge (G.C. Exh. 25FF).

Taking the position that the contractual layoff provisions were no longer in effect, the Company ignored his seniority and laid him off on 25 April without offering him continued employment on any of the lesser skilled machine operator jobs. In the Company's 14 July response to his and others' claim for bumping rights (G.C. Exh. 19), it asserted that "Other categories did not fit

[Kemp's] talents with the possible exception of Machine 1-1 and that in the area of the radial drill or mill" (work performed by two other senior employees). The Company ignored the remaining machine operator jobs, including those on which he had previously worked. As a highly skilled operator, he undoubtedly was as qualified as many of the junior employees who were still employed on the lower skilled machine operator jobs.

Because of machinist Kemp's good evaluation in the high-skilled machine shop work, I find (1) that the General Counsel has proved that he was as qualified as various junior employees performing available work in lower pay levels and (2) that Kemp should have been retained to perform the remaining machinist and other available work.

Richard Martin. Two of the three remaining utility employees were U-1 Richard Martin (with a seniority date of 2/2/76) and U-1 Henry Cordoba (with a seniority date of 4/18/79). Martin had a 108 evaluation, with a high 8 rating on quantity, a very high 9 rating on quality, and a 5 rating on job knowledge (G.C. Exh. 25LL). Supervisor Roger Cordoba gave Henry Cordoba a high 8 rating on quantity and quality and a 7 rating on job knowledge. Despite the comparable evaluations, the Company laid off Martin on 25 April and retained Henry Cordoba, who had 3 years less seniority.

The Company's only stated reason for laying off the more senior utility employee was that U-1 Martin was primarily operating a roll machine (Tr. 288) whereas U-1 Cordoba "was operating one of the saws," that Martin "had not operated that saw," and "That was what we needed at that particular moment in time" (Tr. 295). As discussed above, Supervisor Roger Cordoba estimated that it would take only a few minutes to instruct an employee how to operate the saw. At the time, Martin was also helping on the shears and Henry Cordoba was also working in the bull gang (Tr. 1045-1047).

I find that the stated reasons for not honoring U-1 Martin's greater seniority was merely a pretext and that Martin, with 10 years of service as a utility employee, was qualified to perform the available work.

Francisco Santiago. He was admittedly an excellent worker, although he was unable to read English and spec sheets. Both he and the other 2d class painter were laid off, leaving only the 1st class painters. There is no basis for finding P-2 Santiago's layoff to be improper.

Bradley Steven. He was classified as a crane operator 2d class, but he had not been trained to operate the overhead crane (Tr. 1033-1034). Apparently because of his exceptional 110 evaluaton (G.C. Exh. 26Y) he was reclassified from a utility employee to enable him to become an all-around crane operator. He was working primarily as a forklift operator and was laid off when there was insufficient work to keep him busy. The junior CO-2 J. K. Hawkins, who was retained, did operate the overhead crane. (Tr. 285-286, 1434.) I find that the General Counsel has failed to prove that CO-2 Stevens was qualified to perform the available work.

In summary, the Company in April laid off a total of 46 employees. Although the General Counsel contends that the Company's failure to honor the contractual seniority provisions resulted in the improper layoff of 26 of them, I find that only 7 of the employees were laid off in violation of their seniority rights under article 14.1 of the 1985-1988 agreement. They were Robert Brown Jr., Cliff Gardner, Robert Garrett, Lonnie Kemp, Curtis Langford, Richard Martin, and Juan Romero.

CONCLUSIONS OF LAW

1. By failing to continue in effect all the terms and conditions of the 1985-1988 collective-bargaining agreement until 30 days after it has given the 8(d)(3) notice of a dispute to the Federal Mediation and Conciliation Service and the Kansas Department of Human Resources, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By making unilateral changes in the conditions of employment without affording the Union an opportunity to bargain, the Company violated Section 8(a)(5) and (1).

3. By (a) reducing wages 14 percent on 14 April and also in April (b) changing the grievance procedure, (c) promoting leadmen to crew chiefs and permitting them to perform bargaining unit work, (d) ceasing the checkoff of union dues, (e) stopping the making of pension benefit contributions, and (f) failing to follow the contractual layoff requirements, the Company violated Section 8(a)(5) and (1).

4. By laying off Robert Brown Jr., Robert Garrett, and Juan Romero on 14 April and Cliff Gardner, Lonnie Kemp, Curtis Langford, and Richard Martin on 25 April in violation of their seniority rights under article 14.1 of the agreement, the Company violated Section 8(a)(5) and (1).

5. The Company did not tell an employee that the Union no longer represented the employees in the bargaining unit.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including the restoration of all the terms and conditions of the 1985-1988 collective-bargaining agreement until 30 days after it has given the 8(d)(3) notice to the Federal Mediation and Conciliation Service and the Kansas Department of Human Resources.

The Respondent must make the employees whole for the loss of earnings and other rights and benefits suffered as a result of its reduction of wages and other changes in the terms and conditions of the agreement while failing to comply with Section 8(d)(3), as well as make the Union whole for any loss of dues suffered as a result of the cancellation of the dues checkoff, *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent, having unlawfully laid off seven employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of layoff to date of proper offer of reinstatement, less any net interim earn-

ings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest.

The Respondent must transmit to the pension fund the contributions it has failed to make while not in compliance with Section 8(d)(3). Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at this adjudicatory stage for the addition of interest at a fixed rate on unlawfully withheld fund payments. Any additional amount owed the pension fund shall be determined as in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Geo. C. Christopher & Sons, Inc., Wichita, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or modifying a collective-bargaining agreement with Boilermakers Local Lodge 286 until 30 days after it has given the 8(d)(3) notice of a dispute to the Federal Mediation and Conciliation Service and the Kansas Department of Human Resources.

(b) Making unilateral changes in the conditions of employment without affording the Union an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore all the terms and conditions of the 1985–1988 agreement until the notice requirements of Section 8(d)(3) have been complied with.

(b) Make the employees whole for the loss of earnings and other rights and benefits suffered as a result of its reduction of wages and other changes in the terms and conditions of the agreement while failing to comply with Section 8(d)(3) of the Act.

(c) Make the Union whole for any loss of dues suffered as a result of the cancellation of the dues checkoff.

(d) Offer Robert Brown Jr., Cliff Gardner, Robert Garrett, Lonnie Kemp, Curtis Langford, Richard Martin, and Juan Romero immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of their unlawful layoff, in the manner set forth in the remedy section of the decision.

(e) Remove from its files any reference to the unlawful layoffs and notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(f) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees employed by Geo. C. Christopher & Son, Inc. at its facility located in Wichita, Kansas, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its facilities in Wichita, Kansas, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[3] If no exceptions as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate or modify an agreement with Boilermakers Local Lodge 286 until 30 days after giving the required 8(d)(3) notice of a dispute to the Federal and State Mediation Services.

WE WILL NOT make changes in your conditions of employment without giving the Union an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore all the terms and conditions of the 1985–1988 agreement until we have complied with the 30-day notice requirement.

WE WILL make you whole for the loss of earnings and other rights and benefits resulting from the wage reduction and other changes in the agreement, plus interest.

WE WILL offer Robert Brown Jr., Cliff Gardner, Robert Garrett, Lonnie Kemp, Curtis Langford, Richard Martin, and Juan Romero immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their layoff, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his layoff and that the layoff will not be used against him in any way.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employee in the bargaining unit:

> All full-time and regular part-time production and maintenance employees employed by Geo. C. Christopher & Son, Inc. at its facility located in Wichita, Kansas, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

GEO. C. CHRISTOPHER & SON, INC.

FMC Corporation, Cable Crane and Excavator Division *and* United Automobile, Aerospace and Agricultural Implement Workers of America, Inc.
Cases 18–CA–7654 and 18–CA–7971

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On October 24, 1983, Administrative Law Judge George Norman issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs to which the Respondent filed an answering brief. On February 6, 1986, pursuant to the Board's remand order of July 6, 1984, Administrative Law Judge William A. Gershuny issued the attached supplemental decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed exceptions and a supporting brief[1] to which the Charging Party filed a reply brief. The Respondent also filed a brief in response to the General Counsel's and the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judges' rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

Before setting forth our rulings on each of the issues raised by the complaints, the decision, and the supplemental decision, we shall first summarize the background of the case.

As set out below, the complaint in Case 18–CA–7654 alleged that the Respondent violated Section 8(a)(5), (3), and (1) and Section 8(d) by unilaterally transferring the manufacture of Sea Hawk pedestal cranes from its unionized Cedar Rapids, Iowa facility to its nonunionized Bowling Green, Kentucky plant and further violated Section 8(a)(5) and (1) by failing to bargain in good faith during concession bargaining requested by the Respondent during the term of the parties' contract. The complaint also alleged that certain supervisors made threats and engaged in interrogations which violated Section 8(a)(1) and further violated Section 8(a)(5) by directly dealing with employees in an effort to get employees to agree to the proposed concessions. The complaint in Case 18–CA–7971, also more fully detailed below, alleged that the Respondent violated Section 8(a)(5), (3), and (1) and Section 8(d) by failing to bargain about the decision to transfer certain admitted bargaining unit work (small crawler cable cranes) from its unionized Cedar Rapids plant to its nonunionized Bowling Green and Lexington, Kentucky facilities and further violated Section 8(a)(5) and (1) by failing to bargain about the effects of the transfer and failing to provide certain requested information regarding this decision and its effects.

The complaints in Cases 18–CA–7654 and 18–CA–7971 were the subject of a hearing before Judge Norman in March and May 1983. On October 24, 1983, Judge Norman issued a decision dismissing the complaints in their entirety. Regarding Case 18–CA–7654, he summarily found, inter alia, that various allegedly unlawful supervisory remarks and inquiries concerning the Sea Hawk work were expressions of opinion of "lower echelon people" that were not authorized by the Respondent and that such conduct did not show that the Respondent acted in retaliation in transferring the Sea Hawk in violation of Section 8(a)(3). He did not make any specific factual findings regarding any of the seven allegedly unlawful statements nor did he decide whether they separately constituted 8(a)(1) violations or whether they were indicative of direct dealing in violation of Section 8(a)(5).[3] With respect to the complaint allegations of Case 18–CA–7971, Judge Norman found that the 6-month 10(b) period commenced with the Respondent's announcement to the Union on May 24, 1982, of its decision to transfer unit work and that this period had run by the date on which the charge in that case was filed—December 1, 1982. Thus, the judge found that Section 10(b) precluded

[1] The Respondent thereafter filed a motion to dismiss the complaints on the basis that the controversy was moot. The Charging Party filed a response. We find no merit to the Respondent's arguments in support of its motion and deny it.

[2] The Respondent, the General Counsel, and the Charging Party have excepted to some of the judges' credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for overruling the findings.

[3] In finding that these remarks did not show retaliatory intent, the judge recommended "the dismissal of the 8(a)(3) allegation with respect to the interrogations and remarks by the supervisory personnel concerning the Sea Hawk decision." It appears that the judge's reference to an 8(a)(3) allegation in this context is an inadvertent error as the complaint does not allege that these remarks violated Sec. 8(a)(3). It is not clear, however, that the judge's discussion there was intended to dispose of all the 8(a)(1) allegations where the judge set out none of their specifics and simply referred to them as statements "concerning the Sea Hawk decision" and made by "lower echelon people." We note also that one of the alleged unlawful remarks was attributed to the plant manager and several remarks and inquiries concerned employee thoughts about concessions without reference to the Sea Hawk decision. Accordingly, we do not read Judge Norman's decision as containing recommendations regarding the disposition of these alleged 8(a)(1) violations.

consideration of the allegations pertaining to the transfer decision as well as the allegations pertaining to the failure to engage in effects bargaining and to supply the requested information, which he found were dependent on and subsidiary to an obligation to bargain about the decision. He thus dismissed this complaint without further discussion.

By order dated July 6, 1984, the Board remanded this case to the chief administrative law judge (Judge Norman having retired on December 31, 1983) for designation to another judge who was to make specific factual and legal findings regarding the 8(a)(1) allegations of threats and interrogations in Case 18–CA–7654. The order also directed the designated judge to make specific factual and legal findings regarding the 8(a)(5) effects bargaining and information allegations of Case 18–CA–7971. A decision on all the issues in both cases was held in abeyance pending the issuance of the supplemental decision. Thereafter, Judge Gershuny, to whom this case was assigned, issued a supplemental decision on February 6, 1986. He set forth the factual findings pertaining to the seven alleged 8(a)(1) interrogation and threat allegations, finding that several of the statements violated the Act and dismissing the others. He further found that the Union had requested bargaining about the effects of the decision to transfer small crawler cranes on June 2, 1982, and that, as admitted by the Respondent, no effects bargaining had taken place. He failed to rule formally on this 8(a)(5) allegation, however, finding it intertwined with and dependent on the decision bargaining allegation, which he found that he was not authorized to rule on as it had not been included in the Board's remand order. With respect to the information request allegation, he found that the Union had requested certain information on June 2, 1982, but he otherwise failed to set forth facts or to rule on the information request issue, noting that the parties' briefs did not "address" the relevance of each item requested or the adequacy of each piece of information provided by the Respondent.

Turning now to the merits of this case, we find as follows:

A. *Case 18–CA–7654*

1. The complaint in Case 18–CA–7654 alleged that the Respondent violated Section 8(a)(5) and (1) and Section 8(d) in various respects. First, it was alleged that the Respondent unilaterally and without the consent of the Union relocated certain alleged bargaining unit work (the manufacture of a Sea Hawk pedestal crane) from its unionized Cedar Rapids, Iowa plant to its nonunionized Bowling Green, Kentucky facility. Second, it was alleged that, by this transfer, the Respondent sought to evade its contractual obligation.

Judge Norman dismissed both these allegations. He found that Sea Hawk was a new product line and that the decision to build it at Bowling Green did not involve a transfer of bargaining unit work. Thus he found that despite the fact that employees believed, based on the statements and actions of certain supervisors and anticipatory preparations at the Cedar Rapids plant, that Sea Hawk would be manufactured at Cedar Rapids, the Respondent was not obligated to bargain with the Union regarding its decision to produce Sea Hawk at Bowling Green and therefore did not violate Section 8(a)(5) and (1) and Section 8(d) when it failed to do so. He further found that the decision to produce Sea Hawk at Bowling Green was prompted by legitimate business considerations, including the fact that Bowling Green was the principal manufacturing site for most of the Respondent's pedestal cranes. He further found that, at most, there was a loss of work at Cedar Rapids on the production of one Sea Hawk prototype and that this loss had a de minimis effect on employees.

We agree with Judge Norman's dismissal of these 8(a)(5) and (1) and 8(d) allegations for the following reasons. First, regarding the 8(a)(5) allegation that is based on the specific proscription of Section 8(d), we rely on the Board's later decision in *Milwaukee Spring Division*, 268 NLRB 601 (1984) (*Milwaukee Spring II*).[4] Here, as was found in *Milwaukee Spring II*, there is no evidence that the parties' contract contained a provision which restricted or otherwise preserved the performance of the Sea Hawk work to the Cedar Rapids facility. Similarly, there is no clause which restricts the Respondent's decision-making regarding work relocation. Accordingly, we find that the Respondent did not modify the parties' contract and thus did not

[4] Subsequent to the issuance of *Milwaukee Spring II*, supra, the General Counsel in this case filed a motion to withdraw its exceptions to the extent that its earlier-filed exceptions relied on the Board's decision in *Milwaukee Spring Division*, 265 NLRB 206 (1982) (*Milwaukee Spring I*). That motion was granted. We note, however, that the Charging Party, which had separately excepted to the judge's findings on these issues, did not join in this motion to withdraw. Hence, the issue remains before us for our consideration.

In *Milwaukee Spring II*, 268 NLRB 601 (1984), the Board found that the respondent did not violate Sec. 8(a)(5) and Sec. 8(d) when it failed to obtain the union's consent to its decision to transfer certain bargaining unit work from one location to another. In so doing, the Board found that while an employer may not unilaterally institute proposed changes in contractual terms and conditions of employment which are mandatory subjects of bargaining, Sec. 8(d) proscribes unilateral modification of contractual terms only where the modified term is contained in the contract. The Board found that the parties' contract did not contain a clause requiring the bargaining unit work in question to remain at the Milwaukee plant and that the relocation did not disturb existing wages and benefits of unit employees. Thus, the Board found that the respondent did not unlawfully modify the terms of the contract in violation of Sec. 8(d) when it transferred the work.

violate Section 8(a)(5) as defined in Section 8(d) when it decided to manufacture the Sea Hawk crane at its Bowling Green facility.[5] We further dismiss the second alleged theory of an 8(a)(5) violation. Thus, we find that the unilateral transfer of the Sea Hawk crane work did not violate the Act even if it were bargaining unit work. We note in this regard that the credited testimony, as found by Judge Norman, shows that the decision to manufacture the Sea Hawk crane at Bowling Green involved a number of business reasons, including higher productivity, lower scrap costs, and lower wage rates at Bowling Green as well as the fact that Bowling Green was the Respondent's principal pedestal crane manufacturing site. We thus find that the Respondent's decision to manufacture Sea Hawk at Bowling Green did not violate Section 8(a)(5) under any of the views expressed in *Otis Elevator Co.*, 269 NLRB 891 (1984) (*Otis Elevator II*).

In adopting Judge Norman's conclusion that the Respondent did not violate Section 8(a)(5) by removing the Sea Hawk prototype from Cedar Rapids to Bowling Green, we find it unnecessary to rely on his finding that the loss of such work was de minimis. Rather, we note that the General Counsel, in contending that the transfer of the Sea Hawk project was unlawful, did not allege or argue that the removal of the Sea Hawk prototype alone violated the Act. We further find that the issue of whether the removal of the prototype alone was unlawful was not fully litigated.[6]

2. The complaint also alleged that the Respondent violated Section 8(a)(1) by seven separate statements of Cedar Rapids supervisory personnel, i.e., that Plant Manager McCafferty, at an employee meeting, threatened employees with a loss of existing jobs if concessions were not supported; that Powers, a supervisor, interrogated employees regarding concessions and threatened them with loss of jobs; that Chesmore, a supervisor, unlawfully interrogated employees concerning their position on concessions and threatened them with loss of work; that Klingman, a supervisor, interrogated employees on their positions on concessions; that Uldrich, a supervisor, threatened employees with loss of work if concessions were not agreed to; that Hootman, a supervisor, interrogated an employee concerning his and other employees' views on concessions and threatened him with loss of employment if concessions were not accepted; and that Wolfe, a supervisor, threatened employees with loss of jobs if concessions were not accepted.

As noted above, Judge Norman did not set out factual findings with respect to any of these alleged statements. On remand, Judge Gershuny in his supplemental decision made various findings on these allegations. We agree with Judge Gershuny's finding that Wolfe and Chesmore's statements violated the Act and that McCafferty's,[7] Hootman's, and Uldrich's[8] remarks did not. Contrary to the judge, however, we do not find that Powers' and Klingman's statements violated the Act.

Regarding Powers, the judge found that Powers asked employee Brundrett "what did the guys out in the shop" think of the concessions and expressed the opinion that salaried employees were making greater concessions than were hourly employees. The judge found this inquiry violated Section 8(a)(1). We disagree. The record shows that concessions were a common topic of conversation around the plant. The record also shows that Brundrett was a union shop steward and that the nature of the inquiry, which took place in Brundrett's work area, was general and nonthreatening. Accordingly, we do not find this inquiry violated Sec-

[5] In Member Johansen's view, Sec. 8(d) defines the duty to "bargain collectively." It is an "unfair labor practice" as defined in Sec. 2(8), pursuant to Sec. 8(a)(5) and 8(b)(3) "to refuse to bargain collectively." Sec. 8(d) merely defines conduct which will violate either Sec. 8(a)(5) or 8(b)(3). Sec. 8(d) is not itself violated by that conduct.

[6] Chairman Stephens does not reach the question whether, assuming the production of the Sea Hawk were unit work at Cedar Rapids, the decision to subcontract it to another plant would be a mandatory subject of bargaining under the *Otis Elevator* test. Rather, he would affirm the judge's finding, based on the credited testimony of Division Manager Robert Price, that the Respondent's initial decision regarding the location for producing the Sea Hawk was the decision to manufacture it at Bowling Green. Thus, it never became unit work at Cedar Rapids and there is no work transfer issue in the case, at least so far as production of the Sea Hawk is concerned. Chairman Stephens agrees with the judge that this was a decision regarding the location in which manufacturing of a new product line would be started up and that such decisions are entrepreneurial decisions that are not subject to a bargaining obligation under the Act.

With respect to the work on the Sea Hawk prototype, Chairman Stephens would find that the work of building at least one Sea Hawk prototype was removed from the bargaining unit. He reaches this conclusion on the basis of the credited evidence that the building of prototypes was customarily done at Cedar Rapids and that a decision to build one prototype at Cedar Rapids had been prepared for and publicly announced. He does not, however, agree with the judge's conclusion that loss of this work resulted in only a "de minimis" loss to the employees and that unilateral removal of the work could therefore not constitute a violation of Sec. 8(a)(5). Obviously the loss of 500 hours of work on the prototype harmed Cedar Rapids employees who were laid off and who could have performed that work. Chairman Stephens would find a violation of Sec. 8(a)(5) in the unilateral removal of that work from the bargaining unit because none of the reasons, other than wage rates, which the Respondent offered as its entrepreneurial reasons for locating the production work on the Sea Hawk at Bowling Green would apply to the removal of the work on this prototype. Chairman Stephens would find that the decision to remove this particular work was clearly a mandatory subject of bargaining under *Otis*.

[7] In dismissing the allegation regarding McCafferty, we rely only on the judge's finding that employee Brundrett's testimony on the point was vague and uncertain. While the judge further found that employee Dusil testified that no such threat was made, we note there were a number of employee meetings and no evidence that Dusil and Brundrett attended the same one. Thus, contrary to the judge's indication, Dusil's testimony is not necessarily inconsistent with that of Brundrett.

[8] We find it unnecessary to pass on the allegation regarding Uldrich because the finding of such an additional violation would be cumulative.

tion 8(a)(1). See, e.g., *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

The judge also found that Supervisor Klingman's inquiry of employee Feiereisen regarding what Feiereisen thought were the feelings of the employees about the concessions violated Section 8(a)(1). We do not agree. The record shows that the remark occurred in a conversation described by employee Feiereisen as "small talk" and was, unlike Chesmore's remarks, not accompanied by other, potentially coercive remarks. Accordingly, we find this a general, innocuous inquiry which does not violate Section 8(a)(1). See, e.g., *Sunnyvale*, supra.

3. The complaint also alleged that the Respondent violated Section 8(a)(5) by engaging in bad-faith bargaining during concession bargaining. In this connection, the complaint further alleged that the Respondent violated Section 8(a)(5) by failing to provide the Union with certain requested financial information supporting the Respondent's request for concession bargaining and that the Respondent engaged in direct dealing with the employees, evidenced both by holding meetings with employees and by the employee interrogations and threats discussed above.

Judge Norman dismissed these 8(a)(5) allegations. In so doing, the judge characterized the concession bargaining as a "full and fair airing on a wide variety of subjects on both sides" and found that, despite the absence of any agreement on any proposal advanced by either party, substantive good-faith prevailed. The judge further found that where, as here, the Respondent clearly indicated that it could afford to meet its contract obligations and would honor them even if the concession proposals were not accepted, there was no obligation to provide the Union with assertedly relevant financial information. The judge also concluded that there was no evidence that the Respondent bypassed the Union and dealt directly with employees. Rather, the judge found that employee meetings were not unusual occurrences and that the Respondent sought and obtained the Union's permission to hold these employee meetings, each of which was attended by at least one union officer.

We agree with Judge Norman's finding that the Respondent did not engage in bad-faith bargaining during concession bargaining for the reasons cited in his decision. We also agree with his conclusion that the Respondent did not independently violate Section 8(a)(5) by refusing to provide the requested financial information for the judge's reasons as described above,[9] and we agree with Judge Norman's dismissal of the direct dealing allegations. In dismissing the direct dealing allegations, we note the evidence as found by the judge shows that the Respondent's meetings were held only after its proposals were presented to the Union, that the Union was informed of the Respondent's intent to hold the meetings, and that the meetings were held in the presence of Union officers. The evidence further shows that at the meetings all the Respondent did was to present the proposals as previously presented to the Union. Under these circumstances, we find the meetings did not constitute unlawful direct dealing.

As noted above, the complaint asserts that the alleged unlawful interrogations and threats, discussed above, also constituted direct dealing in violation of Section 8(a)(5). Judge Norman, however, failed to make any specific findings regarding their 8(a)(5) aspects. The General Counsel excepts to the judge's failure to make these findings. In her brief, the General Counsel argues that by the alleged 8(a)(1) conduct the Respondent sought to obtain employee support for its concession proposals directly. The General Counsel also argues that this conduct not only constituted an independent violation of unlawful bypassing of the Union and direct dealing with employees, but further evidenced overall bad-faith bargaining on the part of the Respondent.

In our above discussion, we have found that remarks made by Chesmore and Wolfe violated Section 8(a)(1). We, however, have dismissed allegations of bad-faith bargaining with respect to the Respondent's actual conduct during concession bargaining, its failure to provide financial information to the Union, and its holding of employee meetings to discuss concession proposals. In these circumstances and viewing the nature of the 8(a)(1) violations we have found, we do not find these 8(a)(1) violations sufficient to establish direct dealing or overall bad-faith bargaining.

4. Finally, the complaint alleged that the Respondent violated Section 8(a)(3) and (1) under two theories. First, it alleged that the Respondent violated Section 8(a)(3) under *Milwaukee Spring I*, supra, 265 NLRB 206, where, as part of a plan to

[9] The General Counsel contends that this case is similar to *Goodyear Aerospace Corp.*, 204 NLRB 831, enfd. in part, 497 F.2d 747 (6th Cir. 1974), in which the Board found that the respondent violated Sec. 8(a)(5) and (1) by failing to provide requested financial information in connection with its request for concession bargaining. In *Goodyear*, the respondent sought concession bargaining in an effort to remain competitive, but did not indicate an affirmative intent to abide by the terms of the contract in the event that concessions were not granted. Additionally, in presenting its proposals at meetings with employees, the respondent in *Goodyear* represented to employees that it was engaged in a "profitless" operation and if it waited for the expiration of the current contract to discuss proposed changes, there would be "no need for talking," and that the Union was unwilling to make the changes. Accordingly, we find *Goodyear*, supra, distinguishable from the instant case.

escape the economic obligations of a collective-bargaining agreement, it transferred the Sea Hawk project from a unionized to a nonunionized plant, adversely affecting unit employees by the accompanying loss of work. The complaint also alleged that the transfer of Sea Hawk independently violated Section 8(a)(3) and (1) because it was in retaliation for the Union's refusal to agree to concession proposals.

Judge Norman dismissed these 8(a)(3) allegations. In so doing, he distinguished this case from *Milwaukee Spring I*, supra, finding that in this case, unlike *Milwaukee Spring I*, lower labor costs were only one of the reasons the Respondent advanced for its decision to build the Sea Hawk at Bowling Green. The judge further dismissed the independent 8(a)(3) allegation that the decision to produce Sea Hawk was in retaliation for the Union's failure to agree to concession proposals. In so doing, he credited the testimony of the Respondent's division manager that the decision was made solely for business reasons, i.e., higher productivity, lower scrap costs, the fact that Bowling Green was the principal pedestal crane manufacturing site, and lower labor rates, and was not related to the ongoing concession bargaining which continued thereafter. In connection with this allegation, the judge also found that the various alleged job-loss threats and interrogations by the Respondent's supervisory personnel made in connection with the Sea Hawk decision (as described above) did not truly reflect the Respondent's reasons for its Sea Hawk decision as they were merely expressions of opinion by lower-level supervisors which were not authorized by the Respondent.

We agree with the judge that the various 8(a)(3) allegations should be dismissed. In so doing, we note that the 8(a)(3) allegation based on the first theory is derived from *Milwaukee Spring I*, which was overruled in *Milwaukee Spring II*, to which we adhere. Regarding the second 8(a)(3) theory of the complaint, we adopt Judge Norman's findings, based in part on credited testimony, that the evidence does not support a finding that the Respondent sought to retaliate against employees by transferring the Sea Hawk crane work because of the Union's failure to agree to the proposed concessions. Finally, we also find that the two 8(a)(1) violations that we have found are insufficient to establish that the Respondent's transfer of the Sea Hawk crane was for an unlawful purpose.

B. *Case 18–CA–7971*

As noted above, the complaint alleged that the Respondent violated Section 8(a)(5) and (1) and Section 8(d) by failing to provide the Union with an opportunity to bargain about its decision to transfer the assembly and manufacture operations of small crawler cable cranes (admittedly existing bargaining unit work) from its Cedar Rapids plant to its Bowling Green and Lexington, Kentucky plants. The complaint further alleged that this transfer violated Section 8(a)(3) and (1) by its adverse effect on bargaining unit employees. The complaint also alleged that the Respondent violated Section 8(a)(5) and (1) by failing to bargain at the Union's request about the effects of this transfer and by failing to provide or to timely provide certain requested information pertaining to this transfer decision and its effect on employees.

As noted above, Judge Norman dismissed this complaint in its entirety, finding that the alleged failure of the Respondent to bargain about the transfer decision was barred by Section 10(b) and that as the effects bargaining and information allegations were derived from the related charge pertaining to the transfer decision, that Section 10(b) also precluded their consideration. In his supplemental decision, Judge Gershuny likewise failed to make legal findings on the effects-bargaining issue on the basis that the terms of the remand did not give him the authority to do so. He also failed to make full factual and legal findings regarding the information request.

The following facts are relevant to our findings on these decision bargaining, effects-bargaining, and information request issues. The record shows that on May 24, 1982, the Respondent announced that in light of the Company's reorganization and pursuant to recommendations of a task force, the assembly and manufacture of small crawler cable cranes would be transferred beginning June 21, 1982, from Cedar Rapids to Bowling Green and Lexington. On May 24, the Union served notice on the Respondent that it would grieve the transfer and it did so on June 3. On June 2, 1982,[10] the Union, in writing, protested the transfer, requested effects bargaining, and requested information "which would help the Union to discuss this effect properly." The Union, however, did not make a request to bargain over the transfer decision. On August 6, 1982, by which time the transfer of the small crawler cable crane work had begun, the Respondent sent the Union a letter with accompanying documents in response to the Union's June 2 letter. The Respondent, at the hearing, conceded that no effects bargaining took place.

First, we agree with Judge Norman's dismissal of the allegations pertaining to the Respondent's refusal to bargain over the transfer decision. The

[10] The parties stipulated that the letter is misdated May 2, 1982.

General Counsel initially alleged two theories under which the transfer decision violated Section 8(a)(5). In dismissing the first theory, we rely, as we did in dismissing the complaint allegation concerning the Respondent's decision to manufacture the Sea Hawk crane at its Bowling Green plant, on *Milwaukee Spring II*, supra. Thus, where, as here, the contract contains no provision which restricted or otherwise preserved the performance of small crawler cable crane work to the Cedar Rapids facility or restricted the Respondent's decision-making regarding work relocation, we do not find that the Respondent unilaterally modified the parties' contract in violation of Section 8(a)(5) and Section 8(d) when it decided to transfer this work to its Bowling Green and Lexington plants. Regarding the second theory, i.e., that the relocation constituted a unilateral change in the employees' terms and conditions of employment about which the Respondent had to bargain, we find that even assuming arguendo that the Union had a right to bargain about the transfer decision, the Union waived this right. Thus, we note that although the Union received clear notice of the Respondent's decision to transfer the assembly and manufacture of the small crawler cable cranes from Cedar Rapids, it did not request bargaining over this decision. Accordingly, we dismiss this allegation.[11]

Contrary to Judge Norman, however, we find that effects-bargaining and information request issues are separate issues involving independent events.[12] Thus, our dismissal of the allegation concerning a failure to bargain over the Respondent's decision to transfer bargaining unit work does not preclude our consideration of an effects-bargaining allegation on the same transfer issue. See, e.g., *Otis Elevator II*, supra. Accordingly, based on the facts set forth above, we shall now examine both the timeliness of the charge regarding the effects-bargaining and information request issues and the merits of these allegations.

With respect to the effects-bargaining allegation, we first find no merit to the Respondent's contention that this complaint allegation is barred under Section 10(b). The record shows that the request for effects bargaining occurred on June 2, 1982, and that a charge alleging a failure to bargain over the effects was filed December 1, 1982, within the 6-month period. Turning to the merits of the allegation, we note that the Respondent concedes that no effects bargaining took place.[13] Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) in failing to accede to the Union's request for effects bargaining.[14]

The record shows that the Union's information request of June 2 listed 41 numbered items.[15] Of these, items numbered 32–33 and 37–41 appear to relate to effects bargaining regarding the transfer.[16] The letter includes requests for seniority lists

[11] In light of our finding, we find it unnecessary to address the Respondent's contentions that the allegation pertaining to the transfer decision was precluded from consideration by Sec. 10(b); that the Union had contractually waived its right to bargain about the issue; or that the matter should be deferred to an arbitrator's decision favorable to the Respondent. Further, in light of our dismissal of the 8(a)(5) and 8(d) allegations regarding the transfer, we also shall dismiss the derivative 8(a)(3) allegation. *Milwaukee Spring II*, supra at 604.

[12] The Respondent contends that if consideration of the complaint is not barred by Sec. 10(b), the complaint should be dismissed in deference to an arbitration award on the transfer decision issued in December 1983. As we find the effects-bargaining and information request issues are matters which warrant our independent consideration, we do not find merit to the Respondent's contention that they should be deferred to an arbitration award covering only the transfer decision.

[13] The Respondent contends that it was not obligated to bargain with the Union regarding the effects of the decision to transfer the small crawler cable cranes where, inter alia, the transfer had no detrimental effect on the bargaining unit. We note that the cases cited by the Respondent involve subcontracting in accordance with past practice and with a minimal effect on employee jobs. In contrast, the facts in this case do not show a past history of subcontracting. Further, the transfer of small crawler cable crane work constituted approximately 20 percent of future bargaining unit work at Cedar Rapids. Accordingly, we find these cases inapplicable.

[14] Although the Respondent concedes that no effects bargaining took place, it suggests in its brief that the Union failed to act on the Respondent's offer in its letter of August 6 to bargain about the matters relating to the transfer. Thus, the Respondent argues that the Union waived its right to bargain over the effects of the decision.

The letter, in pertinent part, states:

> The Company has met with the Union in the past to discuss the subject of transfer of work and is ready to discuss at the Union's request any other subject that relates to the transfer of work and which has impact on the bargaining unit personnel.

We note, by its own language, the Respondent's letter fails to respond to or even acknowledge the Union's previous request for effects bargaining. We also note that the letter was sent approximately 2 months after the transfer had begun. Further, even if this letter were to be construed as expressing the Respondent's willingness to engage in effects bargaining, we note, in view of our finding below, that the Respondent made this offer at the same time it was unlawfully refusing to provide the Union with requested information relevant to the effects of the work transfer and thus precluded a meaningful opportunity to bargain. We thus find that the Respondent's letter did not satisfy its obligation to bargain about effects and that the Union's failure to respond to the Respondent's letter did not constitute a waiver of its right to engage in effects bargaining.

[15] Judge Gershuny found that the Union requested 61 numbered items. The letter introduced into evidence lists 41 items.

[16] The General Counsel contends, and the Charging Party does not otherwise contradict, that the first 31 items pertain to the decision to transfer the small crawler cable cranes. As we have dismissed the allegation regarding the Respondent's failure to bargain about the decision, we find it unnecessary to discuss items 1–31 in terms of their relevance or to pass on whether the Respondent complied with the Union's request for information on these items.

Further, items 34–36 in the June 2 letter refer to information about toxic substances, about substances subject to Federal OSHA or state OSHA standards, and reports and/or analyses regarding employee health matters. The complaint is narrowly drafted to allege as unlawful the refusal to supply information concerning the effects of the decision to transfer the work. As we do not construe items 34–36 to relate to that decision, we do not further address these items.

Finally, the record shows that in addition to its information request of June 2, the Union made requests for timestudies. The record also shows that the Respondent subsequently provided the Union with timestudies. We find it unnecessary to pass on whether the material requested was relevant to effects bargaining or whether the Respondent satisfied its obliga-

Continued

and lists of any employees on layoff and sick leave. The letter also makes inquiries concerning employee transfer rights, job assistance, relocation benefits, and severance settlement. The record also shows that the materials signed by its personnel director and sent by the Respondent to the Union on August 6 included a seniority list of employees and information concerning retirees. This letter, however, informed the Union that lists regarding employees on sick leave or eligible for workers' compensation should be requested from the labor relations manager and further that, as layoff lists were regularly provided to the Union, the Union should look to its own records for this information. The letter provided no additional information requested by the Union regarding effects bargaining.

It is well established that an employer has a duty to furnish a union, at its request, necessary and relevant information to enable it to carry out its obligations as the employees' bargaining representative. Further, under the standard of relevancy applied by the Board and the Courts, it is sufficient if the information requested is shown to be probably or potentially relevant. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

In this case, the Union's letter clearly requested effects bargaining and also clearly requested information which would be relevant to bargaining about effects. The information requested included employee lists, including seniority and lay off, and lists of employees on sick leave. The letter further requested, inter alia, information regarding whether the Company would provide severance pay and job assistance. There can be no dispute, and we so find, that these subjects are clearly relevant to the effects of the Respondent's transfer decision and information on them would be relevant and necessary to the Union to perform its statutory representative function.

Having determined that the requested information is relevant, we shall now examine the question of whether the Respondent complied with the request. In this regard, we note that "[i]t is an employer's obligation to provide relevant and material information to the collective-bargaining representative, to make a reasonable effort to secure the requested information, and if unavailable, explain or document the reasons for the asserted unavailability [footnote omitted]." *Goodyear Atomic Corp.*, 266 NLRB 890, 896 (1983).

The record shows that the Respondent provided the Union with a seniority list, a retiree list, and a cost benefits list in its August 6 response, sent some 2 months after the Union's request. The Company did not answer or even acknowledge the Union's questions regarding matters such as severance pay or job assistance. Further, in response to several of the union questions, the Respondent simply referred the Union to another department in the Company.

We thus find that, in most respects, the Respondent's letter did not respond adequately to the Union's request for information. We further find that when the Respondent provided the information sought, it provided this information in an untimely manner.

The Respondent contends that it complied with the request for information in good faith and within a reasonable amount of time, given that it was overburdened with requests for information and it was involved in court litigation and with another major layoff unrelated to this case. We find that these reasons do not excuse the Respondent's delay in responding to the Union's information requests. We further note that with respect to the Respondent's merely referring the Union to another company department as to certain requested information, it offers no explanation why it could not have taken steps to acquire the information or have informed the Union sooner of the need to obtain the requested information from another department. Moreover, the fact that the Respondent was involved with other matters does not explain why it did not respond in any way to certain of the requests made by the Union.

In summary, having found that the Respondent's August 6 reply to the Union's information bargaining request was both untimely and inadequate and that the Respondent has offered no reasonable explanation for its delay in providing the information or failure to do so, we find that the Respondent violated Section 8(a)(5) and (1). See, e.g., *Florida Steel Corp.*, 235 NLRB 941 (1978).

THE REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent unlawfully refused to bargain with the Union about the effects of its decision to transfer small crawler cable crane work out of the Cedar Rapids bargaining unit, we shall accompany our order to bargain with a limited backpay requirement designed both to make whole employees for losses, if any, suffered as a result of the violation and to recreate in

tion to provide the information requested as it does not appear from the language of the complaint itself or from the General Counsel's and the Charging Party's arguments that a failure to provide the timestudies was a subject of the complaint.

some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent.[17] We shall do so in this case by requiring the Respondent to pay backpay to its employees in a manner analogous to that required in *Transmarine Corp.*, 170 NLRB 389 (1968), and *Interstate Tool Co.*, 177 NLRB 686 (1969). Thus, the Respondent shall pay employees backpay at the rate of their normal wages when last in the Respondent's employ, from 5 days after the Board's decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects on its employees of the decision to transfer work out of the bargaining unit; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he would have earned as wages from the date on which he was laid off to the time he was recalled or secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. See *Uncle John's Pancake House*, 232 NLRB 438 (1977).

Additionally, the record shows that the Respondent has permanently closed its Cedar Rapids, Iowa plant and has laid off all unit employees. Accordingly, in lieu of posting, we shall order the Respondent to mail a copy of the attached notice to each bargaining unit employee who was on layoff status or on the Respondent's payroll at its Cedar Rapids, Iowa plant as of the date the Respondent permanently closed its plant, at his or her last known address, as disclosed in the Respondent's records.

ORDER

The National Labor Relations Board orders that the Respondent, FMC Corporation, Cable Crane and Excavation Division, Cedar Rapids, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding their or other employees' sentiments about the Respondent's request for certain midterm contractual concessions or threatening employees with job loss if the Union fails to agree to the requested concessions.

(b) Failing to bargain with the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of its unit employees, over the effects on unit employees of its decision to transfer bargaining unit work (small crawler cable cranes) from its plant at Cedar Rapids, Iowa, to its Bowling Green and Lexington, Kentucky plants.

(c) Failing to comply in a timely and adequate manner with the Union's request for information relevant and necessary to the Union's functioning as the collective-bargaining representative of the unit employees concerning the effects of the Respondent's decision to transfer bargaining unit work.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union over the effects on unit employees of the Respondent's decision to transfer unit work (small crawler cable cranes) from its Cedar Rapids, Iowa facility to its Bowling Green and Lexington, Kentucky plants.

(b) Pay the employees who were laid off as a result of the work transfer for the period set forth in the remedy section of the decision.

(c) Furnish the Union with the information it requested concerning the effects of the Respondent's decision to transfer bargaining unit work.

(d) Mail a copy of the attached notice marked "Appendix"[18] to each bargaining unit employee who was on the Cedar Rapids, Iowa plant payroll or layoff status on the date final notice was given of the plant's closure. Such notice shall be mailed to the last known address of each employee.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[17] In its motion to dismiss, the Respondent proferred evidence of a termination agreement executed between the parties and dealing, inter alia, with the effects of the Cedar Rapids plant's permanent closing on June 28, 1984. We find that this termination agreement dealing with the effects of the plant's closing in June 1984 does not preclude our remedying the Respondent's failure to bargain about the effects of its decision to transfer certain unit work in May 24, 1982.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees regarding their or other employees' feelings about requested economic concessions or threaten our employees with job loss if the Union fails to agree to the requested concessions.

WE WILL NOT fail to bargain with United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of our unit employees over the effects of our decision to transfer bargaining unit work (small crawler cable cranes) from our Cedar Rapids, Iowa plant to our Bowling Green and Lexington, Kentucky plants.

WE WILL NOT fail to comply in a timely and adequate manner with the Union's request for information relevant and necessary for the Union's functioning as the collective-bargaining representative of the unit employees concerning the effects of our decision to transfer bargaining unit work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request by the Union, bargain collectively with it, over the effects of our decision to transfer unit work from our Cedar Rapids, Iowa plant to our Bowling Green and Lexington, Kentucky plants.

WE WILL furnish the Union with the information it requested concerning the effects of our decision to transfer bargaining unit work.

FMC CORPORATION, CABLE CRANE AND EXCAVATOR DIVISION

James L. Fox, Esq., for the General Counsel.
Richard H. Schnadig, Esq. and *Bruce R. Alper, Esq. (Fedder, Price, Kaufman & Kammholz)*, of Chicago, Illinois, for the Respondent.
Jerome Schur, Esq. (Katz, Friedman, Schur & Eagle), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge. This case was tried on March 14–17 and May 24, 1983, in Cedar Rapids, Iowa, pursuant to an order consolidating complaints issued by the Regional Director for Region 18 on February 2, 1983.

The complaint in Case 18–CA–7654 is based on a charge filed by United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) on April 5, 1982.[1] On November 26, a complaint was issued alleging that the FMC Corporation (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by unilaterally transferring the manufacture of a pedestal crane known as "Sea Hawk" from Cedar Rapids, Iowa, to Bolling Green, Kentucky. That action is separately alleged to be in derogation of Respondent's duty to bargain, an abrogation of a collectively bargained wage schedule and in reprisal for the Union's failure to agree to "concessions" sought by Respondent beginning on or about March 31. The alleged transfers are also claimed to have resulted in the layoff of approximately 100 bargaining unit employees. The complaint further alleges that Respondent engaged in "surface bargaining" with respect to concessions, failed or refused to furnish relevant information sought by the Union in the course of such bargaining and threatened, surveilled, and interrogated employees and thereby bypassed the Union as the collective-bargaining representative. All such conduct is alleged to have occurred between approximately March 26 and April 6.

The complaint in Case 18–CA–7971 issued on February 7, 1983, is based on a charge filed by the Union on December 1. That complaint alleges violations of Section 8(a)(1), (3), and (5) because of Respondent's alleged failure to bargain over a transfer decision, the claimed effects thereof on unit employees, the abrogation of collective-bargaining provisions, and Respondent's delay in furnishing, and refusal to furnish, purportedly relevant information sought by the Union after it was informed of the transfer decision.

The Regional Director initially deferred consideration of the December 1 charge under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), because the issue of Respondent's contractual authority to transfer work was then pending before arbitrator Burton I. Luskin. On December 20, Arbitrator Luskin issued his decision and found that the company had such express contractual authority. On January 25, 1983, the Regional Director revoked the *Dubo* deferral, ruling that the arbitrator's decision was "repugnant" to the Act under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Respondent contends that the charge in Case 18–CA–7971 was time-barred under Section 10(b) of the Act.[2] In both complaints, the General Counsel,

[1] All events occurred in 1982 unless otherwise stated.

[2] Respondent filed three pretrial motions: motion to dismiss, motion to sever, and motion to strike, contending that Respondent's substantive and procedural due-process rights were violated by: (1) the issuance of complaints in both cases based on a new and enlarged Board doctrine or theory (see *Milwaukee Spring Division*, 265 NLRB 206 (1982)), which did not exist at any time when Respondent allegedly engaged in its supposedly illegal conduct, and (2) the issuance of a complaint in Case 18–CA–7971 when the Regional Director had failed or refused to establish jurisdiction over the underlying unfair labor practice charge pursuant to Sec. 10(b) of the Act, and when the undisputed facts and law presented to him showed the absence thereof.

Continued

inter alia, seeks return of the work allegedly transferred from Cedar Rapids.

On the entire record in this case, including my observation of the demeanor of the witnesses, and a thorough consideration of the briefs submitted by the General Counsel, Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges and Respondent admits that it is an employer engaged in interstate commerce and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Decision to Manufacture the Sea Hawk Crane at Bolling Green, Kentucky*

FMC (Respondent), a diversified manufacturing company, produces cable cranes, pedestal cranes, hydraulic cranes, and excavators at plants located in Cedar Rapids, Iowa, Bolling Green and Lexington, Kentucky, and Woodstock, Canada. Cranes and excavators may be mounted either on tracks (or crawlers) or on truck bodies and are used in heavy construction. Pedestal cranes are produced primarily at Bolling Green and are mounted on stationary platforms and used primarily in offshore oil drilling. The Union has represented production and maintenance employees at Cedar Rapids since 1950 and at Woodstock, Canada, since the mid-1960s. The employees of the Kentucky plants are not represented by any union.

It is undisputed that although for several years Respondent successfully manufactured and sold pedestal cranes used in offshore oil drillings, in 1981, because of a demand for a lighter, more weather resistant hydraulically controlled crane to be mounted on offshore drilling platforms, the Company's sale of pedestal cranes used in offshore oil drillings fell sharply.

Cable crane and excavator division management[3] did not consider a specific product to fill this market void until November 30, 1981. On that day, Product Manager Frank Foster presented a 12-step program for the design, engineering, and manufacture of Sea Hawk to Division Manager Robert Price and his staff. Price approved both the Sea Hawk design and its production plan. A short time later he recommended it to Vice President and Group Manager John McKeon who also approved it. No decision was made at either meeting with respect to where the Sea Hawk was to be manufactured.

Division Manager Price testified that although Cedar Rapids had greater knowledge of hydraulic principles he preferred the Bolling Green facility because it was already the principal manufacturing location for almost all the Company's pedestal cranes, was a more productive and efficient facility than Cedar Rapids, and had lower labor rates. Price further testified that he made no selection at that time because Bolling Green, unlike Cedar Rapids, was then operating at or near capacity and he feared that it might not be able to manufacture Sea Hawk on schedule if that product obtained the market success Price anticipated.

Bolling Green's workload diminished significantly in January and February due to a general slackening in demand for all company products caused by a near depression in the construction industry. By March 23, production or build schedule for Bolling Green showed that substantial layoffs would be required unless work could be found for the plant.

Price further testified that layoffs at Bolling Green would result in a permanent loss of a skilled work force. He said he preferred Bolling Green because of the quality, productivity, and other cost advantages it had over Cedar Rapids. He said that sometime in the week of March 29, he made the decision to assign production of Sea Hawk to the Bolling Green plant and notified that plant's manager of his decision. Price further testified that he informed the rest of his staff on April 5. There is no dispute that at the time of Price's decision, concession bargaining, which had begun March 26, was then going on and Price was disappointed in its progress.

Also undisputed is the fact that in the several months preceding Price's decision, but apparently not known or authorized by him, preparations were being made to produce one Sea Hawk prototype at Cedar Rapids, where such prototypes normally are built and tested. The evidence showed that some structural changes were made in the old prototype area located on Bolling Street in Cedar Rapids. It is also undisputed that the Sea Hawk is similar in design to other models manufactured at Respondent's Cedar Rapids facility and its Bolling Green facility and that both facilities had the capability of producing this new crane. Storage bins were cleared for Sea Hawk parts, a few of which were ordered and received, and a "A-1" code or labeling system was developed in order to expedite the handling of Sea Hawk parts and equipment. Also on March 19, during a management union meeting, Frank Foster and Phil McCafferty elaborated on the manufacturing and marketing concepts underlying Sea Hawk.

Despite such preparations and expectations created by them, the only Sea Hawk produced at all in 1982 was a prototype manufactured at Bolling Green, Kentucky, months after the charge and complaint in Case 18–CA-7654 was filed. The work thereon required 500 "standard man-hours."[4]

After hearing arguments on those motions, the motions to strike and sever were denied and ruling on the motion to dismiss complaint in Case 18–CA–7971 was reserved.

[3] Until May 1, a divisional operation existed between the companies cable crane and excavator division, whose headquarters and engineering facilities were in Cedar Rapids, and the hydraulic crane division, which was located in Lexington, Kentucky. The other plants comprised in the cable crane and excavator division were Bolling Green, Kentucky, and Woodstock, Canada.

[4] "Standard man-hours" is the time it would take one employee working 100-percent efficiency to perform assigned work during a measured hour. The Company keeps no record of actual hours worked but the evidence shows that Bolling Green, Kentucky plant productivity is approximately 85 percent of standard.

The General Counsel contends that Respondent had sufficiently committed the Sea Hawk to Cedar Rapids to give rise to a claim that it constituted bargaining unit work, that Respondent relocated this work in derogation of its bargaining obligations under the Act, and that Cedar Rapids employees were adversely affected as a consequence thereof. The General Counsel relies on the following to support its contention: What the Union and employees were told concerning the proposed production of the Sea Hawk; what preparatory measures were taken at the Cedar Rapids facility in anticipation of the Sea Hawk production; and what the Union and employees were told at the time the decision to produce the Sea Hawk in Bolling Green, Kentucky, was announced.

The Union first learned about the Sea Hawk crane at a meeting held on March 19. Respondent's representatives at that time were Frank Foster, product development manager, and Phil McCafferty, plant manufacturing manager for the Cedar Rapids facility.[5] During that meeting Foster showed the union representatives a model of the Sea Hawk and told them it would be built in the "S Bay" of the old prototype building. Foster also told the union representatives that it was Respondent's intention to get the Sea Hawk off the drawing board and into production as soon as possible.[6] In order to accomplish this, Respondent intended to speed up production by producing more parts itself rather than buying them from suppliers. At the meeting McCafferty said that Sea Hawk parts would be given A-1 designation (would receive priority), and that Respondent would begin manufacturing the parts "before the ink was even dry on the blueprint." McCafferty also stated that because of a downturn in work, this would be an opportune time to build a Sea Hawk at Cedar Rapids and, using an overhead projector, gave an elaborate presentation on the Sea Hawk. Employees McDowell and Tollefson testified that they and other employees were told by McCafferty, in the presence of Ron Weaver, division manufacturing manager, that the Sea Hawk would be built in Cedar Rapids. McDowell further testified that McCafferty stated that production would begin within the next few weeks or months. Tollefson testified that Foreman Igou told him that cabs for the Sea Hawk would be built in the "S Bay" of the old prototype building.[7]

B. *Conclusions with Respect to the Decision to Build the Sea Hawk at Bolling Green*

It is not disputed that although the Sea Hawk is basically a pedestal crane hydraulically operated as are other cranes manufactured at both Cedar Rapids and Bolling Green, it is a new product line. That particular product had not previously been produced at Cedar Rapids or anywhere else until after the charge in this case was filed. No production work was actually performed on it at any time at any plant.

The Supreme Court's decision in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1974), and decisions after that have held that work "transferred," "relocated," or "subcontracted" and concerning which decision bargaining is required must be *existing* bargaining unit work. Even under *Milwaukee Spring*, supra, there was a relocation of substantial and significant amounts of existing bargaining unit work (assembly operations).

There is no duty to bargain where no bargaining unit work existed at the time the decision was made. The decision was about placement of future manufacturing work and I am aware of no case that has ruled that in those circumstances an employer must bargain about such a decision. To require advance union approval for such a decision would invite direct union participation in fundamental management decisions respecting the growth and direction of an enterprise and would give the Union a veto over those decisions at least during the life of a collective-bargaining agreement.

The fact that Cedar Rapids employees believed it would be built in Cedar Rapids based on the statements and actions of responsible managers, anticipatory preparations, and acknowledged capacities in personnel and equipment to produce it does not in itself create a duty to bargain. The Board has never equated dissappointed expectations with an actual alteration in wages, hours, and terms and conditions of employment, the only statutory subjects over which bargaining is mandatory. Moreover, the Board has held that no bargaining obligation can be imposed unless the employer's decision results in a real change in employment circumstances that are significantly detrimental to unit employees. See, e.g., *Kennecott Copper Corp.*, 148 NLRB 1653 (1964); *Rochester Telephone Corp.*, 190 NLRB 161 (1971).

Furthermore, the General Counsel has failed to prove that the Sea Hawk decision resulted in the layoff of "approximately 100 employees" as alleged. At best, if anything was lost, considering the evidence that Bolling Green and not Cedar Rapids was the established manufacturing site for most of FMC's pedestal cranes, and Cedar Rapids, the headquarters of division engineering, was the site for prototype production, it was the loss of work on the manufacture of one prototype crane. Employees were informed that only one Sea Hawk prototype model would be built there. Therefore, the most that would be lost would be the 500 standard man-hours or, given Bolling Green's 85-percent productivity level, approximately 565 actual man-hours of work.[8]

The evidence also indicates that because of the lower cost of production at Bolling Green, it was more economical to produce Sea Hawk there than at Cedar Rapids. The General Counsel's contention that the decision to place the Sea Hawk production in Bolling Green was in retaliation for the Union's failure to agree to concessions, which will be discussed later in this decision, is, inter alia, rebutted by the evidence that the concession

[5] Neither McCafferty nor Foster testified at the hearing.

[6] The proposed building schedule indicates that a prototype was to be completed by June 1, and that seven machines were to be shipped by February 28, 1983.

[7] It should be noted that at the time of the decision to manufacture the Sea Hawk in Bolling Green the manufacture of the prototype had not begun in Cedar Rapids. Wage rates in Bolling Green were roughly $3.50 per hour less than in Cedar Rapids.

[8] I do not consider such a loss to be a significant detriment to employees as required in the cases cited supra.

discussions continued for at least four more sessions (April 7, 8, 12, and 15) after Price announced the decision to produce Sea Hawk at Bolling Green. There is also evidence that at the time of the decision, plant management at Cedar Rapids was actively engaged in seeking FMC and non-FMC contracts for the Cedar Rapids plant.

In sum, we have here a decision to build a new product line at a particular location rather than at another, rather than a transfer of bargaining unit work, despite the expectations and preparations without any actual production and at most a de minimis effect on the bargaining unit employees. In the circumstances, I find that there was no duty to bargain over the decision to manufacture the Sea Hawk crane at Respondent's Bolling Green plant and, accordingly, I shall recommend the dismissal of those allegations of the complaint.

C. *The Alleged 8(a)(1) and (3) Allegations Concerning the Sea Hawk Decision*

According to the evidence, the Sea Hawk decision did not result in any employee terminations, denials of reinstatements, or effects on the bargaining unit employees, as was the case in *Milwaukee Spring*, supra. Accordingly, in agreement with the Respondent, I find that the consequences of this Sea Hawk decision on unit employees were "either totally speculative and immeasurable or de minimis." Moreover, the employer's decision in *Milwaukee Spring*, supra, though one based on economics, was influenced almost entirely by the lower labor rates at the nonunion facility. The Board held that, for that reason, the relocation constituted a repudiation of a negotiated wage schedule. In the instant case, however, lower wage rates was one of many factors influencing the decision of Division Manager Price[9] who testified that higher productivity and lower scrap costs at Bolling Green were significant considerations as was Bolling Green's established expertise as the principal pedestal crane manufacturing site and his fear that layoffs at Bolling Green would lead to permanent loss of skilled employees to other local enterprises. In other words, lower labor rates was only one of many reasons that Bolling Green was selected over Cedar Rapids.

D. *The Alleged Retaliatory Motive for not Agreeing to Concessions*

The complaint alleges that Respondent violated Section 8(a)(3) in that the Sea Hawk decision was made in reprisal for the Union's failure to agree to concessions. As previously mentioned, employees of Respondent's facilities in Bolling Green and Lexington accepted the concessions that the employees at Cedar Rapids rejected. Price admitted that the request for concession emanated from him, that he received periodic reports from J. D. Lewis concerning the status of negotiations of Cedar Rapids, that he was very disappointed that Cedar Rapids' employees refused what other employees accepted, and that the disparity in wage rates was a factor in the ultimate decision to produce the Sea Hawk in Bolling Green. Price, however, denied any connection among the concessions, negotiations, and decision. Price testified that he made the decision during the week of March 23, that the Union flatly rejected any economic concessions on March 26, and that the decision was communicated to Bolling Green officials during the week of March 29. In sum, the General Counsel contends that the Company's articulated business reasons are a pretext to camouflage the Company's retaliatory motive. That contention is based almost entirely on the timing of Price's decision in relation to apparently stalemated concession meetings. The evidence also shows however, that at the same time that Price made the Sea Hawk decision, other of Respondent's managers were making efforts to bring work into Cedar Rapids from other companies and FMC divisions. Union witness Dusil testified that he attended the April 7 meeting and that McCafferty spoke about his efforts to bring work from other companies including Gardner-Denver, and that at that time the Company had decided not to produce the Sea Hawk in Cedar Rapids. When such alleged retaliatory treatment of employees is coupled with evidence of favorable or beneficial conduct Board cases have held no reprisal was involved. See *Service Spring Co.*, 263 NLRB 812 (1982); *Rice Food Markets*, 255 NLRB 884 (1981). I am constrained to conclude that the General Counsel's alleged retaliation against the Union for refusing to agree to concessions was the motive behind the Sea Hawk decision must fall in view of the evidence that the Respondent made efforts at the same time of the Sea Hawk decision to secure work for its Cedar Rapids plants.

As for the interrogation by foremen and other supervisors and other statements concerning connecting the Sea Hawk decision with the Union's refusal to agree to concessions, I am not persuaded that Respondent either authorized or condoned such lower echelon people to make such statements nor do I believe that the remarks truly reflected Respondent's reasons for its Sea Hawk decision. Moreover, the lower echelon supervisory personnel were as anxious to have the Sea Hawk built in Cedar Rapids to protect their own jobs as were the rank-and-file employees. I view their remarks as merely expressing their individual opinions as well as indicating their frustrations over the decision to build the Sea Hawk in Bolling Green and not Cedar Rapids. I shall therefore recommend the dismissal of the 8(a)(3) allegation with respect to the interrogations and remarks by the supervisory personnel concerning the Sea Hawk decision.

1. The concession meetings

On or about March 23, Respondent instituted a wage freeze and benefits reduction for salaried employees at all plants and for hourly employees at Bolling Green and Lexington, Kentucky. Such became effective on April 1. At the same time Respondent sought the comparable, economic, and certain noneconomic changes from the Union for both the Cedar Rapids and Woodstock, Canada plants. An initial eight-point proposal was pre-

[9] Price testified in a positive and unhesitant manner. The fact that he was no longer employed by FMC places him in a category of a somewhat disinterested witness. His testimony was not controverted but rather supported by other evidence of record which influences favorably his credibility.

pared by J. D. Lewis, Cedar Rapids' director of personnel, and presented by him at the outset of concession meetings. The first three proposals were purely economic and involved freezes on wages and "COLA" and the elimination of personal days off. The balance of the request involved noneconomic issues effecting plant productivity. The concession meetings took place in seven separate sessions from March 26 through April 15.

Respondent and the Union have been parties to successive bargaining agreements, the most recent of which is effective by its terms from April 1, 1981, until April 1, 1984. The agreement applies to employees employed at two plants located in Cedar Rapids.

2. The March 26 meeting

On March 26 a meeting was held between representatives of the Respondent and the Union. The Union was informed the sales prospects were bleak and that concessions were necessary in order for the Cedar Rapids facility to compete with other clients within the corporation and with outside competitors. At the conclusion of the meeting, Respondent proposed, and the Union agreed, the Respondent be permitted to meet with the employees and inform them of conditions in the marketplace. At no time did the Union agree that Respondent could meet directly with employees to discuss proposed concessions and contract modifications. Bill Stewart, the Union's International representative, informed Respondent's representatives that in the absence of financial data disclosing the need for concessions, the Union would not discuss economic matters further but would be willing to discuss noneconomic matters.

In attendance at that meeting, besides Bill Stewart, was James Hurtt, then local president of the Union, who acted as chief spokesman for the union negotiating committee. Stewart appeared at the first meeting and at the final meeting only. J. D. Lewis acted as the principal company spokesman at all the meetings. Also present on behalf of Respondent was Ronald Weaver, division manager of manufacturing. Lewis and Weaver spoke initially about the cost-saving instituted for salary and nonunion hourly employees and the glum outlook facing both the Company and its industry. Lewis then stated that the Company was seeking comparable concessions at Cedar Rapids. Stewart responded saying that when companies request concessions, it is the UAW policy and practice to request financial information supporting the need for same. Steward then requested it. Lewis replied that FMC was not asking for concessions because it could not afford to meet the contract terms, that if the Union did not agree to economic concessions, the Company "would honor the contract" and further, if the Union preferred to talk about noneconomic matters, the Company would do that instead. That remained the Company's position with respect to financial information throughout concession meetings.

Stewart asked if the Company would consider certain quid pro quos for concessions and mentioned such matters as profit sharing, a layoff moratorium, and a guarantee that work not be transferred from Cedar Rapids in the future. Lewis repeated that the Company was not interested in reopening the collective-bargaining agreement, but, instead, sought to obtain temporary economic and noneconomic relief in order to make Cedar Rapids competitive. That remained the Company's position with respect to similar union requests at all subsequent meetings.

3. The March 29 meeting

Lewis reviewed the eight-point concession proposal and then discussed the relatively sudden increase and available operating capacity at Bolling Green due to order cancellations and its implications for the higher cost and less efficient Cedar Rapids plant.[10]

4. The meetings of March 30 and April 7, 8, 12, and 15

The meetings after March 29 followed somewhat the same pattern as the earlier meetings without reaching agreement on any of the concession requests or other matters. The Union refused to deviate in any respect from the contract and the Company refused to entertain requests for financial information or to expand discussions to include fringe benefits such as profit sharing, early retirement, or a moratorium on layoffs and transfers.

After the March 30 meeting, the Union at the Company's request agreed to and distributed to its members copies of FMC's modified five-point concession proposal. The Union did not bring this proposal to a membership vote.

5. The alleged refusal to bargain in good faith during concession meetings

The complaint in Case 18–CA–7654 alleges, in effect, that Respondent's overall conduct, and particularly its refusal to provide relevant financial information and to consider the Union's proposals, constitute the type of bad-faith bargaining prohibited under Section 8(d) and Section 8(a)(5) and (1) of the Act.

Section 8(d) of the Act expressly relieves both parties to a collective-bargaining agreement of any obligation to bargain concerning modifications that are to be effective prior to expiration of the agreement. In the instant case, Respondent, during the first year of a 3-year agreement,

[10] The Union never asked for any financial information or other data to buttress the comparisons that McCafferty made at that meeting between the costs at Bolling Green and Lexington and Cedar Rapids. However, Union President Hurtt questioned the statements or stressed that the Kentucky plants were nonunion and naturally less costly for that reason. Hurtt then referred to recent Ford and General Motors settlements asking whether the Company would negotiate over profit-sharing and similar matters and suggested the Company undertake further cutbacks in its salaried work force. Lewis declined. Lewis then said the contract was still in effect and would not expire until April 1984. The Union then repeated its request for general financial information and Lewis again refused stating that the books would not be opened and that there would not be any opening of the contract. He further stated that to open books was saying that they cannot financially meet their obligations under the contract and that the Respondent was not saying that, that they could meet their financial obligations under the contract and that was not the issue at hand.

On either March 29 or the day after the Respondent altered its eight-point concession proposal and presented a five-point proposal instead. It modified its wage freeze proposal and three of the productivity requests.

proposed that the Union accept certain concessions and contract modifications. The Union, of course, could have refused to consider or discuss such matters. However, faced with representations that concessions were necessary for survival and to remain competitive, the Union met with Respondent and seriously considered its proposal. Respondent refused, however, to provide the Union with what the General Counsel considers the information necessary and relevant to the Union's evaluation of Respondent's claims. The Respondent, on the other hand, stated its position clearly and emphatically that it could afford to continue with the existing contract and that the financial condition of the Cedar Rapids plants was not relevant and, accordingly, refused to provide the financial information requested by the Union.

I am persuaded by the evidence that the Company acted with as much "good faith" as the Union. With respect to the allegation of surface bargaining, the evidence shows that seven separate concession meetings were held within less than a 3-week period and apparently all but one were considerably lengthy. The International representative was invited by the Company to attend and did participate in the first and last meetings. An examination of the transcribed minutes of these meetings shows that each party listened to the concerns about concession proposals of the other. The Union discussed the 4-day work schedule, the pay raise for and layoffs among the salaried work force, the staffing and performance of the Cedar Rapids personnel department, and the number of arbitration cases, among other things. The Company modified its original concession list and agreed to discuss only noneconomic issues and, when the Union asked, the Company committed itself to reconsider its position on short-term concessions if such were granted and business then improved. The meetings appeared to be conciliatory, open, and responsive throughout. If agreement were possible, it appears that both were seeking it.

It is true that the Company did not agree to union proposals with respect to early retirement, profit sharing, and job security. And the Union refused to accept any of the Company's original or modified concession proposals or to put the proposals to a membership vote. Each party continually reminded the other that the contract was the law. In the circumstances, I believe that there was a full and fair airing of a wide variety of subjects at the concession meetings and despite the absence of agreement on any proposal advanced by either party, substantive good faith prevailed. I therefore will recommend dismissal of those allegations of the complaint alleging bad-faith bargaining on the part of Respondent.

The contention that Respondent independently violated Section 8(a)(5) by failing to provide the Union with division financial information it requested as soon as the Company asked for concessions is also unsupported by the evidence.

The record shows that Respondent has never claimed "inability to pay" or any financial impediment to meeting its contractual commitments. Rather, from the beginning, Company Negotiator Lewis consistently reassured the Union that it could afford to meet its contract obligations and would honor them even if its concession efforts failed. Moreover, Company Representative McCafferty, in a session on April 15, provided specific evidence of the Company's ability to pay when he said that the division had earned approximately $500,000 in fiscal 1981. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

What was relevant, however, was the data presented by the Company to support the Company's unfavorable comparison of Cedar Rapids productivity, quality control, and other costs with the Bolling Green and Lexington plants. However, the Company's claims in that regard did not precipitate any information or request from the Union. The Union merely argued the validity of the comparison or excused them on the grounds of any advantage the Kentucky plants possess is attributable to their nonunion status. The Union did not seek the kind of information truly relevant to the issues under discussion.

I am persuaded, therefore, that the complaint allegations alleging that the Company refused to provide the Union relevant financial information violated Section 8(a)(5) should be dismissed and I shall so recommend.

6. The alleged bypassing

The complaint in Case 18–CA–7654 alleges that the Company bypassed the Union by threatening employees or questioning them with respect to their attitude toward concession proposals. The General Counsel contends the Respondent bypassed the Union and took its case directly to its employees, and interrogated and threatened them concerning the proposed concessions and contract modifications. It further contends that Respondent's overall conduct and particularly its refusal to provide relevant financial information and to consider the Union's proposals constitute the type of bad-faith bargaining prohibited under Section 8(d) and Section 8(a)(5) and (1) of the Act. The General Counsel cites *Goodyear Aerospace Corp.*, 204 NLRB 831 (1973), enfd. in part 497 F.2d 747 (6th Cir. 1974), stating that the material facts in *Goodyear* are in virtually all respects identical to the facts herein.

I disagree. In that case, the employer proposed midterm concessions and contract modifications; claimed that it was not competitive because of its relatively high labor costs; refused to supply any financial information to document its claim; and dealt directly with and threatened its employees with regard to the proposed concessions. In those circumstances, the Board concluded: "Where, as here, a party proposes an unsettling change during the contract term, he indicates a desire not to hold firm to the terms and conditions of the contract, at least with respect to the change. In this situation there is no reason for not requiring him to fulfill his normal bargaining obligation about the proposal which he himself initiated, if the other party requests it." 204 NLRB at 832.

Unlike *Goodyear*, the Respondent in the instant case did not indicate a desire not to hold firm to the terms and conditions of the contract but did just the opposite. It stated that it could and would meet the conditions of the contract if the union refused to grant the concessions. In *Goodyear*, in view of the employer's statement

that it could no longer afford the higher labor costs, the financial information to support the employer's position was indeed relevant and necessary to the Union in the bargaining process. The Employer's normal bargaining obligations do not include a duty to provide *irrelevant* information.

The evidence shows that employee meetings were not unusual at the Cedar Rapids plants and that particular meetings in question took place only after concession proposals were presented to and thoroughly discussed with the Union and after the Company had informed the Union of its intention to meet with employees and to obtain the Union's agreement and encouragement. Moreover, one or more union officers were invited to and did attend every meeting to listen and monitor what took place.

The General Counsel's position is that although the meetings between the company officials and the employees are not alleged as unlawful bypassing in the complaints, the record evidence summarized here is important in determining whether Respondent bargained in bad-faith concerning the proposed concessions and contract modifications. The General Counsel further contends that that does not however, preclude a finding that Respondent in fact bypassed the Union and dealt directly with employees. To offset Respondent's contention that the presence of employer officers of the local union precludes such a finding the General Counsel cites the letter sent by the Union President Hurtt as expressing the Union's vigorous opposition to the Company's conduct.[11]

I do not agree with the General Counsel that the manner in which the Company planned and held employee meetings, its solicitation of union cooperation and the Union's presence at those meetings supports the complaint allegation of bad faith on the part of Respondent. I shall therefore recommend dismissal of those allegations. Moreover, I do not find any "by-passing."

7. Case 18–CA–7971 and the 10(b) issue

On May 24, the union committee was informed that a decision to transfer parts and fixtures in connection with its decision to transfer work on its small crawler crane line from Cedar Rapids to Kentucky had been reached and would be implemented within the month. On being so informed, Local President Hurtt immediately served notice on Respondent that he would grieve and file NLRB charges. He said that the transfer violated the parties' letter of agreement regarding subcontracting, that the Union would grieve the action and file NLRB charges. On June 3 the Union did grieve. On June 21, the Union also sought and obtained ex parte a temporary restraining order prohibiting the transfer of tooling, fixtures, and parts from Cedar Rapids. However, the Union did not file a charge with the NLRB until December 1, 6 months and 6 days after the day that it had been informed of the transfer.

Respondent's decision was announced by Ron Weaver at a company-union meeting held May 24. He read a letter from Group Operations Manager Smith, dated May 20, as follows:

> With the next (non-division) structure basically in place, we are now proceeding to implement some of the concepts recommended by the task force. Within the next 30 days, we will move assembly operations of the small cable crawlers to the Bolling Green plant; fabrication, welding, and related machining operations to the Lexington plant with much of the gear and shaft operations remaining at the Cedar Rapids plant.

Weaver then stated that the transfer of parts ultimately to be fabricated, welded, and assembled would commence on June 21, and on the same day, due to continued poor business conditions, a plant shutdown of approximately 4 to 6 weeks' duration would begin. According to Weaver's testimony the June 21 date for both shutdown and parts transfer was intentionally coincident in order to accomplish the latter with minimum disruption from what otherwise would be normal plant activities. Weaver also stated that he anticipated that machining or manufacturing of gears and shafts, then being performed at all plants, eventually would be centralized at Cedar Rapids.

At no time since the announcement on May 24 has the Union orally requested bargaining about the decision or the possible effects thereof on the unit. On June 3, Local President Hurtt gave Weaver a letter with a four-page questionnaire form attached. The letter stated that the Company had violated the contract and purported to seek "effects" bargaining. Beginning June 20, William Holz, labor relations manager, responded to the letter and to other informational requests. Holz delivered to the Union much data and explanatory cover material in response to the Union's request.

on June 29, after hearing, the TRO was dissolved and the transfer of fixtures and parts resumed. The plant shutdown caused by general economic conditions ended in the first week of August and employees laid off as a result were recalled. Through October 1, the work force continued to build small cranes in accordance with the established production schedule, and Cedar Rapids continued to fabricate gears and other parts to the end of the year. However, in the last quarter of 1982, Bolling Green assembled five small crawler cranes, each of which required 200 standard labor hours.

[11] There is in evidence, G.C. Exh. 11, a letter dated March 31 from "Jim J. Hurtt, UAW President," to "Bob Price" that reads as follows:

Dear Bob:

This is to serve official notice to FMC Crane and Excavator Division of the Union's Notice to Terminate the Companys [sic] dealing directly to [sic] our union membership. The Company is trying to renegotiate contract language and benefit by acting to undermind [sic] the representing union UAW, Local 299. We demand this repatitish manor [sic] be stopped immediately.

Also the company has made comments of a threatening nature to our membership of cheaper labor costs and routing of work on a comparison of non-union FMC plants. We will reserve the legal rights [sic] to pursue this action in a manor [sic] of not freedom of speech but damaging to union and company. N.L.R.B. Section 8(a)(5), 8(a)(3) and 8(a)(1).

Apparently, though not entirely clear, the above letter was making reference to Respondent's conduct at the meetings. There is no evidence the union representatives who attended made any protests to Respondent's representatives at the time the alleged conduct was taking place.

8. Conclusions with respect to the 10(b) issue

It is well established that the Board and courts have held that the 6-month statute of limitations in 10(b) starts to run on the date the union (or employee) is fully and fairly informed of the facts that give rise to the alleged unlawful conduct. *Southeastern Michigan Gas Co.*, 198 NLRB 1221 (1972), enfd. 485 F.2d 1239 (6th Cir. 1973). As previously stated, the Union first learned of the relocation at a meeting held on May 24. The actual relocation of work commenced on June 21. The charge involving the relocation of the small crawler cranes was filed on December 1.

According to the General Counsel, the 10(b) period commenced on June 21 and not on May 24 as contended by Respondent. The General Counsel relies, inter alia, on *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), to support its contention that in 8(d) cases generally, it is the *act* and not the *announcement* of the act that triggers the commencement of the 10(b) period. In *Farmingdale* however, the *act* and not the announcement became the starting point because the announcement was not clear and unequivocal. Here however, and the record is clear, on May 24, the union committee was clearly and unequivocally informed that a decision to transfer parts and fixtures from Cedar Rapids to Kentucky had been reached and would be implemented within the month. Union President Hurtt understood precisely what was said and its implications because he immediately served notice on the Company that he would grieve and file NLRB charges. Not only did the Union know of facts that could support a charge but acted on that knowledge with every apparent intention of filing one. Notwithstanding, nothing was done until after 6 months from the announcement of the decision. The TRO proceeding commenced; the arbitration was heard; and only after that, on December 1, did the Union file its charge. In addition, there was no obligation to furnish the Union with information with respect to the parts transfer because that bargaining obligation was subsidiary to and dependent on the existence of an obligation to bargain about the decision itself. Accordingly, if indeed a bargaining obligation did arise, it arose with the announcement of a company decision on May 24, a date beyond the 10(b) period.

In the circumstances, the informational delay and related allegations in the complaint cannot revive a legally defunct charge. I will therefore recommend dismissing the complaint allegations based on the language of the December 1 charge as untimely under Section 10(b) as well as other allegations in the complaint deriving from that charge including the informational delay and related allegations in the complaint and the allegation that the parts transfer was in retaliation for the Union's failure to agree to concessions a year earlier. That allegation was never made a subject of a timely charge and therefore it too must be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent has not violated Section 8(a)(1), (3), and (5) of the Act as alleged in the complaint.

3. The charge filed with regard to the relocation of the small crawler crane and the complaint based thereon are barred by Section 10(b) of the Act.

[Recommended Order for dismissal omitted from publication.]

James L. Fox, Esq., for the General Counsel.
Richard H. Schnadig (Vedder, Price, Kaufman & Kammholz), of Chicago, Illinois, for the Respondent.
Jerome Schur, Esq. (Katz, Friedman, Schur & Eagle), of Chicago, Illinois, for the Charging Party.

SUPPLEMENTAL DECISION

WILLIAM A. GERSHUNY, Administrative Law Judge. By Order dated 30 October 1985, I was designated to supplement the findings and conclusions of the 23 October 1983 decision of Administrative Law Judge George Norman (now retired), in accordance with the Board's remand order of 6 July 1984.

I conducted a telephonic pretrial conference on 15 November 1985, the parties filed statements of position in January 1986 about the issues to be decided, and Respondent filed a motion to dismiss on 19 December 1985, alleging mootness based on the expiration of the labor agreement, the permanent closure of the plant, and a 1 March 1985 termination agreement incorporating "a complete understanding by the parties concerning the shutdown [of the plant], employee termination and the effects of both." The agreement and the other factual assertions of the motion are undisputed and are made a part of the record for purposes of this supplemental decision. With this exception, the findings and conclusions herein are made on the existing record and briefs. Credibility resolutions are made, of course, without consideration of witness demeanor.

1. *The Motion to Dismiss*: Respondent seeks dismissal on grounds of mootness, based on uncontroverted facts occurring subsequent to the 1983 hearing. In remanding these cases, the Board expressed the "opinion that a full disposition of the issues in this proceeding [including those held in abeyance] requires additional factual and legal findings." Given such explicit, limiting instructions, I am without authority to entertain the motion. Nevertheless, the termination agreement and other factual assertions concerning expiration of the contract and plant closure have been received in evidence, to permit the Board, if it is so disposed, to consider Respondent's mootness contention.

2. *The 8(a)(1) Allegations in Case 18-CA-7654*: (a) Paragraph 5(a) of the complaint alleges that Plant Manager McCafferty, at a meeting of employees, threatened a loss of existing jobs if concessions were not accepted. The only witness to support this allegation, former Steward Brundrett, was uncertain whether the threat was made by McCafferty or by Division Manager Weaver. Both admittedly are supervisors. None of the other nine witnesses called by the General Counsel to testify about those meetings confirmed Brundrett's testimony of a threat. Indeed, one such witness, Dusil, testified that no

such threat was made. Based on the record evidence alone, I am unable to creidt the testimony of Brundrett for the reasons that it is vague, uncertain, and totally unsupported in this respect by any other witness called by the General Counsel. Accordingly, paragraph 5(a) of the complaint is dismissed for want of evidence.

(b) Paragraph 5(b) of the complaint alleges that Powers unlawfully interrogated employees concerning their position on concessions and unlawfully threatened loss of jobs. The latter is unsupported by any testimony and is dismissed for want of evidence. Brundrett testified that such an inquiry was made of him by Powers, who, admittedly, is a supervisor. Powers, employed elsewhere at the time of the hearing, did not testify. There is no reason to discredit Brundrett's version of this one-on-one conversation with a company supervisor. It was an innocuous question—what did the "guys out in the shop" think of the concessions—and was combined with an opinion by Powers that the salaried employees were making greater concessions than the hourly employees. Brundrett's response—that it would destroy the Union and was one-sided—indicates that Brundrett certainly was not intimidated by the inquiry, but this, of course, is irrelevant. Tested objectively, the interrogation was coercive in nature and, hence, violative of the Act.

(c) Paragraph 5(c) alleges that Chesmore unlawfully interrogated employees concerning their position on concessions and threatened them with loss of work. Chesmore admittedly is a supervisor. Employee Campbell testified that he and several other employees were asked by Chesmore what they thought of the concessions and that Chesmore was afraid the facility might lose the Sea Hawk project. None of the other coworkers was called to testify. Chesmore denied making the inquiry, but admitted that he and other foremen were instructed to learn employee sentiment. I credit Campbell's testimony, despite its vagueness about the details of the inquiry and other remarks and, on this record, find that the inquiry was violative of the Act despite its informal nature. As I stated above, the question, viewed objectively, was a coercive one. Moreover, I find that Chesmore's remarks, in response to a general employee question, that "the Company could shut the door Monday morning if it wanted to" and that he was "afraid we would lose the Seahawk project," are sufficiently suggestive of a threat of loss of jobs if concessions were not agreed to, as to constitute an independent violation of Section 8(a)(1) of the Act.

(d) Paragraph 5(d) alleges that Klingman, admittedly a supervisor, interrogated employees concerning their positions on concessions. Employee Feiereisen testified without contradiction that Klingman "asked . . . what I thought . . . was the feelings of the employees about the concessions." Tested objectively, the question constitutes a coercive, and thus unlawful, interrogation.

(e) Paragraph 5(e) alleges that Uldrich, admittedly a supervisor, threatened employees with loss of work if concessions were not agreed to. Employee Rhoads was the General Counsel's only witness. He testified that he and two other employees were urged to vote for the concessions and that, later, he overheard Uldrich say to two other supervisors that the Sea Hawk crane would be built elsewhere unless concessions were granted. Although the remark was not addressed to Rhoads and not intended to be heard by him, he interjected, "at least we'll get to build a prototype." He testified that Rhoads replied, "No, it goes south, too." Uldrich denied the latter conversation (the only one alleged as a violation) and the General Counsel did not call any of the other participants. Under the circumstances, I cannot find that a threat was made, in the absence of corroborating testimony. But, even assuming the statement to have been made, it does not constitute a violation. The conversation during which the statement was made was a private one, between supervisors in a supervisor's office. It was not intended for employee consumption. The fact that it was overheard by a unit employee who voluntarily entered the office in the midst of the conversation does not convert an otherwise lawful statement into an unlawful threat of loss of employment. This allegation is dismissed.

(f) Paragraph 5(f) alleges that Hootman, admittedly a supervisor, unlawfully interrogated an employee concerning his and other employees' views on concessions and threatened him with loss of employment if concessions were not accepted. Brundrett testified that Hootman asked him on 5 April what he thought about the concessions. Brundrett "believed" Hootman also said: "If we wanted to protect our jobs we probably ought to accept those concessions"; there was insufficient work for all the Company's plants; and (after reviewing his affidavit), "if we wanted that contract we'd probably better make the concessions." I am unable to credit Brundrett's testimony. Again, it was too vague and unconvincing to carry the General Counsel's burden. Clearly, Brundrett was confusing several different conversations with more than one supervisor. Clearly, he was unsure what was said by Hootman and, clearly, he used his affidavit as a prop, rather than as a refresher. This alone tends to destroy any confidence in his testimony. Accordingly, this allegation must be dismissed for want of proof.

(g) Paragraph 5(g) of the complaint alleges that Wolfe, admittedly a supervisor, threatened employees with loss of jobs if concessions were not granted. Employee Brown testified that, on 6 April, Wolfe came into his work area, slammed some doors, and said, "You guys have done it now. You didn't take those concessions, and now we are going to move [the work] out of cedar Rapids," and "It won't make any difference anyway. They are going to close the plant within 30 days." Another employee who was present was not called by the General Counsel. Wolfe could not recall making such statements, but, as chief steward for 8 years, Wolfe testified he was aware that threats were unlawful. On this record, I have no basis for not crediting the testimony of Brown. Wolfe's remarks clearly reflected his frustration about deteriorating business conditions at the plant. Nevertheless, when taken in context, they amounted to an explicit threat that jobs would be lost unless concessions were granted to the Company and, thus, were violative of Section 8(a)(1).

3. *The 8(a)(5) and (1) Allegations in Case 18–CA–7971*: In its remand order, the Board noted that, in Case 18–

CA-7971, Judge Norman "did not fully address the factual and legal aspects of the Union's requests to bargain about the effects of the transfer decision . . . or to provide certain requested information in that case and Respondent's compliance therewith." The Board ordered that specific factual and legal findings be made (1) "regarding Respondent's alleged refusal to bargain about the effects of its decision to transfer work" and (2) its alleged refusal to provide certain requested information, including, but not limited to, the relevance of the information requested and the degree to which Respondent complied with this request."

(a) *Effects Bargaining*: First, it should be noted that the remand order seeks further findings only with regard to the effects bargaining allegations of paragraph 10 of the complaint. Further findings about the *decision* bargaining allegations of the same paragraph are not encompassed in the Order.

Second, it should be noted that the relevant facts about effects bargaining are not in dispute. The decision to relocate was announced at a company-union meeting on 24 May 1982. The Union announced that it would grieve the action and file an unfair labor practice charge. A grievance was filed on 3 June and denied on 20 December. A restraining order was obtained by the Union in the district court on 21 June and was dissolved on 29 June. The charge was filed on 1 December, more than 6 months after the initial announcement. Admittedly, a written request for effects bargaining was made by letter dated 2 June and, by letter dated 6 August, the Company replied that it was ready at the Union's request "to discuss any other subject that relates to the transfer of work and which has impact on the bargaining unit personnel." There is no evidence of any further union request, oral or written, and, admittedly, no effects bargaining was conducted. Counsel do not suggest what further findings might be appropriate under the Board's remand order.

Because the issue of whether an obligation existed to engage in *effects* bargaining is closely intertwined with, and dependent on, the *decision* bargaining issue that the Board has held in abeyance, I am unable to make conclusions of law at this time.

(b) *Request for Information*: Approximately 61 individual requests for information were submitted by the Union, and the Company provided voluminous documents in response. The posthearing briefs of the parties do not address the items individually, the relevance of each, or the adequacy or inadequacy of each piece of information provided. The General Counsel treats the information issue only by way of footnote, noting that "Although Respondent ultimately furnished some of the requested information . . . the relocation [of the work] already has been consummated," but failing to discuss any particular request or response. Respondent comments only that "It is beyond the scope of this brief and the reader's endurance to attempt a detailed analysis of the propriety and relevance of each of the [61] questions originally propounded by the Union in its June 2, 1982 letter." The Charging Party's brief (as supplemented on 8 January 1986) makes only limited reference to individual items of requested information. Presumably counsel have recognized that the posture of this case, both at the time of the hearing and at present, does not warrant the time and expense of preparing the type of detailed analysis that would be essential to the factfinder. I am reluctant, at this late date in the proceeding, to direct counsel to prepare such an analysis and, not having presided over the receipt of this voluminous documentary evidence, I am unable to do the analysis apparently directed by the Board.

In addition, I take note of the fact that almost 4 years have lapsed since the decision to relocate; that the contract expired in 1985; that the Cedar Rapids plant has been permanently closed since June 1984; and that the Union and the Company have entered into a termination agreement on 1 March 1985 encompassing severence pay and benefits of unit employees. Under these circumstances, I do not believe the Board intended to require the kind of detailed analysis of the information requested and provided, which its Order appears to suggest.[1]

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Adscon, Inc. *and* Earl Morgan *and* Bobby Lee Morgan, *and* Lloyd Parish Plumlee *and* Henry L. Plumlee *and* James F. Muse *and* Randall Gosseen, *and* Don Fox *and* Dean E. Herd

Adson, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 598. Cases 19–CA–18435, 19–CA–18436, 19–CA–18437, 19–CA–18438, 19–CA–18439, 19–CA–18453, 19–CA–18454, 19–CA–18483, 19–CA–18557, and 19–RC–11401

July 29, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On November 12, 1987, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Parties filed an answering brief to the Respondent's exceptions. The General Counsel filed a brief in support of the judge's decision and limited exceptions and a supporting brief. The Respondent filed an answering brief to the General Counsel's limited exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified, but not to adopt the recommended Order.[2]

1. We agree with the judge that Hank Plumlee was not a supervisor. However, we do not rely on the judge's differentiation between Hank Plumlee's status before and after May 15, 1986. Although the Respondent asserts that Plumlee had the authority to make hiring decisions, the record indicates that Plumlee, as well as other employees, could suggest persons for employment, but it fails to show that the Respondent invested Plumlee with the discretion to make hiring decisions or to exercise independent judgment in any other area. We conclude that the record as a whole fails to establish that Hank Plumlee was a supervisor before or after May 15, 1986.

On July 1, 1986, Hank Plumlee arrived at the construction trailer at 6:30 a.m. As he entered the trailer, President Saum said he had caught Randy Gosseen pilfering company property that morning, and that charges were being pressed. Plumlee turned to leave the trailer to begin work and Saum said, "Yeah, get out there and bust your ass and . . . if you don't think you can handle the heat of that . . . just hit the fucking road." Plumlee told Saum not to "hard ass" him, and to fire him if that is what he wanted to do. Plumlee then indicated he was quitting by walking over to the desk and putting down his keys. Saum asked Plumlee if he was quitting, and Plumlee walked to the door. Saum told Plumlee to leave the hardhat, and asked Superintendent Lakey to go with Plumlee to remove any of the Respondent's property from Plumlee's pickup truck.

The judge found that new, albeit unspecified, working conditions were imposed on Plumlee and were intended to be so unpleasant as to cause him to quit. The Respondent excepts to the judge's finding that Hank Plumlee was constructively dis-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In her limited exceptions, the General Counsel notes several inadvertent errors in the judge's decision. We correct the judge's decision as follows. (1) The judge states that this case involves the unlawful discharge of six individuals. As is evident from the remainder of the decision, the judge found that seven individuals were unlawfully discharged and that the Respondent unlawfully failed to hire an eighth individual. (2) The judge refers to "Gosseen" passing the welding test. The reference should be to "Muse." (3) The judge states that Company President Saum told employee Muse, "[Y]ou been going to the office complaining about being harassed . . . you haven't seen harassment yet." In fact, Project Superintendent Rick Lakey made this statement.

We note that the Respondent does not except to any of the judge's 8(a)(3) termination findings. Rather, the Respondent argues that the unlawfully terminated welders' (Tom Morgan, Bob Morgan, and Jim Muse) reinstatement rights ceased because of their violation of code welding procedures. We agree with the judge's finding that this defense is pretextual and that any deviation from code was on express instruction of Rick Lakey.

[2] The judge recommended broad cease-and-desist language. However, we have considered this case in light of the standard set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and have concluded that the narrow cease-and-desist language is appropriate. We shall modify the judge's recommended Order accordingly.

In her limited exceptions, the General Counsel notes that the judge found the Respondent unlawfully threatened employee Gosseen with arrest in retaliation for his union activity, as alleged in par. 6(g) of the complaint. The judge failed to include a remedy for this violation in the recommended Order and notice. We shall conform the recommended Order and notice with the judge's findings.

We agree with the judge that Parish Plumlee's May 15, 1986 layoff violated Sec. 8(a)(3). To remedy this violation the judge ordered that Parish Plumlee be made whole for any loss of wages or benefits resulting from the discrimination, but failed to provide him with reinstatement rights. It appears the judge decided that Plumlee's recall as a laborer for a week in July satisfied the Respondent's reinstatement obligation. The General Counsel excepts. We shall provide the traditional reinstatement remedy and leave to compliance whether Parish Plumlee's job as a pipefitter's helper existed at the time of his recall and, if not, whether his recall as a laborer was substantially equivalent to his former position.

Regarding the representation case, we shall modify the judge's recommended Order to direct the Regional Director to open and count the ballots of the six employees found to be eligible and, thereafter, to issue the appropriate certification. Because the Respondent's objections are overruled and the Union filed no objections, we will not set aside the election results.

In the absence of exceptions, we pro forma adopt the judge's rulings on the challenged ballots.

charged in violation of Section 8(a)(3). We find merit in the Respondent's exception.

The Board has held that a constructive discharge occurs when an employee quits because an employer has deliberately made working conditions unbearable. *Keller Mfg. Co.*, 237 NLRB 712 (1978). Two elements must be proven to establish a constructive discharge. First, the burdens imposed on the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

We find that the facts fail to demonstrate that the Respondent imposed conditions on Hank Plumlee that were so intolerable as to force him to resign. Unlike the judge, we find that Saum's statement to Hank Plumlee—"Yeah, get out there and bust your ass and . . . if you don't think you can handle the heat of that . . . just hit the fucking road"—although demeaning, did not change Plumlee's work circumstances. See *Algreco Sportswear Co.*, 271 NLRB 499 (1984). Saum's statement may well be a threat to impose onerous working conditions, but "[a] threat is not the equivalent of the actual imposition of unlawful conditions of employment; it does not in any meaningful sense render the conditions of employment so intolerable as to compel an employee to leave his job." *Central Casket Co.*, 225 NLRB 362, 363 (1976). Because we cannot find that any new conditions were imposed on Plumlee,[3] we conclude that he was not constructively discharged and is not entitled to reinstatement and backpay.

2. In her limited exceptions, the General Counsel argues that the judge erred by not finding an additional 8(a)(3) violation because the Respondent conditioned Jim Muse's reemployment on his dropping his unfair labor practice charges. We do not agree with the General Counsel that the Respondent's offer to reinstate Muse on the condition that he drop his unfair labor practice charges constituted a separate violation of Section 8(a)(3) of the Act. Rather, we find that this statement was a conditional offer of reinstatement, made in the context of settlement negotiations with employee Muse. Muse was free to accept or refuse this settlement offer. He chose to pursue his rights under Section 8(a)(3) of the Act. The Respondent's conditional settlement offer, however, does not satisfy its obligation to offer the unlawfully discharged Muse full and unconditional reinstatement, nor does the offer toll the Respondent's backpay obligation.[4]

[3] In this respect, we find the case is distinguishable from *K & S Circuits*, 255 NLRB 1270 (1981), cited by the judge, in which the respondent actually imposed onerous working conditions on the employees found to be constructively discharged.

[4] Member Cracraft agrees with her colleagues that the Respondent's conditional reinstatement offer did not satisfy its remedial obligations; she finds it unnecessary to reach the issue of whether the offer itself violated the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Adscon, Inc., Renton, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees regarding their own union activity and the union activity of other employees.

(b) Threatening to discharge employees because of their union activity.

(c) Telling employees that the Company will prolong negotiations and will never sign a contract with the Union.

(d) Threatening employees with a reduction in wages if they vote for the Union.

(e) Threatening to contract out work if the employees vote for the Union.

(f) Creating the impression of surveillance of employees' union activity.

(g) Withholding pay increases because of the advent of the Union.

(h) Threatening to close the fabrication shop if the Union is voted in.

(i) Imposing more onerous working conditions on employees because the Union was voted in.

(j) Telling employees that they will be blacklisted because of their union activity.

(k) Refusing to hire employees because of their union affiliation.

(l) Discharging and demoting employees because of their union activity.

(m) Threatening employees with arrest in retaliation for their union activities.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent it has not already done so, offer Parish Plumlee immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Offer Bob Morgan, Earl (Tom) Morgan, Jim Muse, Don Fox, Randy Gosseen, and Dean Herd

immediate and full reinstatement to their former jobs or, in the case of Dean Herd, the job he would have been hired for or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, or that they would have been entitled to, and make them, and also Parish Plumlee, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Remove from its files any reference to the unlawful discharges and refusal to hire and notify the employees in writing that this has been done and that these actions will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its main office in Renton, Washington, and in all field offices and mail a copy of the notice to each employee who was employed at the Yakima Firing Center jobsite or the fabrication shops, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and mailed to the employees immediately upon receipt and maintained by Respondent for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Respondent's election objections are overruled and this matter is remanded to the Regional Director for Region 19 to open and count the ballots of John Sphuler, Kevin Rye, Donald Fox, Lloyd Parish Plumlee, Earl (Tom) Morgan, and Bobby Morgan and that a revised tally of ballots be prepared and served on the parties and the Regional Director shall issue the appropriate certification.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees regarding their own union activity and the union activity of other employees.

WE WILL NOT threaten to discharge employees because of their union activity.

WE WILL NOT tell employees that the Company will prolong negotiations and will never sign a contract with the Union.

WE WILL NOT threaten employees with a reduction in wages if they vote for the Union.

WE WILL NOT threaten to contract out the work if the employees vote for the Union.

WE WILL NOT create the impression of surveillance of employees' union activity.

WE WILL NOT withhold pay increases because of the advent of the Union.

WE WILL NOT threaten to close the fabrication shop if the Union is voted in.

WE WILL NOT impose more onerous working conditions on employees because the Union was voted in.

WE WILL NOT tell employees they will be blacklisted because of their union activity.

WE WILL NOT refuse to hire employees because of their union affiliation.

WE WILL NOT discharge and demote employees because of their union activity.

WE WILL NOT threaten employees with arrest in retaliation for their union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

To the extent we have not already done so, we will offer Parish Plumlee immediate and full reinstatement to his former job, or if such job no

longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL offer Bob Morgan, Earl (Tom) Morgan, Jim Muse, Don Fox, Randy Gosseen, and Dean Herd immediate and full reinstatement to their former jobs or, in the case of Dean Herd, the job he would have been hired for or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, or that they would have been entitled to, and make them, and also Parish Plumlee, whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharges and refusal to hire and notify the employees in writing that this has been done and that these actions will not be used against them in any way.

ADSCON, INC.

Martha A. Barron, Esq., for the General Counsel.
Judd H. Lees and *Thomas H. Fain, Esqs.* (Williams, Kastner & Gibbs), of Bellevue, Washington, for the Respondent.
John Burns, Esq. (Hafer, Price, Rinehart & Schwerin), of Seattle, Washington, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing regarding this matter was held before me in Yakima, Washington, between 27 January and 12 March 1987. The captioned unfair labor practice cases were filed between 9 July and 29 August 1986 by the various named individuals and by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 598 (Union).

Pursuant to a representation petition filed by the Union on 1 May 1986 in Case 19–RC–11401, an election by secret ballot was conducted on 30 June 1986. The tally of ballots reflects that of the approximately 12 eligible employees, 5 cast ballots for the Union, 3 cast ballots against the Union, and 8 ballots were challenged. The challenged ballots are sufficient to affect the results of the election. Thereafter, the Respondent filed timely objections to the election. On 20 August 1986 the Acting Regional Director for Region 19 issued a Report on Objection and Challenged Ballots and recommended that a hearing be held to resolve the issues.

On 22 August 1986 the Acting Regional Director issued an order consolidating cases, consolidated complaint and notice of consolidated hearing, which consolidated the unfair labor practice proceeding and the representation proceeding for the purpose of hearing, ruling, and decision by an administrative law judge. On 20 November 1986, the Board issued a Decision and Direction sustaining the Acting Regional Director's determination in the representation case.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for Respondent, and counsel for the Union.

On the entire record,[1] and based on my observation of the witnesses and considerations of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a State of California corporation with an office and place of business in Renton, Washington, is engaged in the construction business.

During the 12 months preceding the issuance of the complaint, in the course and conduct of its business operations, the Respondent purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued in excess of $50,000 directly from sources outside the State.

It is admitted, and I find, that Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues raised by the pleadings are whether the Respondent has committed various unfair labor practices during the course of a union organizational campaign, including the discharge of six individuals, in violation of Section 8(a)(1) and (3) of the Act. Further, challenged ballot and election objection issues in the consolidated representation proceeding are also resolved.

B. *The Facts*

The Respondent, a construction contractor, contracted with the Army Corps of Engineers (Corps of Engineers) to perform work at the Yakima Firing Center, an army installation near Yakima, Washington. The job involved the demolition and replacement of an outdated heating system that supplies heat and hot water to approximately 71 barracks and other buildings at the base.

[1] The General Counsel's unopposed motion to correct transcript is granted and is hereby made a part of the record. Also, the General Counsel's motion to correct R. Exh. 20 is granted, and the quality control reports submitted therewith, dated 12 November 1985 and 2 May 1986, are substituted in place of those two reports introduced at the hearing.

On 29 April 1986,[2] following an organizing meeting on 23 April, Union Business Manager Glenn Hickman sent the following letter to the Respondent's headquarters in Renton, Washington:

> A majority of the pipefitter/welders and pipefitter helpers on your project at the Yakima Firing Center have designated Local 598 as their representative for collective bargaining.
>
> I am writing to request recognition and begin bargaining.

Hank Plumlee, a journeyman pipefitter, worked for the Respondent on several Corps of Engineers projects and in various capacities since 1984. In January 1986 he was transferred from the Bonneville Dam project in Bonneville, Oregon, to the Yakima Firing Center (the base) where he remained until 1 July as pipefitter foreman.

Plumlee testified that on 1 May, Rick Lakey, project superintendent, asked Plumlee to go for a ride with him in Lakey's pickup. Lakey parked the truck in the construction area and told Plumlee that Richard Saum, Respondent's president and Lakey's uncle, had called from Seattle and said that the Company had received the aforementioned letter from the Union. Lakey asked Plumlee if he knew anything about it. Plumlee said no. Lakey said, "Well, you know how Saum feels about the union . . . he's going to come over here and . . . fire everybody . . . including you." Plumlee asked, "Well, are we fired or what?" Lakey replied, "No, he's going to come over tomorrow and do it himself." Lakey said he believed that Bob Morgan would favor the Union but that Tom Morgan[3] would not. Lakey asked whether Randy Gosseen was Union and Plumlee said "Yes, he is union." Lakey asked whether Plumlee's son, Parish Plumlee, might have called the Union, and Plumlee said he doubted it.[4]

Hank Plumlee testified that during the conversation Lakey engaged in further speculation regarding the union sympathies of certain other plumbing employees. Lakey doubted whether Roger Miller or Bruce Roybal would bring the Union in, but said that Don Fox[5] had been complaining a little bit to Bruce Roybal about not making journeyman's scale. Lakey asked if Plumlee would try to find out and let him know who had called the Union and signed cards, and said that Saum would be at the base the following day. Lakey then drove Plumlee back to where he had been working and dropped him off.

On the next day, 2 May, Lakey asked Plumlee if he had learned who called the Union. Plumlee said he had not heard anything. Lakey said he had talked to Saum. He again told Plumlee that Don Fox had been complaining to Roybal about not being paid journeyman's pay. He said that he believed Fox had to be the one causing all the trouble and that he was going to fire Fox that day.

Later that day Fox was laid off by his supervisor, Roger Miller, who told Fox that he was being temporarily laid off for about a week or so. The layoff slip he was furnished states: "Temporary layoff."[6]

Respondent maintains that Fox's layoff was caused by a temporary quarantine of certain barracks in which the plumbing crew, including Fox, had been working. The quarantine was imposed by the Corps of Engineers due to the discovery of asbestos particles in mattresses.

A Corps of Engineers' quality assurance report, dated 28 April—2 May, shows that whatever problem existed in this regard had been resolved. Thus the report expressly states that "Conditions are now we're to work in bldgs. as long as not in body contact with mattress. Regardless of signs, etc."

Roger Miller, plumbing crew foreman, testified that even though access to some of the buildings had been curtailed by the asbestos problem, nonetheless there was work to be performed in the building the crew was then working in at the time he laid off Fox, and there was access to one other building that the crew had not yet started.

Tom Morgan, a welder, was also discharged on 2 May.[7] Lakey advised Plumlee that Morgan was being laid off, and told Plumlee to sign Morgan's layoff slip, which had previously been prepared by Lakey. The slip Morgan was furnished states: "Temporary layoff."[8]

Morgan testified that on 2 May, Lakey told him he was to be laid off for "one week and one week only," and that he was to report to work in a week. Morgan reported for work a week later, as instructed, but was told to go home and to thereafter keep checking in by telephone. Three weeks later when he checked in he was told by Bob Harvey, Respondent's quality control inspector, that he was no longer needed.

Plumlee testified that at the time of Morgan's layoff Lakey said the layoff could be a week or even less. Plumlee further testified that during the months of May and June there was fabrication welding work to be done at the base sufficient to occupy the time of all three certified welders, namely, Bob Morgan, Tom Morgan, and Plumlee.

Lakey testified that Morgan had been hired only to assist in the prefab work and that this had been virtually completed on 2 May. Therefore, he told Plumlee the following:

> I just told him that we didn't have no access to any more buildings and that we was going to have to

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[2] All dates or time periods are within 1986 unless otherwise specified.

[3] Bob Morgan and Earl Tom Morgan (Tom Morgan), brothers, were welders on Plumlee's crew.

[4] Gosseen and Parish Plumlee were pipefitter helpers on Plumlee's crew.

[5] Bruce Roybal and Don Fox were plumbers on Roger Miller's crew.

[6] However, the layoff slip submitted by Respondent during the course of the investigation states: "Temporary layoff—ran out of work; may recall."

[7] Tom Morgan began working for the Respondent on 16 January. He was laid off for a week and a half in late January, and was also laid off on 24 February for about 4 weeks. His last period of work apparently began in late March and he worked steadily until his final layoff on 2 May.

[8] Plumlee had never been asked to sign any previous layoff slips. The slip submitted by Respondent during the course of the investigation states: "Temporary layoff; ran out of work."

> lay him off and Hank's comment at that time was that he was only planning on him [Plumlee] and Bob Morgan doing the condensate line and that since the prefab was done that he was planning on laying him [Tom Morgan] off permanent at that time.

Plumlee denies that this conversation occurred and testified that, in fact, he suggested to Lakey that Tom Morgan not be laid off because there was other work to do.

About 13 May, Saum said he wanted to talk to Plumlee. Saum said he had talked to his lawyer and it was perfectly legal to solicit Plumlee's vote. He asked if Plumlee knew any of the guys who had signed cards, or whether they had any union meetings. Plumlee answered no. Saum asked about Plumlee's son, Parish, and Plumlee said he was sure Parish had not signed a card. Saum said he knew the Morgan brothers were against him from the start and "were locked into the union tight as hell." He said that both Tom and Bob Morgan were "not worth a shit" and that he was going to start playing hardball and was going to send Bob Morgan into the shop on Rudkin Road[9] to keep an eye on him, and move Jim Muse from the shop to the jobsite to increase production. He said, according to Plumlee, "Morgan'll have a job but he'll have a hell of a time keeping it."

Saum told Plumlee that the Union would screw up the job and that "I'm going to fight like hell to keep it out of here"; that he was nonunion because he chose to be; that the matter could be negotiated for years and tied up in court; that it was not uncommon to go for a couple of years' negotiations and that the job would be long completed; that they could cut off his right arm before he would sign a contract; that if the employees went Union, they would take a cut in pay, and the wages would go down; that Plumlee would be sitting on the bench like the rest of the welders; and that there was a lot of work at the firing center and that he was going after the work, but the guys who were against him would not be part of it. Plumlee interrupted Saum and said, "Before you tell me much more, I have not really fully decided which way I'm going." Saum then walked away.

Jim Muse began working for Respondent at the end of January in the fabrication shop on Rudkin Road. He was hired by Al Lakey, fabrication shop foreman and Saum's brother-in-law and Rick Lakey's father. Muse primarily welded pipe supports and also mechanical stands but was not a certified welder.

About the first of May, Al Lakey told Muse that some of the guys at the base were wanting to go Union. About a week later Muse overheard a phone conversation between Saum and Al Lakey regarding whether Muse could certify as a welder at the base. Muse asked what was going on and Lakey said, according to Muse, that they were "having problems out at the base." Lakey asked if Muse wanted to try to pass a welding certification test. Muse said yes.

In mid-May, Lakey asked Muse "how big of an asshole [he] could be," and went on to explain that they wanted to get Bob Morgan down to the fabrication shop and wanted to know whether Muse "can piss him off enough to get him to quit." Lakey said, however, that this would not happen until Respondent's attorney okayed whether the Company could get away with it.[10]

Lakey asked Muse and another employee what they thought of the Union. Muse said he did not have any plans to fool around with the Union. Muse testified that Lakey, on more than one occasion, said if the Union did come in no one in the fabrication shop would have a job because the Company would subcontract the work.

Later, Muse asked Lakey what the lawyer said about the plan to get rid of Bob Morgan. Lakey said that the matter worked out well as the Corps of Engineers "shut us down on the line and so we just laid him off."

Bob Morgan and Parish Plumlee were laid off on 15 May by Bob Cole.[11] Hank Plumlee had been given no prior notification of their layoffs.[12] Respondent maintains that the suspensions were due to a 14 May phone call to Saum from Terry Childers, project engineer for the Corps of Engineers, instructing Saum to suspend all work on both the steam and condensate lines. Saum testified that Childers told him that the suspension was due to the fact that it had been discovered that the insulation requirements on both lines were not sufficient to protect the lines from freezing weather in the winter months, and that the intention was to insulate both the steam and condensate lines with thicker insulation than had been previously scheduled. Childers told him that a letter would be forthcoming in 2 weeks with further instructions. Saum testified that as a result of this instruction from Childers, all work on the steam and condensate lines, and the fabrication of poles in the fabrication shop, was suspended for 2 to 3 weeks, after which time the problem worked itself out and the work continued.

A confirmation letter of the foregoing phone call, denoted as Serial Letter No. 31, dated 16 May, was sent by the Corps of Engineers to the Respondent, as follows:

> In accordance with CC-7, SUSPENSION OF WORK of your contract, you are directed to suspend work associated with removal of insulation on the exterior steam line. All other work associated with the steam line may continue.

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[9] The Respondent maintained a fabrication shop on Rudkin Road in Union Gap, Washington, some 8 miles from the base, where various items were fabricated, particularly the pipe supports or poles from which the condensate and steam lines were to be suspended. The steam lines bring steam into the buildings. The condensate lines return the water to the boilers. Respondent's contract provided for the replacement of some 1200 existing wooden poles with metal pipe supports, and also for the replacement of approximately 21,000 feet of condensate line. Also, the Respondent was to remove the existing insulation from 21,000 feet of steam line.

[10] The law firm currently representing Respondent was retained subsequent to the date of the alleged unfair labor practice.

[11] Cole had replaced Rick Lakey on 12 May as project superintendent at the base, and Rick Lakey became designated as general foreman. This change was at the direction of the Corps of Engineers because it was felt that Rick Lakey was spending too much time in the field with the employees and was not readily available in the Respondent's office trailer at the base. Therefore, Cole was brought on to apparently perform the administrative duties so that Lakey could remain in the field.

[12] Their layoff slips, signed by Cole, state: "RIF due to suspension of work."

> This suspension is necessary due to a re-evaluation of the insulation requirements on the exterior steam line. All other contract work may continue. You will be notified when the suspended work may continue.
>
> If you have any questions regarding this directive, please contact the Ft. Lewis Resident Office at (206) 967-6937.

Saum testified that as a result of this steam line suspension order it was not possible to continue with "all other contract work," even though the Corps of Engineers said the work could continue. Thus, Saum testified that it was necessary to know the dimensions of the insulation on the steam lines in order to be able to ascertain the proper dimensions and placement of the poles that support both the steam and condensate lines, and that welding on the condensate line could therefore not continue. Therefore, Bob Morgan, who welded on the condensate line, Parish Plumlee, who worked in the mechanical rooms, and two laborers, who worked on the crew installing the pipe supports, were laid off.

Hank Plumlee testified that he was never aware of any suspension of work by the Corps of Engineers, and that he continued welding on the condensate line until Jim Muse came out from the fabrication shop and began welding, infra. According to Plumlee, and contrary to Saum's testimony, there was no slowdown or suspension of any work on the condensate line during this period.

At the time of the layoff, Parish Plumlee was performing plumbing work in the mechanical rooms located in each barrack. This work was independent of the work being done on the outside lines. Plumlee was replaced, apparently the following day, by Kevin Rye. Rye testified that he thereafter worked steadily, without interruption, in the mechanical rooms. The record discloses that two laborers were laid off on the same day, Thursday, 15 May, ostensibly because of the shutdown. However, on Monday, 19 May, and Wednesday, 22 May, two new laborers were hired. Richard Alvord, a laborer hired on 22 May, testified that he assisted in pouring the concrete bases for the poles. Brian Longmire, a laborer hired on 19 May, testified similarly. James Muse testified that his work in the fabrication shop, where he was primarily engaged in the fabrication of pipe supports, did not slow down.

Muse did not pass the first welding test, and his sample weld or "coupon" was rejected by the independent shop that performs tests on welds and certifies welders. Prior to making another coupon, Al Lakey told him that Lakey would guarantee that he would pass the test because if he had any more problems Saum, who was a certified welder, would come up and take the test for him. Gosseen passed the welder's certification test on the second attempt about the end of May. Shortly thereafter, he was told by Saum that Saum had to work Muse into the base slowly so that the Union would not "get on his case about just sticking a brand new guy up there after they'd laid Bob Morgan off." He said by the first of June, Muse should be working there full time and would be receiving full journeyman's scale. Muse was curious about his test results and Saum said, "Who gives a damn, you passed." Later that day Muse received a phone call from Rick Lakey who said he was not going to bring Muse out to the base that week because he (Lakey) would not be there and he did not want Muse and Plumlee together by themselves.

Muse was permanently transferred to the base about 1 June as a welder. On that day, Lakey told him not to ask Plumlee any questions and to stay away from him. He further told Muse that if Muse needed help or anything he was to call Lakey on a radio that Lakey would provide for him and Lakey would come down and help him. Half an hour later Muse, who had never done this type of work, was looking at some welds and asked Lakey, "Well, what do I do?" Lakey said, "You're the welder. You tell me. That's your job." He then told Muse to do whatever Plumlee told him to do.

Muse told Plumlee he wanted to watch him weld. Then Muse asked Plumlee if he would watch Muse weld. Plumlee gave Muse, who was having some problems, pointers. During the first few days Lakey came by and inspected Muse's welds. Lakey said he was not very impressed and said they would have to get better.

During a subsequent conversation on a later date, Lakey again told Muse to stay away from Plumlee.

About 19 June the Company held a meeting of the unit employees.[13] Muse testified that Saum said he knew there had been a union meeting the night before "because his spies had let him know."[14] He said all he had to do was negotiate in good faith and "he could stall it for two years, and by that time the job would be over and everybody would be gone." He said that the employees could go somewhere else if they did not like working for him, but he did not want the Union to have anything to do with the Company. He said there were three or four people who deserved raises but he could not grant them raises because it would look like he was trying to buy their votes. Apparently during a side conversation Saum asked Muse, "Well, I heard you were going to vote for the union." Muse said no, he just went to the meeting to hear both sides.

Hank Plumlee gave the following account of Saum's remarks at the meeting: Saum said that he heard the Union had a meeting the night before, and that he heard there had been a lot of carrots dangled in front of guys' noses. He said that if the Union won the election it would only give the Union the opportunity to sit at the bargaining table with the Company, and that it would not change the job a bit. He said the matter could be tied up in court for a couple of years, and that the employees would definitely take cuts in pay. Saum had a sheet of paper that compared union scale with the wages the employees were then making, and said there were some em-

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[13] On 11 June, the Regional Director approved a stipulation for certification upon consent election defining the appropriate unit as follows:

> All pipefitters, pipefitter welders, and pipefitters helpers working for the Employer within the jurisdiction of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry Local 589, excluding all other employees, guards, and supervisors as defined in the Act.

[14] Those attending the union meeting were Hank Plumlee, Parish Plumlee, Don Fox, Randy Gosseen, Jim Muse, Randy Anderson, and Kevin Rye.

ployees who had been under consideration for raises, but because of the union deal the Company could not give out raises then because it would look like the Company was trying to buy their votes. He said the Company was looking into an insurance program for the employees. Saum said the Union would not do anything but screw the job up and that he knew there were problems, but that they were working on them. He said there was a lot of work out there at the firing center that the Company was going to bid.

Plumlee testified that Al Lakey, who also spoke at the meeting, pointed at some of the employees and said, "I know a couple of you guys in there at the shop . . . they were dangling carrots in front of your noses and you better take a real hard look at this because . . . that shop could be closed down if this thing goes."

The election was held on 30 June. Immediately before the election, which was held at the jobsite on the base, Gosseen observed three employees from the Rudkin Road fabrication shop drive up. When they got out of the car they were approached by Al Lakey. Gosseen heard Lakey tell them, "Now, remember, if you vote for this union you're going to be out of a job." Gosseen then told Lakey that this was not the place to be politicking.

Immediately after the election, in which the Union prevailed, Rick Lakey told Gosseen and Kevin Rye that he wanted to have a meeting with them. Gosseen testified that Lakey was shaking and acted nervous or upset and said, "This is the way it's going to be . . . from now on you're going to be working at 6:30, you're not going to pick up your tools until 3:00 . . . no more coffee and soda pop on the job except at lunchtime. No more radios on the jobsite . . . and production will increase." He told the two employees that they were no longer working for Hank Plumlee but rather were working for Roger Miller, and that if they were caught out of their work area, they would be terminated.

Gosseen testified that the practice prior to that day was that the employees would get into the trucks near the Respondent's construction office and begin driving to the actual worksite at 6:30 a.m., and they usually picked up their tools 10 minutes before the 3 p.m. quitting time. There had been nothing said prior to that time regarding coffee, soda pop, and radios, and employees were permitted to have soft drinks or coffee while they were working. Further, there had never been a rule about being outside their immediate work area, and the employees would periodically leave their work area to pick up materials needed on the job.

Lakey returned about 15 minutes after the aforementioned conversation and, according to Gosseen, told Rye that he would no longer be working with Gosseen, and took Rye inside the barracks. Then Plumbing Foreman Roger Miller came out with Randy Anderson and told Gosseen that he would thereafter be working with Anderson. Anderson knew nothing at all about the work in the mechanical rooms and did not even know how to run a pipe-threading machine, which was the primary tool. Miller said he had been instructed to tell Gosseen that Gosseen and Anderson were required to complete two mechanical rooms a week. Gosseen said he would be unable to do that with a new man who did not know the tools, and that he would have to train Anderson as he had trained Rye. Miller said he understood that but "that's the word I got from above."

On 30 June, prior to the election, Lakey told Muse about some changes in the work and helped Muse move some pipe. Lakey told Muse that he "better hope the union doesn't go through or you're going to be out of a job."

Immediately after the election Lakey told Muse that he could not leave his immediate work area to get parts, that he would be on location working at 6:30 a.m. rather than arriving on the jobsite at 6:30, and that he would not pick up his tools until 3 p.m. Prior to this time Muse had begun picking up his tools about 2:45 p.m. Also, at that time Lakey furnished Muse with a radio, as he had told Muse he would do about 1 June, so that Muse could contact Lakey if he needed any help.

Shortly thereafter Saum started berating Muse about not leaving a 1/16-inch gap on his socket welds. Later he told Muse, "You been going to the office complaining about being harassed . . . you haven't seen harassment yet."[15] He told Muse that he (Saum) would provide him with a ledger book to keep a record of his welds, and Muse would make 18 to 20 welds a day or he would be terminated. There had never been a welding quota before.

The next day, 1 July, Gosseen arrived at the jobsite at approximately 5:30 a.m., although work did not begin until about 6:30 a.m. Gosseen testified that he arrived early because he was nervous about the job as a result of the aforementioned quota he was expected to meet with Randy Anderson, an inexperienced person, and believed he was being set up to be dismissed for lack of production. He sat in his truck and waited awhile and then began looking through the nearby junk pile for valves and strainers, which were to be salvaged from the old piping and reused in the mechanical rooms.

Saum drove up and stopped. Gosseen said "Good morning." Saum asked what he was doing and Gosseen told him that he was looking for valves and strainers. Saum asked, "What have you been stealing?" Gosseen said he had not been stealing anything and opened the door of his pickup and told Saum to search it. Saum glanced inside the pickup and glanced into the bed of the truck and said, "Well, I don't see anything, but we've been having these poles come up missing and . . . I'm sick and tired of these thefts and I'm going to get the FBI and investigate these thefts."

Saum drove to the Military Police (MP) station and told the MPs he wanted to swear out a complaint. After doing so, Saum left and went back to the construction trailer. Gosseen, who had followed Saum to the MP station, told the MPs that there had been a union election the day before, which the Company lost, and that Saum was looking for a reason to discharge Gosseen. The MPs said they had no reason to detain him any further, and that he could go back to work. Gosseen told them that he did not want to go back until they searched his truck,

[15] Muse had complained about his treatment by Lakey, who seemed to be unduly critical of Muse's work performance.

which they did. Nothing was found. Before Gosseen got back to the construction trailer, he met Plumlee, who was driving down the road. Plumlee waved him over, and asked what happened. Plumlee told Gosseen that Saum had told him, "We caught your fucking buddy," that Gosseen had been caught stealing, that Saum was going to press charges, and that Gosseen was going to be fired.

When Gosseen walked into the office, Saum told him to pick up his check. Bob Harvey gave him a separation notice that states that Gosseen was discharged for pilfering property belonging to the Government and to Respondent.

Plumlee testified that when he got to the construction trailer at 6:30 that morning, Saum said, "Well, Hank, I got your fucking union buddy out here pilfering around this morning . . . and I've got his ass down at the MP station and I'm pressing charges on him." Plumlee asked who he was talking about, and Saum said Randy Gosseen. Plumlee asked, "Well, what was he doing?" and Saum said, "He was pilfering through my stuff."

Plumlee proceeded to leave the construction trailer to go to work and Saum said, "Yeah, get out there and bust your ass and . . . if you don't think you can handle the heat of that . . . just hit the fucking road." Saum also said that if Plumlee could not take the heat, he should stay out of the kitchen. Plumlee told him not to "hardass" him, and said if Saum wanted to fire him, then fire him, but get off his back. Then Plumlee decided that he could not tolerate that harassment and laid the keys to the Respondent's pickup on the desk. Saum asked, "Are you quitting Hank . . . are you quitting?" Plumlee did not say anything, and as he started to walk back out the door, Saum told him to "leave the fucking hardhat." Then Saum directed Lakey to accompany Plumlee to Plumlee's pickup and look through the personal things he was taking. Plumlee then left the site.

On the morning of 1 July, Lakey asked Muse if he saw some undercut on some welds Muse had made. Muse said yes. Saum, who was present, said he was suspending Muse for failing visual examination of his welds. Muse asked why Saum did not do this 2 weeks ago when the line was hydrotested.[16] Saum said he was not worried about it then or did not have the time. Saum asked why he was using 5-P rod for all three passes, infra, and Muse said that Plumlee told him to, and he had been told by Lakey to do what Plumlee told him.

On the way back to the office Lakey told Muse that Gosseen had been caught stealing and that they threw him in jail. Muse asked where Plumlee was and Lakey said, "We got rid of him, too." Back at the office Saum told Muse he was being suspended for failing visual examination of his welds. Saum said that he could go back to the fabrication shop at his old rate of pay, and could recertify as a welder on his own time and expense, and if there was an opening at the base then they could talk about reinstating him. Muse said he knew that Saum was mad because Saum could not buy his vote and that his vote was not for sale. Saum started swearing at him and said, "You're goddamn right I'm mad . . . I'm not going to send you to school here and pay you 1100 bucks a week." Lakey repeatedly asked Muse whether he wanted to go to work at the shop and would accept the job, which was at considerably lower pay, and stated that he had to call his dad, Al Lakey, at the shop and let him know. Muse accepted the offer of the job at the shop.

Muse walked in the front door of the shop and Al Lakey said he heard Muse was looking for a job. Muse said, "You guys are going to play hardball, huh?" Lakey said, "You're goddamn right. You guys started this union bullshit." Muse said he did not start any of it. Lakey said, "Well, you're involved in it and now you're going to pay for it." Lakey said he had work for him at $11.30 an hour.

On the next day, 2 July, Lakey said he only had laborers' work for Muse at $8.77 an hour and asked if he wanted the job. Muse said yes. Muse finished a job at 11 a.m. that Tuesday and asked Lakey what else he wanted done. Lakey said there was no more work. He gave Muse his check and told Muse to call him in a week. Muse called the following Monday, and Lakey said he had no work for him. He also said that Muse would be getting a letter explaining why he would no longer be working for the Respondent.

On 2 July, Plumlee remembered that he had not turned in the keys to the storage trailer at the base and that he also had several acetylene and oxygen bottles at his home that he used when doing 1-day jobs for Respondent away from the base. Fearful of the threats Saum had made against Gosseen, Plumlee anticipated that Saum would also accuse him of stealing. He, therefore, took the items to the local police department with the intention of delivering them to the Company at a later date when he got a chance. Later that day he got a call from Saum, who apparently had been notified about the bottles by the police, pursuant to Plumlee's request. Plumlee explained that he had kept the bottles at his home because he needed to have the equipment available when he was assigned work at other jobsites. Saum said he would probably have the sheriff waiting for Plumlee when he came to deliver the bottles to the Respondent.[17]

Saum then asked, "Why'd you bring this union shit down on me?" Plumlee said, "I didn't; you brought it down on yourself by not taking care of the job." Saum said the Morgan brothers were professional organizers. He said, "I hope you and the union get what you want out of this thing . . . I've already talked to nonunion contractors . . . you won't work another nonunion job." He told Plumlee, "You're going to end up losing about $25,000 . . . over this," and he repeated that he'd cut his right arm off before he would sign a contract. He then told Plumlee that Plumlee would never work for him again.

[16] This particular line had previously been inspected and hydrotested and was found to be satisfactory.

[17] Respondent does not dispute Plumlee's testimony that he had been given permission to keep the bottles at his home as a convenience and that Respondent had been aware of this. Saum did not carry out his threat to have the sheriff waiting, and Respondent does not maintain that Plumlee had done anything improper.

Then Saum asked him why he changed the welding procedure, below. Plumlee replied that he did not have authority to change the welding procedure on the job and had not done so. Saum said, "Well, we found some welds out here . . . where you were using 5-P rod . . . in violation of the contract." Plumlee said he was doing what he was told to do by Rick Lakey.

On the following day, 3 July, Respondent sent letters to Plumlee, Muse, Bobby Morgan, and Tom Morgan regarding their welding on the job. The letter to Plumlee, signed by Bob Harvey, Respondent's quality control inspector, is as follows:

> Our employment records indicate on the morning of July 1, 1986, at 6:30 A.M. you voluntarily quit and left the project on your own volition.
>
> We also note on July 2, 1986, at 2:30 P.M. you returned all company tools and equipment per the enclosed inventory list. If this inventory is not correct, please let me know.
>
> Shortly before your departure, I was investigating the welds on the new schedule 80 condensate piping installed throughout the courtyards between 4th and 6th Avenues. It is apparent you and the other welders directly under your daily supervision changed the welding procedures for this work. Specifically, the pipe has been welded using the Lincoln 5-P electrode for the entire three-pass weld application.
>
> As of this date, all welds have been identified and accounted for. The welds were made by yourself, Jim Muse, Bob Morgan and Earl [Tom] Morgan.
>
> To complete my Quality Control Report to the Government, I need your explanation as to why you arbitrarily changed our welding procedure without permission from my office.
>
> Hank, this is a serious matter. Think it over carefully and give me a collect call soon to discuss this further. Adscon will correct the welds to satisfy our Contract requirements as I intend to fulfill my obligations to the Government as this Company's Quality Control Officer for this project.
>
> If you take exception to this letter in any form, you are welcome to come out to the project immediately and walk the condensate line with me. I will show you the welding work performed by yourself and your crew. You are also encouraged to bring your entire crew for definite identification of individual welds if you would like.
>
> I want reasons why this procedure was changed. You and your creware professionals, you know welding procedures and the ASME code—why did you do the work differently?

Plumlee sent the following reply:

> In response to your letter written 7–3–86 regarding me changing the welding procedure at the Yakima Firing Center, as I told you on the phone I had nothing to do with changing the procedure. As a working foreman I only followed orders from the job superintendent Rick Lakey. We were all told to use 5-P rod because it was faster and clean-up time on welds were quicker. I am qualified on both 5-P and 7018 rods and was not responsible for any procedure changes. Every welder on the job was told the same thing by Rick Lakey (Job Superintendent). There was never any comments made counterdicting [sic] this by Adscon Q.C or Corp of Engineers compliance officer until after my dismissal by Adscon Inc.

The letters to both Bob and Tom Morgan, signed by Saum are identical, as follows:

> Our records indicate on May 15, 1986[18] you were laid off on a temporary basis due to lack of work at the time.
>
> It is our intent to start recalling welders for this project in the near future.
>
> Please be advised we have found several welds that you have completed that are not in conformance with the welding procedures established for this project.
>
> Before your employment can be reinstated, we are investigating the reasons why you changed your welding procedure. For further details, you should contact Hank Plumlee.
>
> In the meantime, your re-employment with this company is under suspension.

Both Morgan brothers replied as follows:

> I have received your letter of July 3, 1986. The statement that some of my welds were not in conformance with procedure is untrue. All welds I did were in accordance with company policy and were approved, as stated by the Superintendent.
>
> I am ready, willing and able to resume working and have been ready, willing and able to resume working since my improper layoff.

The letter to Muse, signed by Saum, is as follows:

> Our records indicate on July 1, 1986, you were suspended from work for violating the welding procedure you were qualified for. In addition, you failed a visual examination for severe undercutting on several welds we inspected. As you recall, the welds in question are located in 4th Avenue between Poles 942 and 1002.
>
> Your reinstatement with Adscon as a journeyman certified welder is conditional dependent upon your requalification by test under the same established welding procedures, with your statement explaining why you changed your welding procedures on these welds.
>
> We will look forward to your immediate response. In the meantime, your employment with Adscon is suspended until further notice.

On 24 July, Muse responded as follows:

[18] The letter to Tom Morgan, who was laid off earlier, contains the date May 8, 1986.

Upon request of your letter, I have retested and passed. Enclosed is a copy of my test results.

In regards to the welding procedure in question, Rick Lakey did not explain or give me specs or procedures for the job. He stated, do it any way you want. Then he said do it like Hank, so I asked Hank and he said Rick told him to use 6010 on the filler and cap, because it was faster. I did what management told me to do and my foreman.

After two weeks I asked Rick Lakey if I could switch to 7018 Hi-Lo, because thats what I qualified with and I could do a better job, he said do it any way you want.

I will expect a reply on being reinstated as soon as possible.

Thank you.

About 28 July, Muse received a call from Saum. Saum asked why Muse changed the welding procedure. Muse said that Lakey told him to do it the way Plumlee did it, and that Plumlee told him to do what management told Plumlee, namely that 5-P was to be used for all three passes. Saum said that Lakey was not a welder and Muse should not have listened to him.

Saum went on to say that he was satisfied with Muse's explanation and if he would drop his charges with the NLRB he could have his job back. During the conversation Muse asked why Lakey had been giving him (Muse) such a hard time on the job. Saum said that Lakey was retaliating because he thought Muse was going to vote for the Union, and that Lakey had seen Plumlee and Muse associating with each other, riding home together, and that was the only way Lakey knew to get even. Saum said, "You're probably the only clean welder out there because you didn't know any better . . . you were used by Hank [Plumlee] and the union and the Morgan boys." Muse said he would think about Saum's offer to withdraw the NLRB charges.

One week later Muse phoned Saum and said he would accept the offer to return to work but would not drop his charges against Respondent with the Board. Saum said no. On 21 August, Muse wrote Saum a confirmation letter of this conversation, as follows:

> On or about the 28th of July 1986, you received a call from me concerning your earlier phone call with my wife. In this conversation we talked about several things, the one in question was concerning my re-employment with Adscon. You stated and I quote, "I'll give you your job back if you drop your charges against the Company." I stated let me think about it for a week and if I want the job I'll call back. One week later I called and stated I will come back to work, but I will not drop my charges. You stated and I quote, "If you don't drop your charges you can't come back to work." I stated I would not come back to work on those conditions.
>
> I await your response.

Respondent's attorney replied to Muse on 27 August as follows:

> The Company has forwarded your letter of August 21, 1986 regarding its settlement offer of re-employment. The National Labor Relations Board recognizes and, indeed, encourages the parties to any unfair labor practice proceeding to engage in informal efforts to settle a dispute. You have alleged that you were improperly laid off; the Company offered to reinstate you to settle that unfair labor practice charge. In your letter of August 21, 1986, you have declined that offer. As a result, the offer of reinstatement is no longer available.

Fox was called back to work by Rick Lakey on 8 July. Fox began working on Roger Miller's crew with five other employees. Fox testified that Miller made him work by himself on the other side of the barracks for about a week and a half, and that none of the other employees would speak to him. Miller laid him off again on 24 July.

Dean Herd, a certified welder, went to the base looking for a job on 7 July. Bob Harvey gave him a job application. Bob Cole, project superintendent, came into the office and said it was possible that they would be needing some welders. Herd returned his completed application the next day and Harvey said he had received verbal word of some work being awarded. Harvey asked Herd if he was Union. Herd said yes, and stated that he had worked on some union jobs. Cole asked if his union dues were paid up. Herd said yes. Harvey said the Company was nonunion but paid union scale. Herd said okay. Cole requested that Herd come back on 11 July to take a welding test.

Herd returned for the welding test on 11 July. During the test Saum introduced himself. After the test, Saum told Herd that his "coupon"[19] looked fine and that they would let him know if they needed him. Saum asked if he belonged to the union and Herd said yes. He asked the name of Herd's home local, and Herd advised him that it was Local 598 (the Union herein). Saum said he had been having some problems with the Union and that the Union wanted to organize the Company but he was not going to permit it. Saum said, "Your welding test looked good and . . . I'd like to have you but . . . I have a problem with hiring you because you belong to the union." Herd said he was just as hungry as the next man down the road, union or nonunion. Saum said he just did not want any more problems with the Union. He said they would look over his application and keep it in mind. A copy was made of a prior certification Herd had received after testing on the same procedure that covered the Respondent's job. Thereafter Respondent hired several other welders who, at the time of Herd's test, had not yet submitted an application for employment with Respondent.

The contract between Respondent and the Corps of Engineers requires that the welding be performed in accordance with a particular welding procedure. Each complete weld is to be made with two types of welding rod, or electrode, as follows: The initial, or root, pass or

[19] A "coupon" is a section of welded pipe that is sent to a testing shop to determine whether the weld is satisfactory.

weld is to be made with 5-P rod (also called 6010 rod), having a tensile strength of 60,000 pounds per square inch; the second, or middle, pass is to be made with 7018 rod, having a tensile strength of 72,000 pounds a square inch; the third, final or cap, pass is also to be made with 7018 rod.[20]

The Respondent maintains that the welders were discharged because they did not conform their welds to this procedure, but rather used 5-P rod on all three passes. Moreover, according to Respondent, they made welds that were otherwise defective for various reasons.

Tom Morgan testified that:

> Q. (By Mr. Fain, Respondent's attorney) Now, Rick Lakey never told you to use anything other than the procedure required by the Corps, did he?
>
> A. Mr. Lakey let it be known to every person on the job that they could weld any way they desired with any rod they desired in order to facilitate the speed of the job. Numerous times the welders had complained on that job to him about the 7018 electrode being unstable.
>
> Q. Who did you hear complain like that about that to Rick Lakey?
>
> A. Mr. Plumlee, myself and my brother and anybody else that had anything to do with welding.
>
> Q. Well, is there anyone else you can think of that you heard talk to Rick Lakey about that?
>
> A. No, there's not, because we were the only ones out there that knew anything about welding.[21]
>
> Q. All right, so it would just have been Mr. Plumlee, Mr.—the other Mr. Morgan, Bob Morgan,—
>
> A. Uh-huh.
>
> Q. —and yourself?
>
> A. Yes, sir, to my knowledge.
>
> Q. And Mr. Lakey never directed you to use a 5-P rod for all three passes, did he?
>
> A. Would you repeat that again?
>
> Q. Mr. Lakey never directed you to use a 5-P rod for all three passes; did he?
>
> A. Mr. Lakey directed us to weld any way that we desired in order to facilitate the job for speed.
>
> . . .
>
> Q. Tell us what happened during that discussion with [Mr. Harvey]?
>
> A. Well, simply stated, I made the comment to Mr. Harvey that we needed an electrode-stabilizing oven for the 7018 electrode.
>
> Q. And what did Mr. Harvey say?
>
> A. He mumbled something and went back in the trailer; what it was I don't know.
>
> Q. Were you requesting an oven?
>
> A. Yes, sir, some means of stabilizing the 7018 electrode.
>
> Q. And did you then get an oven?
>
> A. No, sir.

Plumlee, Bob Morgan, and Tom Morgan testified that they knew the contract specifications provided for 5-P rod on the root pass and 7018 rod on the two subsequent passes. However, they were experiencing "porosity" problems when welding with the 7018 rod because they were provided no "rod heaters" or ovens[22] in the field to maintain the correct temperature for the 7018 rod prior to its use. Porosity results in defective welds that may have to be grounded out and redone, thereby slowing down the work, and is caused by the absorption of atmospheric moistures by the rod, a condition particularly noticeable on cold or windy days when welding is performed in open areas. They spoke to Rick Lakey about the matter on various occasions and were told to use whatever rod they wanted to use regardless of the procedure in the specifications. The employees, all highly qualified and experienced welders, with the exception of Muse, who had recently been certified, determined that 5-P rod on all three passes would often result in the best weld under the prevailing circumstances.

Plumlee testified that he refused to stamp his nonconforming welds with an identification stamp because he did not want to be falsely certifying that the welds were performed in accordance with the specifications. The record shows that any experienced inspector can readily tell whether the cap weld was made with 5-P or 7018 rod.

Wallace Giesler, the Corps of Engineers' compliance inspector on the project, testified as follows:

> Q. (By Judge Wacknov): Let me ask, Mr. Giesler, and we haven't been talking about this yet, my understanding of 5-P versus 7018 is that 7018 has more strength to it, the welding rod; is that correct?
>
> A. Well, in a general case it would probably be true.
>
> Q. In this particular situation of condensate pipes, what difference did it really make whether the second and third pass, cap pass, were 7018 or 5-P?
>
> A. Well,—
>
> Q. I mean, as a practical matter. I understand the specifications may provide for it, but as a practical matter for my own -- I'd just like to know; what difference would it make?
>
> A. Well, it was a—*practically it probably wouldn't make a bit of difference under the system that was being installed there.* However, it was a violation of the contract specifications. [Emphasis added.]

[20] The condensate pipe being welded together has a tensile strength of 60,000 pounds a square inch, which is the same as the 5-P rod, the purpose of the 7018 rod, however, according to Saum, which has a greater tensile strength, is to provide a margin of error against imperfection in the weld to insure that the weld will be as strong as the pipe itself. The water pressure within the condensate pipe, however, is only about 30 pounds a square inch.

[21] At the time of the discharge of the Morgan brothers, Muse had not yet been brought out to the base.

[22] A rod heater is a metal container with a heating source used to keep the welding rod at a particular temperature prior to its use. There was only one rod heater, a converted small refrigerator that Plumlee had brought from his home, and it was inadequate and sometimes not functioning. Moreover, it was located in the shop at the base and was not portable for field use.

C. *The Status of Hank Plumlee*

Respondent maintains that Plumlee, pipefitter foreman, is a supervisor within the meaning of the Act. Respondent included Plumlee on the eligibility list in the representation proceeding. On 13 May, Saum engaged Plumlee in a conversation regarding the forthcoming election and attempted to solicit his vote. Plumlee voted in the election without challenge.

Plumlee was the most experienced and qualified pipefitter working for Respondent. He had worked for the Respondent on several projects, and as a previous project was coming to a close, Plumlee was made superintendent on that project for a brief time and for a specific purpose. He was the first pipefitter hired for the instant project. As pipefitter foreman, he was paid $1 an hour more than the other certified welders until the pay period immediately preceding the election, when his wages were reduced by $1 an hour.

Regarding purchasing certain equipment for the project, Plumlee testified that at the beginning of the project he was told by Saum to call a certain local supplier and check out the prices on welding rod and a welding machine. Plumlee obtained the information and was told by Bob Harvey, who also occupied the position of purchasing agent, and apparently Saum, to order the merchandise from the local source because by the time the items were shipped from Seattle the cost would be about the same. Plumlee did so.

Bob Morgan and Tom Morgan were hired in January, shortly after the project began. Plumlee testified that he did not hire these individuals. Rather, he had been acquainted with the Morgan brothers, particularly Bob, and knew that both were experienced welders. They asked him if there was welding work available on the project. Plumlee gave them Respondent's phone number and told them to talk to Saum. Plumlee also mentioned to Saum that he knew the Morgan brothers, and said he thought they would be "real good hands."[23]

Bob Morgan talked to Saum on the phone about the job and thereafter transmitted some certification papers to Saum. Apparently Saum directed Plumlee to hire the Morgan brothers. About 6 January, Plumlee notified Bob Morgan that he was hired, and about 15 January he notified Tom Morgan that he, too, should report to work.

Parish Plumlee began working for the Respondent at the fabrication shop about February, under the supervision of Al Lakey. He had worked for the Respondent on two previous projects for short periods of time. He testified that his father told him that Saum had said to bring him to the fabrication shop, show him how to weld pipe supports, and get him started.[24] Thereafter, Parish worked at the fabrication shop and Hank Plumlee worked at the base until, sometime in March, Parish was brought to the base as a pipefitter helper and worked on the condensate lines with Bob Morgan. Then he was moved into the mechanical rooms and worked with Randy Gosseen plumbing the mechanical rooms.

Hank Plumlee testified that, apparently in February, Saum asked him whether he thought Parish would want to work at the project. Plumlee said he was sure Parish would, and Saum asked whether Parish could handle the job of welding pipe supports. Plumlee said yes. Saum then told him to go ahead and find out if Parish wanted to work at the fabrication shop and to bring him out. Saum's testimony regarding the hiring of Parish is similar, except that Saum maintains that Hank Plumlee approached Saum and asked if Parish could be hired.

Gosseen began working on 17 April. He was hired to work at the base as a pipefitter helper. He worked inside the mechanical rooms of the barracks, fabricating and installing the systems for the steam heat and hot water. Gosseen testified that he had initially spoken to Plumlee about employment. Then, on 17 April, Plumlee phoned him and asked if he would like to begin working as a pipefitter helper. Gosseen said yes and drove to the base to the location where Plumlee was working, and Plumlee accompanied him to the office trailer where he filled out the employment forms Harvey gave him. He then went with Plumlee back to the mechanical rooms where Plumlee had been working, and Plumlee told him what part of the system to work on. Plumlee told Gosseen that he could go to look at a completed mechanical room if he had questions about what needed to be done, and divided the work in half so they would stay out of each other's way.

Gosseen testified that he worked with Plumlee on mechanical rooms for several weeks, after which Plumlee began working in the field, and Gosseen remained in the mechanical rooms by himself. Several days later, Parish Plumlee was brought out to work with Gosseen, and then, after Parish was laid off, Kevin Rye took his place. Gosseen trained both Rye and Parish and told them what work to do. Gosseen was thereafter given instructions by Harvey, Rick Lakey, and Cole; and Roger Miller, plumbing foreman, tested some of the work that the employees had completed in the mechanical rooms. Gosseen asked Lakey for time off on 3 June. Hank Plumlee would only come by occasionally to eat lunch with Gosseen and Parish.

Rye testified that when he first began working with Gosseen in the mechanical rooms, Plumlee came in on five or six occasions "to check on the work to see how things was going, if we had any questions."

Regarding the hiring of Gosseen, Rick Lakey testified that Gosseen had come to the jobsite on several occasions and talked to Plumlee and both Morgan brothers. Later, Plumlee told Lakey that he needed somebody to work in the mechanical rooms. He said that Gosseen had experience as a pipefitter and he recommended that Gosseen be hired. Lakey told Plumlee to go ahead and hire him. Plumlee did not deny this testimony of Lakey.

Plumlee testified that he never recommended that any employees be laid off, disciplined, discharged, or recalled. Rather, all these decisions, as far as he knew, were made by Rick Lakey. Each morning the welders, who generally worked alone, would begin doing the work that they had been working on the day before, unless they were assigned different work by Lakey.

[23] Plumlee and other employees testified that in the construction industry it is customary for employees to obtain jobs through word of mouth.

[24] Al Lakey, shop manager, was not a welder and apparently was not qualified to train Parish Plumlee to do some of the necessary work.

Plumlee did not keep the time of the welders or pipefitter helpers, attend management meetings, or do any paperwork. If Lakey had not already spoken to the welders regarding their assignments, Plumlee would relay the instructions. Plumlee did not oversee or inspect the work of the other employees and performed the same work as they did virtually all the time.[25]

Plumlee testified that on one occasion, Plumlee asked Muse for some assistance. Muse asked Lakey if he could help Plumlee. Lakey said no, that Plumlee was a journeyman and could do it himself. As noted above, when Muse was brought out to the base from the fabrication shop, he was initially told by Lakey not to have anything to do with Plumlee, and on the day of the election Lakey gave Muse a radio so that he could call Lakey if he had any questions about the work.

Saum testified that prior to the beginning of the project he told Plumlee there would be a supervisory job as welding foreman open for him and that he was going to leave the responsibility of hiring welders to Plumlee. Plumlee said he knew a couple of welders and Saum said, "Well, I'll leave that responsibility to you. When the job requires it let's bring the guys in. Plumlee denies this conversation.

D. *Analysis and Conclusions*

1. The status of Hank Plumlee

Respondent maintains that Hank Plumlee is a supervisor within the meaning of the Act. It is clear that whether Plumlee possessed or exercised any supervisory authority prior to the advent of the Union, he neither possessed nor exercised any such authority after about mid-May.

By 15 May three of the four employees Plumlee had called to work, pursuant to the instructions of Saum or Rick Lakey, had been laid off or discharged,[26] and only Gosseen remained. Plumlee had received no prior notice that these members of his crew were to be discharged, nor had he been consulted regarding their replacements. Rye replaced Parish Plumlee in the mechanical rooms, and was trained by Gosseen. I find that Plumlee did not direct the work of Gosseen or Rye and had very little daily contact with them.[27] When Muse was transferred from the fabrication shop to the base he was told by Rick Lakey to stay away from Plumlee and thereafter Lakey, who spent more time in the field after 12 May when Cole was hired as superintendent, inspected Muse's work until he apparently felt that Muse was capable of working on his own. Muse and Plumlee worked separately and Plumlee did not inspect his work.

Thus, the record is devoid of any evidence of supervisory authority exercised by Plumlee. Instead, Plumlee did not even have the authority to direct Muse to assist him, as Lakey denied Plumlee's request in this regard; and Muse went to Lakey, not Plumlee, for time off. Further, Saum solicited Plumlee's vote in the forthcoming election; Plumlee's foreman's pay of $1 an hour was taken away from him prior to the election; and he voted without challenge.

On the basis of the foregoing, I find that whatever Plumlee's prior status, he was clearly not a supervisor on and following 13 May, the date Saum solicited him to vote against the Union.

2. The discharges

On 2 May, Superintendent Lakey told Hank Plumlee that Lakey was going to discharge Don Fox that day because of his suspected union activity. Fox was, in fact, laid off that day and was told by his foreman, Roger Miller, that it would only be for a week or so. However, Fox was not recalled until 8 July, some 2 months later. I credit the testimony of Plumlee and Fox.

Respondent maintains that Fox's layoff resulted from a quarantine of certain barracks in which Fox was working. However, a Corps of Engineers' quality assurance report shows that on 2 May the asbestos problem was no longer precluding work in the barracks. Moreover, Roger Miller testified that the building in which Fox had been working on 2 May, and still another building yet to be started, was not affected by the quarantine.

I therefore find that the evidence does not support Respondent's alleged reasons for the layoff of Fox, and that Fox was laid off for the reason that Lakey stated to Plumlee, in violation of Section 8(a)(3) of the Act.

After being recalled on 8 July to Roger Miller's plumbing crew, Fox was again discharged on 24 July. Respondent maintains in its brief that Fox was discharged because of "performance problems."

Rick Lakey testified that Fox was discharged because:

> It was another complaint, no hardhats, no shoes, Mr. Fox was constantly out of his area, no hardhat, completely two buildings away from his area. I finally had enough of it, I went up and told Roger to fire him.

Superintendent Cole testified that Roger Miller told him that Fox was not performing and should not have been called back and, therefore, Cole told Miller to discharge him. Cole, however, made out the layoff slip, which indicates that Fox was being let go because of lack of work.

Miller testified that there were only about four or five more buildings that needed plumbing and Cole told him that he should cut back on his crew. Therefore, Fox was laid off. When asked whether there was any problem with Fox's work, Miller testified, "No, not really." He then testified that when he was discussing layoffs with Cole, something was mentioned about a productivity problem with Fox "but there was nothing—no big to-do about it."

The reasons for the second layoff of Fox given by various managers and supervisors are contradictory. On the one hand Lakey and Cole maintain that Fox was discharged because of problems with his work. Miller, Fox's immediate supervisor, however, not only does not

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[25] I credit Plumlee's testimony and also the testimony of Bob Morgan and Tom Morgan, who corroborated the foregoing testimony of Plumlee.

[26] Tom Morgan, Bob Morgan, and Parish Plumlee.

[27] Although Rye testified that Plumlee came to check on work in the mechanical rooms shortly after 16 May, this was apparently of short duration. Moreover, this is not determinative of supervisory authority. *Gerber Co.*, 270 NLRB 1235, 1237–1238 (1984).

corroborate this, but maintains that Fox was laid off because, even though there was more work to be done, the Respondent was nearing the end of that phase of the project.

The General Counsel maintains that the conflicting reasons for Fox's second layoff, coupled with the foregoing finding that Fox's earlier layoff was unlawfully motivated, mandates the conclusion that Fox's second layoff was also violative of Section 8(a)(3) of the Act. I agree and so find.

Tom Morgan was discharged on the same day as Fox, 2 May. Morgan was told by Lakey that his temporary layoff would last for "one week and one week only." Plumlee testified similarly. I credit Morgan and Plumlee.

Respondent maintains that Morgan, who had been laid off on two prior occasions, had been hired only to perform prefab work and when this work had been completed Morgan was permanently laid off. Indeed, Lakey maintains that Plumlee acknowledged that Plumlee was planning on permanently laying off Morgan for that very reason. Plumlee denied this and testified that there was abundant welding work to be done on and subsequent to the day Morgan was discharged. I credit Plumlee.

Although Lakey told Plumlee on 1 May that he did not believe that Tom Morgan would favor the Union, Saum told Plumlee, on 13 May, that he knew the Morgan brothers were against him from the start and "were locked into the union tight as hell." That remark of Saum's, coupled with the Respondent's discredited rationale for discharging Morgan on the very day that, it has been found, Respondent discharged Fox because of his suspected union activity, mandates the conclusion that Morgan's discharge was similarly motivated. I so find.

On 13 May, as noted, Saum advised Plumlee of Saum's disregard for the Morgan brothers and also said he was going to start playing hardball and was going to send Bob Morgan to the fabrication shop on Rudkin Road. Meanwhile, at the shop, Al Lakey had told Muse, whom I credit, that they wanted to bring Bob Morgan to the shop so that Muse could "piss him off enough to get him to quit."

This plan, however, did not materialize and Bob Morgan was laid off on 15 May allegedly because, as Saum testified, work on the project had been halted by the Corps of Engineers. Also, on the same date, Parish Plumlee, a pipefitter helper, was laid off, as were two laborers.

The credible evidence establishes, contrary to Saum's testimony, that the work Bob Morgan and Plumlee had been performing had not been suspended. In fact, the contemporaneous letter from the Corps of Engineers states that the suspension involved only the "removal of insulation on the exterior steam line," which work constituted only a relatively minor part of the overall project, and that "[A]ll other contract work may continue." Moreover, Plumlee credibly testified, contrary to Saum, that the work on the condensate line was not suspended and that it continued thereafter; and Muse credibly testified that the fabrication of pipe supports continued throughout the time of this alleged 2-week shutdown. Further, the two laborers discharged on 15 May were replaced within a week by two new hires who continued working in the field on the installation of pipe supports.[28]

Parish Plumlee was working in the mechanical rooms of the barracks with Gosseen at the time of his layoff. It is clear that this work was independent of any outside work on the steam or condensate line, and continued after Parish's discharge, as Parish was replaced by a plumbing employee, Kevin Rye.

Clearly, the Respondent seized on the Corps of Engineers' steam line suspension order to fabricate a rationale for the dismissal of these employees, and the credible record evidence shows that the suspension of the steam line work had no impact on the work that Bob Morgan and Parish Plumlee were performing.

Respondent maintains that there is no record evidence that Respondent knew or suspected that Parish was in favor of the Union. Although Saum had explicitly expressed his animus toward Bob Morgan and had even concocted a scenario for getting him to quit, it is clear that the Respondent had been attempting to identify all the union sympathizers and Saum stated that he had spies at one union meeting. Parish had attended a union meeting and signed a union authorization card prior to his discharge. Moreover, there was no valid reason given for his discharge, and he was not offered either of the laborer jobs that were available the following week even though on 8 July, when Parish was recalled, he was put to work as a laborer on the laborers' crew, thus showing that Respondent had no reservations about recalling Parish as a laborer rather than as a pipefitter helper.[29]

For the foregoing reasons I conclude that the 15 May layoffs of Bob Morgan and Parish Plumlee were discriminatorily motivated in violation of Section 8(a)(3) of the Act.

Gosseen was discharged on 1 July, the day following the election, purportedly for pilfering property. The property that Gosseen was accused of allegedly stealing was scrap iron that had been removed from the mechanical rooms during the demolition stage. Respondent was selling this scrap for 2 cents a pound to a local salvage dealer.

I credit Gosseen and find that he had arrived at the jobsite early because he was apprehensive about his continued employment because of the events the day before, and that he was attempting to locate valves and strainers that were to be reused in the mechanical rooms.[30]

Even though Gosseen's truck was searched by Saum and the military police and nothing was found, Saum nevertheless allegedly determined that Gosseen had indeed intended to pilfer something, and therefore dismissed him. I do not credit Saum and find that he discharged Gosseen in retaliation for Gosseen's suspected

[28] I agree with the General Counsel's position that the layoff of the two laborers on 15 May was contrived "camouflage" to mask the true reason for the layoff of Bob Morgan and Parish Plumlee.

[29] Parish was thereafter discharged again for excessive absenteeism, apparently due to injury he sustained on the job, and there is no complaint allegation that this final discharge is violative of the Act.

[30] Various employees testified that these items, which were to be reused, had sometimes been discarded with the rest of the scrap and had to be obtained from the salvage pile.

union activity. Saum's virtually contemporaneous remark to Plumlee, whom I credit, that Gosseen was Plumlee's "fucking union buddy" and was going to be fired, provides clear evidence of Saum's true motivation. Therefore, I conclude that Gosseen was discharged in violation of Section 8(a)(3) of the Act, as alleged.

As noted, Saum told Plumlee that his "fucking union buddy" had been caught stealing and that Saum had Gosseen at the MP station and was going to press charges against him. Immediately following this, as Plumlee was about to begin work, Saum told him "Yeah, get out there and bust your ass and . . . if you don't think you can handle the heat of that . . . just hit the fucking road." Plumlee told Saum not to "hard ass" him and to fire him or get off his back. He then indicated that he was quitting by laying the keys to Respondent's pickup on the desk which, as evidenced by Saum's repeated questioning of whether Plumlee was quitting, was just what Saum had intended. Shortly thereafter, Lakey told Muse that Gosseen had been caught stealing and had been thrown in jail and that "We got rid of [Plumlee], too."

Respondent maintains that this confrontation did not constitute a constructive discharge, citing *K & S Circuits*, 255 NLRB 1270, 1295 (1981). Contrary to Respondent's assertions, it is clear that the case that Respondent cites constitutes clear precedent for the determination, which I make, that the new, albeit unspecified, working conditions imposed on Plumlee were intended to be so difficult or unpleasant as to cause him to resign, and that such conditions were imposed because of Plumlee's union activity. I therefore find that Plumlee was constructively discharged in violation of Section 8(a)(3) of the Act.

Muse was suspended by Lakey on 1 July, allegedly for making unacceptable welds, and was permitted to take a cut in pay and return to work at the fabrication shop. When Muse arrived at the shop, he made the rhetorical statement to Al Lakey that the Respondent "was going to play hardball." Al Lakey agreed, stating "You're goddamn right. You guys started this union bullshit." Muse denied that he started it and Lakey said, "Well, you're involved in it and now you're going to pay for it." I credit Muse's testimony. Further, I do not credit the testimony of Al Lakey regarding Muse's alleged insubordinate conduct at the fabrication shop. Thereafter, on the following day, Muse was laid off allegedly for lack of work.

I find that Muse was, in effect, discharged by Rick Lakey on 1 July at the base because of his suspected union activity. The welds pointed out to Muse on 1 July, which allegedly resulted in his demotion to the fabrication shop, were welds that he had made some 2 weeks earlier. Moreover, Muse had been welding steadily for a month prior to his discharge and Rick Lakey, who had inspected his work, had not found it unacceptable. Finally, when Muse arrived at the fabrication shop, he was told in no uncertain terms by Al Lakey, who had spoken to Rick Lakey shortly before, that Muse's demotion to the shop was motivated by his union activity.

I find that the 1 July removal of Muse as a welder was discriminatorily motivated in violation of Section 8(a)(3) of the Act. Moreover, I find that the 2 July layoff was similarly unlawful, as credible record evidence does not show that there was no further work for Muse at the fabrication shop.

I credit the testimony of Dean Herd, an applicant for employment, and find that on 11 July, after taking a welding test, he acknowledged to Saum that he was a member of the Union. Thereupon, Saum told Herd that his welding was good and he would like to hire Herd, but he just did not want any more problems with the Union. Herd was not hired. Thereafter, the Respondent hired other welders who, at the time of Herd's conversation with Saum, had not yet applied for employment. Therefore, I find that Respondent's failure to hire Herd was discriminatorily motivated in violation of Section 8(a)(3) of the Act. *Young Hinkle Corp.*, 244 NLRB 264 (1979).

3. The noncode welding

Respondent maintains that even if the four certified welders, Bob Morgan, Tom Morgan, Jim Muse, and Hank Plumlee were unlawfully discharged, nevertheless they would have been discharged for a legitimate reason because of their admitted failure to follow the proper welding procedure and because of various defective welds that were subsequently discovered. I find this defense to be without merit. Hank Plumlee and the Morgan brothers credibly testified that they had been told by Lakey that it was permissible to use 5-P rod in place of 7018 rod if they desired, and this instruction was relayed to Muse by Plumlee.[31] Moreover, I credit the employees' testimony that the primary reason for using 5-P rod in place of 7018 rod was because, after advising Lakey and Harvey of the porosity problem with 7018 rod, the Respondent failed to provide them with rod ovens in the field. I discredit Lakey's and Harvey's denials of these conversations, and find that indeed there were no rod ovens provided to the employees in the field until after they were discharged and new replacement welders were hired.

I do not credit the assertions of Saum, Bob Harvey, or Rick Lakey that the welding of Plumlee and the Morgan brothers was initially so exceptional that Respondent never thereafter inspected the work until immediately prior to the election.[32] The welding work was readily observable and, indeed, it was Bob Harvey's admitted primary responsibility as Respondent's quality control representative, who was on the job at all times, to insure to the Corps of Engineers that the work was in conformity with the contract. Harvey and Lakey testified that,

[31] It is quite reasonable that Lakey would have so instructed the employees, as Giesler, the Corps of Engineers' representative, testified that the use of one rod or the other "probably wouldn't make a bit of difference."

[32] Bob Harvey, quality control representative, testified that "I was so impressed with these men's welds that I didn't watch it all that close. I never seen better welding in my life." Rick Lakey said that "all three was damn good welders." Regarding Plumlee's welding, Saum testified that the work was "as good as I've seen. The guy was an artist," and when asked how the noncode welds could have gone undetected, Saum said, "I don't know. I don't know. I'd still like an answer to that . . . it's a mystery."

although the noncode welding was discovered several days prior to the election and was a serious violation of the contract specifications, the matter was not reported to the Corps of Engineers because Saum did not want anything to affect the 30 June election. This contention, regarding which the Respondent did not elaborate by way of supportive explanation, is nonsensical and preposterous, particularly in light of the fact that Respondent, prior to the election, threatened the employees with discharge should they vote for the Union.

I credit the testimony of the employees, detailed above, and find that they endeavored to make the best possible welds under the prevailing field conditions and at all times were following the instructions of Lakey.

Based on the foregoing, I find the Respondent's argument that the employees are not entitled to reinstatement to be without merit. The Respondent has adduced no credible evidence that the employees did something improper by following Lakey's instruction, or otherwise performed defective welding that would justify their discharge.[33]

4. The 8(a)(1) violations

As discussed above, I concluded that it was unnecessary to determine whether Hank Plumlee was a supervisor prior to 13 May, on which date Saum solicited Plumlee's vote. On 13 May and thereafter, however, I found that Plumlee was not a supervisor within the meaning of the Act.

I credit Plumlee and find that on 13 May, Saum interrogated him about the union activity of other employees. Saum told him, in effect, that he was going to retaliate against Bob Morgan because of his involvement with the Union; that Saum would prolong negotiations and would not sign a contract; that if the Union got in, wages would go down; and that the employees would be discharged.

I credit Muse and find that in mid-May, Al Lakey interrogated Muse and another employee regarding their union activity, stated that if the Union came in, the fabrication shop employees would not have a job because the work would be contracted out, and advised Muse of plans to get rid of Bob Morgan because of his union activity. Also, on 1 June and thereafter, Rick Lakey told Muse to stay away from Plumlee, clearly because of Plumlee's involvement with the Union, as Saum later explained to Muse.

I credit Muse's testimony regarding the 19 June employee meeting and find that Saum told the employees that he knew of the union meeting the night before "because his spies had let him know," thus creating the impression of surveillance of employees' union activity. I find that Saum also said he could stall negotiations for 2 years, that he was withholding raises because of the upcoming election, and that he heard Muse was going to vote for the Union.

Also at the aforementioned meeting, I find that Al Lakey told the employees that the fabrication shop would be closed if the Union won the election. Moreover, I find that immediately prior to the election Al Lakey told the employees that if they voted for the Union they would be out of a job. Contrary to Respondent's contentions, I find that these statements of Lakey constituted direct threats rather than lawful predictions based solely on economic considerations.

Immediately following the election, I find that Rick Lakey imposed more onerous working conditions on Gosseen and Rye by changing their actual working hours, disallowing coffee and soda pop on the job, requiring them to remain in their work area, and requiring them to increase production.Similarly, new and more onerous working conditions were imposed on Muse by Rick Lakey at the same time.[34]

I find that on 1 July, Saum threatened Gosseen with arrest in retaliation for his union activity and, for the same reason, Al Lakey threatened Muse with more onerous working conditions.

I find that on 2 July, Saum, for a discriminatory reason, threatened to have Plumlee arrested when he returned certain items to Respondent, interrogated Plumlee about his union activity, told Plumlee he would never work another nonunion job, and that the Respondent would never sign a contract.

I credit Herd's testimony and find that on 11 July, Saum told Herd that he was not hiring Herd, a union member, because he did not want any more problems with the Union.

On 28 July, Saum told Muse that Rick Lakey had retaliated against Muse because Lakey thought Muse was going to vote for the Union as he had been observed associating with Hank Plumlee.

The foregoing findings of 8(a)(1) and (3) violations are based on the credited testimony of the named employees. I do not credit the testimony of Saum, Rick Lakey, and Al Lakey to the extent that their testimony differs with that of Hank Plumlee, Gosseen, Muse, and Herd, who impressed me as forthright and reliable witnesses with accurate recollections of the various events and conversations.

E. *The Representation Proceeding*

The Union challenged the ballots of John Sphuler, Larry Barnhart, Kevin Rye, and Al Lakey. The Board agent challenged the ballots of Donald Fox, Lloyd Parrish Plumlee, Earl (Tom) Morgan, and Bobby Morgan.

At the hearing it was agreed that the challenge to Al Lakey's ballot should be sustained as he is a supervisor. I shall also sustain the challenge to the ballot of Larry Barnhart, laborer foreman, as laborers are not included within the approximate unit and there is no evidence that

[33] Respondent's extensive evidence concerning the identification and alleged repairs of some 42 welds from 13 August to 6 November is contradicted by record testimony. Thus, for example, Fritz Flowers, called by the General Counsel, who was assigned to repair only one weld, credibly testified that he repaired that single weld on 18 November, and the repair took less than an hour. Respondent's repair log shows, however, that Flowers spent 13 hours that day repairing four welds. I do not credit any of Respondent's evidence regarding the alleged repair of any of the welds. It is significant that none of the other welders who allegedly made the other 41 repairs were called as witnesses by Respondent.

[34] Such new working conditions also constitute violation of Section 8(a)(3) of the Act.

Respondent performed any unit work. The challenges to the ballots of John Sphuler and Kevin Rye are overruled, as the Union presented no evidence that these two employees were not eligible unit employees.

The challenge to the ballots of Donald Fox, Lloyd Parish Plumlee, Earl (Tom) Morgan, and Bobby Morgan are overruled, as the record shows that they are eligible unit employees who were unlawfully discharged prior to the election.

Respondent offered evidence in support of only one of its election objections. The objection is as follows:

> 2. The Union, by and through its agents, officials, representatives, employees and/or supporters, unlawfully promised to waive or reduce substantially initiation fees for employees who joined the union prior to the election.

It was stipulated that the testimony of Union Business Agent Waldbauer, who was present in the hearing room, would be as follows: that at one, or possibly two union meetings Waldbauer told the employees that the Union had a special organizing initiation fee, and that members of the bargaining unit could join the Union for $200 as long as they join the Union within 8 days of when a contract was signed between the Union and Adscon; and further, that Waldbauer said nothing else about organizing fees.

Several employees testified on this matter. I credit the testimony of Hank Plumlee and Don Fox, who specifically recalled that Business Agent Waldbauer stated that the offer for reduced initiation fees extended beyond the election. Parish Plumlee could not recall Waldbauer establishing a time limit for reduced initiation fees, and apparently thought the offer was for an indefinite time. Tom Morgan's testimony on this matter indicates that he had only a vague recollection of Waldbauer's actual statements.

On the basis of the foregoing I find that the Respondent has not sustained its burden of proof and recommend that this election objection,[35] as well as the other election objections, on which no evidence was offered, should be overruled.

It is also recommended that this matter be remanded by the Board to the Regional Director for Region 19, directing that the ballots of John Sphuler, Kevin Rye, Donald Fox, Lloyd Parish Plumlee, Earl (Tom) Morgan, and Bobby Morgan be opened and counted, and that a revised tally of ballots be prepared and served on the parties. If the revised tally reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election results, dismiss the petition, and vacate the proceedings.

[35] See *Savair Mfg. Co.*, 414 U.S. 270 (1973). Cf. *Crane Co.*, 225 NLRB 657 (1976).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in such unfair labor practices and to take affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice attached as "Appendix," and the mailing of the notices to all employees.

I shall recommend to the Board that the Respondent be ordered to offer Hank Plumlee, Bob Morgan, Earl (Tom) Morgan, Jim Muse, Don Fox, and Randy Gosseen immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions of employment, without the loss of their seniority or any other rights and privileges. I shall further recommend that Respondent hire Dean Herd to the position for which he would have been hired, with seniority and other benefits beginning on the date he would have been hired.

I shall further recommend to the Board that the Respondent be ordered to make whole the aforementioned employees, and also Parish Plumlee, for any loss of earnings and other benefits resulting from the discrimination against them. Backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest on such backpay to be computed in accordance with the Board's decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[36] In accordance with the Board's decision in *Sterling Sugars*, 261 NLRB 472 (1982), I shall recommend to the Board that an expunction remedy be included in the Order.

The General Counsel has requested that a visitatorial clause be included in the Order in this case. This request should appropriately be addressed to the Board.

[Recommended Order omitted from publication.]

[36] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

W. S. Smith Electric, Inc. *and* Local Union No. 692, International Brotherhood of Electrical Workers, AFL–CIO. Case 7–CA–27671

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

Upon a charge filed by Local Union No. 692, International Brotherhood of Electrical Workers, AFL–CIO (the Union) on January 21, 1988, and amended on February 24, 1988, the General Counsel of the National Labor Relations Board issued a complaint February 25, 1988, against W. S. Smith Electric, Inc. (the Respondent) alleging that it has violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act. Although properly served copies of the charges and complaint, the Respondent has failed to file an answer.

On April 11, 1988, the General Counsel filed a Motion for Summary Judgment. On April 13, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the Complaint shall be deemed to be admitted true and may be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Acting Regional Attorney, by letter dated March 11, 1988, notified the Respondent that unless an answer was received by March 25, 1988, a Motion for Default Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment insofar as the complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act, by failing to make the fringe benefit fund contributions required under its collective-bargaining agreement with the Union and by failing to remit dues it had deducted from its employees' wages to the Union as required under the dues-checkoff provisions of this collective-bargaining agreement, during the period from August 3 to September 3, 1987.

The complaint additionally alleges, in paragraphs 16 and 18, that the Respondent violated Section 8(a)(3) and (1) of the Act by continuing to deduct dues from its employees' wages after the collective-bargaining agreement was no longer in effect and by withholding this money from its employees. We find this complaint allegation to be so ambiguous that we are unable to determine whether it states a cause of action, because the complaint does not allege sufficient facts to allow the Board to decide how the Respondent violated the Act by this conduct. For example, the complaint does not allege that the employees' dues-checkoff authorizations were revoked or otherwise expired when the contract was no longer in effect. Thus, it is unclear whether, under the theory of the complaint, it is alleged that the Respondent should have ceased deducting dues from its employees' wages or whether it should have deducted the dues but remitted the money to the Union. Accordingly, we deny the Motion for Summary Judgment insofar as it alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by continuing to deduct dues from its employees' wages after the collective-bargaining agreement was no longer in effect. We shall remand the case to the Region for further appropriate action, including, if necessary, a hearing before an administrative law judge on the issue whether the Respondent violated the Act by continuing to deduct dues from its employees' wages when the collective-bargaining agreement was no longer in effect and by retaining this money for itself.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Michigan corporation with its principal office and place of business in Clare, Michigan, is an electrical contractor in the building and construction industry. During the year ending December 31, 1987, the Respondent performed services valued in excess of $50,000 for B & B Contractors and Developers, Inc., a company engaged in the building and construction industry that annually performs services outside the State of Michigan valued in excess of $50,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit and the Union's Representative Status*

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees of the Respondent performing electrical work at the Big Wheel Department Store jobsite in Standish, Michigan; but excluding guards and supervisors as defined in the Act.

On August 3, 1987, the Respondent executed a letter of assent to the terms of the current collective-bargaining agreement between the Union and the Bay City Division, Michigan Chapter, National Electrical Contractors Association, Inc., covering the employees in the unit. This letter of assent was effective by its terms for the period August 3, 1987, to September 3, 1987.

For the period August 3 to September 3, 1987, the Union, by virtue of Section 8(f) of the Act, was the exclusive representative of the unit employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

B. *The Refusal to Bargain*

For the period of August 3 to September 3, 1987, the Respondent failed to make any contributions to fringe benefit funds on behalf of the unit employees as required by the collective-bargaining agreement. The agreement provides that the Respondent shall make contributions to certain fringe benefit funds, including vacation, pension, health and welfare, and apprenticeship funds. For the period of August 3 to September 3, 1987, the Respondent deducted dues from the unit employees' wages, but failed to remit these dues to the Union as required by the collective-bargaining agreement.

The Respondent failed to make fringe benefit fund contributions and failed to remit checked off dues to the Union as required by the agreement without giving the Union notice or an opportunity to bargain about this conduct. We find that the Respondent has failed and refused to bargain collectively with the representative of its employees and has thereby violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By failing and refusing to make fringe benefit fund contributions on behalf of its unit employees and by failing and refusing to remit checked off dues to the Union as required by its collective-bargaining agreement with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall, inter alia, order the Respondent to make all the contributions to fringe benefit funds required by its collective-bargaining agreement with the Union.[1] We shall also order the Respondent to reimburse its employees for any expenses ensuing from its unlawful failure to make contributions to the fringe benefit funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest as prescribed in *New Horizons for the Retarded*.[2] We shall also order the Respondent to remit to the Union the dues it deducted from its employees' wages while the collective-bargaining agreement was in effect, with interest as prescribed in *New Horizons for the Retarded*, supra. We shall further order the Respondent to post an appropriate notice to employees. As noted above, we shall also remand this case for hearing on the limited issue whether the Respondent violated the Act by continuing to deduct dues from its employees' wages when the collective-bargaining agreement was no longer in effect and by retaining this money for itself.

ORDER

The National Labor Relations Board orders that the Respondent, W. S. Smith Electric, Inc., Clare, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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[1] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for the addition of a fixed rate of interest on unlawfully withheld fund payments at the adjudicatory stage of a proceeding. We leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds to satisfy our "make-whole" remedy. Depending on the circumstances of each case, these additional amounts may be determined by reference to provisions in the documents governing the funds at issue and, when there are no governing provisions, by evidence of any losses directly attributable to the unlawful withholding, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[2] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

(a) Failing and refusing to make fringe benefit fund contributions as required by its collective-bargaining agreement with the Union.

(b) Failing and refusing to remit checked off dues to the Union as required by its collective-bargaining agreement with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all the contributions to fringe benefit funds required by its collective-bargaining agreement with the Union, as provided in the remedy section of this decision.

(b) Remit to the Union the dues it deducted from its employees' wages while the collective-bargaining agreement was in effect, as provided in the remedy section of this decision.

(c) Make unit employees whole for any loss of benefits or other expenses suffered as a result of the Respondent's failure to make the fringe benefit fund contributions required by its collective-bargaining agreement with the Union, as provided in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(e) Post at its facility in Clare, Michigan, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for the purpose of taking further action in accord with this decision, including, if necessary, the holding of a hearing before an administrative law judge on the issue whether the Respondent violated the Act by continuing to deduct dues from its employees' wages when the collective-bargaining agreement was no longer in effect and by retaining this money for itself.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to make fringe benefit fund contributions as required by our collective-bargaining agreement with the Union.

WE WILL NOT fail and refuse to remit checked off dues to the Union as required by our collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all the contributions to fringe benefit funds required by our collective-bargaining agreement with the Union.

WE WILL remit to the Union the dues we deducted from our unit employees' wages while the collective-bargaining agreement with the Union was in effect.

WE WILL make our unit employees whole for any loss of benefits or other expenses suffered as a result of our failure to make the fringe benefit fund contributions required by our collective-bargaining agreement with the Union.

W. S. SMITH ELECTRIC, INC.

Associated General Contractors of Minnesota *and* Independent Construction Truck Owners, Inc.

Construction, Building Material, Ice and Coal Drivers, Helpers, and Inside Employees Union, Local No. 221, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO[1] ***and*** **Independent Construction Truck Owners, Inc.**

Construction, Building Material, Ice and Coal Drivers, Helpers, and Inside Employees Union, Local No. 221, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO *and* Park Construction Company and Associated General Contractors of Minnesota

Construction, Building Material, Ice and Coal Drivers, Helpers, and Inside Employees Union, Local No. 221, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO *and* Associated General Contractors of Minnesota

Construction, Building Material, Ice and Coal Drivers, Helpers, Inside Employees Union, Local No. 221, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO *and* Park Construction Company. Cases 18–CE–43, 18–CE–44, 18–CB–1134, 18–CC–896, 18–CC–898, and 18–CE–47

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN JOHANSEN AND MEMBERS BABSON AND CRACRAFT

On June 15, 1982, Administrative Law Judge Walter H. Maloney Jr. issued the attached decision. The Charging Party/Respondent Associated General Contractors of Minnesota (AGC) filed exceptions and a supporting brief, Respondent Construction, Building Material, Ice and Coal Drivers, Helpers, and Inside Employees Union, Local No. 221, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (the Union) filed exceptions and a supporting brief, and Charging Party Independent Construction Truck Owners, Inc. (ICTO) filed exceptions and supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that Respondent Associated General Contractors of Minnesota, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order, and that Respondent Construction, Building Material, Ice and Coal Drivers, Helpers, and Inside Employees Union, Local No. 221, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order.

Robert G. Sykes, Esq., for the General Counsel.
Stephen D. Gordon and *Bruce A. Finzen, Esqs.*, of St. Paul, Minnesota, for the Respondent Teamsters Local 221.
David R. Hols and *Charles F. Bisanz Jr., Esqs.*, of Minneapolis, Minnesota, for the Charging Party Independent Construction Truck Owners, Inc.
Timothy A. Sullivan, Esq., of St. Paul, Minnesota, for the Associated General Contractors of Minnesota, for the Respondent and the Charging Party.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY JR., Administrative Law Judge. These cases came for hearing before me in Minneapolis, Minnesota, on a consolidated unfair labor practice complaint,[1] issued by the Regional Director for Region 18,

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. The caption has been amended to reflect that change.

[2] The Charging Party/Respondent AGC has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall conform the judge's Conclusion of Law 6 to the violations found. Accordingly, we substitute the following for the last phrase of that conclusion of law: "the Respondent Union violated Section 8(b)(4)(ii)(A) and (B)."

[4] In adopting the judge's recommended remedy and Order, we find that in the circumstances of this case it would not effectuate the policies of the Act to provide a reimbursement remedy. See *Shepard v. NLRB*, 459 U.S. 344 (1983); *Associated General Contractors*, 280 NLRB 699, 703 fn. 19 (1986). See also *Teamsters Joint Council 42 (Irvine-Santa Fe Co.)*, 248 NLRB 808 (1980).

[1] Charge filed by Independent Construction Truck Owners, Inc. (ICTO), against Respondent Associated General Contractors of Minnesota (AGC), on July 3, 1980, in Case 18–CE–43; charge filed against Construction, Building Material, Ice and Coal Drivers, Helpers, and Inside *Continued*

which alleges that Respondent Teamsters Local No. 221 violated Section 8(e), 8(b)(3), and 8(b)(4)(i), and (ii)(A) and (B) of the Act, and that Respondent Associated General Contractors of Minnesota (AGC),[2] violated Section 8(e) of the Act. More particularly, the consolidated complaint alleges that the Respondents, as well as Park Construction Company, an individual signatory, entered into an unlawful "hot cargo" agreement, called the Memorandum of Understanding, in which they agreed to apply the union-security provision in an areawide multiemployer agreement to independent contractors, agreed to pay fringe benefits to a union-management trust fund for independent contractors, gave the Respondent Union the preferential right to refer independent contractors to members of the Respondent Employer Association, set wage rates for independent contractors employed by members of the Respondent Association, and applied to the Memorandum of Understanding a grievance procedure that unlawfully permitted self-help. The consolidated complaint also alleges that the Respondent Union entered into an illegal no-subcontracting agreement with Park in violation of Section 8(e) of the Act, and that it interpreted a provision in the expired master area agreement with Park and other members of the AGC in such a manner that the Union would be able to engage in a work stoppage to enforce provisions of the agreement that were or might otherwise be valid under the provisions of Section 8(e). The consolidated complaint also alleges that the Respondent Union, in fact, engaged in a work stoppage to enforce no-subcontracting restrictions in the Memorandum of Understanding. It further alleges that, in the course of collective-bargaining negotiations leading to a new contract, the Respondent Union illegally demanded a contractual restriction against subcontracting that would violate Section 8(e) of the Act and that it threatened to picket employer members of AGC to obtain such a contract clause. The consolidated complaint alleges that the Respondent Union engaged in an illegal secondary boycott by threatening a work stoppage at a Park jobsite and by picketing Park, and, in fact, struck Park during a contract term to obtain a modification of an existing collective-bargaining agreement. The Union maintains that the independent truck owners—whose status was drawn sharply into issue in this case—are, in fact, the employees of the various AGC members who employ them from time to time, and that it was lawful to bring pressure on AGC to bring independent truck owners (ITOs) under the union-security provisions of the collective-bargaining agreement with AGC members and otherwise to negotiate terms and conditions of employment with AGC concerning such individuals. Respondent also denies commission of any violations of Section 8(b)(4) and 8(b)(3) and asserts that the strike and picketing of Park was lawful primary activity aimed at enforcing the grievance and arbitration provisions of an existing collective-bargaining agreement, which agreement permitted strikes under certain limited circumstances during the contract term.[3] On these contentions—and particularly the contentions with respect to the status of independent truck owners—the issues here were drawn.[4]

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

For many years the highway and heavy construction industry (highway and heavy) in the Twin Cities area and in all of central Minnesota has been dominated by the two Respondents in this case, the Associated General Contractors of Minnesota (and its employer member) and Teamsters Local 221. AGC has both bound and unbound members.[5] The former bargain collectively with the Teamsters and other labor organizations on a multiemployer basis, while the latter, who are also members in good standing of AGC, either refuse to participate in collective-bargaining negotiations at all or elect to sign, as individual signatories, one or more of various

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Employees Union, Local No. 221, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO (Teamsters or the Union), in Case 18-CE-44 on July 3, 1980; charge filed against Respondent Teamsters by AGC and Park Construction Company (Park), on April 3, 1981, in Case 18-CB-1134; charge filed against Respondent Teamsters by AGC and Park on April 3, 1981, in Case 18-CC-896; charge filed against Respondent Teamsters by AGC on April 22, 1981, in Case 18-CC-898; charge filed against Respondent Teamsters by Park in Case 18-CE-47 on April 22, 1981.

Consolidated complaint issued by the Regional Director for Region 18 against Respondent AGC and Respondent Teamsters on April 30, 1981; Respondent Teamsters' answer filed on May 19, 1981; Respondent AGC's answer filed on May 29, 1981; case heard before me in Minneapolis, Minnesota, on December 1-4, 1981, and January 18-25, 1982; briefs filed with me on or before April 30, 1982.

[2] Respondents admit, and I find, that, during calendar year 1980, employer members of Respondent AGC performed services within the State of Minnesota valued in excess of $50,000 and purchased and received at their facilities in the State of Minnesota directly from points and places located outside the State of Minnesota goods and merchandise valued in excess of $50,000. At all times material, Park is and has been a Minnesota corporation that maintains its principal place of business in Minneapolis, Minnesota, where it is engaged in the highway and heavy construction business as a general contractor. During the course of 1980, Park purchased at its Minneapolis, Minnesota place of business directly from points and places located outside the State of Minnesota goods and merchandise valued in excess of $50,000. Accordingly, both AGC and Park are, respectively, employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Respondent Teamsters is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Certain errors in the transcript have been noted and corrected.

[4] Several posttrial motions were made to me and are resolved as follows:

1. Counsel for Respondent Teamsters have moved that certain data relating to the business of Jacobs Trucking Company with Rauenhorst Construction Co., which was obtained following the close of the trial in this case as a result of a subpoena enforcement proceeding, be admitted into evidence in this case. Specifically, they request that the data set forth in par. 5 of their motion, dated April 30, 1982, be admitted into evidence. The motion is granted.

2. Counsel for Respondent Teamsters have also moved to strike the rebuttal testimony of witness Keith Kramer on the ground that such testimony was improper rebuttal. The motion is denied. However, I discredit all the testimony of witness Kramer, both on direct and rebuttal, unless the testimony was corroborated, because of admittedly untruthful testimony given by Kramer at the hearing (Tr. 2264, 2294-2295).

[5] The 1978-1981 agreement between AGC and the Teamsters involved 74 bound AGC members and 64 other members who signed the master agreement individually. The 1981-1984 agreement covered 33 bound AGC members and 15 others who signed individually. Park, a charging party in this case, is an influential member of AGC but, in recent years, has elected to sign the area agreement with the Teamsters on an individual basis. Teamsters Local 221 has in excess of 2000 members, of whom 650-700 are employed in the highway and heavy industry. Of this number, about 200-250 are unionized ITOs.

areawide agreements that are worked out by the AGC Labor Relations Committee and the various unions it recognizes. Drivers who are engaged in the highway and heavy industry may be conventional employees who operate company equipment. They may also be multiple truck owners (MTOs) who drive their own equipment, who employ one or more individuals to drive equipment owned by the MTOs. The status of ITOs and MTOs lies at the heart of this dispute.

For a number of years, MTOs and ITOs were covered by the terms of the 3-year agreements, which were negotiated by the AGC and the Teamsters. The more recent agreements, including the 1978–1981 agreement that was in effect when the events in this case arose, make only a few references to ITOs. Specifically, they provided that an employer could hire employees who own their own equipment or who operate equipment belonging to someone other than the general contractor and that such "employees" would be covered by all the terms and conditions of the master agreement, except seniority. The master agreement also provided that the rate of rental for ITO or MTO equipment was outside its scope. It also provided that general contractors were obliged to pay overload fines imposed on ITOs for exceeding the legal load limits on public highways and, if a contractor failed to pay fringe benefits called for by the agreement, he could be required to pay the ITOs with two checks, one for wages and the other for truck rental.

Over the years many general contractors, both those covered by AGC-Teamsters agreements as well as those who operated strictly on a nonunion or open shop basis, began to hire ITOs through the use of truck brokers.[6] The names of Jacobs Trucking Company, and its owner, Sy Jacobs, Buesing Brothers Trucking, Inc., and Rucki Trucking Company, figure most prominently in these proceedings as brokers, although there are other brokers who perform the same function on a smaller scale in the Twin Cities area. These brokers also subcontract trucking jobs, using their own vehicles and their own employees. ITOs are employed strictly on a day-to-day basis and are referred from job to job each day during the construction season.[7] As more fully described later in this decision, it is the function of the broker to match a contractor's daily requirements with truckers drawn from the ranks of ITOs who have requested referrals. For this service, the broker normally charges a commission amounting to 10 percent of the hourly rate paid by the contractor to the trucker.

While at one time almost all ITOs referred to construction jobs in the Twin Cities area were Local 221 members, the Union began to notice that the number of unionized truckers in the highway and heavy industry was in decline, as was the number of conventional company drivers, while the number of nonunion drivers utilizing the services of truck brokers began to increase. It cites several reasons for a decline in the employment of union members generally in this industry. Among them are the winding down of the Federal highway construction program and poor overall economic conditions, as well as a growing practice on the part of some contractors to hire ITOs rather than to employ company drivers on company seniority lists to drive company equipment. There is some evidence in the record suggesting a belief on the part of some general contractors that it cheaper in the long run to employ ITOs than to operate company-owned trucks with company drivers. The specter of union members getting a smaller piece of a shrinking pie prompted the Respondent Union to take the actions that gave rise to this case.

On August 1, 1979, Holzschuh Truck Leasing Company filed an 8(b)(4)(A) and (B) charge against Local 221 in Case 18–CC–804. In this charge, Holzschuh alleged that the Union was unlawfully pressuring certain general contractors, such as McCrossan, Johnson, and Bel-View, to apply the terms of the master AGC-Teamsters agreement to owner-operators (ITOs). Specifically, Holzschuh objected to the demands by the Union that ITOs, who are hired on a daily basis to supplement an employer's regular cadre of company drivers, be brought under the provisions of the same union-security clause that applies to company drivers. This case (referred to here as the Holzschuh case), was referred by the Regional Office to the Division of Advice (Advice) in the Office of the General Counsel in Washington, D.C., for a determination whether to issue an unfair labor practice complaint.

On or about November 29, 1979, Advice notified the Regional Office that this charge (and others which had been filed alleging essentially the same thing) should be dismissed because, in the view of Advice, ITOs were employees, not independent contractors, so the activity about which Holzschuh complained was simply lawful primary activity aimed at organizing the unorganized or at enforcing the provisions of the union-security clause. The dismissal of the charge in the Holzschuh case was appealed by Holzschuh to the Office of the General Counsel and was reviewed a second time, on this occasion by the Office of Appeals (Appeals). By memo dated March 26, 1980, Appeals took the same position as did Advice and directed the Regional Director to dismiss the pending charge. Thus, for the second time in a period of 6 months, the General Counsel of the Board determined that the owner-operators, whose status is in question in this case, were employees concerning whom certain pressures might lawfully be exerted by the Union because the pressures were primary in character.

Armed with this official determination concerning the status of ITOs, Respondent Teamsters began to take certain actions about which the General Counsel now complains. It wrote letters to several leading contractors who had been employing nonunion ITOs referred by brokers. It objected to the fact that these contractors had been employing individuals who were not members of the Union in violation of the union-security clause in the master agreement and further objected to the fact that these contractors had not been making payments to the health and welfare and retirement funds for the nonunion ITOs they had been employing. The Union threatened

[6] In this decision, the term ITOs will henceforth be normally used to include MTOs as well since, with rare exception, the same facts and circumstances pertaining to one affect the other.

[7] In Minnesota, the construction season begins in mid-May and usually lasts until sometime in November. It normally has about 100 working days.

arbitration to collect from the contractors union dues that were owed to the Union by the nonunion "employees" they had been using, and to collect fringe benefit payments that were due under the master agreement for all trucking employees. Although the potential liability of the several contractors involved in these claims was never actually determined, AGC admits that this potential liability, taken together with an official determination that ITOs were employees within the meaning of the Act (and presumably within the meaning of the master agreement), were sufficient incentives to prompt several leading contractors to enter into negotiations with the Teamsters, under the watchful eye of the AGC, respecting the terms and conditions of employment of ITOs during the 1980 construction season.

These negotiations ultimately led to the execution of a Memorandum of Understanding on April 25, 1980.[8] Several unbound members, including Park, signed the memorandum at later dates. The agreement expressly recited that it was being entered into to resolve a dispute that had arisen because of the determination by Advice that independent truck operators and multitruck operators were employees. It extended to ITOs and drivers for MTOs (who, in many instances, were also the truck owners themselves) the provisions of the union-security clause in the master agreement. It set forth a further provision that ostensibly gave the Union "equal opportunity" to refer trucks to general contractors but which, in fact, gave the Union preference in referring trucks. It obligated contractors to call the Union first with a request for trucks. Only thereafter might a contractor call other sources when the Union was unable to provide the number and type of trucks that were requested.

The memorandum obligated all contractors to pay fringe benefits for all ITO and MTO drivers they might employ, regardless of source, and to pay no less than the prevailing rental rates for trucks and drivers for the type of trucks employed.[9] It also released contracting employers from liability for union dues and fringe fund payments that the Union had claimed were due and owing by virtue of the previous failure of these employers to apply the union-security provisions of the master agreement and make fringe fund contributions for truckers whom they had hired because of the assumption that such individuals were independent contractors.

After making preliminary inquiries among its members whether they wished the Union to establish a hiring hall, the Union instituted the operation of a referral system for ITOs beginning in the spring of 1980. This referral system operated actively during the 1980 season and, at the height of the season, referred 30 or more drivers in a workday. The net effect of the operation of the union referral system was to reduce the business of brokers such as Jacobs, Buesing, and Rucki. It also had an adverse economic impact on nonunion independent truckers, all of whom were theoretically eligible to be referred through the union hall (and in accordance with the rate established by Bailey's May 9 memorandum) but most of whom sought daily employment with general contractors either through brokers or through direct solicitation. It should be noted that the rates normally paid to truckers referred by brokers differed slightly from the rate established by the Union. In 1980, the owner of a brokered tandem dump truck normally charged $30 per hour, of which 10 percent was retained by the broker. However, no fringe benefits (amounting to $1.30 an hour during 1980) were paid by the broker, whereas the union rate was $29 plus fringes. Moreover, having referred a driver through its hall, the Union was then in a position to police the provision of the union-security clause in the master agreement, which required membership after the eighth day of employment at a jobsite. Brokers referred both union members and nonmembers alike without concern for membership status. When this system came into full operation in the summer of 1980, nonunion truckers formed the ICTO, an organization having approximately 150 members, and filed some of the charges that resulted in the consolidated complaint in this case.[10]

On February 11, 1981, the Union and AGC met in the first of several negotiating sessions that led up to the execution of the 1981–1984 master agreement. At this time, the ICTO charges against the Union were pending in Advice to which they had been referred by the Regional Office, and the parties to the negotiations were operating under an assumption, if not a total agreement, that ITO and MTO drivers were employees within the meaning of the Act. The Memorandum of Understanding was still in effect and would expire of its own terms on April 30, the same day that the 1978–1981 agreement was shceduled to expire.

The opening session of negotiations in this industry were described by one participant as a "ha ha" session, during which the parties exchanged proposals, examined the demands of the other party in cursory fashion, and in general express to opposing negotiators the thought that there is no way that their demands will be accepted. The purpose of the first few sessions is simply to "sniff out" the other party and determine what it really wants and what items among its proposals it may be willing to abandon. Serious negotiating sessions come later as the expiration date of the old contract draws near and a new construction season approaches.

There is little doubt that union representatives adamantly insisted at the first negotiating meeting on the inclusion in the forthcoming agreement of language satisfactory to itself respecting ITOs and the subcontracting of work. At the second session, held on March 3, 1981,

[8] William Gary, the executive director of the AGC and the principal negotiator of its labor agreements, studiously avoided any official connections with the discussions that took place during the winter of 1979–1980 leading up to the signing of the Memorandum of Understanding. He ultimately signed the memorandum at the insistence of two prominent members of the AGC, who were told by the Teamsters that the Union would not sign the document unless Gary signed, thereby lending to it the official approval of the AGC.

[9] Union President Paul Bailey sent a memo to union contractors notifying them that the Union had set up a hiring hall for independents and stating further that the rental rate for the 1980 season would be $29 per hour, plus fringe benefits. His memo indicated also that the ITOs referred by the Union would bill the contractors directly and that a minimum of 4 hours work would be required of any contractor who hired a truck through the union hiring hall.

[10] During the summer of 1980, the Union did an aggressive job of checking construction sites and of insisting to contractors and truckers alike that ITOs employed on those sites carry union cards.

Union Secretary-Treasurer Chris Van Lith offered management a proposal that stated that "for the preservation of work, there shall be no subcontracting of any work covered under the classifications of this agreement." The actual agreement, concluded before the expiration date of the old contract and formally executed in May 1981, contains no provision forbidding the subcontracting of work. The present contract does contain a "union standards" provision governing subcontracted work to be performed at the jobsite.[11] These provisions were included because, during the time that elapsed between the commencement of negotiations and the conclusion of the agreement, the Office of the General Counsel had reversed its earlier determination and had concluded that ITOs are, in fact, independent contractors and not employees within the meaning of Section 2(3) of the Act. Hence the Union chose to abandon Van Lith's proposal.

On March 23, 1981, Advice notified the Regional Office and presumably the parties that, based on a revised assessment of the status of ITOs, it was authorizing the issuance of an unfair labor practice complaint on the 8(b)(4) and 8(e) charges filed in 1980 by ICTO and others.[12] On receipt of this opinion, counsel for the Union immediately informed the Regional Office and the AGC that the Union would be willing to settle the temporary injunction aspect of the proposed 8(b)(4) and 8(e) complaint, but that it would not concede the merits of the new Advice determination or admit the commission of any unfair labor practices. Union counsel also informed the Regional Director that Local 221 would not thereafter attempt to enforce the provisions of the Memorandum of Understanding, an agreement which at that point had slightly more than one month to run. Presumably, its bargaining posture in pending negotiations was similarly revised, as the results of the bargaining reflect an attempt to adhere to the theory that ITOs are independent contractors, not employees.

Union President Bailey testified that, during the winter and early spring of 1981, he received calls from several company drivers on the seniority list at Park inquiring about when they might be called back to work. Bailey could give them no definite reply. Park is one of the principal general contractors in the Twin Cities area and an individual signatory to both the master agreement and the Memorandum of Understanding. In recent years, Park had sold a substantial number of its trucks and, as a result, had permanently laid off a number of its regular company drivers. It also utilized ITOs who were referred to it by Jacobs Trucking Company.

On March 16, Bailey sent Business Agent Robert Bonhoff, who normally services the Park account, to speak with Richard Carlson, president of Park, concerning the manning of a forthcoming Interstate 94 (I-94) highway construction job on which Park had received a substantial dirt-moving contract. Bonhoff asked Carlson if he was going to man the job with company drivers and Carlson was noncommittal. Bonhoff reported back to Bailey that he felt that Park was going to subcontract all or part of that job.[13]

Bailey testified that, in March 1981, during the same period of time that he was receiving complaints from Park employees who had not been recalled, he also noticed that Park was utilizing ITOs for hauling at several jobsites, among them the Metropolitan Airport and two large construction sites in downtown Minneapolis at First Street and Marquette and at Fourth Street and Eleventh Avenue. In light of these complaints and observations made by Bailey, Van Lith, the secretary-treasurer, sent a telegram to Park claiming that Park was in violation of schedule E of the Memorandum of Understanding by utilizing subcontractors to circumvent the intention of the memorandum. Van Lith characterized his complaint to Park as a grievance, requested that Park contact him to resolve the grievance, and stated that he would submit the grievance to the State Joint Committee if it was not resolved immediately. Van Lith also asked Park in his telegram for a prejob conference concerning work that Park was scheduled to start on I-94 near downtown Minneapolis. When Park made no response to Van Lith's telegram, Bailey sent Park a second telegram, dated March 28, stating that he had learned that Park was subcontracting work on I-94 and other projects and that, pursuant to article 11 of the master agreement,[14] he was referring the matter to the prime contractor to resolve the dispute.

On March 30, Van Lith requested that a meeting be held to resolve the outstanding dispute with Park. A meeting was held the following day between Union and Park officials at the office of Park's counsel. At this meeting, union counsel asked Park to agree not to sub-

[11] In addition, the present contract does contain a provision relative to the involvement of primary contractors in the mediation of disputes arising between its subcontractors and the Union (art. 16) and a section concerning ITOs, referred to as individual truck owners (schedule 4). The latter section severely modified the provision in the former Memorandum of Understanding concerning referrals, stating only that the Union agreed to continue to refer ITOs when requested and leaving it to employers to utilize this service or not as they chose. Schedule 4 also provides that the Union reserved the right to request bargaining concerning ITOs if and when a court of final resort should determine that the Union might lawfully represent them.

[12] Despite the ponderous size of the record in this overtried case, the Advice memorandum of March 1981 was not included, so it is not possible to compare with precision the conflicting determinations from Washington that have given rise to so much mischief in this situation. Presumably the brief of the General Counsel follows the revised findings and rationale of the Division of Advice. The second decision by Advice is apparently not based on anything approaching newly discovered evidence or on a different factual setting than the one that gave rise to the original determination. The basis for its change of heart seems to be a revised assessment of the law and an abandonment of any reliance on the holding of the Board in *Teamsters Local 982 (Barker Trucking)*, 181 NLRB 515 (1970), affg.. *Teamsters Joint Council 42 v. NLRB*, 450 F.2d 1322 (D.C. Cir. 1971), regarding the independent contractor issue.

[13] Carlson testified that they discussed subcontracting to Sy Jacobs and that Bonhoff told him that, if Jacobs went on the job, there would be trouble. Bonhoff denies any discussion relating to Jacobs and specifically denied this statement concerning Jacobs. I found Bonhoff to be a truthful witness and Carlson to be an unreliable one, so I credit Bonhoff's denial.

[14] Art. 11 of the 1978–1981 agreement, entitled "subcontractor," provided: "In the event a subcontractor is involved in a controversy, the Union shall be obligated to bring it to the attention of the prime contractor. The prime contractor shall have at least 48 hours to attempt a settlement of the controversy before a work stoppage is brought about. It shall not be a violation of this Agreement, including art. 17 (the no-strike, no-lockout provision), if a stoppage of work occurs due to the failure to arrive at an agreement." A similar provision may be found in the current contract as part of art. 16.

contract out any work during the remainder of its existing contract with the Union, which had 30 days left to run. Park declined and on the following day the Union posted pickets, or "banners," in front of Park's main facility and at several of its jobsites. As a result of this action, Park employees employed in several different trades stopped work. The picket lines were maintained until April 15.

On Friday, April 10, Carlson and Bailey had a dinner meeting at a restaurant known as Little Jack's to discuss the picketing that was still in progress. Bailey complained to Park that he was subcontracting work while 18 company drivers on the Park seniority list were not working. He also complained to Carlson that the latter had broken his word, assertedly given the previous year in settlement of a grievance, that ITOs would not be used for Saturday work.[15] Bailey mentioned to Carlson the place where Park was currently using subcontractors. He also suggested that, if Carlson had insufficient trucks for regular company drivers because of the sale of company trucks that had taken place, Park might lease trucks for company drivers to operate. He also told Carlson that he wanted an agreement only for the balance of the current contract. Carlson objected to Bailey's suggestions and said that he might have to discontinue subcontracting. Bailey then gave Carlson the names of some union ITOs who would be interested in working for Park as ITOs.

Carlson told Bailey that he was not going to begin to perform any work on the I-94 contract for a while until he resolved a dispute with some black truckers who were also picketing Park at the I-94 project. Bailey then asked Carlson to drop certain suits and unfair labor practice charges that Park had pending against the Union. Carlson refused the latter request, saying that the issue of whether ITOs were independent contractors had to be finally determined.

Nothing was resolved at this meeting. However, on the following day, Carlson, Van Lith, Bailey, and Duane Prairie, a Park official, met at the Sheraton Northeast Hotel. They briefly discussed the status of negotiations between AGC and the Union, which were then in progress, before engaging in renewed negotiations concerning the picketing of Park projects. The Union demanded that Park put Teamsters members to work and refrain from subcontracting work for the remainder of the 1978–1981 agreement. It also asked that all civil actions and NLRB charges filed by Park against the Union be dropped. Carlson agreed to use Teamsters members for construction jobs other than the I-94 job but refused to drop any unfair labor practice charges or civil suits. He mentioned that he actually had two dirt-moving contracts on I-94, one of which was a small job that was nearly completed, and he would like to finish the small job soon. This meeting concluded without an agreement. However, Carlson said that he would be in touch with the Union early the following week.

On April 14, Carlson phoned Van Lith and told him that he would agree to use company drivers on the three construction projects that were currently in progress and would also use company drivers on the small I-94 job, which was nearing completion, if the Union would withdraw its pickets. Van Lith agreed and pickets were withdrawn the following day.

[15] Company drivers employed under the terms and conditions of the master agreement must be paid time-and-a-half for Saturday work. However, ITOs are hired at a flat hourly rate, irrespective of the number of hours a day or days per week they may work. In 1980, during certain rush jobs, Park had used ITOs for Saturday work and the Union had grieved this practice.

II. ANALYSIS AND CONCLUSIONS

A. *The Status of ITOs and MTOs as Employees or Independent Contractors*

All parties have correctly focused on the central issue in this case, and some have gone so far as to say that the charges here were filed in order to obtain a final and binding determination of that issue. In my opinion, the ITOs and MTOs involved in this proceeding are not employees within the meaning of Section 2(3) of the National Labor Relations Act. They are independent contractors and they are clearly so. No other conclusion is possible either under the case law as it has developed to this time or under the ponderous amount of evidence on this point, which both sides have placed in the record in this proceeding.

A brief review of the law indicates that, at one time, the Board, on facts not very dissimilar from those found in this case, concluded that dumptruck operators who haul material to and from construction sites are employees of the contractors for whom they worked and that disputes arising between unions and general contractors involving such dump truck operators are primary in character. *Teamsters Local 982 (Barker Trucking)*, supra. This determination was upheld in 1971 by the District of Columbia Circuit[16] and serves as the principal basis, if not the only basis, for the Union's contention that ITOs and MTOs are employees and that its disputes with AGC and Park are primary in character.

Following the *Barker Trucking* case, the Board rendered a similar decision regarding the status of dumptruck operators in *Associated General Contractors of California*, 201 NLRB 311 (1973). However, that decision was reversed by the Ninth Circuit, which concluded that dumptruck operators are in fact independent contractors.[17] The Board accepted the remand of that decision and acceded to the Ninth Circuit's determination, but only as the law of that particular case. *Associated General Contractors of California*, 239 NLRB 686 (1978).

However, in a subsequent decision, the Board went far beyond accepting the Ninth Circuit's ruling in the first California dumptruck case as the law of that particular case and adopted the Ninth Circuit's rationale as its own, thereby effectively abandoning the *Barker Trucking* holding mentioned above. In *Teamsters Local 36 (California Dump Truck)*, 249 NLRB 386 (1980), another case arising in southern California, the Board concluded that dumptruck operators are in truth and fact independent

[16] *Teamsters Joint Council 42 v. NLRB*, supra.

[17] *Associated General Contractors of California v. NLRB*, 564 F.2d 271 (9th Cir. 1977).

contractors, not employees, and that pressures brought to bear by unions to bring them under the terms and conditions of collective-bargaining agreements are secondary in character. Apparently, the District of Columbia Circuit also abandoned its own *Barker Trucking* decision, inasmuch as that court upheld the Board's determination in *Teamsters Local 36* and also concluded that dumptruck operators are independent contractors.[18]

The evidence in this case in no way differentiates ITOs and MTOs in the Twin Cities area from dumptruck operators in southern California. A great deal of effort was expended to distinguish ITOs and MTOs employed by AGC members from those employed by nonunion contractors but no significant distinctions emerged. The evidence submitted by all parties on the independent contractor issue was similar, if not identical, and differed, if at all, in matters of emphasis and detail rather than in dispositive substance. Respondent Union would have the Board concentrate almost exclusively on the jobsite activity of truckdrivers, where there is a marked similarity in the routine followed by drivers who are conventional employees, and ITOs and MTOs, who are not. However, the courts have repeatedly stated that "the total factual context" and "all the incidents of the relationship must be assessed and weighed, with no one factor being decisive." *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968); *Associated General Contractors of California v. NLRB*, supra; *Democratic Union Organizing Committee Local 777 v. NLRB*, 603 F.2d 862 (D.C. Cir. 1979); *Teamsters Local 36*, supra. If we avoid the temptation to engage in tunnel vision and look at the manner in which ITOs (and MTOs) engage in business throughout the entire course of their operations, their status as independent contractors becomes well defined.

Conventional company drivers are employed at a fixed hourly wage which, in the case of the employees of AGC contractors, is set forth by 3-year written contracts which establish not only basic wages (and stated yearly increases) but fringe benefit payments as well. Such drivers are entitled to time-and-a-half for Saturday work and for all work in excess of 8 hours in any one day. The trucks they drive are entitled to the companies they work for and the cost of operating and maintaining those trucks is borne entirely by their employers. In a normal day's work, company drivers report to their employer's principal place of business, are dispatched to a jobsite or jobsites, and return to the employer's shop or garage, regardless of how long it takes them to drive to the construction site, the quarry, or the batch plant from which, or to which, they are expected to haul materials. The only responsibility exercised by a company driver is to operate his employer's equipment in a safe and sensible manner, to engage in first-line maintenance such as checking the gas, the oil, and the tires, and possibly to hose down the vehicle when it becomes very dirty or caked with materials that have been hauled. A company driver bears no out-of-pocket cost for any aspect of the operation of the vehicle, except perhaps for a speeding ticket if he violates state law when driving on a public highway. As one ITO witness put it, a company driver has nothing invested in a job but his lunchbox.

ITOs own their own trucks and bear the entire entrepreneurial risk which is incident to such ownership. They select the year, model, and condition of the trucks they buy, finance the purchase of the trucks and any equipment used in connection with the operation of the trucks, and dispose of their trucks at their sole discretion, retaining any proceeds they might be able to derive from the sale. The entire cost of operation is borne by the ITOs, who purchase all gas, oil, lubricants, antifreeze, and similar items involved in routine operation. They pay the cost of all maintenance and repairs,[19] other than for damage to their vehicles that can be directly attributable to a general contractor in such a manner that the contractor would be civilly liable if he did not furnish repairs in kind. ITOs are paid only from the time they arrive at the jobsite and only until they leave the jobsite (or dumpsite), regardless of how far they may have to come in order to start work. The hourly fees earned by ITOs cover both their services in driving their trucks and the total cost of maintenance and operation of the trucks. It is a constant fee, regardless of the number of hours employed in any one day or in any week. Because this rate is the same regardless of the difficulty of a particular job, the net earnings of ITOs vary considerably from job to job even though the hourly rate does not change, because the hauling distance, the road grades encountered, the type of material being hauled, and other external conditions can greatly affect the cost per mile of operating a vehicle. No such entrepreneurial risk is borne by company drivers, whose compensation is the same regardless of how easy or how difficult a given haul may be.

The hourly rate paid to ITOs normally remains the same throughout a construction season and is generally set by the brokers who refer the ITOs on the basis of what they estimate the traffic will bear. It is never established by written contract. Indeed, the daily hauling arrangement between contractors and ITOs is generally an oral one which is concluded by the broker making the referral. As a result, the first inquiry which a prudent ITO makes when offered a referral is the rate to be paid and the nature of the items to be hauled. However, ITOs can and have gone directly to contractors to bid for work at less than the going rate and some have even tried to obtain work for more than the going rate. In a depressed market, the latter is difficult to do, although the former is not at all unusual. Hauling jobs undertaken by ITOs are not always quoted on an hourly basis, and it is not unusual for a contractor to hire ITOs on a ton-mile or load basis.

The relationship between a contractor and a conventional company driver is an ongoing one. Construction

[18] *Teamsters Local 36 v. NLRB*, 669 F.2d 759 (D.C. Cir. 1981).

[19] There is evidence in the record that, from time to time, a contractor or his employees may give an ITO on a job some gas or oil, or may lend him a tool for a quick repair job. This is simply a matter of a small accommodation based on friendship or "first aid" for a truck. Any significant repairs are handled by ITOs at their expense, and breakdowns of ITO trucks for any significant periods of time result in a deduction in the compensation ultimately paid.

work is seasonal and many employees are laid off at the end of the year. However, the master agreements have clear and detailed provisions for individual company seniority rosters and for the recall of laid-off drivers at the beginning of a new season. One witness for the Respondent Union testified that he worked 35 years for the same contractor and is now retired from that firm. ITOs work strictly on a day-to-day basis, even on long-term jobs where prospects are good for employment lasting several weeks. They never accrue seniority and the master agreement is explicit on this point. Most contractors employ ITOs only as a supplement to their regular cadre of company drivers so, even if a particular job is long term in character, the nature of the contractors' other business may dictate that company drivers be assigned to that site each day in fluctuating numbers. ITOs get what work is left over. Accordingly, at or near the end of each day an ITO calls the broker who dispached him and asks for work the following day. The broker may refer him back to the same job, to another job for another contractor, or not at all. If an ITO should ask the contractor's job superintendent for work the following day, the superintendent will normally refer him to his broker, who dispatches ITOs to jobsites depending on the calls he has received from all of his customers. Conversely, if a contractor who normally does business with a broker desires ITOs the following day, he must make a daily request, stating the number and kind of trucks desired and the location to which they should be dispatched. Normally, an order of this kind is placed only as to quantity and quality of vehicles desired, without reference to the names of the owners or drivers of the vehicles. From these orders, dispatches are then made.[20]

For his part, if an ITO does not desire to work on a given day, he does not need to ask for time off. He simply refrains from calling a broker on the preceeding afternoon and is not dispatched. ITOs are free to work for one or more brokers during the same season and frequently do so. They are also free to solicit jobs directly from contractors. Some ITOs advertise, either in local papers, the yellow pages of the phone book, or over the radio, and obtain work in that manner from the general public. The terms of any such employment are necessarily set by the ITO and his customer at the time the engagement is agreed on.

Company drivers are paid periodically by checks which remit to each employee the amounts which remain after taxes and social security payments are deducted. Union dues are frequenty checked off in addition to deductions required by law. ITOs who are referred by brokers are not paid by the contractors at all but by the broker, who in turn bills the contractor. ITOs prepare periodic statements and bill their broker, attaching to their statements daily timecards signed by job superintendents as evidence of the fact that they have worked the time which is set forth in the billing. These cards are ultimately transmitted by the broker to the contractor with the broker's weekly or monthly invoice, which will normally contain billings for the services of several ITOs. The contractor then pays the broker who pays the ITO after deducting the brokerage commission, although such payments do not necessarily take place in this order. The broker is responsible for paying the ITO regardless of whether he is paid or when he is paid by the general contractor. In a depressed economy, contractors are frequently slow to pay, while others follow this policy regardless of general business conditions. One of the substantial benefits of referral by a broker, rather than employment through direct solicitation, is that the ITO is assured of payment with reasonable promptness. When referred by a broker, if the contractor never pays, it is the broker, not the ITO, who absorbs the loss. This feature of commercial life in the highway and heavy construction industry has been experienced from time to time by several of the brokers involved in this litigation, who have paid drivers while not being paid by the contractor to whom the driver was referred. In the first California dumptruck case discussed above, the respondent union therein claimed that owner operators were employees of the brokers who dispatched them, not employees of the contractors who were ultimately responsible for payment. In this case, the Respondent Union maintains that ITOs are employees of the contractors, not employees of the brokers. In light of the standard payment arrangements between and among these parties, there is even less basis for finding an employment relationship here than there was in the California case, since that most fundamental of all employment factors, namely, payment by employer to employee, is totally missing here, except when the job is directly solicited and the contractor is directly billed by the ITO. The latter arrangement occurs only in a minority of cases.

In any one summer, an ITO who is regularly employed will work for several contractors. Indeed, he may work for several contractors even in the course of a single week or during the course of a single day, if the first job to which he is referred finishes and the broker who refers him is able to find work with another contractor to complete the day. An ITO is free to reject a job when offered or to drive off the job after he arrives. Depending on the availability of other work and the size of his bank account, an ITO may leave a job abruptly in the middle of the day if the job involves hauling of material other than the kind which was represented to him when he agreed to the referral, or if a contractor's employee is abusing the ITOs equipment in the course of loading.[21] No such option is open to a company employee, who risks serious discipline for leaving a job without permission. On the other hand, a company employee would simply not be inclined to leave for the reasons which normally prompt an ITO to remove his equipment.

On rare occasions, a contractor may have reason to ask an ITO to leave a jobsite. Except in emergency situa-

[20] In the case of an MTO, the owner of the vehicle may be the person who is referred to the contractor but the vehicle may arrive at the jobsite driven by someone other than the owner who has been hired by the contractor to drive for that day. Such substitution of drivers is normally not a basis for rejecting the job referral by the general contractor.

[21] All witnesses seem to agree that heavy concrete chunks make the least desirable loads because they can easily damage the equipment, either during loading or hauling, and because the weight of concrete adds to gasoline consumption and general wear and tear on the vehicle.

tions, a contractor will normally vent his displeasure with an ITO directly to the broker who referred him rather than to the ITO and will ask the broker that the ITO not be referred again. The principal source of contractor displeasure with ITOs runs to the nature of the equipment furnished, not to the driving performance of the ITO. Likewise, an ITO referred by a broker will normally take up any disagreement with a contractor first with the broker and ask the broker to straighten out the problem with the contractor. When the construction season is in full swing, a busy broker or his associate will visit jobsites frequently, both to cement relations with general contractors and to iron out any disputes that may have arisen with ITOs. Few such disputes do arise since ITOs are rarely on the same jobsite for lengthy periods of time and experienced brokers know, prior to referral, which ITOs do not work well with which contractors.

At the jobsite and during the actual hauling operation, ITOs must follow the same regimen as a company driver, and it is because of this similarity of activity that the Respondent Union argues that both are employees of the same employer. However, these similarities are necessitated by the facts and circumstances of the job, not because of the relationship that has been established between the ITOs and the contractors. Both ITOs and company drivers normally arrive at the job at or about the same time, line up in the same line to be loaded or to dump materials obtained from another site, and drive over the same routes to the same dumpsite. In the course of performing these duties, both company drivers and ITOs are subject to the directions of the contractor's job superintendent, the company loader, the dumpsite foreman, or the grader, and both are subject to company safety regulations. At a jobsite involving a mixed assortment of company drivers and ITOs, it is difficult to see how the operation could proceed efficiently in any other manner. However, the fact that ITOs must take instructions from their customers should not serve to convert a relationship which began—and will end—at arm's length into something different than what it started out to be. Accordingly, in light of all the factors discussed above, I conclude that ITOs and MIOs are independent contractors.

B. *The Memorandum of Understanding*

The General Counsel asserts that the Memorandum of Understanding concluded by the Respondent AGC and the Respondent Union in 1980 violates Section 8(e) of the Act for several reasons enumerated in the consolidated complaint. For its part, the Respondent Union contends that at all times the actions it took, including the negotiation and execution of the Memorandum of Understanding, were geared to preserving job opportunities for its members who are employees of AGC contractors. Accordingly, the Union argues its efforts were protected by the work preservation exception to Section 8(b)(4) and 8(e) of the Act which was judicially created by the Supreme Court decision in *Woodwork Mfrs. v. NLRB*, 386 U.S. 612 (1967). In *Woodwork Mfrs.*, the Supreme Court, relying heavily on the legislative history rather than the language of Section 8(e) and 8(b)(4), held that a refusal by employees to handle the products of other employees—an act ostensibly outlawed by the literal language in the above-cited sections of the Act—is permissible when the refusal is prompted by a desire to preserve the traditional job opportunities of striking (or boycotting) employees, because such a refusal is primary in character and is directed principally at the relationship between these employees and their own employer. The frequently quoted language of the decision which seeks to differentiate a primary from a secondary boycott in a work-preservation situation is stated as follows in *Woodwork Mfrs.*, supra at 644–645.

> The determination whether the "will not handle" sentence of Rule 17 (of the challenged work rules) and its enforcement violated § 8(e) and § 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the primary employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case . . . the boycotting employer would be a neutral bystander and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer . . . for the activity to fall within this category so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer, thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees. This will not always be a simple test to apply. But "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task."

Despite restrictions on a literal reading of the statute enjoined by the Supreme Court, the statutory language in question has been used to define violations of the Act in certain stylized situations without any additional findings of motive, object, or surrounding circumstances, even in the face of a work preservation claim. A contract between a labor organization and an employer, which requires the latter to treat independent contractors as employees and apply to them the terms and conditions of a collective-bargaining agreement designed to be applicable only to statutory employees, is a violation of Section 8(e) of the Act, and work preservation is no defense to such tactics. *Teamsters Local 36*, supra; *Teamsters Local 814 (Santini Bros.)*, 223 NLRB 752, enfd. 546 F.2d 989 (D.C. Cir. 1976); *Retail Clerks Local 1288 v. NLRB*, 390 F.2d 858 (D.C. Cir. 1968); *Musicians Local 802 (Huntington Town House)*, 225 NLRB 559 (1976). The net effect of such agreements normally is to require independent contractors to abide by the union-security provisions of the primary agreement and to become union members within 30 days after employment (or within 8 days in the building and construction industry). The Memorandum of Understanding at issue in this case contained a conventional union-security clause tailored

to the building and construction industry and required, by its terms, all independent contractors hired by AGC members to become union members after working on a job for 8 days. The clause in question violated Section 8(e) and the Union's effort to obtain that clause violated Section 8(b)(4)(ii)(A) and (B) of the Act.[22]

The Memorandum of Understanding required signatory employees to pay to the joint trustees who administer the pension and the health and welfare benefit funds the same hourly contribution that they are obligated to make for bargaining unit employees. There is no evidence that union membership is a requirement for eligibility to participate in these funds, and there is uncontradicted testimony that any trucker can draw benefits from the fund so long as he meets the uniform requirement of working a stated number of hours during a calendar quarter for contributing employers. It appears, therefore, that this provision in the Memorandum of Understanding defines a primary obligation between the Union and AGC members, to which independent contractors are third-party beneficiaries. Whether a union may lawfully insist to impasse that contributions be made to fringe benefit funds on behalf of individuals who are not members of the bargaining unit is not an issue before the Board in this case. What is at issue is whether the obligation that was undertaken between the parties to the memorandum in this respect was primary or secondary in character. I conclude that the obligation in question is primary in character and, therefore, the contract provision covering such payments does not offend Section 8(e) or 8(b)(4) of the Act. Accordingly, I would dismiss as much of the consolidated complaint that alleges a violation respcting this portion of the memorandum.

The General Counsel attacks the ITO referral provision in the memorandum as violative of the Act and cites as authority the Board decision in *Teamsters Local 36 (California Dump Truck)*, supra.[23] In the contract, the parties agreed to an "equal opportunity" clause which did not live up to its billing because it required AGC members to give preferential status to the union hiring hall. When in need of ITOs, an AGC member was required first to call the union hall and then to seek ITOs from some other source if the Union was unable to fill its requirements. If the referral clause in question truly spelled out an "equal opportunity" procedure, placing the Union on the same footing as Jacobs, Rucki, Buesting, and other truck brokers, a convincing argument might be made that the provision complied with the law. However, this provision granted preferential status to the Union and had direct secondary consequences. It was not addressed to the labor relations of contracting employers and their own employees but was, to borrow a phrase, "tactically calculated to satisfy union objectives elsewhere." *Woodwork Mfrs.*, supra at 644 fn. 23.

The Union was interested in securing work not only for its employee members but for a large number of unionized ITOs who sought and utilized the services of the union referral service. Despite the fact that this group of ITOs carried union cards, they were still independent contractors. Bailey championed the interest of this group of ITOs, whose number was estimated at between 200 and 250. He gave the names and addresses of several of these ITOs to contractors and specifically asked contractors to call them in preference to other ITOs. Many contractors, such as Ames Construction Company, Park, and Bolander and Sons Construction Company, had established relationships with brokers such as Rucki and Jacobs and normally called these brokers rather than the Union for ITOs when the need arose. The ITOs who were referred by these brokers might be union members, they might be part of a large category of nonunion truckers who now make up the ICTO, or they might be unaffiliated with any organization. The requirement to call the Union first necessarily disrupted the relationship with these brokers. During the summer of 1980, Bailey, Van Lith, and other union agents regularly visited jobsites of AGC members to police the terms of the memorandum. They insisted the ITOs found on these jobs join the Union and they insisted that the referral provision of the memorandum be observed by AGC members. In short, the referral provision drawn into question by the General Counsel was an instrumentality that was being utilized by the Union to see to it that its members received preferential hiring over ITOs referred by commercial brokers. As a necessary and foreseeable consequence, the job opportunities of other independent contractors, who might be employed by an AGC contractor only after the Union's referral list was exhausted, were clearly diminished. Moreover, contractors ceased doing business with commercial brokers to the degree and extent that they were formerly accustomed to doing business. It is clear that one of the objectives of this preference was to assist the Union in its effort to organize all independent contractors and bring them into the Union fold. Accordingly, the referral clause in question violates Section 8(e) and the Union effort to secure the clause violated Section 8(b)(4)(ii)(A) and (B).

The General Counsel attacks another provision of the memorandum, claiming that, by reference or tie-in linking the memorandum with certain provisions of the 1978–1981 master agreement between the Union and AGC, an otherwise neutral or valid undertaking became

[22] The parties to this proceeding can take no benefit from the construction industry proviso to Sec. 8(e) of the Act, which sanctions union signatory provisions in a primary contract covering work done at a construction site. It has been consistently held that on-site work, qualifying for protection under the proviso, does not extend to bringing materials to or from a jobsite. *Teamsters Joint Council 42 (California Dump Truck)*, 248 NLRB 808 (1980); *Teamsters Local 89*, 254 NLRB 783 (1981). I do not read the recent Supreme Court decision relating to the ambit of the construction industry proviso as affecting previous Board decisions excluding hauling to and from jobsites from the shelter of the proviso. *Carpenters Local 944 (Woelke & Romero Framing)*, 239 NLRB 241 (1978); affd. in part sub nom. *Woelke & Romero Framing v. NLRB*, 456 U.S. 645 (1982).

[23] I do not regard the contract clause litigated in *Teamsters Local 36* to be apposite to the provision at issue in this case. In the second California dumptruck case, the contract required owner-operators to undergo a clearance procedure at the union office after reporting to the jobsite. The Board found the clause to be bad but, unlike the administrative law judge, did not regard it as illegal per se but illegal only because surrounding circumstances in the case demonstrated that it was aimed at furthering general union objectives and regulating labor policies of employers other than those who were parties to the agreement. *Teamsters Local 36*, supra at fn. 1.

violative of Section 8(e) because it permitted self-help or economic action as a means of enforcement. His argument in this regard is somewhat murky. It is well settled that, although the union may employ coercive means to obtain a no-subcontracting agreement in the construction industry, it may not employ coercive means to enforce such an agreement. Any contractual provisions that authorize or approve self-help as a means of enforcing valid no-subcontracting agreements are illegal *Painters Local 48 v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964); *Teamsters Local 89 (McKee, Inc.)*, 254 NLRB 783 (1981), and cases cited in fns. 15 and 16.

It is equally well settled that if a clause in a contract is ambiguous, the Board will not presume unlawfulness. *Teamsters Local 982 (Barker Trucking)*, supra. The mere fact that a union signatory has taken a position asserting an unlawful interpretation of a clause does not make the clause unlawful unless the employer who is a signatory to the agreement accedes to the Union's unlawful construction. *Teamsters Local 89*, supra. The General Counsel makes no contention that any unlawful interpretation placed on the memorandum by the Union is likewise the construction given to it by AGC. The record establishes no agreement by the Respondent AGC to any unlawful or arguably unlawful interpretations placed on the memorandum by the Respondent Union. The memorandum provides that:

> No other terms or provisions of the collective bargaining agreement shall apply to any ITO's or drivers for multi-truck owners, except that the grievance arbitration procedure as set forth in Article XII of the current Highway and Heavy collective bargaining agreement shall apply to any differences or disputes concerning the interpretation or application of the provisions of this memorandum of Understanding.

The memorandum does not key into its provisions in article XI (no-subcontracting) of the 1978–1981 agreement nor is there any reference in the memorandum to schedule H, subparagraph 6(g) of the agreement, which permits the Union, under certain circumstances, to strike an employer to collect unpaid fringe benefits or to require the production of records relating to liability for payment of fringe benefits.[24] The above-quoted provision of the memorandum makes reference only to a grievance-arbitration procedure which calls for ultimate arbitration before a three-member panel, which includes a neutral arbitrator and provides that the decision of this panel shall be final. The grievance-arbitration provision in question is backed up by the no-strike, no-lockout provision that is found in article XVII of the expired master agreement, thus eliminating self-help as a means of enforcing secondary obligations that are tied into the memorandum.

[24] Even if such self-help, as authorized by the master agreement, could somehow be dovetailed with the provisions of the Memorandum, a strike, authorized by schedule H, subpar. 6(g), would be a primary strike if undertaken to collect from an AGC member fringe benefit payments due and owing because of hours worked by an ITO.

If we interpret the memorandum in accordance with the plain language of its provisions and do not attempt to read into its language other provisions in other agreements that are nowhere mentioned, there is no basis for finding that the memorandum calls for self-help, as alleged. Therefore, the portion of the consolidated complaint attacking the reference in the memorandum of article XII of the expired agreement should be dismissed.

C. *The Negotiations for the 1981–1984 Agreement*

At the outset of the negotiations leading up to the execution of the master agreement that is currently in effect, ITOs and MTOs were presumed to be employees, not independent contractors, because of the rulings on this point that the parties had previously received from Advice and Appeals. As the Respondent Union points out in its brief, there were still in existence a large number of individuals in the bargaining unit covered by the negotiations who were employees of AGC contractors by any definition and, despite the pendency of the independent contractor issue in the Office of the General Counsel, it was for and about these employees that the negotiations in question were principally being conducted.

At the second bargaining session, Van Lith handed to AGC negotiators a written proposal which read: "For the preservation of work, there shall be no subcontracting of any work covered under the classifications of this agreement." As noted, there were no exceptions carved into this proposal, either for union signatories or for subcontractors observing union conditions. If adopted, AGC members would have been required to perform all hauling work during the ensuing 3 years with company trucks operated by company drivers, all of whom were and are employees within the meaning of Section 2(3) of the Act.

Throughout the history of the industry in central Minnesota, contractors utilized their own trucks and their own drivers for hauling work and looked to this source of labor first, hiring ITOs only to supplement their own work force. However, during busy months ITOs were traditionally retained in large numbers because the demand for immediate performance of contracts was so great and so concentrated that the contractor's regular work force could not handle the work. Plainly, if Van Lith's proposal had been adopted, it would have brought about monumental changes in the established practices in the highway and heavy construction industry. General contractors would have been forced to discontinue using all ITOs, either union or nonunion, and would have had to make do at the height of the season with company drivers operating company equipment. Presumably this is why the proposal in question was given such short shrift. However, the fact that a bargaining proposal is extraordinary or even radical in its scope and effect does not mean that it violates Section 8(b)(4) or 8(e) of the Act.

In industrial settings, flat and unqualified no-subcontracting clauses are commonplace features of collective-bargaining negotiations. Far from being illegal, no-subcontracting clauses are mandatory subjects of bargaining, and the Supreme Court has so ruled. *Fibreboard Paper*

Products Corp. v. NLRB, 379 U.S. 203 (1964). There does not even seem to be a requirement that such a clause contain, as did Van Lith's proposal, a preface that it is designed "for the preservation of work." The rationale outlined in support of the *Fibreboard* decision presumed this motivation and set it forth as the major premise for the decision.[25]

Because the collective-bargaining representative for a large number of employees employed by the AGC members who were parties to the negotiations in question, the Union was within its rights, if not within the reasonable prospects, in offering a complete and unqualified no-subcontracting clause to management representatives, and therefore much of the consolidated complaint which is directed at this effort must be dismissed.

D. *The Dispute with Park*

Park is one of the largest AGC contractors and an individual signatory to the areawide highway and heavy construction agreements. At one time, Carlson from Park was a member of the AGC labor negotiating committee. Park formerly owned more than 30 trucks and employed conventional unionized employees to drive these vehicles. In the years immediately preceding this dispute, Park had sold many of its vehicles and its company seniority roster had shrunk proportionately as its use of ITOs had increased.

In the spring of 1981, Park received a large dirt-moving contract on the I-94 interstate highway project. Even before the main part of the construction season started, Park was busy on about three other projects. Meanwhile, laid-off employees were complaining that they had not been called back to work and union officials had observed trucks operating on Park projects which did not belong to Park. They determined to bring pressure on Park to change this situation. The pressure ultimately resulted in a strike and picketing, which it sought to justify on the basis of two different and mutually inconsistent premises.

Van Lith sent Park what might be termed a telegraphic grievance, which was followed up by a second telegraphic grievance sent by Bailey on March 28. Bailey's telegram invoked article XI of the master agreement, which read:

> In the event a subcontract is involved in a controversy, the Union shall be obligated to bring it to the attention of the prime contractor. The prime contractor shall have at least forty-eight (48) hours to attempt a settlement of the controversy before a work stoppage is brought about. It shall not be a violation to this Agreement, including Article XVII, if a stoppage of work occurs due to the failure to arrive at an agreement.

At a meeting on April 1 held to resolve this dispute, union counsel asked Park to agree to a no-subcontracting clause for the balance of the agreement. Park refused. In a later settlement discussion with Park officials, Van Lith and Bailey said they would pull their pickets if Park would agree not to subcontract any more trucking work and put their own employees on the jobs which were in progress. The testimony of Van Lith and Bailey is inconsistent as was their position vis-a-vis Park. Van Lith testified that the picketing, which began on April 2, took place as a direct result of the failure of the parties to reach an agreement during the meeting of April 1. He further testified that the meeting in question was held to resolve a dispute that had arisen under the existing contract between Park and the Union and had nothing to do with a new contract. He insisted that they were not trying to add any provisions to the existing contract with Park but were merely enforcing the terms of a contract already in effect.

On the other hand, Bailey stated that the nub of the Union's dispute with Park was that it did not want Park to subcontract its work. It wanted Park to agree to hire the employees on Park's seniority list. He noted that there were about 3-1/2 weeks left on the existing contract and testified that the Union was attempting to obtain a no-subcontracting clause with Park for the balance of this contract term.

Enforcing the provisions of an existing agreement, either by arbitration or by self-help, proceeds from the premise that the moving party is entitled to the relief it is seeking under rights conferred by existing contract provisions and that the defaulting party is remiss in failing to live up to obligations it has already agreed to. Seeking to obtain a no-subcontracting clause proceeds from the opposite premise, namely, that under existing contract obligations, the employer is free to subcontract work if he chooses but the Union, being unhappy with the freedom of action the employer currently enjoys, wishes to restrict that right by imposing on the employer additional contract obligations which do not currently exist. The inconsistent allegations in the consolidated complaint simply mirror the ambivalent stance that the Respondent Union took in its dealings with Park in March and April 1981.

As of April 1, 1981, Park was contractually free to subcontract without limitation, inasmuch as the Memorandum of Understanding had been formally discontinued and there was no provision in the master agreement, to which Park adhered, which limited subcontracting beyond certain minimal requirements applicable to ITOs. The Union's resort to article XI (subcontracting) in the master agreement to support its contention with Park was a sham and a pretext designed to provide the Union with a colorable excuse for striking Park in the face of a no-strike clause in its contract. When it threatened Park with strike action and then took the action it threatened, the Union was not enforcing any contractual grievance which it had against Park. It was attempting to force Park to agree to forgo what Park was contractually free to do on April 1, namely, subcontract work to ITOs on I-94 and the three other jobs which were in progress at that time.

The Respondent Union claims that its threats and its strike action were justified by virtue of the *Woodwork Mfrs.* rule because it was seeking only to preserve the

[25] In *Fibreboard*, the work at issue in the union's contract proposal was the farming out of maintenance work in a paper mill.

jobs of its employee members who were on Park's seniority roll but who had not been recalled to work. This contention must fail because work preservation is not so broad an umbrella as the Union might wish it to be. Park's dispatching log, which was introduced into evidence, indicates that several ITOs had been dispatched during March and that 12 trucks belonging to Sy Jacobs had been dispatched on April 1. Taking Bailey at his word, several trucks not belonging to Park and necessarily belonging to independent truck owners were repeatedly observed by Bailey and other union members or agents during the month of March immediately preceding the threat that was made on March 28. In light of this evidence it is clear that one of the Union's principal objects in moving against Park was to force Park to get rid of these contractors, i.e., to cease doing business with them and to replace them with his own men. Indeed, an oral agreement to this effect, entered into between Carlson and Van Lith on or about April 14, ultimately brought about and end to the dispute and the picketing.

In *Northeastern Indiana Building Trades Council (Centlivre Village Apartments)*, 148 NLRB 854, 857 (1964), the Board long ago said:

> . . . where, as here, the evidence indicates that an object of picketing, although assertedly directed at obtaining a subcontracting clause valid under the construction industry proviso to 8(e), is to cause a cessation of business between a neutral general contractor and an existing and identified non-union subcontractor, we shall continue to find a violation of Section 8(b)(4)(B).

In this case, the Union cannot even take solace from the contention that it was seeking an agreement authorized by the construction industry proviso because, as noted above, this proviso is inapplicable to hauling to and from construction sites and is limited in its scope to on-site activity. The efforts directed at Park were in furtherance of the Union's dispute with Jacobs and the other nonunion independent contractors who were doing Park's work during March and who might be hired thereafter. While these latter contractors were not identified in Bailey's testimony by name, they were sufficiently identified by class or description to fall within the rule announced in *Centlivre*. Accoringly, I conclude that the threats and the picketing engaged in by the Respondent Union here violated Section 8(b)(4)(i) and (ii)(A) and (B) of the Act and the oral agreement or understanding not to use independent truckers on certain jobs, concluded by Park and the Union on or about April 14 in settlement of the dispute, violated Section 8(e) of the Act.

The General Counsel also contends that the strike against Park constituted a violation of Section 8(b)(3) of the Act, a contention that would necessarily fail if the strike were considered to be merely an effort to enforce the provisions of an existing agreement between these parties. At the time the strike commenced, Park and the Union were parties to a contract that was not due to expire for another 30 days and contained grievance, arbitration, and no-strike provisions that were broad in their scope. As concluded above, one object of the strike was to force Park to enter into an additional understanding not to subcontract work during the remainder of the contract on the I-94 and other construction jobs that were then underway. No suggestion exists that the required 60-day notice for termination or modification of a contract was given by the Union in advance of taking this action. Accordingly, I conclude that, by striking Park during a contract term to force Park to agree to a modification or addition to this agreement the Respondent Union here violated Section 8(b)(3) of the Act.

E. *The Liability of Respondent AGC*

Respondent AGC argues that it should be absolved from any responsibility and legal consequences for entering into the Memorandum of Agreement that it executed on April 25, 1980, because it was coerced into doing so. The contention is without merit. It is clear that AGC signed the Memorandum reluctantly, but its reluctance in no way mitigates its liability under the Act. AGC and its members were not coerced, in the sense of the common law, into signing the memorandum. They received a substantial quid pro quo for their undertaking, namely, a release from a large potential liability for payment of dues and fringe benefits that would become due and owing if ITOs were ultimately found to be employees governed by the master agreement. They also bought labor peace during the 1980 construction season. Accordingly, there is no reason that the Respondent AGC should not be found to be in parti delicto with the Respondent Union for entering into the Memorandum of Understanding in violation of Section 8(e) of the Act. I so find and conclude.

CONCLUSIONS OF LAW

1. Respondent Associated General Contractors of Minnesota and Park Construction Company are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Construction, Building Material, Ice and Coal Drivers, Helpers, and Inside Employees Union, Local 22, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By entering into, maintaining, and giving effect to provisions of the Memorandum of Understanding which applied to independent truck operators and to multiple truck owners the provisions of article IV (union security) of the 1978–1981 Master Agreement between AGC and the Union and Park and the Union, and by agreeing to the "equal opportunity" clause of the Memorandum of Understanding relating to the referral of ITOs by the Union, Respondent Union violated Section 8(e) of the Act.

4. By entering into, maintaining, and giving effect to the provisions of the Memorandum of Understanding which applied to independent truck operators and to multiple truck owners article IV (union security) of the 1978–1981 Master Agreement between AGC and the Union, and by agreeing to the "equal opportunity" clause of the Memorandum of Understanding relating to

the referral of ITOs by the Union, Respondent Associated General Contractors of Minnesota violated Section 8(e) of the Act.

5. By entering into, maintaining, and giving effect to an oral contract, understanding, or arrangement with Park Construction Company pursuant to which Park agreed not to subcontract to ITOs the work of hauling materials to or from certain construction sites during April 1981, Respondent Union violated Section 8(e) of the Act.

6. By coercing and restraining Associated General Contractors of Minnesota, Park Construction Company, and various employers engaged in commerce who are members of Associated General Contractors of Minnesota, for the purpose of requiring them to enter into contracts, agreements, or understandings, either express or implied, which violated the provisions of Section 8(e) of the Act, the Respondent Union violated Section 8(b)(4)(ii)(B) of the Act.

7. By threatening to strike Park Construction Company and by picketing Park Construction Company, with the object of forcing Park Construction Company to cease doing business with Jacobs Trucking Company, Inc., an employer engaged in commerce within the meaning of the Act, and other particular employers engaged in commerce within the meaning of the Act who were employed on Park Construction Company jobsites in March and April 1981, and to force and require said employers to become members of the Respondent Union, the Respondent Union violated Section 8(b)(4)(i) and (ii)(A) and (B) of the Act.

8. All truckdrivers and truck maintenance employees employed by Park Construction Company in highway construction and heavy construction in the Metropolitan Twin Cities area and in central Minnesota, exclusive of plant clericals, guards, and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

9. At all times material, the Union has been the exclusive collective-bargaining representative of the employees of Park Construction Company in the unit found appropriate in Conclusions of Law 8 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

10. By striking to require Park Construction Company to enter into a revision and modification of its collective-bargaining agreement with the Union during the term of said contract and without giving the requisite 60-day notice, the Union violated Section 8(b)(3) of the Act.

11. The above-recited unfair labor practices have a close, intimate, and substantial effect on commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have committed certain unfair labor practices, I will recommend that they be required to cease and desist and to take certain affirmative actions that are designed to effectuate the purposes and policies of the Act. Charging Party ICTO requests that the Board order a make-whole remedy requiring the Respondent Union (but not Respondent AGC) to compensate any persons or business damaged by its unlawful activities. It requests a remedy that includes reimbursement of dues and fees paid to the Union, loss of profits from businesses stemming from the Respondent Union's unlawful activities, and consequential damages to any business injured by the Respondent Union's unlawful activities. The Board has recently refused to order such a remedy in an 8(e) case and its refusal has been judicially sustained. *Teamsters Local 36*, 249 NLRB 386 (1980), affd. 669 F.2d 759 (D.C. Cir. 1981). I am mindful that another circuit court of appeals has remanded a similar case to the Board for further consideration of a make-whole remedy in an 8(e) case[26] and that the Supreme Court has recently granted certiorari in the above-cited *Teamsters Local 36* case in order to resolve the conflict between circuit courts on this point. See 50 U.S.L.W. 3908 (1982). My obligation in this decision is to follow the law as it has developed to this point in time and, in so doing, to apply Board rules unless and until they have been set aside by the U.S. Supreme Court. Acting in accordance with these requirements of law, I will not recommend to the Board the remedy requested by ICTO.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

A. Respondent Construction, Building Material, Ice and Coal Drivers, Helpers and Inside Employees Union, Local No. 221, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO, and its officers, agents, and representatives shall

1. Cease and desist from

(a) Entering into, maintaining, or giving effect to the provisions of the Memorandum of Understanding that applied to independent truck owners and to multiple truck owners the provisions of article IV (union security) of the 1978–1981 Master Agreement between the Respondent Associated General Contractors of Minnesota and the Respondent Union and between Park Construction Company and the Respondent Union, and cease and desist from entering into, maintaining, or giving effect to the "equal opportunity" clause of said Memorandum of Understanding relating to the referral of ITOs and MTOs by the Respondent Union, to the extent found lawful.

(b) Entering into, maintaining, or giving effect to an oral contract, understanding, or arrangement with Park Construction Company pursuant to which Park agreed not to subcontract to ITOs the work of hauling materials to or from certain construction sites during April 1981 to the extent found unlawful.

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[26] *Teamsters Joint Council 42 v. NLRB*, 671 F.2d 305 (9th Cir. 1981).

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Coercing and restraining Associated General Contractors of Minnesota, employer members of Associated General Contractors of Minnesota who are engaged in commerce, or Park Construction Company for the purposes of requiring any of them to enter into contracts, agreements, or understandings, either expressed or implied, which violate Section 8(e) of the Act.

(d) Coercing or restraining Park Construction Company with the object of forcing or requiring Park Construction Company to cease doing business with Jacobs Trucking Company, Inc., an employer engaged in commerce within the meaning of the Act, or other particular employers who are trucking companies engaged in highway and heavy construction industry in commerce within the meaning of the Act, who were employed on Park Construction Company jobsites in March and April 1981, or to force and require the employers to become members of the Respondent Union.

(e) Striking Park Construction Company for the purpose of compelling the employer to enter into a revision or modification of an existing collective-bargaining agreement with the Union during the term of the agreement or without giving Park the 60-day notice required by the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Minneapolis, Minnesota office and meeting hall copies of the attached notice marked "Appendix A."[28] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondent Associated General Contractors of Minnesota and its officers, agents, successors, member organizations, and their officers, agents, successors, and assigns shall

1. Cease and desist from entering into, maintaining, or giving effect to the provisions of the Memorandum of Understanding which applied to independent truck operators and to multiple truck owners the provisions of article IV (union security) of the 1978–1981 Master Agreement between Respondent AGC and Respondent Union, and cease and desist from entering into, maintaining, or giving effect to the "equal opportunity" clause of the Memorandum of Understanding relating to the referral of ITOs and MTOs by the Respondent Union, to the extent found unlawful.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its business office in St. Paul, Minnesota, copies of the attached notice marked "Appendix B."[29] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that insofar as the consolidated complaint alleges matters that have not been found to violate the Act, the said consolidated complaint is dismissed.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[29] See fn. 28, supra.

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Teamsters Local 221, is posting this notice to comply with an Order of the National Labor Relations Board, which was issued after a hearing before an administrative law judge in a case in which we were found to have violated certain provisions of the National Labor Relations Act.

WE WILL NOT enter into, maintain, or give effect to provisions of a Memorandum of Understanding with Associated General Contractors of Minnesota or Park Construction Company which applied to independent truck operators and to multiple truck owners the provisions of article IV (union security) of the 1978–1981 Master Agreement between ourselves and those employers or employer organizations, and WE WILL NOT enter into, maintain, or give effect to the "equal opportunity" clause of the Memorandum of Understanding relating to the referral of ITOs and MTOs by this Union, to the extent that such clauses violate Section 8(e) of the National Labor Relations Act.

WE WILL NOT enter into, maintain, or give effect to an oral contract, understanding, or arangement with Park Construction Company pursuant to which Park agreed not to subcontract to ITOs the work of hauling materials to or from certain construction sites during April 1981 to the extent such agreement violated Section 8(e) of the Act.

WE WILL NOT coerce or restrain Associated General Contractors of Minnesota, employer members of Associated General Contractors of Minnesota, or Park Construction Company with the object of requiring any of them to enter into contracts, agreements, or understand-

ings, either express or implied, which violate Section 8(e) of the Act.

WE WILL NOT coerce or restrain Park Construction Company with the object of forcing or requiring Park Construction Company to cease doing business with Jacobs Trucking Company, Inc., or any other particular employers who are trucking companies engaged in the highway and heavy construction industry in interstate commerce, and who were employed on Park jobsites in March and April 1981, or to force or require the employers to become members of this Union.

WE WILL NOT strike Park Construction Company for the purpose of compelling Park to enter into a revision or modification of an existing collective-bargaining agreement with this Union during the term of the agreement without giving Park the 60-day notice required by the Act.

CONSTRUCTION, BUILDING MATERIAL, ICE, AND COAL DRIVERS, HELPERS, AND INSIDE EMPLOYEES UNION, LOCAL NO. 221, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AFL-CIO

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Associated General Contractors of Minnesota is posting this notice to comply with an Order of the National Labor Relations Board, which was issued after a hearing before an administrative law judge in a case in which we were found to have violated certain provisions of the National Labor Relations Act.

WE WILL NOT enter into, maintain, or give effect to provisions of a Memorandum of Understanding with Teamsters Local No. 221 which applied to independent truck and to multiple truck owners the provisions of article IV (union security) of the 1978–1981 Master Agreement between ourselves and Teamsters Local No. 221, and WE WILL NOT enter into, maintain, or give effect to the "equal opportunity" clause of the Memorandum of Understanding relating to the referral of ITOs and MTOs by that labor organization, to the extent that such clauses violate Section 8(e) of the National Labor Relations Act.

ASSOCIATED GENERAL CONTRACTORS OF MINNESOTA

Local 257, United Brotherhood of Carpenters and Joiners of America (DAT Construction Corporation) *and* Jay Buffington. Case 2–CB–12081

August 5, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 31, 1988, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting and answering brief. The General Counsel filed a brief in opposition to the Respondent's cross-exceptions.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Gwynne A. Wilcox Esq., for the General Counsel.
Ira A. Sturm, Esq. (Manning, Raab, Dealy & Sturm), of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City on 6 and 7 January 1988. On a charge filed on 11 August 1987,[1] a complaint was issued on 28 October, alleging that Local 257, United Brotherhood of Carpenters and Joiners of America (the Union or Respondent) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by the Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

[1] All dates refer to 1987 unless otherwise specified.

FINDINGS OF FACT

I. JURISDICTION

DAT Construction Corporation (the Employer or DAT), a New York corporation with an office and place of business in New York City, is a carpentry contractor in the building and construction industry, constructing commercial and office facilities. Respondent admits that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and I so find. In addition, the Union admits, and I so find, that it is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Issue*

The issue in this proceeding is whether the Union, acting through its steward, caused the Employer not to hire the Charging Party, in violation of Section 8(b)(1)(A) and (2) of the Act.

B. *The Facts*

Jay Buffington, who had been a carpenter for 20 years, was employed by Partitions Service Company, working at the Citicorp building in New York City. He resigned his position with Partitions on 13 March. On that day, he heard that positions may be available with DAT at the same jobsite. That afternoon he telephoned Richard D'Ambrosio, president of DAT, and asked for employment. Buffington testified that D'Ambrosio told him "go to work Monday with your tools."[2] When Buffington asked whether he could start employment a week later, on 23 March, D'Ambrosio responded that that was agreeable.

On 19 March, Buffington went to the jobsite and spoke with Eugene Garcia, DAT's foreman. He told Garcia that "D'Ambrosio had signed me up for work starting the following Monday and I wanted to check the job out." Garcia was unaware that Buffington had been hired, and told him to speak to John Hanley, the shop steward. Buffington showed Hanley his union card that indicated that Buffington was a member of a sister local, Local 296. Buffington told Hanley that he was "supposed to start work there on Monday." Buffington testified that Hanely told him that "they were not hiring anybody unless they were Local 257." Buffington then went to D'Ambrosio's office to discuss the matter but

[2] At the hearing, counsel for Respondent objected to Buffington's testimony about what D'Ambrosio told him on the ground of hearsay. I sustained the objection, and did not receive the testimony for the truth of the matter asserted. The General Counsel has requested that I reconsider my ruling. I grant the General Counsel's request and reverse my prior ruling. Buffington testified that D'Ambrosio told him "go to work Monday with your tools." In effect D'Ambrosio was offering Buffington a job. As the court said in *Creaghe v. Iowa Home Mutual Casualty Co.*, 323 F.2d 981, 985 (10th Cir. 1963), "Oral agreements can only be established by testimony about the conversation that was had between the parties." When one of the parties testified as to such a conversation, it does not constitute hearsay. See also *General Tire of Miami Beach v. NLRB*, 332 F.2d 58, 60 (5th Cir. 1964) ("The verbal act, as any other act, may be proved by one who heard it, saw it, or felt it").

D'Ambrosio was unavailable. Buffington left his number and later that afternoon D'Ambrosio telephoned him. Buffington testified that D'Ambrosio told him "he was sorry, that he has to rescind the job offer."

Buffington also testified that hiring at the jobsite is done pursuant to a "50/50 rule," that means that half of the employees are the Employer's choices and half are hired through the hiring hall. In addition, Buffington testified that after his conversation with Hanley he did not report it to the Union, or otherwise contact the Union.

Hanley testified that during March, Buffington approached him and told him that "he was sent by Richie D'Ambrosio to go to work." Hanley further testified, "I told Mr. Buffington that I was unaware that Mr. D'Ambrosio had hired him. And I told him that if he was looking for work to go through the union." Under questioning by counsel for the General Counsel, Hanley conceded that he told Buffington to "go back to his own local to seek work." Hanley denied that he told Buffington that the Union was not hiring anyone except from Local 257.

Garcia, a member of Local 135, credibly testified that there were several individuals working at the jobsite during March who were not members of Local 257. He also testified that if additional carpenters are needed he contacts the shop steward, who then calls the hiring hall.

Robert Olsen, a union official, testified that the following are the duties of the shop steward:

> The shop steward is basically the business representative of the business agent on the job. He is the eyes and ears, he is there to see what transpires and to make sure that the members are paid up in their dues, to take the names and social security [numbers] of the members so that the union can make sure that everybody that is working for the particular contract on that job is being paid their benefits.

Olsen testified that the shop steward has no authority to refuse an individual work at the jobsite.

Discussion and Conclusions

Buffington testified that Hanley told him that the Union was not "hiring anybody unless they were Local 257." Hanley denied making such a statement but instead testified that he advised Buffington "to go back to his own local to seek work." The General Counsel presented no corroboration of Buffington's testimony in this regard. On the contrary, the record indicates that during March, employees who were not members of Local 257 were working at the jobsite. I find that the General Counsel has not shown by a preponderance of the evidence that Hanley made the statement that the Union would only permit members of Local 257 to work at the jobsite.

The complaint alleges that on 19 March, the Union acting through Hanley, refused to allow the Employer to hire Buffington. There is no evidence in the record to support that allegation. Buffington merely testified that he was called by D'Ambrosio on the afternoon of 19 March and told that the job offer was rescinded. D'Ambrosio was not called as a witness nor is there any evidence in the record that any union representative caused D'Ambrosio to withdraw the job offer. See *Railway Clerks Local 1902 (Safety Cabs)*, 180 NLRB 126, 127 (1969). Accordingly, the allegation is dismissed.[3]

Conclusions of Law

1. DAT Construction Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practice alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The complaint is dismissed.

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[3] In view of my disposition of this case, it is unnecessary for me to determine whether Hanley was an "agent" of the Union. I note, however, that the record indicates that the steward had no authority in connection with the hiring of personnel. Under the 50/50 rule, either the individual was hired by the Employer or the employee was referred through the union hall. In either case, the steward was not involved in choosing or approving the employee.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Proxy Communications of Manhattan, Inc. *and* United Telephone Answering and Communications Service Union, Local 780. Case 2–CA–21169

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

Upon a charge filed by the Union on July 22, 1985, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on September 30, 1985, against the Company, the Respondent, alleging that it had violated Section 8(a)(5) and (1) of the National Labor Relations Act.

Thereafter, the Respondent filed an answer, later amended, admitting in part and denying in part the allegation in the complaint and raising certain affirmative defenses.

The determinative facts in this case are not in dispute. On or about June 25, 1985, the Respondent purchased the assets of Federated Answering Service, a Division of Sherwood Diversified Services, Inc. (Federated). Prior to June 25, 1985, Federated had been engaged in providing telephone answering services to businesses and the general public. Federated had recognized the Union in or about 1957 as the exclusive collective-bargaining representative of its telephone operators employed at its facility located at 210 East 86th Street, New York, New York.[1] This recognition was embodied in collective-bargaining agreements to which the Union and Federated were parties, the most recent of which expired on May 31, 1983. About August 17, 1983, Federated's employees went on strike. At the time it purchased Federated, the Respondent was aware that Administrative Law Judge Joel Biblowitz, in a decision issued on July 9, 1984, in Case 2–CA–19496, had found, inter alia, that Federated had committed unfair labor practices aimed at disaffecting the employees from the Union, that Federated had unlawfully refused to bargain with the Union, that the unlawful refusal was the cause of the strike, that the striking employees, therefore, were entitled to reinstatement, and that Federated had a legal obligation to bargain with the Union.[2]

Since it purchased Federated, the Respondent has been engaged in providing the same services that Federated had provided at the same location to the same customers. Additionally, at the time the Respondent purchased Federated on June 25, 1985, it hired all the employees who had been working for Federated on June 24, 1985. These employees composed the Respondent's entire work force, which consisted of 39 replacements for Federated's unfair labor practice strikers and 7 employees who had never gone on strike or who had returned from the strike.

By letter of about June 28, 1985, the Union requested the Respondent to recognize and bargain with it as the exclusive representative of the Respondent's employees. In its response letter of about July 10, 1985, the Respondent refused to recognize and bargain with the Union.[3]

Notwithstanding its admission of all the facts set forth above, the Respondent denies that it violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union after purchasing Federated's assets.

On November 27, 1985, the Respondent filed a Motion for Summary Judgment with a supporting brief. On December 9, 1985, the Board issued an order transferring proceeding to the Board and Notice to Show Cause. On December 23, 1985, the General Counsel filed a Cross-Motion for Summary Judgment with a brief in support of that motion and in opposition to the Respondent's summary judgment motion. On January 10, 1986, the Charging Party filed a brief supporting the General Counsel's motion and opposing the Respondent's motion. Also on January 10, 1986, the Respondent filed a brief opposing the Cross-Motion for Summary Judgment.

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[1] The Respondent admits that the following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

All telephone operators employed by the Respondent at its facility located at 210 East 86th Street, New York, New York, but excluding all office workers, guards and supervisors as defined in the Act.

[2] On February 10, 1986, the Board remanded Case 2–CA–19496 against Federated to the judge for further findings, conclusions, and credibility resolutions based on the existing record regarding whether Marilyn McGuire was Federated's agent. 278 NLRB 472 (1986). On March 6, 1986, Judge Biblowitz issued his supplemental decision finding that McGuire was Federated's agent. On March 31, 1988, the Board issued its decision in 288 NLRB 341 which, inter alia, affirmed the judge's decision in all relevant respects and found that, as a result of McGuire's agency status, Federated was responsible for additional unfair labor practices. It is the burden of the successor employer to establish that it lacks knowledge of unfair labor practices pending at the time of purchase. See *Airport Bus Service*, 273 NLRB 561, 597 (1984); *Mansion House Center Management Corp.*, 208 NLRB 684, 686 (1974). Here, there is no contention that the Respondent lacked knowledge of all the allegations pending at the time it purchased Federated. In fact, the Respondent concedes that it was aware of the judge's decision in *Federated Answering Service*, above, and the Federated respondent's exceptions to that decision that were then before the Board. Accordingly, the Respondent has raised no material issue of fact regarding its capacity to sustain the burden of disproving knowledge at the time of purchase of *all* unfair labor practice allegations then pending in *Federated*, including those of which Judge Biblowitz had recommended dismissal but in which the Board ultimately found merit, and we shall order the Respondent to remedy those unfair labor practices as well.

[3] On July 12, 1985, the Respondent filed an RM petition (Case 2–RM–1959). By letter dated November 4, 1985, the Regional Director for Region 2 dismissed the petition. On October 14, 1986, the Board affirmed the Regional Director's dismissal of the petition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motions for Summary Judgment

1. The parties' contentions

In support of its Motion for Summary Judgment, the Respondent argues that it is not a *Burns*[4] successor to Federated, obligated to bargain with the Union. It predicates its argument that it has no bargaining obligation on a claim of objective good-faith doubt as to the Union's majority status based, inter alia, on the sentiments of the unfair labor practice striker replacement employees. Further, the Respondent asserts that because it is not a *Burns*, successor it cannot be a *Golden State*[5] successor and that, even if it is found to be a *Burns* successor, it is not obligated to remedy Federated's unfair labor practices under the balancing of interests required by *Golden State.*

In support of its Cross-Motion for Summary Judgment, the General Counsel asserts that the Respondent is both a *Burns* successor and a *Golden State* successor obligated to bargain with the Union and to remedy Federated's unfair labor practices by virtue of its purchase of Federated's assets because its work force after the purchase consisted entirely of employees who had been employed by Federated prior to the purchase and because, at the time it made the purchase, the Respondent was aware of Federated's unremedied unfair labor practices. We agree with the General Counsel and find that the Respondent is both a *Burns* successor and a *Golden State* successor.

2. The Respondent has a bargaining obligation under *Burns*

The Respondent admits that the employing enterprise was not materially altered after it purchased Federated's assets. Also, the strike replacements, nonstrikers, and returned strikers who had been employed by Federated the day before the purchase (June 24) were employed by the Respondent the day of the purchase (June 25). Thus, the same employees were employed at the same location, performing the same functions after the sale as before the sale. The purchase, then, involved a mere transfer of title, not a major restructuring of the enterprise. In these circumstances we find that there was substantial continuity in the identity of the employing enterprise and conclude that the Respondent is a *Burns* successor.[6] Furthermore, the Respondent admits that when it purchased Federated, it was aware of the unfair labor practice charges and the judge's decision finding that Federated had committed unfair labor practices aimed at disaffecting its employees from the Union, that Federated had unlawfully refused to bargain with the Union, that Federated's unlawful refusal was the cause of the employees' strike, that the striking employees were, therefore, unfair labor practice strikers entitled to reinstatement on their unconditional offer to return to work, and that Federated was legally obligated to bargain with the Union.[7]

It is well settled that there is a rebuttable presumption in favor of a union's majority status following the certification year.[8] This presumption also applies where the union has been accorded voluntary recognition as in the instant case.[9] Further, this presumption applies in the successorship context.[10] In order to rebut this presumption, the employer must show that on the date recognition was denied the union did not represent a majority of the unit employees, or it must present evidence establishing an objective good-faith doubt of the union's majority status.[11]

It is also settled that an employer can not lawfully justify a refusal to bargain based wholly on doubt as to a union's majority status stemming from the antiunion sentiments of replacement employees hired to replace unfair labor practice strikers.[12] This is because the employer's unfair labor practices sought to cause disaffection from the union and caused its employees to strike. For without the employer's unlawful conduct, there would be no replacement employees, nonstrikers, or returned strikers.[13] Indeed, the interest of replace-

[4] See *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). See also *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), in which the Supreme Court elaborated on the successorship principles stated in *Burns.*

[5] See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). See also *Fall River*, above.

[6] This finding would be warranted regardless of which groups of former Federated employees the Respondent had chosen to hire. Whether the Respondent hired, as a group, the replacements, nonstrikers, and returned strikers (as it chose to here), or whether it had employed, as a group, the strikers or a combination of these two groups, the employee complement would have continued substantially the same.

[7] We emphasize that Federated's obligation to bargain was not founded on a Board-directed bargaining order resulting from its unfair labor practices, but rather on Federated's voluntary recognition of the Union.

[8] *Celanese Corp.*, 95 NLRB 664, 673 (1951), cited with approval in *Ray Brooks v. NLRB*, 348 U.S. 96, 104 (1954).

[9] *Bartenders Assn.*, 213 NLRB 651 (1974).

[10] *Harley-Davidson Transportation Co.*, 273 NLRB 1531, 1532 (1985), cited with approval in *Fall River*, above.

[11] *Station KKHI*, 284 NLRB 1339 (1987).

[12] See *NLRB v. Frick Co.*, 423 F.2d 1327, 1334 (3d Cir. 1970).

[13] See *Celanese Corp. of America*, above at 673 (an employer can not question a union's majority status "in a context of illegal antiunion activities, or other conduct by the employer aimed at causing disaffection from the union"). Moreover, Federated's unfair labor practices had a tendency to affect all its employees because they were unremedied as of the time Federated sold its business to the Respondent. Thus, whichever category an employee came under—striker, nonstriker, returned striker, or replacement—Federated's unlawful conduct interfered with the employee's Sec. 7 rights and, consequently, tainted his or her free choice in selecting or rejecting a bargaining representative.

ments for unfair labor practice strikers in the unit is illusory or ephemeral at best: they must give way to strikers who choose to return.

In *Frick*, an economic strike was converted to an unfair labor practice strike when the employer's unlawful conduct prolonged the strike. The court, in agreement with the trial examiner noted, at 134, that:

> The Company's unfair labor practices not only undercut the union but had a natural tendency to impede "a settlement of the strike. A corollary of this is that if the strike had been settled at an early date and not prolonged by Respondent's unfair labor practices . . . there may never have been 202 strikers who abandoned the strike and returned to work or 239 replacements for strikers."

The court concluded that the Board was correct in precluding the company from relying on the replacements as evidence rebutting the presumption of continuing majority status.

In the instant case, the Respondent, while contending that it had the right to hire whom it pleased, provided no discrimination was involved, admits that it has continued the employing enterprise without change. Yet the Respondent seeks to rely on the sentiments of the replacement employees and nonstrikers and returned strikers it hired as evidence of an objective good-faith doubt in the Union's majority status.

The Respondent is correct that as the purchaser of Federated's assets it was free to choose its employees, in the absence of unlawful motivation.[14] This right, however, does not allow the Respondent to avoid the consequences of the choices it made.

At the time of the purchase, the Respondent admits that it was aware of the judge's recommended disposition of unfair labor practice charges against Federated, including the judge's findings that Federated had committed unfair labor practices which caused the employees to strike and that the striking employees, therefore, were entitled to reinstatement. Given this knowledge, the Respondent, by retaining all of Federated's employees (and by refraining from making any other change in the employing enterprise), effectively stepped into Federated's shoes,[15] vis-a-vis the Union.[16] Because it knew of Federated's unremedied unfair labor practices, and as a result of its continuation of the employing enterprise without change, the Respondent succeeded to Federated's obligation to bargain with the Union.

As noted, the presumption of majority status also applies in the successorship context. As a consequence of having been found to have committed unfair labor practices aimed at causing disaffection from the Union, Federated, as found in Case 2-CA-19494, could not rely on the decertification petition signed in the context of those unfair labor practices as evidence of its good-faith doubt in the Union's majority status. For the same reason, had Federated remained the employer and relied on the sentiments of the replacement strikers as evidence of its good-faith doubt, that defense also would have failed. As the Respondent here has stepped into Federated's shoes in relation to the Union, it too is prevented from relying on the sentiments of the unfair labor practice striker replacements as evidence of its good-faith doubt as to the Union's majority status.

In this regard, the Respondent's knowledge that Federated's actions were the cause of the strike means that the Respondent was aware that absent Federated's conduct there would never have been 39 replacement employees or 7 nonstriking or returned strikers for it to hire. To allow the Respondent to rely on the replacements' sentiments as evidence of its objective good-faith doubt of the Union's majority status in these circumstances would be to allow the Respondent to benefit from Federated's unfair labor practices.[17] Thus, by stepping into Federated's shoes, the Respondent like Federated (had Federated remained the employer) is precluded from relying on the replacements' sentiments as evidence of its objective good-faith doubt in the Union's majority status.

As additional support for its assertion that it has an objective good-faith doubt about the Union's majority status, the Respondent relies on two other grounds: (1) the Union's misconduct as found in *Telephone Answering Service Union Local 780 (Federated Communications)*[18] and (2) the presence of

[14] *Fall River*, above, 414 U.S. at 168 fn. 6.

[15] See *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987) (where the Supreme Court noted that "to a substantial extent the applicability of *Burns* rests in the hands of the successor").

[16] See *Bay Diner*, 279 NLRB 538 (1986) (employer continuing predecessor's business without change stands in shoes of predecessor vis-a-vis its relationship with the union).

[17] Because we find that the Respondent can not rely on the sentiments of the replacement employees, it is unnecessary for us to determine the union sentiments of those employees. We note, however, that the Board recently has declined to generalize about the union sentiments of striker replacements. In so doing the Board rejected both the presumption that the replacements support the union in the same ratio as the striking employees and any presumption that the replacements evidence repudiation of the union simply by crossing a picket line or because they were not contacted by the union. See *Station KKHI*, 284 NLRB 1339 (1987). See also *Johns-Manville Sales Corp.*, 289 NLRB 360, 363 (1988).

[18] 276 NLRB 507 (1985).

seven employees who either never went on strike or abandoned the strike and returned to work.[19]

In *Telephone Answering*, one striking employee was found to have told one nonstriking employee who had crossed the picket line that the striking employee "would kick her [the nonstriking employee's] ass and her mother's ass."[20] This statement was made twice and was found to be a violation of Section 8(b)(1)(A) of the Act.[21] Neither this statement nor the other lawful statements found to have been made (e.g., strikers calling employees crossing the picket line scabs) indicate that the Union had lost its majority status[22] or that the Respondent had an objective good-faith doubt about that status.

Nor does the fact that 7 of the 46 employees hired by the Respondent had never gone on strike or had returned from the strike establish an objective good-faith doubt as to those employees' union sentiments. As stated previously, absent Federated's unfair labor practices, which the Respondent knew remained unremedied, there would never have been any nonstrikers or returned strikers. In any event, apart from considerations arising out of Federated's misconduct, the facts here do not show that these employees had antiunion sentiments.[23]

3. The Respondent has a *Golden State* obligation to remedy Federated's unfair labor practices

The Respondent also contends that, as required by *Golden State*, a balancing of the conflicting legitimate interests involved, i.e., the interests of the Respondent as an arm's-length purchaser of Federated's assets, the interests of the public, and the interests of the "affected" employees,[24] should absolve it of any obligation it might have to remedy Federated's unfair labor practices. We find no merit to this contention. Although the Respondent's liability for remedying Federated's unfair labor practices does require a balancing of interests, the Respondent's declared application of this balancing test unduly emphasizes its own interests as the purchaser of Federated's assets with a right to hire its employees and the interests of the employees it hired. Such an emphasis is misplaced.

Under the *Golden State* balancing test, emphasis is placed instead on the protection of the victimized employees.[25] The court in *Golden State* quoted with approval the following statement made by the Board in *Perma Vinyl*:[26]

> Especially in need of help, it seems to us, are the employee victims of unfair labor practices who, because of their unlawful discharge, are now without meaningful remedy when title to the employing business operation changes hands.

An emphasis on victimized employees is especially appropriate in this case where the victimized employees were on strike as a result of Federated's unfair labor practices—thus entitling the strikers to reinstatement on their unconditional offer to return to work. Further, the Respondent was aware of these facts and still decided to hire all of the striking employees' replacements. This shows that the Respondent essentially continued unaltered the job situations of Federated's strikers and, thereby, their legitimate expectations that Federated's unfair labor practices would be remedied.[27]

The choices the Respondent made in hiring all of Federated's employees in light of its knowledge of Federated's unremedied unfair labor practices has placed it in the position of being obligated to remedy those unfair labor practices. The Respondent can not now point to its freedom to make those choices for legitimate reasons and to the interests of the unfair labor practice striker replacements (who must be discharged, if necessary) that it retained, as outweighing the special protection given to the victimized employees.

The Respondent also claims that it is not required to reinstate the strikers on their unconditional offer to return to work because the strikers had not made an offer to return to work prior to the

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[19] The Respondent also offers the fact that the Union did not seek to bargain with Federated over the terms and conditions of employment of the unfair labor practice striker replacements as evidence that the replacement employees were not represented by the Union. Although this argument relies on the antiunion sentiments of the replacements, a reliance we have found to be misplaced, it also ignores Federated's earlier withdrawal of recognition from the Union, which made any subsequent attempt to bargain futile. The Respondent admits, however, that the Union sought to bargain with it within 3 days of the Respondent's purchase of Federated's assets.

[20] *Telephone Answering*, above at 510.

[21] Ibid.

[22] Nor is the 8(b)(1)(A) violation a sufficient basis on which to deny a bargaining order. Cf. *Laura Modes Co.*, 144 NLRB 1592 (1963) (union denied affirmative bargaining order despite 8(a)(5) refusal-to-bargain finding when union agent physically beat the employer and "pushed around" an office employee).

[23] See *Station KKHI*, supra (failure to join strike may indicate employees' economic concerns); *Frick*, supra, 423 F.2d at 1333 (no presumption that an employee's return to work during a strike demonstrates a rejection of union).

[24] *Golden State*, above, 414 U.S. at 181.

[25] 414 U.S. at 181–182.

[26] Id. at 181, quoting 164 NLRB 968 (1967), enfd. sub nom. *U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

[27] Sound policy reasons support requiring the Respondent to remedy Federated's unfair labor practices in these circumstances. See *Golden State*, supra at 184. To the extent the Respondent argues that "employees who have been retained" are the replacement employees, the Respondent misperceives the implications of its actions in purchasing Federated's assets with knowledge of its predecessor's unremedied unfair labor practices and without changing the employing enterprise in any way.

Respondent's purchase of Federated's assets.[28] The Respondent states that because there was no offer to return to work prior to the purchase, the sale extinguished the strikers' right to reinstatement. There are several flaws in this assertion. First, it ignores the fact that Federated's unlawful refusal to bargain, the cause of the strike, had not been remedied prior to the purchase. Second, it ignores the fact that the Respondent stepped into Federated's shoes, that at the time it did so it was aware the strike had been designated an unfair labor practice strike, and that, additionally, it was aware that Federated had unlawfully threatened to replace permanently the strikers and had been ordered to notify the strikers that they were entitled to reinstatement on their unconditional offer to return to work. Third, it ignores the fact that the Union promptly requested bargaining with the Respondent after the purchase but that the request was rejected, making any offer to return to work futile.

Of course the Respondent has the option of retaining the replacement employees while at the same time reinstating the striking employees on their unconditional offer to return to work.[29] Even if the Respondent chooses this option, however, we still need not analyze the union sentiments of the replacement employees (or any other former Federated employees) to determine if the presumption favoring the Union's majority status continues. See fn. 13 supra.

As a practical consideration, the Respondent argues that it can not be expected to run its business under the condition that it reinstate the strikers whenever they decide to make an unconditional offer to return to work. It is within the Respondent's power, however, to avoid such disruption by bargaining with the Union and offering reinstatement to the striking employees.

Nor is the conclusion that the Respondent is obligated to remedy Federated's unfair labor practices unduly burdensome. As the Court in *Golden State*, again quoting with approval from the Board's *Perma Vinyl* decision, stated:[30]

> Since the successor must have notice before liability can be imposed, "his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices."

Here, the Respondent at the time of its purchase of Federated's assets admittedly had knowledge of the unremedied unfair labor practices and could have protected itself from the burden of remedying those unlawful practices, which burden resulted from its choice to purchase and continue unaltered the employing enterprise.

In summary, we find that the Respondent is a successor employer that purchased Federated's assets with knowledge of Federated's unremedied unfair labor practices, that in the circumstances of this case the Respondent can not rely on the sentiments of the unfair labor practice striker replacements as evidence of its objective good-faith doubt in the Union's majority status, that none of the other evidence establishes that the Respondent has rebutted the presumption in favor of the Union's majority status, and that the Respondent is obligated to remedy Federated's unfair labor practices.

Accordingly, we grant the General Counsel's Cross-Motion for Summary Judgment.[31]

On the entire record the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Proxy Communications of Manhattan, Inc., a Delaware corporation, has been engaged in providing telephone answering and related services to businesses and the general public at its facility in New York, New York, where it annually will derive gross revenues in excess of $500,000 and annually will purchase goods and materials valued in excess of $50,000, directly from firms located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[28] We note that the strikers' right to reinstatement is derived from their status as unfair labor practice strikers. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). The order against Federated required it to notify the strikers that the threat of permanent replacement was withdrawn and that Federated would reinstate the strikers on their unconditional offer to return to work.

[29] With regard to the composition of the Respondent's work force, the Respondent wants us to infer, solely on the basis of the passage of time (i.e., since the start of the strike against Federated on August 17, 1983), that few, if any, of the strikers would be available for work and, therefore, that a majority of the Respondent's work force would not be composed of union supporters.

We cannot infer, based merely on the passage of time, however, that only a few of the strikers would return to work if the Respondent indicated its willingness to comply with its obligation to bargain with the Union and reinstate all the strikers on their unconditional offer to return to work. That the Respondent has received no answer from the Union or the Regional Director to its inquiry as to how many of the strikers desire to fill vacancies or be placed on preferential hiring lists in no way assists the Respondent in carrying its burden of establishing an objective good-faith doubt of the Union's majority status.

[30] *Golden State*, above, 414 U.S. at 185.

[31] The Respondent's Motion for Summary Judgment is denied.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Recognition*

Since about 1957 Federated had recognized the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All telephone operators employed by Federated at is facility located at 210 East 86th Street, New York, New York, but excluding all office workers, guards and supervisors as defined in the Act.

Since about June 25, 1985, the Respondent has been the employer of the employees in the unit by virtue of having about June 25, 1985, become a successor to Federated at the New York facility. The Union continues to be the exclusive representative of the Respondent's employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since about June 28, 1985, the Union has requested the Respondent to bargain, and since about July 10, 1985, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By refusing on and after July 10, 1985, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. The Respondent is Federated's successor at the New York facility.

3. The Respondent is legally obliged to comply with the Board's Order against Federated in Case 2-CA-19496[32] with respect to those unfair labor practices of which it had knowledge at the time of its purchase of Federated.

[32] We are aware that this case is before us in a somewhat unusual procedural posture in that an alleged successor's status is normally litigated in the context of a compliance hearing. Instead, this case is before us on an 8(a)(5) complaint in which it is alleged, inter alia, that the Respondent is obligated to bargain with the Union as a result of its status as Federated's successor. Despite these somewhat unusual circumstances, however, the Respondent had a full opportunity after adequate notice to address the question of whether it is a successor responsible for remedying its predecessor's unfair labor practices. *Jessie Beck's Riverside Hotel*, 279 NLRB 405 (1986) (Board directed successor to comply with an order against predecessor that required the predecessor to bargain with the union).

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.[33]

ORDER

The Respondent Proxy Communications of Manhattan, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Telephone Answering and Communications Service Union, Local 780 as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All telephone operators employed by Respondent at its facility located at 210 East 86th Street, New York, New York, but excluding all office workers, guards and supervisors as defined in the Act.

(b) Notify all its striking employees, by letter or telegram, that the threat of permanent replacement contained in Federated's August 17, 1983 telegram to them is withdrawn, and that on an unconditional offer to return to work, they will be offered reinstatement to their former positions, or substantially similar positions.

(c) Comply with the Board's Order in *Federated Answering Service*, 288 NLRB 341 (1988).

(d) Post at its facility in New York, New York, copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediate-

[33] The General Counsel's request for a visitatorial clause in the Order is denied because the circumstances of this case do not warrant such a provision. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ly upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Telephone Answering and Communications Service Union, Local 780 as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All telephone operators employed by us at our facility located at 210 East 86th Street, New York, New York, but excluding all office workers, guards and supervisors as defined in the Act.

WE WILL, on an unconditional offer to return to work, offer to all those employees who participated in the strike which began on August 17, 1983, immediate and full reinstatement to their former positions of employment or, if those positions are no longer available, to substantially equivalent employment without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL comply with the National Labor Relations Board's Order in *Federated Answering Service*, 288 NLRB 341 (1988).

PROXY COMMUNICATIONS OF MANHATTAN, INC.

Jensen Enterprises, Inc. d/b/a Jensen Pre-Cast *and* Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 631, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO,[1] Petitioner. Case 31-RC-5745

July 29, 1988

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held September 28, 1984, and the hearing officer's report recommending disposition of the objection.[2] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows six for and two against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings and recommendations, and finds that a certification of representative should be issued.

The issue in this case is whether the display of an altered Board sample election ballot, under the circumstances presented, warrants setting aside the election. The hearing officer found that the display did not constitute objectionable conduct. The Employer contends in its exceptions that the document likely gave voters the misleading impression that the Board favored the Union. We find no merit to the Employer's contentions and shall overrule the objection.

In *SDC Investment*, 274 NLRB 556 (1985), the Board found that the "crucial question" in resolving issues raising the alteration of a Board sample ballot is whether the ballot in issue "is likely to have given voters the misleading impression that the Board favored one of the parties to the election." 274 NLRB at 557. Under the circumstances of this case, we find insufficient evidence that voters reasonably would be misled.

The facts are not materially in dispute. On September 25, 1984, the Employer's president, Donald Jensen, observed Union Official Michael Straight speaking to unit employees immediately outside the Employer's premises. Jensen was located inside his office and, from a distance of 10 feet, observed Straight through an office window. Jensen observed Straight displaying to employees a reproduction of an official Board sample ballot that had been altered by the entry of an "X" in the "YES" box. The sample ballot was encased in clear plastic in a looseleaf three-ring binder. There is no evidence that the sample ballot displayed by Straight left his hands at any time or that it contained any other alterations or markings of any kind other than wording customarily found on a Board sample ballot.[3] Further, there is no evidence regarding what Straight may have said to employees while displaying the ballot.

As an initial matter, it may be instructive to emphasize that this case does not involve an altered sample ballot that has been distributed or circulated to employees. Absent any such distribution or circulation, the accompanying potential, or even likelihood, that the document will then be passed along to employees who may not have received it from the originating party is not present.[4]

The paramount factual element of the instant case is that Union Agent Straight did not distribute the altered ballot but merely displayed the document in a notebook, apparently as an instructional device. The document did not leave his hands. Further, there is no evidence what the union agent may have said regarding the display. In these circumstances, we agree with the hearing officer that employees looking at the three-ring binder containing the altered sample ballot, as described by Jensen, could reasonably have concluded that the party holding these materials was the source of the alteration and would not necessarily be given the misleading impression that the Board favored one of the parties to the election. As the objecting party, the Employer retained the evidentiary burden to show that the conduct of the union agent interfered with the election. Where, as here, the altered document did not leave the hands of the union agent, and the evidence shows only the display of the document, we will not presume that employees have been misled by the display of the document alone.

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] On May 28, 1985, the Board adopted the Regional Director's findings and recommendations overruling the Employer's Objections 1, 3, and 4 and ordering a hearing on Objection 2, now before us in this proceeding.

[3] Jensen credibly testified that while he could not read certain "fine print" on the document, he could read bold type printed phrases including "Official Secret Ballot," "United States of America," "National Labor Relations Board," "Mark an 'X' in the square of your choice," and boxes designated "YES" and "NO." Jensen did not identify any wording on the document expressly indicating the voting group or type of election to be conducted and was unable to see whether the sample ballot was specifically that to be used in the instant case.

[4] Because this case does not involve the distribution of an altered ballot, we do not consider it useful, under the facts presented, to apply the two-prong analytical approach set forth in *SDC*. In cases involving distribution, we shall continue to apply the *SDC* methodology in determining whether the altered ballot in issue is likely to have misled employees.

SDC is bottomed on the realistic notion that employees are generally sophisticated enough to recognize that sample ballots containing designated choices often are part and parcel of election campaigns. The interaction between employees and Union - Agent Straight displaying a three-ring binder containing a sample ballot is precisely the type of encounter that, standing alone, is likely to be perceived as electioneering by a party to an election and not as an endorsement by the governmental authority overseeing the election. Accordingly, we shall overrule the objection.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 631, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following unit:

> All regular full-time and part-time drivers and maintenance and production employees employed by the Employer at its facility located at 3853 Losee Road, North Las Vegas, Nevada, but excluding all other employees, including office clerical employees, salesmen, confidential employees, administrative employees, managerial employees, professional employees, guards, watchmen and supervisors as defined in the National Labor Relations Act, as amended.

MEMBER JOHANSEN, concurring.

This is an altered ballot case where a union agent did no more than show the ballot to unit employees. The sample did not leave the union agent's hands. That, coupled with the fact that it was encased in plastic in a looseleaf notebook, makes it clear that it was an instructional device and its source was evident. Unlike sample ballots that are distributed to voters, there was little danger here that the ballot's origin would be mistaken.

A rigid and unvarying requirement that the party responsible for preparation of an altered ballot must be indicated on the ballot, as demonstrated by this case, makes no sense. That is particularly so as the Board does not even require any indication that the ballot has, in fact, been altered.[1]

On the facts of this case, the source and the instructional purpose of the alteration were abundantly clear and there is little likelihood of employees being misled. I concur in affirming the hearing officer and certifying the Union as collective-bargaining representative.

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[1] Over my dissent. *Professional Care Centers*, 279 NLRB 814 (1986).

Boston Edison Company *and* Local 369, Utility Workers Union of America, AFL–CIO. Case 1–CA–23666

July 29, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

Upon an unfair labor practice charge filed on March 21, 1986, by the Union, Local 369, Utility Workers Union of America, AFL–CIO, the General Counsel of the National Labor Relations Board issued a complaint on December 5, 1986, against the Respondent, Boston Edison Company, alleging that it violated Section 8(a)(5) and (1) of the National Labor Relations Act. Copies of the complaint and notice of hearing were served on the Respondent. The Respondent filed a timely answer denying the commission of any unfair labor practices and asserting certain affirmative defenses.

On July 27, 1987, the parties jointly moved the Board to transfer the proceeding to the Board without benefit of a hearing before an administrative law judge and they submitted a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On September 30, 1987, the Board issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter the General Counsel, the Union, and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this case, the Board makes the following findings.

I. JURISDICTION

The Respondent is a corporation with its principal office and place of business in Boston, Massachusetts, and is a public utility engaged in the generation, transmission, distribution, and sale of electricity in the greater Boston area. The Respondent during the calendar year ending December 31, 1985, derived gross revenues in excess of $250,000 in the course and conduct of its business operations, and purchased and received products, goods, and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Massachusetts. Accordingly, we find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The parties stipulated and we find that at all times material Local 369, Utility Workers Union of America, AFL–CIO (Local 369 or Union); Utility Workers Union of America, AFL–CIO (the National Union); Local 386, Utility Workers Union of America, AFL–CIO (Local 386);[1] and Local 387, Utility Workers Union of America, AFL–CIO (Local 387) were labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Issue*

The issue is whether the Respondent has, since on or about January 30, 1986, and continuing to date, violated Section 8(a)(5) and (1) of the Act by refusing to negotiate and enter into an agreement separately with Local 369 with regard to a retirement/pension plan covering the employees represented for the purposes of collective bargaining by Local 369.

B. *Facts*

The Respondent is a public utility and is engaged in the generation, transmission, distribution, and sale of electricity in the greater Boston area. The parties stipulated that all production and maintenance employees employed by the Respondent including those employees in the classifications listed in the schedule effective June 13, 1986, of the collective-bargaining agreement between the Respondent, Local 369, and the National Union, but excluding meter readers, foremen, office clerical employees, professional employees, guards and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. At all times material, Local 369 has represented the bargaining unit of the Respondent's production and maintenance employees.

On June 29, 1950, the Board certified the National Union as the exclusive collective-bargaining representative for the employees in the production and maintenance unit. In 1950, the National Union was also certified as the exclusive collective-bargaining representative for the employees in the office and clerical unit and the professional and technical unit respectively. Shortly after the three certifications

[1] At all times material, Local 387 has represented a bargaining unit of Respondent's office and clerical employees. Until recently, Local 386 represented a bargaining unit of all professional and technical employees. This professional and technical unit still constitutes a separate bargaining unit but it is now represented by Local 387. Local 386 no longer exists as a separate local union. This change occurred on February 1, 1987, after the factual development relevant to the instant case.

were issued in 1950, Local 369, Local 387, and Local 386 were chartered to represent the employees in the production and maintenance unit, the office and clerical unit, and the professional and technical unit respectively. In 1971, the three collective-bargaining agreements for the three bargaining units were amended through the collective-bargaining process to reflect that the Respondent recognized both the National Union and the three respective local unions as the exclusive collective-bargaining representative for the employees in the three bargaining units. Specifically, since 1971 and continuing to date, the collective-bargaining agreements for the production and maintenance unit have contained the following language in the recognition clause:

> The Company recognizes the Union and the Local as the exclusive bargaining representative of all the employees of the Company in the Production and Maintenance Unit, as certified by the National Labor Relations Board in Case No. 1-RC-1368 on June 29, 1950.

At all times since 1950, Local 369 has participated in collective-bargaining negotiations with the Respondent and the National Union for collective-bargaining contracts covering the employees included in the unit of production and maintenance employees employed by the Respondent and has signed all collective-bargaining agreements since 1950 which covered the employees. Since 1951, there have been successive separately negotiated, separately administered collective-bargaining agreements for each of the three bargaining units. The three respective collective-bargaining agreements were initially negotiated between the Respondent, the National Union, and each local union in 1951, and the three agreements were each separately renegotiated in 1953, 1955, 1957, 1959, 1961, 1963, 1965, 1967, 1969, 1971, 1973, 1975, 1977, 1980, 1983, and 1986. The most recent collective-bargaining agreement between the Respondent, Local 369, and the National Union covering the employees included in the production and maintenance unit is effective by its terms from the period of June 13, 1986 to May 15, 1990. In each general negotiating process which led to the agreements, Local 369, Local 387, and Local 386 each submitted their own proposals and negotiated separately with the Respondent. The National Union has been signatory to all the collective-bargaining agreements.

The employees of the Respondent in all three bargaining units have always been covered by one unified pension/retirement plan (pension plan). The existence of a single pension plan for all three bargaining units predates the certification of the National Union in 1950.[2] Since 1950, when the National Union was certified and the three local unions were chartered, collective bargaining over changes in the pension plan has been conducted separately from the general collective bargaining described above for all other terms and conditions of employment. Unlike the general negotiations over the three collective-bargaining agreements, collective bargaining over the pension plan has always been conducted jointly among all three local unions, the National Union, and the Respondent. In practice, each local union submitted its own pension plan proposals, but the negotiation sessions were conducted jointly, and the resulting unified pension plan covered employees in all three bargaining units. When agreement was reached through collective bargaining on pension plan issues, the parties produced a unified Memorandum of Agreement that was signed by the Respondent, the National Union, and all three local unions. The membership of each local union conducted a ratification vote over the terms contained in the agreement. Pension plan bargaining, as described above, occurred in 1951, 1957, 1962, 1967, 1972, 1975, 1977, and 1980.

By letter dated January 6, 1972, the Respondent notified the National Union that Local 369, Local 387, and Local 386 had notified the Respondent of their intention to review the pension plan. By letter dated January 7, 1972, Local 369 notified the Respondent that it would not negotiate in joint session regarding the pension plan with the other local unions. The Respondent notified Local 369 by letter dated January 14, 1972, that a separate meeting date with Local 369 for pension plan negotiations was not acceptable to it. By letters dated February 29, 1972, the National Union notified Local 369, Local 387, and Local 386 that Local 369 would be given the opportunity to attempt to arrange for separate negotiations with the Respondent regarding a pension plan by March 6 and, if that could not be arranged, Local 369 was directed to negotiate jointly with Local 387 and Local 386.

When the Respondent continued to refuse to negotiate separately with Local 369 regarding a separate pension plan, Local 369 filed an unfair labor practice charge in Case 1-CA-8176. After investigation of this charge, it was dismissed by Region 1. Local 369 appealed this dismissal to the Office of Appeals and this appeal was denied.

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[2] From approximately 1943 to 1950, the three bargaining units existed but were represented by the United Brotherhood of Edison Workers in separate units of production and maintenance employees, office and clerical employees, and technical employees. See *Boston Edison Co.*, 51 NLRB 118 (1943).

By letter dated December 18, 1985, the Respondent notified the National Union and Local 369 of its desire to terminate the then-current collective-bargaining agreement and of the Respondent's intention to review and modify the pension plan. By letter dated January 9, 1986, Local 369 requested to negotiate with the Respondent separately over the terms of a pension plan covering only the employees included in the production and maintenance unit.

By letter dated January 30, 1986, the Respondent replied to the letter dated January 9, 1986, from Local 369. The Respondent's response was that the pension plan is with the National Union, the parties have historically bargained jointly, and that the Respondent intends to do so again this year.

By letter dated February 28, 1986, Local 369 advised Respondent, inter alia, of the names of the bargaining committee for Local 369, and by letter dated March 3, 1986, the National Union's president, James Joy Jr., advised the Respondent that Local 369 had permission to proceed separately for the 1986 negotiations to modify the current collective-bargaining agreement and the pension plan.

On March 7, 1986, the Respondent and Local 369 met in their first general negotiating session for the collective-bargaining agreement for the production and maintenance unit. Local 369 again requested that the Respondent meet individually with Local 369 to negotiate terms of a separate pension plan for the production and maintenance employees, but the Respondent did not agree.

On March 13, 1986, at the second general negotiating session over the collective-bargaining agreement for the production and maintenance unit, Local 369 first presented its proposals to modify the agreement. Included were proposals to modify the pension plan. The Respondent refused to accept or discuss the pension proposals that day, and told Local 369 that it intended to negotiate pension plan changes jointly with all three local unions and the National Union. By letter dated March 14, 1986, the Respondent notified the National Union of its position that pension plan negotiations would be conducted jointly, as in the past.

On April 3, 1986, representatives of the Respondent, the National Union, and the three local unions met for the first scheduled pension plan bargaining session. Local 369 announced that it would not participate in joint bargaining and then withdrew. The negotiation session continued without Local 369. Local 369 returned to the negotiation session to present its list of proposed changes in the pension plan and to hear the Respondent's proposals. Local 369 then left and bargaining continued between the National Union, the Respondent, Local 387, and Local 386.

On April 10, 1986, the parties convened for a second day of pension plan negotiations. Local 369 was not present until after lunch. During the morning session, the Respondent, the National Union, Local 387, and Local 386 bargained jointly. During the afternoon session, the Respondent and Local 369 bargained over Local 369's pension plan proposals. The National Union, Local 387, and Local 386 were present.

On April 24, 1986, the parties convened for a third day of pension plan negotiations. During the morning session, the Respondent, the National Union, Local 387, and Local 386 bargained jointly. Local 369 appeared only for an afternoon session and discussed only Local 369's proposals with the Respondent. For at least part of the afternoon session, the National Union, Local 387, and Local 386 were present. About 4 p.m., when the negotiation session ended, the Respondent asked Local 369 to participate in a full-day session with all the parties present on May 1, 1986. Local 369 did not respond.

On May 1, 1986, the parties convened for a fourth day of pension plan negotiations. Throughout the day, the Respondent negotiated individually with each local union over their respective sets of proposals, in the presence of the National Union and the other two locals. The parties convened for a fifth day of pension plan negotiations on May 8, 1986. The Respondent announced its position that the pension bargaining process for 1986 would result in only one pension plan, as in the past. After a recess, the National Union announced that Local 387 and Local 386 had withdrawn their separate proposals and that Local 369's proposals would be adopted by Locals 387 and 386. Bargaining ensued on that basis. At the close of the session, the Respondent presented the National Union and Locals 369, 387, and 386 with a written proposal on the pension plan that eventually became part of the Respondent's final offer to all three local unions as the contract expiration date on May 15, 1986, approached.

On May 16, 1986, all three local unions began a strike on issues unrelated to the instant charge. The strike was resolved prior to June 13, 1986, and new separate collective-bargaining agreements were entered into between the Respondent and each of the three local unions covering the bargaining units represented by each local union, and the National Union. With respect to the pension plan, a single Memorandum of Agreement was prepared reflecting changes agreed to by the Respondent, the National Union, and the three local unions.

At times during the 1986 pension and collective-bargaining negotiations, Local 369 stated to the Respondent that it wanted an answer to the question of its right to bargain with respect to a separate pension plan apart from Local 387 and Local 386; that it was reserving its position and rights on that issue; and that it would pursue the instant charge filed with the National Labor Relations Board in that regard. The Respondent stated that Local 369 could reserve whatever rights it believed it had, but that the Respondent did not agree that Local 369 had the right to bargain with respect to a pension plan individually. The Respondent further stated that it had always bargained with respect to the pension plan jointly and that it would continue to do so.

C. *Contentions of the Parties*

The Respondent contends that it did not violate the Act by refusing to agree to Local 369's request that it alter the historic joint pension bargaining practice that had been in effect since 1950 and bargain with Local 369 separately on the subject of pensions. In support, the Respondent cites *Paperworkers Local 1027 (Mead Corp.)*, 216 NLRB 486 (1975) *(Mead)*, for the proposition that once a voluntary consensual unit has been established by the agreement of the parties, any party can then lawfully insist to impasse on continued bargaining along the lines of the established and historic unit. The Respondent also cites the case of *Shell Oil Co.*, 194 NLRB 988 (1972), enfd. sub nom. *Oil Workers v. NLRB*, 486 F.2d 1266 (D.C. Cir. 1973), in defense of its action in refusing to bargain with the Union separately on the retirement/pension plan. Relying on *Shell Oil*, the Respondent argues that because for over 36 years pension bargaining has always been conducted on a companywide basis between Boston Edison, the National Union, and its three locals, the established unit for purposes of collective bargaining with respect to pension issues is the joint unit. Thus, the Respondent could lawfully insist on confining bargaining on pensions to the established joint unit.

The Respondent further argues that this conclusion is supported by the Regional Director's 1972 dismissal of an unfair labor practice charge filed by Local 369 charging that the Respondent's refusal to bargain over pension plan improvements was unlawful. In that proceeding the Office of Appeals, Office of the General Counsel, upheld the Regional Director's dismissal of the charge, on the grounds that the National Union is the certified representative, that pension bargaining historically has been on a multiunit basis, and that the National Union never requested separate pension bargaining on a single unit basis.

In the alternative, the Respondent also argues that even if Local 369 was privileged to withdraw from the multiunion bargaining arrangement, it did not lawfully do so because its attempted withdrawal was neither permanent nor unequivocal. The Respondent maintains that the National Union has not agreed permanently to halt the multiunion bargaining arrangement because it granted only one of the four different union entities permission to proceed separately for 1 year—1986. Further, citing *Tampa Ship Repair & Dry Dock Co.*, 202 NLRB 368 (1973), the Respondent maintains that Local 369 did not unequivocally withdraw from multiunit bargaining, because it participated in the joint bargaining for the 1986 pension agreement and signed the single Memorandum of Agreement reflecting changes in the pension plan.

The General Counsel's position is that Local 369 timely and unequivocally withdrew from multiunit bargaining on the pension plan and that the Respondent violated Section 8(a)(5) and (1) by its refusal to bargain separately with Local 369 concerning a pension plan. The General Counsel argues that while parties may voluntarily consent to the enlargement or alteration of an existing unit, to the merger of separate units, or to the combination of several units for the purpose of jointly negotiating issues of common concern, neither party may be forced to continue negotiations on the altered basis, citing *Consolidated Papers*, 220 NLRB 1281 (1975), and *Pacific Coast Assn. of Pulp & Paper Mfrs.*, 133 NLRB 690 (1961), enfd. 304 F.2d 760 (9th Cir. 1962).

The General Counsel also argues that the fact that Local 369 participated with Locals 387 and 386 in pension negotiations after the Respondent had rejected the request of Local 369 for separate negotiations does not render the request of Local 369 equivocal or moot. The General Counsel also requests a visitatorial clause in this case.

The Charging Party reiterates the arguments made by the General Counsel in this case, and argues that a bargaining unit has the right to withdraw regardless of a history of multiunit bargaining, where it has given the employer timely and unequivocal notice of its intent to withdraw. If parties are unable to withdraw from multiunit bargaining, they would be discouraged from experimenting with such bargaining. Further, the Charging Party maintains that its withdrawal was timely and unequivocal, and that the Local 369-represented unit is an "appropriate unit" since Local 369 has been negotiating independent collective-bargaining agreements since 1950 with the Respondent. It fur-

ther argues that any inconvenience to the Company caused by negotiating pensions separately is outweighed by the importance of permitting the Union to negotiate separately.

The Charging Party maintains that since a union has a right to withdraw from multiunit bargaining, it is a violation of Section 8(a)(5) and (1) for an employer to insist to impasse on multiunit bargaining, citing *Shell Oil*, supra, as support for its proposition that while parties may agree to consolidate units for purposes of collective bargaining, a party may not be forced to bargain on other than a unit basis. The Union also argues that the *Mead* case relied on by the Respondent is inapposite to the instant case. In *Mead*, the Union insisted to impasse on retaining multiunit bargaining, and the Board's decision to uphold its right to do so was consistent with employees' Section 7 rights to bargain collectively through representatives of their own choosing. In the instant case, it is the employer who is insisting to impasse on retaining multiunit bargaining. In so doing, the Company is attempting to impose on the Union its opinion regarding who should be the collective-bargaining representative of its employees. This is inconsistent with employees' Section 7 rights to bargain collectively through representatives of their own choosing.

The Charging Party further contends that despite its decision to enter into a joint pension agreement with the Respondent, its withdrawal was unequivocal because the Company was notified at all times that the Union was nonetheless reserving its right to have this case resolved by the Board. In addition, Local 369 did not participate in any joint bargaining with the other locals, until the other locals withdrew their proposals and adopted Local 369's proposals. The Charging Party argues that for the Board to hold that Local 369 did not unequivocally withdraw from multiunit bargaining would give the Union two untenable choices—either to accept the Company's unwillingness to bargain separately, even if it is unlawful, or to exist without a pension agreement until all the Board's processes and court appeals have been exhausted.

The Charging Party also argues that Local 369 has maintained a separate identity from that of the other locals involved in multiunit bargaining, and that the bargaining unit represented by Local 369 was an appropriate one for purposes of collective bargaining. The Charging Party maintains that Local 369 was delegated authority by the National Union to negotiate a pension plan. Unlike the temporary authority granted in 1972, the grant of authority to Local 369 for the 1986 negotiations was clear and unequivocal. Further, the Respondent has never before questioned the authority of Local 369 to bind the National in contract negotiations for separate contracts with Local 369. Finally, the recognition clause of the collective-bargaining agreement for the production and maintenance workers has contained language that the Company recognizes both the National and Local 369 as exclusive representative of that unit.

D. *Analysis and Conclusions*

The major thrust of the Respondent's argument is that two separate bargaining units covering the same employees co-exist—one unit for pension bargaining and a second unit for bargaining on the remaining subject matters. The Respondent argues that because for over 36 years pension bargaining has always been conducted on a companywide basis between Boston Edison, the National Union, and its three locals, the established unit for purposes of collective bargaining with respect to pension issues is a companywide unit. At the same time it acknowledges that the three separate employee groups represented by the individual locals are the appropriate units for purposes of bargaining over the remaining subject matters.

Although it is well settled that the parties may voluntarily agree to bargain jointly on an other-than-unit basis for certain subject matters and to bargain on a unit basis for other matters, that agreement does not result in two separate units—a broader unit for some purposes and a narrower unit for others. Only one unit covering the same employees may exist at any given time, even if the parties agree to bargain on certain matters on a different basis.

Further, although parties may voluntarily consent to bargaining jointly on a basis other than the established appropriate unit, neither party may be forced to continue such negotiations. The scope of an established bargaining unit is a nonmandatory subject of bargaining that either party may propose changing so long as it does not insist on its proposal to impasse. *Consolidated Papers*, supra.[3] A party may not be forced to bargain on other than a unit basis. *Shell Oil*, supra.[4]

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[3] The Board in *Consolidated* at fn. 6, found that *Mead*, relied on by the Respondent here, was not relevant to the issue posed in *Consolidated*. It appears that the Board, without specifically so stating, was declining to follow *Mead*. *Mead* has not been cited in any Board majority decision since *Consolidated*. In fact, between the time that *Mead* and *Consolidated* were decided, it was only cited in a dissent in *Columbus Printing Pressmen Union 252*, 219 NLRB 268 fn. 24 (1975), with a specific notation that the dissenting member was expressing no view concerning its validity or invalidity. Accordingly, we find that *Mead* was implicitly overruled by *Consolidated*. In any event, we overrule *Mead* to the extent it is inconsistent with our decision.

[4] *Shell Oil Co.*, relied on by the Respondent, does not support its view. There the company had collective-bargaining agreements with various local unions of the Oil, Chemical and Atomic Workers Union (OCAW)

Continued

In the instant case, the National Union was certified in 1950 as the exclusive collective-bargaining representative for the Respondent's production and maintenance employees. Shortly after the certification was issued, Local 369 was chartered to represent the Respondent's employees in the production and maintenance unit. In 1951 Local 369 negotiated a separate collective-bargaining agreement for the employees it represents and thereafter it renegotiated agreements in 1953, 1955, 1957, 1959, 1961, 1963, 1965, 1967, 1969, 1971, 1973, 1975, 1977, 1980, 1983, and 1986. The most recent collective-bargaining agreement between the Respondent, Local 369, and the National Union covering the employees in the production and maintenance unit is effective from June 13, 1986 to May 1990. The recognition clause of the collective-bargaining agreement for the production and maintenance workers contained language that the Company recognizes both the National and Local 369 as the exclusive representative of that unit. Thus, the production and maintenance employees have continued throughout to constitute a separate appropriate bargaining unit represented by the National and Local 369.

With respect to the pension plans, historically each local union during joint negotiations submitted its own pension plan proposals; the agreements reached in pension plan negotiations were specifically subject to ratifications by the membership of the three locals which were individual parties to these agreements, and each local conducted separate ratification votes on the terms contained in the agreements.[5] This joint bargaining with separate ratification and separate agreements is consistent with the finding that the units continued to be represented as separate units.

Local 369 successfully met the threshold requirements for withdrawal from joint bargaining, as provided in *Retail Associates*, 120 NLRB 388 (1958), and *Evening News Assn.*, 154 NLRB 1494 (1965), enfd. 372 F.2d 569 (6th Cir. 1967), by giving a timely and unequivocal notice to the Respondent of its desire and intention to bargain with the Respondent concerning the pension plan separately from Locals 387 and 386. In the letter of January 9, 1986, to the Respondent, Local 369 specifically notified the Respondent of its intention to negotiate a pension plan separately from the negotiations for the units represented by Locals 387 and 386. This notice was unequivocal and was made in a timely fashion as it was given prior to the commencement of negotiations on the pension plan on April 3, 1986. Further, the Respondent was notified by the National Union that Local 369 had permission to proceed separately for the 1986 negotiations to modify the pension plan.

We also find that Local 369's withdrawal from joint bargaining was unequivocal despite the fact that it proceeded to bargain with the Respondent on a pension plan when the Respondent informed Local 369 that it was unwilling to bargain separately. The Respondent was notified at all times that the Union was reserving its right to have this case resolved by the Board.[6]

Accordingly, we find that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to negotiate separately with Local 369 over a pension plan covering the employees in the production and maintenance unit it represents.

CONCLUSIONS OF LAW

1. Boston Edison Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 369, Utility Workers Union of America, AFL–CIO; Utility Workers Union of America, AFL–CIO; Local 387, Utility Workers Union of America, AFL–CIO; and Local 386, Utility Workers Union of America are labor organizations within the meaning of Section 2(5) of the Act.

3. The appropriate collective-bargaining unit is:

> All production and maintenance employees employed by Respondent including those employees in the classifications listed in the pay schedule effective 13 June 1986 of the collec-

covering employees in 19 bargaining units. Negotiations between Shell and OCAW had always been conducted separately for contracts covering each of the 19 units and the parties never engaged in multiunit or joint bargaining. Representatives of OCAW's employees proposed that Shell bargain with them on a joint basis regarding the common fringe benefit plans' revisions. Shell refused. In dismissing the complaint that had been issued based on OCAW's charges, the Board stated that in the absence of an agreement, neither party may attempt to force on the other an enlargement, alteration, or merger of an established unit or units. Thus, an employer (or a union) may lawfully insist on confining bargaining within established unit borders. A union's (or employer's) attempt by coercive means, or by insistence in bargaining to the point of impasse, to require an alteration of a unit will be regarded as a unilateral attack on the integrity of the established bargaining unit.

[5] The fact that a similar charge filed in 1972 was dismissed by the Regional Director does not constitute precedent for our decision. Nevertheless, we find that the facts in the instant case are different than those present in the 1972 case in that here, unlike in 1972, the National specifically notified the Respondent that Local 369 had permission to proceed separately for the 1986 negotiations to modify the pension plan.

[6] We agree with the General Counsel that the fact that Local 369 executed a pension plan agreement with the Respondent subsequent to the filing of the unfair labor practice charge does not render this case moot. See, e.g., *Massillon Publishing Co.*, 215 NLRB 380 (1974); *Pacific Coast Assn. of Pulp & Paper Mfrs.*, 133 NLRB 690 fn. 1 (1961). Here Local 369 was coerced by the Respondent's unlawful refusal to bargain into either foregoing a pension plan covering the bargaining unit employees it represents or joining in the execution of the companywide plan. The fact that it chose one of these options does not render this case moot. This is particularly true in this case where Local 369 clearly informed the Respondent of its intention to preserve its argument that the Respondent's refusal to bargain separately was violative of Sec. 8(a)(5) and Local 369 pursued the instant unfair labor practice charge.

tive bargaining agreement between Respondent, Local 369 and the National Union but excluding meter readers, foremen, office clerical employees, professional employees, guards and all supervisors as defined in the Act.

4. At all times relevant the National Union and Local 369 have been and are now the exclusive representative of all employees in the appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) by failing and refusing to bargain separately with Local 369 on a retirement/pension plan for employees in the production and maintenance unit.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[7]

We have found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain separately with Local 369 regarding a retirement/pension plan covering the employees in the production and maintenance unit. In order to remedy these unfair labor practices, we shall order the Respondent to cease and desist and, on request, to rescind the pension agreement reached and to bargain separately with Local 369 on a pension plan covering the production and maintenance unit and, if an understanding is reached, to embody the understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Boston Edison Company, Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain separately with Local 369, Utility Workers Union of America, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit on a retirement/pension plan covering unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On the request of Local 369, rescind any agreement covering a pension plan for unit employees.

(b) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed by Respondent including those employees in the classifications listed in the pay schedule effective 13 June 1986 of the collective bargaining agreement between Respondent, Local 369 and the National Union but excluding meter readers, foremen, office clerical employees, professional employees, guards and all supervisors as defined in the Act.

(c) Post at its facility in Boston, Massachusetts, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] As noted above the General Counsel requests that the Order include a visitatorial clause authorizing the Board for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain separately with Local 369, Utility Workers Union of America, AFL–CIO as the exclusive representative of the employees in the production and maintenance bargaining unit on a retirement/pension plan.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, rescind any agreement covering a pension plan for unit employees and, on request, bargain with Local 369 and put in writing and sign any agreement reached on a retirement/-pension plan for our employees in the production and maintenance bargaining unit.

BOSTON EDISON COMPANY

Blankenship and Associates, Inc. and Rayford T. Blankenship *and* Sheboygan Graphic Communications Union Local 556, Subordinate to the Graphic Communication International Union and Diamond Printing Company Employee Committee. Case 30–CA–9265

July 29, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On August 13, 1987, Administrative Law Judge Marvin Roth issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondents filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

1. The judge concluded, inter alia, that the Respondents violated Section 8(a)(1) of the Act by counseling the Employer, Diamond Printing Company (not a respondent herein), to remove Walter Hake as personnel/labor relations director, in response to employee complaints about him and in order to influence the outcome of the upcoming election by discouraging support for the Union. We disagree with the judge.

The facts, as set forth more fully by the judge, are essentially as follows. On March 21, 1986,[2] the Union filed a petition with the Board to represent the Employer's full-time production and maintenance employees for purposes of collective bargaining. On April 4, the Employer contractually engaged the services of Respondent Blankenship and Associates, Inc., as the Employer's "representative in such NLRB case and any concurrent, subsequent or related cases, if any." The representation election was scheduled for May 16.

On April 7, the Respondents conducted a meeting with the employees. The employees complained about the allegedly harsh manner in which Walter Hake, the Employer's chief executive officer, conducted personnel and employee relations matters. Thereafter, Respondent Blankenship informed the Employer's president, Randall Hake (Walter Hake's son) that the employees did not want Walter Hake to continue to manage personnel and labor relations matters. Blankenship told Randall that he felt that "some changes should be made in that area." Randall asked Blankenship to put his recommendations in writing to Randall. Blankenship agreed to do so.

In the meantime, on April 15, four of the Employer's supervisors signed and gave to Randall, for his review, a letter addressed to Walter stating, inter alia, that:

> [W]e the supervisory personnel along with the recommendation of the Labor Consultant, feel that a change must be made in personnel handling for the benefit of the company and its employees.
>
> In our opinion, all personnel matters such as: pay raises, vacation time, disciplinary matters, etc. should be turned over to Randall Hake.

Two days later, on April 17, the Respondents sent Randall a letter containing recommendations regarding their April 7 meeting with the employees. The letter, signed by Respondent Blankenship, stated, in pertinent part:

> I strongly suggest you take your Dad out of the day-to-day labor relations management. . . . In fact, you should take your Dad's place if possible.
>
> I am very hesitant about suggesting such, but I feel that we can't win the union election without such.

Thereafter, Randall discussed with Walter the possibility that the former would replace the latter in managing the Employer's personnel and employee relations matters; Walter agreed to relinquish his responsibilities. On April 23, Randall posted a notice to all employees advising them that he had assumed authority and responsibility for all personnel matters.

The judge preliminarily found that in removing Walter Hake from his position as personnel/-employee relations manager in response to employee complaints about his performance, the Employer acted unlawfully by granting the employees a change in their working conditions. Thus, the judge found that employees could reasonably perceive Walter Hake's removal as a benefit or response to their expressed grievances or to their reasons for seeking unionization, given for the purpose of discouraging employee support for the Union. The judge then found that the Respondents violat-

[1] We agree with the judge's finding that the preparation of the answer to the complaint in this proceeding is not an unfair labor practice. We therefore find it unnecessary to the disposition of this case to determine whether the crime or fraud exception to the attorney-client privilege applies here. See, however, *Patrick Cudahy, Inc.*, 288 NLRB 968 (1988), in which we rejected the position taken by the Board in *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965), that a violation of the NLRA constitutes a crime or fraud for purposes of the crime or fraud exception to the attorney-client privilege.

[2] All dates are 1986, unless otherwise indicated.

ed the Act by counseling the Employer to engage in this unlawful conduct.

In so finding, the judge relied on the Board's decision in *Resistance Technology*, 280 NLRB 1004 (1986), in which the Board found that an employer's instruction to a supervisor to commit an unfair labor practice is an unfair labor practice when the instruction is carried out or the employees otherwise become aware that the instruction was given.[3] Analogizing to *Resistance Technology*, the judge found that the Respondents' advice to the Employer to commit the unfair labor practice of removing Walter Hake as personnel/employee relations manager was an unfair labor practice because the Employer followed that advice and removed Walter Hake.[4] According to the judge:

> If an employer can be held accountable for its instructions or even suggestions to its supervisory personnel which result in the commission of unfair labor practices, than it would seem only proper that a professional counselor should be held responsible for its advice which has the same unlawful effect.

Contrary to the judge, we find *Resistance Technology* and *Walker's* to be inapposite. In those cases the principals (the employers) were held liable for the unlawful acts of their agents (the supervisors or the buyers). This is in keeping with fundamental precepts of the law of agency.[5] However, unlike in *Resistance Technology* and *Walker's*, the judge here found that the agents (the Respondents) violated the Act because the principal (the Employer) violated the Act on the agents' advice. In this regard, we find that the judge has improperly held the Respondents, as the Employer's agents, responsible for the unlawful act of the Employer, as principal—a notion that is clearly foreign to agency principles. Accordingly, we shall dismiss this allegation of the complaint.[6]

2. The judge also concluded that the Respondents violated Section 8(a)(1) and (2) of the Act by formulating, and counseling the Employer to implement, a plan to establish an employee committee to negotiate and develop with the Employer a new set of work rules. We do not agree with the judge in this regard. Initially we find that, as noted above, the Respondents as the Employer's agents cannot be held liable for the acts of the Employer even if it was found that the Respondents had formulated and then counseled the Employer to implement a plan to establish an employee committee. Thus, we find no violation on that basis. However, on review of the record, we note additionally that we do not agree with the judge's factual conclusions with regard to this allegation. Thus, contrary to the judge's express and implicit factual finding that the Respondents formulated and counseled the Employer to implement such a plan, the record establishes that it was the Employer's president, Randall Hake, who formulated and implemented this plan, without the advice or substantive foreknowledge of the Respondents.

The record establishes, and the judge found, that the Respondents advised Hake to update the Employer's work rules. Indeed, the Respondents provided Hake with four or five different proposed sets of new work rules. But according to Hake himself, he asked the Respondents in mid-May, "Can I go ahead and proceed with my plan to set up a committee that we could develop a new set of work rules." There is no evidence that Hake had ever before mentioned such an employee committee to the Respondents. Hake testified that he was told in reply by the Respondents "that I have to run the business." The next day, according to Hake, in response to his above conversation with the Respondents "and my own plan to revise the work rules and make changes in the work force," he held a meeting of all employees, at which he told them that he would like to proceed with formulating a committee and establishing a new set of work rules. Towards that end, Hake instructed the employees to elect two people to meet with Hake and the plant superintendent to revamp the existing work rules. Employees Kenneth Martin and Marjorie Grinnell were elected as the employee representatives.

Hake testified that his only consultation with the Respondents about this employee committee before he actually implemented this plan was to the extent that, on the day before he actually implemented this plan, "when I laid it out to [them, the Respondents told me] that I should go ahead and I should run the business the way I saw fit." Hake testified that when he asked the Respondents whether he could form such an employee committee to develop new work rules, the Respondents did not advise him to form, to assist in forming, or

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[3] The Board majority in *Resistance Technology* also found that such an instruction to a supervisor is not an unfair labor practice when the instruction is not carried out and the employees do not otherwise become aware that the instruction was given. Chairman (then-Member) Stephens and Member Babson found it unnecessary to decide this issue because, in *Resistance Technology*, the instructions were executed and disclosed.

[4] In finding a violation of the Act in the instant circumstances, the judge also cited *Walker's*, 159 NLRB 1159, 1175, 1179 (1966), as a case in which the Board found the employer violated the Act by suggesting to buyer employees (nonsupervisory, unit personnel who were viewed by other employees as management) that they interrogate employees about their union sentiments.

[5] Restatement 2d, *Agency*, § 212 and comment a (1957).

[6] See *St. Francis Hospital*, 263 NLRB 834, 847–850 (1982), affd. 729 F.2d 844 (D.C. Cir. 1984).

to even meet with such a committee, but simply advised Hake to run his own business.

The testimony of employee committee member Marjorie Grinnell is consistent with the testimony of Randall Hake that it was he, and not the Respondents, who formulated and implemented the plan to form an employee committee to develop new work rules. Thus, according to Grinnell, when she herself earlier asked the Respondents in April if the employees could form a committee, the Respondents simply advised Grinnell to contact the National Labor Relations Board for guidance on that subject. In Grinnell's testimonial account of Hake's subsequent mid-May announcement of the formation of an employee committee, Hake made no mention of the Respondents, but instead simply told the assembled employees that (in Grinnell's words)

> [W]e had to get together and try to come up with a plan to keep the business going and therefore, he [i.e. Hake] thought it would be a good idea if we would elect . . . two representatives, employee representatives, to sit down with him and [the plant manager] and draw up a policy . . . that we would have work rules and vacation provisions in it, and such.

In light of the above facts and in the absence of any record evidence to the contrary, we find that the preponderance of the evidence establishes that the Employer's president, Randall Hake, acting on his own initiative and without the advice or substantive foreknowledge of the Respondents, formulated and implemented the plan to form an employee committee to develop new work rules. Thus, we find that the factual predicate for the judge's unfair labor practice finding in this context—that *the Respondents* formulated and advised Hake to implement such a plan—is not supported by, and indeed is contradicted by, the record. Accordingly, we shall dismiss this allegation.[7]

ORDER

The complaint is dismissed.

[7] To the extent, if any, that the judge's unfair labor practice finding in this context may have been premised on the alleged failure of the Respondents affirmatively to instruct Hake *not* to proceed with his plan to form such an employee committee, we find that the judge based such a rationale on the same factual predicate that we have found not to be supported by the record, i.e., that the Respondents themselves had initially formulated and advised Hake to implement such a plan. (See the final par. of sec. III,E, of the judge's decision). As indicated, the record fails to establish that the Respondent's had anything more than the barest and briefest foreknowledge that Hake planned to form an employee committee to develop new work rules.

MEMBER JOHANSEN, dissenting in part.

I agree with the majority's dismissal of the complaint except as to the actions of Respondent Blankenship in counseling Diamond Printing to remove Walter Hake as personnel/labor relations director in order to discourage support of the Union; counseling that was heeded and acted on by Diamond. I agree with the judge for the reasons he gave that by counseling the Employer to commit unfair labor practices, Blankenship, as the Employer's labor consultant, violated Section 8(a)(1) of the Act. In doing so, I hold Blankenship accountable for his own action, not that of the Employer.[1]

Further, although I agree with the majority that Blankenship did not violate the Act by counseling the Employer to implement a plan to establish an employee committee to negotiate with the Employer, I do so because the facts do not support the finding of a violation, not because Blankenship was an agent of the Employer and thus could not violate the Act in his own right.

[1] The statute defines the term "employer" to include an "agent." Statutory prohibitions against "employer" conduct, thus, also run against the "agent" of an employer.

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Joseph W. Weigel, Esq., of Milwaukee, Wisconsin, for the Respondent.
Rayford T. Blankenship, of Greenwood, Indiana, pro se.
Robert G. Robinson, of Menasha, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Milwaukee, Wisconsin, on 31 March and 1 and 2 April 1987. The charge was filed on 30 June 1986 by Sheboygan Graphic Communications Union Local 556, Subordinate to the Graphic Communication International Union (the Union).[1] the complaint, which issued on 3 December and was amended at the hearing, alleges that Blankenship and Associates, Inc. and Rayford T. Blankenship (Associates and Blankenship, respectively, and collectively Respondents), violated Section 8(a)(1) and (2) of the National Labor Relations Act.[2] The gravamen of the complaint is that Respondent allegedly counseled Diamond Printing Co., Inc. (Diamond) in the commission of unfair labor practices that were subsequently settled informally by the Company, and allegedly engaged in unfair labor practices involving the Company's employees; specifically, soliciting grievances,

[1] All dates refer to 1986 unless otherwise indicated.

[2] By letter dated 27 April 1987, the General Counsel indicated that it would not proceed on certain other allegations of the complaint (pars. 10(b) and (c)). The General Counsel's request in its brief (fn. 1) to withdraw pars. 12 and 15 of the complaint, which were based on pars. 10(b) and (c), is granted.

promising benefits, advising employees that they could obtain such benefits without a union, and suggesting that employees could negotiate a collective-bargaining agreement with the Company. Respondents, by their answer, denied commission of the alleged unfair labor practices.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs.[3] The General Counsel and Blankenship each filed briefs. On the entire record in this case,[4] and from my observation of the demeanor of the witnesses and having considered the briefs submitted by the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS AND THE EMPLOYER INVOLVED

Diamond, a Wisconsin corporation, is engaged in the commercial printing of business forms and envelopes at its Sheboygan, Wisconsin plant. In the operation of its business, Diamond annually purchases goods and materials valued in excess of $50,000 directly from suppliers located outside of Wisconsin, and annually ships goods valued in excess of $50,000 directly to customers located outside of Wisconsin. In their answer to the complaint, Respondents pleaded no knowledge about these matters. However, in the representation proceeding involved in this case, Blankenship on behalf of Diamond stipulated the commerce facts. I find that Diamond is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Associates, a corporation with its principal office and place of business in Greenwood, Indiana, is engaged in the business of labor consultants, principally representing management in labor relations matters. In the operation of its business, Associates has an annual gross revenue in excess of $250,000, and annually performs services valued in excess of $50,000 for employers located in States other than Indiana, many, if not all, of whom are in interstate commerce. It is undisputed that at all times material, Blankenship has been and is chief executive officer and the majority stockholder of Associates.

In their answer, Respondents assert that they "were employed as agents of [Diamond] for the limited purpose of assisting [Diamond] in Case No. 30–RC–4566" (the representation proceeding). The General Counsel also contends (Br. 9–10) that Respondents acted as the agents of Diamond. Because the present case involves an employer engaged in commerce (Diamond) it is immaterial whether Associates meets any standard for assertion of Board jurisdiction. See, e.g., *St. Mary's Infant Home*, 258 NLRB 1024, 1031 (1981), enfd. in pertinent part 690 F.2d 1062, 1070 (4th Cir. 1982); and *Chalk Metal Co.*, 197 NLRB 1133 (1972), in which the Board asserted its jurisdiction over a labor relations consultant without making specific findings concerning the commerce of the consultant. This is not a case involving the labor relations of Associates vis-a-vis its own employees. In the absence of such situations, jurisdiction may be based on the commerce of any affected person or persons, e.g., in cases involving alleged union unfair labor practices, on the commerce of any affected or involved employer or employers. The General Counsel suggests (Br. 7), that jurisdiction may be asserted over labor relations consultants under the same standard applicable to law firms. In fact, the Board has asserted jurisdiction over a consulting firm, using the same standards generally applicable to nonretail business. *St. Francis Hospital*, 263 NLRB 834, 839 (1982), affd. 729 F.2d 844, 851 (D.C. Cir. 1984). In any event, regardless of which standard is used, this case meets both the statutory and the Board's self-imposed tests for jurisdiction. I find that Associates is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, that Blankenship is an agent of Associates within the meaning of Section 2(2) and (13) of the Act, that Associates and Blankenship were at times material, at least arguably agents of Diamond, and therefore that it would effectuate the policies of the Act for the Board to assert its jurisdiction in this case.

II. THE LABOR ORGANIZATION INVOLVED

It is undisputed that the Union is a labor organization within the meaning of Section 2(5) of the Act. I shall reserve to the merits of this case the question whether Diamond Printing Company Employee Committee (sometimes employee committee) was at times material a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Diamond is a family-owned and operated business. As of March 1986, Walter Hake was chief executive officer, chairman of the board, and minority stockholder. His son, Randall Hake, was president and majority stockholder. Walter was responsible for personnel relations. The Company had about 17 plant employees. On 21 March the Union filed a petition for a Board-conducted election among the Company's production and maintenance employees (Case 30–RC–4566). The Hakes decided to retain a labor relations firm. They received a solicitation letter from Blankenship (who evidently kept himself informed of representation petitions filed with the Board), and on 4 April, Diamond retained Associates as its representative in the representation case and any related litigation. Associates requested and the Regional Director issued an order postponing the representation hearing from 8 to 10 April. On 11 April, Diamond, by Blankenship, and the Union executed a Stipulation for Certification upon Consent Election, which was subsequently approved by the Regional Director. The election was scheduled for 16 May.

In the meantime, on 7 April, Blankenship, accompanied by his associate James Pierce, met with the Hakes to discuss their strategy in opposing the Union. Blankenship asked for and received permission to meet with the

[3] On 31 March 1987 the Board denied Blankenship's motion for special permission to appeal from the Regional Director's order denying Blankenship's motion for a further continuance and adjournment of the hearing (the Regional Director having granted Respondents' prior request for a continuance of 7 weeks). On 31 March 1987, I denied Blankenship's renewed motion for a further continuance.

[4] Transcript corrections are noted and corrected.

supervisory personnel and with the employees without the Hakes being present, in order to learn the situation and to determine the employees' attitudes and concerns. That afternoon Blankenship, accompanied by Pierce, conducted a meeting of the employees on company premises and time, to which the employees were summoned by their supervisors and for which they were paid. Pierce and employee Kenneth Martin, who were both presented as the General Counsel's witnesses, testified concerning the meeting.[5] Their testimony was mutually corroborative in part, but conflicted in certain important respects. Both testified in sum that most but not all the meeting was tape recorded.[6] They also testifed, in sum, that Blankenship presented an antiunion film entitled "Floyd." Martin testified in sum as follows: Blankenship identified himself as a labor consultant, and described how unions allegedly functioned. Employee Marjorie Grinnell asked Blankenship whether he was an attorney. Blankenship said that he was a lawyer rather than an attorney, and explained the difference (Blankenship evidently is a law school graduate, but not admitted to any bar). Employer Donald Wield, the principal union adherent, made some comment, whereupon Blankenship retorted that he had heard of Wield, and then proceeded to change the subject. He asked the employees what their problems were, and they proceeded to air their gripes. Most of the complaints related to the allegedly arbitrary manner in which Walter Hake handled personnel matters including harsh or unusual discipline, favoritism, and avoidance of responsibility for decisions. Some employees complained about the poor condition of the washrooms. Blankenship told the employees that they did not need a union, they could negotiate a contract directly with the Employer and they would have the same safeguards under the Act as they would with a union. Martin left about 15 minutes before the meeting ended. (Blankenship told him he had to remain because he was on worktime. Martin refused to remain, and walked out. No punitive action was taken against him.) Pierce testified in sum as follows: Employee Wield accused Blankenship of practicing law without a license. He made other accusations during the meeting. Blankenship discussed unions, using charts, and asserted in essence that unionization would deprive the employees of a voice in management, and that it was simple to get a union in but difficult to get it out. Blankenship asked the employees what their problems were. Wield said they did not get sufficient increases, were not treated properly, and that Walter Hake was a tyrant. Blankenship asked Wield if he confronted management. Wield answered that it did no good. Another employee complained about being deprived of holiday pay for being late. One female employee asked about whether they could start "an employee type union," whereupon Blankenship answered that "you people pay taxes and there is such a place as the Labor Board and you should bring your questions to their attention." He offered to get them the Board's telephone number. Pierce testified that, except as indicated above, Blankenship did not advise the employees about what they could do about their problems.

I credit Pierce's testimony concerning the 7 April meeting, and I credit Martin's testimony only insofar as it is consistent with that of Pierce. I specifically do not credit Martin's testimony to the effect that Blankenship sugggested or advised that the employees could negotiate a contract directly with Diamond. In so doing, I find significant the testimony of Marjorie Grinnell. On her direct testimony, the General Counsel did not question Grinnell about the 7 April meeting. However, on cross-examination by Blankenship, Grinnell testified that at a meeting of employees addressed by Blankenship, she asked whether they could form an employee committee, that Blankenship referred her to the Board, and that Pierce gave her the Board's telephone number. The testimony in this case indicates that there were captive audience meetings on 7 April and 2 and 12 May. Blankenship spoke only briefly at the 12 May meeting, without discussing any substantive matters, and the evidence fails to indicate any such exchange between Grinnell and Blankenship at the 2 May meeting. In light of Pierce's testimony, it is evident that Grinnell was referring to the 7 April meeting. I find it unlikely that Blankenship would suggest formation of an employee committee to deal directly with management, while at the same time telling an employee who made the same suggestion to ask the Board whether it was proper. Moreover, as will be discussed, Blankenship did not talk to Diamond about an employee committee until after the 7 April meeting. It is unlikely that Blankenship would have made such a suggestion to the employees without first consulting with the Hakes. I find that Grinnell, not Blankenship, first raised the matter of an employee committee.[7]

[5] Respondent did not present any witnesses. Blankenship, the key figure in this case, did not testify. No adverse inference is warranted from either the failure of Blankenship to testify on behalf of Respondents or the General Counsel's failure to call him as an adverse witness. *O'Dovero Construction*, 264 NLRB 751 fn. 1 (1982).

[6] At the hearing, Respondents objected to any testimony concerning the substance of the meeting because the tapes constituted "the best evidence of what was said." There are several problems with this argument. Neither the tapes nor any transcriptions were offered in evidence or authenticated, except for a page of the approximately 50-page transcript of the 7 April meeting, which was offered in evidence by the General Counsel. That page, insofar as pertinent to the issues of this case, reflected an employee complaint about Walter Hake, and a statement evidently made by Blankenship that: "The only thing that I can tell you is that I will honestly try to get some answers for you. I will tell you this, it would be illegal for me to stand here and tell you that we will adjust all your complaints. That would violate the law." The General Counsel took the position that the transcript of the 7 April meeting was generally unreliable, and both Pierce and Martin indicated in their testimony that the tapes were incomplete. The Board has received tapes or transcriptions in evidence and has sometimes found them to be the "best evidence" of a meeting or conversation. However, there is no rule of evidence that requires their acceptance to the exclusion of oral testimony, even when the parties have stipulated about their accuracy (which is not the situation here). The "best evidence" rule relied on by Respondents stands for the proposition that the terms of a document must be proved by production of the document. 4 Wigmore, *Evidence* ¶ 1174 (Chadbourn rev. 1972). Here, the witnesses did not testify about contents of the transcription, i.e., the "document." Rather, they testified about the meeting itself. Therefore, the rule is inapplicable.

[7] Ordinarily I might be inclined to give greater weight to the testimony of a current, disinterested employee than to that of an interested employer or union representative. However, the present case presents a somewhat different situation. At the time of the present hearing, Martin was a member of the Union's negotiating committee, and his employer,

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After Blankenship and Pierce met with the employees (and also met separately with the supevisory personnel on 7 April), they met with Randall Hake to discuss their conclusions and recommendations. Blankenship advised Randall Hake that the employees could not work well with his father, and that Walter Hake should no longer handle personnel relations. Blankenship also advised that Diamond should update its work rules. Diamond had in effect a written five-page statement of "policies for full time plant employees," dated 6 July 1981. This document covered, among other matters, employee benefits, absenteeism, tardiness, and discipline. However, these policies were not uniformly followed by management, and in fact Walter Hake tended to handle such matters as discipline in an arbitrary manner. Blankenship offered to provide Diamond with sample work rules and a list of proposed work rules for Diamond. Randall Hake asked Blankenship to put his recommendations in letter form, and Blankenship agreed to do so. By letter dated 17 April, Blankenship told Randall Hake that, in light of the employees' comments at the 7 April meeting, "I strongly suggest that you take your Dad out of the day-to-day labor relations management regarding the employees in the plant," and that "You should take your Dad's place if possible." Blankenship opined that "I feel that we can't win the union election without such." He also enclosed "a copy of the contract that you should consider adopting after we rid you of the union problem." Blankenship added: "From looking at what you have and listening to your employees, it is imperative that what you have in the way of policies, rules, wages, and hours be modified and brought up-to-date as quickly as possible." The enclosed "contract" copy actually purported to be an employee policy pamphlet rather than a contract. Among a long list of offenses warranting disciplinary action, the pamphlet listed as "terminal offenses . . . advocating trouble between management and the employees" and "unauthorized entry on company property." Randall Hake testified that Blankenship advised him to distribute copies of the pamphlet to the supervisors, "and leave them available in the plant for scrutiny if anybody so wished." However, Hake admittedly understood that the pamphlet "was a general outline of policies that were intended to be implemented at [Diamond] once we had resolved the Union issue." Hake also testified that James Pierce gave him several samples of policies that he might use. Pierce testified that he prepared three copies of the policy pamphlet for Randall Hake and told him not to use them until there was a decision on the election. To evaluate the testimony of Pierce and Hake, which in some respects appears inconsistent, it is necessary to first consider subsequent developments.

By letter dated 15 April to Walter Hake, Diamond's supervisory personnel requested that he turn over responsibility for personnel relations to his son. Randall Hake also confronted his father with Blankenship's letter. At a family meeting, Walter Hake agreed to the transfer of authority. On 23 April Randall Hake posted a notice to the company personnel that effective as of that date he was assuming "authority and responsibility for all personnel matters." On 22 April Walter Hake made a last-ditch effort to reassert his former authority by firing Donald Wield. However, Randall Hake immediately countermanded this action, and there was no further challenge to his authority.[8]

As indicated, there was a captive-audience meeting on 2 May. Blankenship conducted the meeting, and a film was shown. Employee Martin testified that Blankenship showed the employees the policy pamphlet (which he had sent to Hake) as a prototype of a contract that could possibly be drafted between the employees and Diamond. Martin testified that Blankenship had two copies with him, that he gave one to Marjorie Grinnell, that the employees requested more copies, and that the next day he found a copy on his worktable. However, in his investigatory affidavit to the Board, Martin stated that Randall Hake (who was present at the 2 May meeting) showed the employees a copy of the policy pamphlet, said that it was patterned after something Blankenship gave him, that he would make additional copies to be circulated among the employees, and that they should make notes of proposed changes. Grinnell testified that copies of the policy pamphlet were distributed at the 12 May meeting. After some equivocation, Grinnell testified that she thought Blankenship distributed copies of the pamphlet. However, on cross-examination, she testified that Randall Hake distributed copies of the pamphlet. In her investigatory affidavit, Grinnel stated that Hake "had a copy of an 'employee policy pamphlet'" which he said Associates prepared as a guideline and that Hake would have copies made for everybody. I do not credit the testimony of Martin and Grinnell that Blankenship distributed copies of the policy pamphlet. For reasons that will be discussed, I find that Hake distributed copies at a meeting of employees on or shortly after 14 May, at which Blankenship was not present.

Randall Hake was not present at the 7 April and 2 May meetings. However, he was scheduled to address the employees at the 12 May meeting, and Pierce prepared a speech for his use. Pierce's draft was about 1-1/2 typewritten pages. I have found nothing unlawful in this draft, nor does the General Counsel contend that it contains any unlawful statements. The draft contains no express or implied threats of reprisal or promises of benefit. However, Hake, acting on his own and without consulting Blankenship or Pierce, decided to use Pierce's draft only as a starting point for his own speech. Hake struck out much of Pierce's draft, decided to paraphrase other portions, and added his own handwritten draft.[9] Hake

Diamond, is not a respondent in this proceeding. Therefore, Martin was not testifying against the interests of his employer. Subsequent to the event involved in this case, Blankenship fired Pierce, and by the time of this hearing Pierce was engaged in the labor relations consulting business in competition with Blankenship. Therefore, he had no evident reason to testify falsely to advance Blankenship's interests.

[8] From this point on, "Hake" refers to Randall Hake, unless the context indicates otherwise.

[9] Hake testified in detail concerning his revisions and the resulting speech, which he delivered, and his testimony was corroborated by Pierce. I do not credit employee Martin's uncorroborated testimony to the effect that Hake delivered both Pierce's draft and his own in their entirety. This appears to be another illustration of Martin's general unreliability as a witness.

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did not show his draft to Blankenship or Pierce and they did not ask to see it, although Hake told them that he had altered Pierce's text. The resulting speech was considerably different from that drafted by Pierce. Blankenship, Pierce, and the Company's supervisory personnel were present at the 12 May meeting. Hake testified that he told Blankenship and Pierce that if he said anything "that was blatantly illegal," they should interrupt and stop him. Marjorie Grinnell testified that Hake told the employees that Blankenship was there to stop him if he said anything wrong (Hake's text did not contain any such comment). After restating Diamond's opposition to unionization and reminding the employees of their present benefits, Hake stated that as a result of "this situation . . . all people involved become aware that it was time for my Dad to surrender the reins as it pertains to labor relations," and that "things are not going to revert back once the union issue is resolved." Hake told the employees to "direct all concerns about wages, vacations, etc. to your supervisor and they in turn, if need be, will consult me." Hake then declared that: "As soon as this week's election has been conducted . . . hopefully as I see it for the best—no union—we will start to develop a contract and work rules that we can live by! This should be in place by July 1, 1986." At this point, Hake's text indicates "show sample." However, neither Hake nor Pierce testified that Hake distributed copies of the sample policy pamphlet at this meeting. Hake concluded by exhorting the employees to give him a chance, and specifically to give him 1 year "to make the changes without having to pay the costs of belonging to a union."

After Hake delivered his prepared remarks and called for questions, employee Wield challenged Blankenship's credibility. Hake explained that he retained Blankenship because he needed a labor relations consultant, and Blankenship admonished Wield not to slander him. Blankenship did not interrupt Hake during his speech. Hake testified that after the meeting Blankenship told him that the speech was fine, that "there were gray areas in there which could present some problems," but that "what is done is done." Pierce testified that after the meeting Blankenship asked him if he noticed "that Randy broke the law." Pierce answered he did not, whereupon Blankenship responded that Hake "in effect promised the people that he was going to make some improvements," adding that he hoped no one else caught it. Neither Blankenship nor Pierce told Hake that he said anything unlawful. However, Pierce stated in his investigatory affidavit that Blankenship previously advised Hake "not to make any outright promises to employees," and Hake admitted that Blankenship sent him written instructions to supervisors that indicated that they could not "make any promise of benefits in return for vote against a union."

On 14 May, the Union filed an unfair labor practice charge (Case 30–CA–9216), alleging that Diamond was violating Section 8(a)(1), (3), and (5) of the Act, among other things, by making promises of benefits at captive-audience speeches in late April and on 2 and 12 May. The following day, the Board's Regional Director issued an order postponing the election indefinitely, pending investigation of the charge. On learning that the election would be put off, Hake telephoned Associates and spoke to Pierce. Hake asked whether Diamond could proceed with the plan to set up a committee to develop a new set of work rules. Pierce said he would check with Blankenship. Shortly thereafter, Pierce called back, stating that he had checked with Blankenship, who said to tell Hake that Hake had to "run the business." Pierce told Hake to go ahead and run the business as he saw fit. On or shortly after 14 May, Hake summoned a meeting of the employees. He told them that the election was called off because the Union filed charges, but that he had to keep the business going, and wanted to proceed with forming a committee to prepare a new set of work rules. Hake instructed the employees to elect two representatives to meet with himself and Plant Superintendent Leon Ristenpadt. Hake then left the meeting. The employees selected Grinnell and Martin as their representatives, and Hake was informed of their decision. I find that at this meeting Hake circulated copies of the sample policy pamphlet given to him by Blankenship. As indicated, Hake referred to the sample at the 12 May meeting. The affidavits of Grinnell and Martin indicate that Hake did not circulate copies when he first showed the pamphlet, but promised to make copies for distribution. It is unlikely that Hake would have made such distribution before checking with Associates about whether he could proceed with the committee plan, as the distribution would have served no purpose except as a guide for negotiations. It is also unlikely that Hake would have singled out Grinnell and Martin to receive the pamphlets unless he learned that they would be the employee representatives.

The employer-employee committee first met on 27 May. Hake told Grinnell and Martin that he had to have a set of work rules in place by 1 July, which was Diamond's biannual wage review date. He told them that Diamond's 1981 policy statement would be the basis for discussion. The joint committee met again on 29 May and 3 June. The committee met on work time for which the employees were paid. Grinnell acted as secretary. She made minutes, typed them, including matters on which they agreed, and circulated copies to the other three representatives. By 3 June, the joint committe had agreed on and reduced to writing a document entitled "Policies for Full-Time Plant Employees," to be effective beginning 1 July 1986 for a period of 1 year. The document provided for annual meetings between management and employee representatives Grinnell and Martin for the purpose of reviewing wages and other conditions of employment for the forthcoming year. The document spelled out terms and conditions of employment concerning hospitalization plan, probationary employment, discipline, layoff and termination and grievance procedure (including meetings between management and employee representatives), absence and tardiness, wages (including a schedule of wage increases), service credit, overtime, and vacations. Many of these provisions reflected changes in wages and other working conditions. The joint committee was scheduled to meet again on 5 June. However, as a result of intervening developments, the meeting never took place.

After receiving the Union's initial unfair practice charge, Hake had second thoughts about retaining Associates. Hake expressed his concern to Pierce about the mounting cost of representation. Pierce offered an adjustment on rates, and suggested that Hake talk to Blankenship. However, following the 3 June employer-employee meeting, Grinnell and Martin told Hake that they questioned the propriety of this procedure and suggested that he retain an attorney. Hake's corporate law firm referred him to Attorney Alfred Heon of the law firm of White and Hirschboeck. On 5 June, Diamond retained Heon to replace Associates. That same day the Union filed an amended charge, alleging that Diamond was violating Section 8(a)(2) of Act by "assisting and/or dominating in the formation of a labor organization." Heon immediately advised Hake to discontinue the employee committee, which he did. On 30 June, the Union filed the present charge against Respondent. In mid-August, Diamond and the Union executed an informal Board settlement agreement in Case 30–CA–9216, which was approved by the Regional Director on 25 August. The settlement provided, among other things, that Diamond has disestablished the employee committee and ceased negotiating with it, and will not give effect to the negotiated terms, except for the agreed-on wage increase. The settlement further provided that Diamond has discontinued the service of Blankenship as its labor relations consultant, and "will not rely upon, implement nor follow any advice he previously gave us which is contrary to the pledge" contained in the settlement. The settlement agreement also provided that Diamond and the General Counsel "understand and agree" that the settlement resolves only the allegations against Diamond in Case 30–CA–9216, that the General Counsel is not precluded from proceeding on any other charge against any other person or entity, including the charge in Case 30–CA–9265, that evidence in Case 30–CA–9216 may be used in such other proceedings, and that no other relief would be sought against Diamond. On 31 October a Board election was conducted among Diamond's employees. The Union won, was certified, and at the time of the present hearing, Diamond and the Union were negotiating a contract.

B. *The Attorney-Client Privilege Issue*

Daniel McCarthy, who was presented as a General Counsel witness, is an attorney who is admitted to practice before the Supreme Court of Ohio and the United States Supreme Court. After leaving the United States Army, where he served as a JAGC officer, he was employed by Associates as a "labor consultant." Blankenship told McCarthy that Associates' staff, including Blankenship himself, practiced before the Board in that capacity and did not practice as attorneys. Associates did not itself conduct litigation before the courts in connection with Board proceedings, but referred such litigation to an outside law firm. However, Blankenship sometimes used the terms "attorney" and "lawyer" in referring to himself and his associates. Thus, on one occasion, Blankenship told a client that "we are all attorneys." As indicated Blankenship told Diamond's employees that he was a lawyer rather than an attorney. On several occasions, McCarthy prepared complaints in civil litigation. However, with one exception—a proceeding in a small claims court that was handled by McCarthy—these matters were referred to outside counsel for litigation.

McCarthy was not involved in the Diamond representation proceeding. However, in July, after the Union filed its charge against Respondents, Blankenship assigned McCarthy to handle the case. McCarthy prepared and submitted a position statement to the Board's Regional Office and unsuccessfully attempted to negotiate a settlement of the case. After the complaint issued, McCarthy drafted the substance of a proposed answer and discussed the answer with Blankenship. At the present hearing, the General Counsel sought to question McCarthy about Blankenship's statements concerning the allegations of the complaint in these discussions.[10] Respondents objected to the introduction of any testimony by McCarthy, invoking the attorney-client privilege, work product privilege, and trade secrets privilege. On consideraton of testimony by McCarthy and argument and citations presented by the parties, I indicated my view that the attorney-client privilege was applicable. However, in view of the importance of the question to the merits of the case, I permitted the Generl Counsel to proceed with his questioning, subject to my ultimate ruling in this decision. McCarthy testified in sum concerning his questions about each allegation of the complaint and Blankenship's responses. McCarthy asked these questions for the purpose of preparing the answer. Blankenship's responses varied in some respects both in substance and form from the answer filed by Respondents, which was prepared and signed by McCarthy. The answer did not consist simply of admissions, denials, and pleas of insufficient knowlege, but was qualified regarding the status of Associates and also contained an affirmative defense. McCarthy indicated in his investigatory affidavit that he and Blankenship discussed and agreed on language concerning the status of Associates. These facts indicate that McCarthy exercised professional discretion in preparing the answer. I indicated at the hearing that McCarthy's testimony tended to confirm my view that the attorney-client privilege was applicable. Having had further opportunity to consider and research the matter, I remain of that view.

The attorney-client privilege extends to the relationship between a business entity and its house counsel. *Swan Sales Corp. v. Jos. Schlitz Brewing Co.*, 126 Wis. 2d 16 (1985). The privilege also extends to Board proceedings. *NLRB v. E. Bruce Harvey*, 349 F.2d 900, 904 (4th Cir. 1965). It is not necessary to look much beyond the *Harvey* decision to ascertain the principles applicable to the present case. In *Harvey*, the court relied on an "oft quoted definition of the privilege" in *U.S. v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358 (D. Mass. 1950), in which Judge Wyzanski stated that

> The privilege applies only if (1) the assert holder of the privilege is or sought to become a client; (2) the

[10] At the time of the present hearing, MCarthy was no longer employed by Associates. He has engaged in consulting work in competition with Blankenship. There was litigation between Blankenship and his former associates, including McCarthy, which was eventually settled.

person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

The court in *Harvey* also cited Wigmore's statement of the essentials of the privilege, namely: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. 8 Wigmore, *Evidence* §§2292 (McNaughton rev. 1961). However, the court made clear, as did Judge Wyzanski, that the privilege is not limited to the obtaining of "legal advice," in the strict sense of that term, but also to communications for the purpose of obtaining "legal services" or "assistance in some legal proceeding." The court further held that the "mere fact that a person who is not an attorney could have performed the same service is not a ground for requiring a lawyer to disclose communications with his client discovery proceedings." In *Harvey*, an attorney refused to comply with a Board subpoena that required him to disclose the identity of a client for whom he had retained a private detective. Plainly this was a service that could have been performed by a nonlawyer. Nevertheless, the court held that the privilege applied if the lawyer hired the detective as an incident to rendering a legal opinion, performing a legal service, or affording representation in legal proceedings, notwithstanding that the detective might have been retained to engage in unlawful surveillance of union organizational activity. On remand, following a hearing, the district court held in sum that the privilege applied because the lawyer retained the detective in furtherance of his client's request for advice "as to what steps he could take in opposition to his plant being organized." *NLRB v. Harvey*, 264 F.Supp. 770, 771 (W.D. Va. 1966).

The instant case presents all the requisite elements for application of the attorney-client privilege. McCarthy was and is an attorney. Respondents were his clients, in that he was acting as their house counsel. Blankenship answered McCarthy's questions in confidence, for the purpose of enabling McCarthy to prepare an answer to a Board complaint, which is a legal function. Respondents timely invoked the privilege and have not waived the privilege. Nevertheless, the General Counsel argues (Br. 35-36) that the privilege is not here applicable because (1) "McCarthy was not performing legal services, but rather was acting as a scrivener for Blankenship in preparing the Answer," and (2) even if McCarthy was performing attorney work, "it was in aid of the commission of continuing unfair labor practices." Neither argument has merit. The first argument disregards the fact that McCarthy was not simply directed to prepare an answer, but was assigned to handle the case. Pursuant to that assignment, McCarthy prepared a position statement and attempted to negotiate a settlement. If McCarthy had not left Associates he probably would have represented Respondents at the present hearing. Here, as in *Harvey*, the service performed must be viewed in its overall context. Moreover, the preparation of an answer to a complaint is a legal service. It is not unusual for an attorney to work under the supervision of another person who (as in the case of house counsel), may not even be a lawyer. It is also not unusual for attorneys to prepare "boiler plate" pleadings. In some legal specialties this is the usual procedure. It is also not unusual for an attorney to submit pleadings to his client for approval. In some situations the attorney might be derelict in his responsibilities if he failed to do so. In the present case, the complaint was not against one of Respondents' clients, but was directed against Respondents. Therefore, it is not surprising that Blankenship would want the final say about what went into the answer. However, the presence of any or all of these factors does not negate the fact that preparation of an answer is a legal service.[11] The General Counsel's second argument fails on two grounds. First, under *Harvey*, an unfair labor practice is neither a crime nor a tort for purposes of the attorney-client privilege (349 F.2d at 904). Second, the preparation of an answer in a Board proceeding is not an unfair labor practice or part of an unfair labor practice, even if the General Counsel thinks the answer is false. I would assume that in most cases in which the complaint alleges unfair labor practices and the allegations are denied, that the General Counsel thinks the answer is false. Therefore, for the reasons discussed, I have not considered McCarthy's testimony concerning his conversations with Blankenship in deciding the merits of this case.[12]

C. *Respondents' Procedural Arguments*

At the outset of this hearing, Respondents presented several motions for summary dismissal of the complaint. Although Respondents nominally offered various grounds for these motions, e.g., improper service, lack of

[11] *Underwater Storage v. U.S. Rubber Co.*, 314 F.Supp. 546 (D.C.D.C. 1970), cited by the General Counsel (Br. 35), is not in point. That case involved the preparation and processing of a patent application, which the court did not regard as a legal function.

[12] Regarding Respondents' remaining objections to McCarthy's testimony, the work product privilege rises or falls with the attorney or client privilege because "the coverage and purposes of the attorney-client privilege are completely subsumed into the work product privilege." *Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982). Therefore, as the attorney-client privilege is here applicable, the work product privilege is also applicable. If the attorney-client and work product privileges were not applicable, then the trade secrets privilege would also not be applicable because the information in question directly concerns the merits of this case, namely, whether Respondents engaged in or counseled unfair labor practices. Where, as here, the existence of the alleged offense can be proved only by investigating the methods of business of the person invoking the privilege, "it might amount practically to a legal sanction of the wrong if the court conceded to the alleged wrongdoer the privilege of keeping his doings secret from judicial investigation." In that situation "no privilege at all should there be conceded. 8 Wigmore, *Evidence* § 2212 (McNaughton rev. 1961).

jurisdiction, failure to state a claim, mootness, and res judicata, these motions were all based on Respondents' underlying argument that the General Counsel acted improperly by approving a settlement between the Union and Diamond in Case 30–CA–9216 and proceeding separately against Respondents in the present case. Respondents' argument is without merit. The General Counsel has discretion to consolidate or sever proceedings on unfair labor practice charges, subject to review by the Board or courts of appeal, for abuse of that discretion or denial of due process. *Packinghouse Workers (Wilson & Co.)*, 89 NLRB 310 (1950); Board's Rules and Regulations, Section 102.33; *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1043–1044 (8th Cir. 1976); *Teamsters Local 728 (Overnite Transportation) v. NLRB*, 332 F.2d 693, 696–697 (5th Cir. 1964), cert. denied 379 U.S. 913 (1964); *NLRB v. Hotel & Restaurant Employees (Crown Cafeteria)*, 301 F.2d 149, 155–156 (9th Cir. 1962); *Typographical Union (New York Printers)*, 87 NLRB 1418, 1424–1425 (1949); *Webb Tractor & Equipment Co.*, 181 NLRB 230 fn. 2 (1970). In the present case, the General Counsel had valid reasons for proceeding separately against Respondents. The General Counsel, the Union, and Diamond were able to agree on the terms of a Board settlement, but the General Counsel and Respondents were not able to do so. The situation at Diamond involved a pending representation proceeding. As Respondents no longer represented Diamond, it was possible, through an informal settlement with Diamond, to proceed promptly with an election and thereby resolve the immediate problem and enable the employees to express their free choice, while reserving the General Counsel's claim for prospective relief against Respondents to separate litigation. The Diamond case involved substantially conventional issues, including (as Blankenship himself observed), clear violations of the Act, whereas the case against Respondents involved (as the General Counsel concedes) a substantial and unresolved question of law. Compare *Crown Cafeteria*, supra, 301 F.2d at 155; *Overnite Transportation*, 332 F.2d at 696. Respondents were not prejudiced by this procedure. The General Counsel presented Randall Hake and the two employee members of the joint committee as witnesses, and Respondents could have presented any of Diamond's witnesses, and Respondents could have presented any of Diamond's personnel as their own witnesses in this proceeding, but they declined to avail themselves of this opportunity. Respondents were afforded full opportunity to litigate the alleged unfair labor practices at Diamond. Therefore, Respondents have failed to demonstrate that they were prejudiced by the action of the General Counsel in proceeding separately against them. Compare *Royal Typewriter*, supra; *New York Printers Assn.*, supra; *Webb Tractor*, supra, 181 NLRB at 235. A Board settlement does not preclude litigation of matters "specifically reserved from the settlement agreement by the mutual understanding of the parties," nor does it preclude presentation of evidence in further or other proceedings where such right is preserved in the terms of the settlement agreement. *Cambridge Taxi Co.*, 260 NLRB 931 (1982); *Park-Ohio Industries*, 283 NLRB 583 (1987); *Air Express International Corp.*, 245 NLRB 478, 483 (1979), enfd. in pertinent part 659 F.2d 610 (5th Cir. 1981). Here, the Diamond settlement expressly reserved both the right of the General Counsel to proceed separately against Respondents and the right to present evidence in the Diamond case in such separate proceeding. Moreover, Diamond is not an indispensible party in this proceeding. Respondents may be found to have committed unfair labor practices and an appropriate remedial order may issue, either on the basis of Associates' status as an employer under the Act, or on the basis of their status as agents of an employer within the meaning of Section 2(2) of the Act. *St. Francis Federation of Nurses v. NLRB*, 729 F.2d 844, 857 (D.C. Cir. 1984); *St. Mary's Infant Home*, supra.[13] Therefore, Respondents' motions for dismissal, insofar as they were not denied at the hearing, are denied.

D. *Alleged Direct Commission of Unfair Labor Practices by Respondents*

The complaint alleges in essence that at the captive-audience meetings on 7 April and 2 and 12 May, Blankenship violated Section 8(a)(1) of the Act by (a) soliciting employee grievances, (b) promising benefits if the Union were unsuccessful in obtaining recognition as their representative, (c) advising the employees that they could accomplish the same improvements in wages, hours, and working conditions without a union, and (d) suggesting that the employees could negotiate a collective-bargaining agreement with Diamond with the full protection afforded by the Act.[14] For the reasons discussed in the "Facts" section of this decision, I find that the credible evidence fails to indicate that Blankenship engaged in any such conduct at the 2 and 12 May meetings, and that Blankenship did not engage in the conduct alleged in paragraphs 11(c) and (d) at the 7 April meeting. The credited evidence also fails to demonstrate that Blankenship made any express promises of benefits. The evidence does demonstrate that Blankenship solicited employee grievances. Indeed that was the principal purpose of the 7 April meeting. Therefore, under the applicable principles of law, the question presented is whether by soliciting employee grievances, Blankenship impliedly promised benefits or redress of grievances if the employees rejected union representation. The General Counsel argues (Br. 17), that: "Solicitation of grievances is a violation of Section 8(a)(1) of the Act." This is not an accurate state-

[13] Blankenship's reliance on *Loss v. Blankenship*, 673 F.2d 942 (7th Cir. 1982), is misplaced. That case was a class action against Blankenship brought (insofar as pertinent) under Sec. 301(a) of the Act. The court held that Sec. 301(a) of the Act authorizes suits for violation of collective-bargaining contracts only against parties to the contract. As Blankenship functioned as a labor relations consultant to the signatory employer in that case (*Mark Twain Marine Industries*), he was not amenable to suit under Section 301(a). However, the Board's authority under the Act is not so limited. The courts are not in agreement on this narrow interpretation of Sec. 301(a). See *Painting Contractors v. Painters & Decorators*, 707 F.2d 1067, 1071 (9th Cir. 1983), cert. denied 460 U.S. 927 (1983).

[14] The complaint is technically defective in that it contains no conclusory allegations with respect to these allegations (contained in par. 11 of the complaint). Rather, the conclusory paragraphs are all addressed to other allegations that Respondents counseled Diamond in the commission of unfair labor practices. However, the matters pleaded in par. 11 were fully litigated, and it is evident that the General Counsel was contending that Respondents thereby violated the Act. I have considered the allegations accordingly.

ment of the law. In *Uarco, Inc.*, 216 NLRB 1 (1974), the Board held as follows:

> the solicitation of grievances at preelection meetings carries with it an inference that an employer is implicitly promising to correct those inequities it discovers as a result of its inquiries. Thus, the Board has found unlawful interference with employee rights by an employer's solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action: the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary. However, it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation or polling about union sympathies that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer.

See also *Ace Hardware Corp.*, 271 NLRB 1174 (1984). It is of course unlawful for an employer to expressly or impliedly promise or grant benefits to its employees to discourage support for a union, regardless of whether such conduct occurs in the context of a solication of benefits. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409–410 (1964).

Applying the foregoing principles to the facts of the present case, I find that the credible evidence rebuts any inference of promises of benefits or redress of grievances. As the employees were well aware, Blankenship was an outside consultant who would have no authority to make promises without the approval of Diamond's management. In fact Blankenship had no such authority. Blankenship was authorized solely to ascertain the employees' attitudes and concerns, and then report back to Hake about what course of action should be taken. Blankenship never said or suggested to the employees that he had any greater authority and discouraged any such inference at several points during the 7 April meeting. The one page of transcript, which the General Counsel offered in evidence, indicates that Blankenship told the employees that it would be illegal for him to say that "we will adjust all your complaints." As the General Counsel points out, such statements do not operate to legalize the solicitation if other evidence indicates that the employer is expressly or impliedly promising benefits or redress of grievances. However, Blankenship's other remarks were consistent with this statement. When employee Wield said that it did no good to confront management with their problems, Blankenship did not express disagreement. When employees Grinnell asked whether they could form an employee committee, Blankenship referred her to the Board's Regional Office. Such responses are inconsistent with a promise of benefits. Blankenship never expressed sympathy with or concern about the employees' problems, and did not even promise to look into these problems. He did suggest that the employees confront management with their grievances. However, such statements, even when made to management directly, do not, standing alone, warrant an inference of or promise that any grievance would be remedied. *Cherokee Culvert Co.*, 262 NLRB 917 fn. 2 (1982). See also *Radio Broadcasting Co.*, 277 NLRB 1112 (1985), affd. sub nom *Teamsters Local 115 v. NLRB*, 802 F.2d 448 (T) (3d Cir. 1986), in which the Board held that a remark by the employer's president that a wage increase was a good idea but that he could not promise anything, coupled with an unusual grant of wage increases about 4 months later, was insufficient to warrant an inference of a promise to increase wages, and that the president's statements that he would "look into" increased health coverage, coupled with the grant of additional health benefits about 4 months later, was insufficient to warrant an inference of a promise of such benefits. Therefore, I find that Blankenship did not promise benefits if the employees rejected unionization, and I am recommending that the allegations of paragraph 11 of the complaint be dismissed.

E. *Alleged Counseling of Unfair Labor Practices by Respondents*

The complaint contains several allegations that Respondents violated Section 8(a)(1) by reason of unfair labor practices committed by Diamond that were "counseled" by Blankenship. I shall first address the allegation pertaining to the replacement of Walter Hake by Randall Hake, as this squarely presents a situation in which Blankenship expressly advised Diamond to engage in unlawful conduct. The compaint alleges in sum that at the 12 May captive-audience meeting, Randall Hake unlawfully stated that he was taking over Diamond's labor relations from his father, and that having counseled such statement Respondents, together with Diamond, were responsible for this unfair labor practice. In fact, Randall Hake announced by notice posted to the employees on 23 April that he was assuming authority and responsibility for all personnel matters, and thereafter confirmed and elaborated on this announcement in his 12 May speech. The evidence is uncontroverted that Blankenship learned at the 7 April meeting that Walter Hake's arbitrary and capricious handling of personnel matters was a principle source of employee discontent, that Blankenship advised Randall Hake to replace his father in order to improve the Company's chances of winning the pending election, and that Randall Hake, acting on Blankenship's advice, informed the employees that he was replacing his father in handling personnel matters. By announcing and implementing this decision, Randall Hake granted the employees a change in their working conditions that they could reasonably perceive as a benefit or response to their expressed grievances or their reasons for seeking unionization, for the purpose of discouraging employee support for the Union. Hake made this clear in his 12 May speech. Diamond thereby violated Section 8(a)(1) of the Act. See *Eagle Material Handling*, 224 NLRB 1529, 1533 (1976), enfd. 558 F.2d 160 (3d Cir. 1977) (employer violated Sec. 8(a)(1) by discharging an unpopular supervisor in response to employee complaints); *Ann Lee Sportswear*, 220 NLRB 982, 993 (1975), enfd. 543 F.2d 739, 742–743

(10th Cir. 1976) (employer violated Sec. 8(a)(1) by forcing the resignation of a supervisor concerning whom the employees had expressed dissatisfaction, for the calulated purpose of influencing the outcome of election); *Watkins Furniture Co.*, 160 NLRB 188, 192 (1966) (employer violated Sec. 8(a)(1) by promising employees that it would ameliorate their grievances by lessening their contact with a sales manager). Compare: *Grove Valve & Regulator Co.*, 262 NLRB 285, 299 (1982) (employer lawfully replaced its industrial relations manager because evidence fails to establish a relationship between employees' expressed grievances and his replacement).

As the General Counsel correctly states (Br. 5), the Board has never decided whether an attorney or labor relations consultant violates the Act by advising a client employer or labor organization to commit unfair labor practices. *St. Francis Hospital*, supra, 263 NLRB at 850.[15] However, analogous lines of case authority tend to indicate that they should be held responsible under the Act for the consequences of such advice. First, an employer violates the Act by instructing its supervisors to engage in unfair labor practice conduct, where the instructions were carried out or disclosed to the employees. *Resistance Technology*, 280 NLRB 1004 (1986).[16] In *Walker's*, 159 NLRB 1159, 1175, 1179 (1966), the Board held that the employer violated Section 8(a)(1) by suggesting to its buyers (nonsupervisory personnel who were generally looked on as part of management) that they question employees about attitude toward unionization. In the present case, Respondents were not part of Diamond's managerial hierarchy. Blankenship had only limited authority over Diamond's employees, e.g., to exercise such authority as was necessary to conduct the captive audience meetings. However, Respondents, having been retained by Diamond for the express purpose of acting as Diamond's "representative" in the representation proceeding, was the agent of Diamond at least for the purpose of advising Diamond about its course of action in that proceeding, and Diamond relied on that advice when it unlawfully announced and carried out its decision to replace Walter Hake as the person in charge of personnel matters. If an employer can be held accountable for its instructions or even suggestions to its supervisory personnel that result in the commission of unfair labor practices, then it would seem only proper that a professional counselor should be held responsible for its advice that has the same unlawful effect. As indicated, labor relations consultants and attorneys have been held responsible for their commission of unfair labor practices, whether the Board found that they acted as agents of an employer or as employers within the meaning of the Act in their own right. See *Chalk Metal Co.*, supra; *West Coast Casket Co.*, 192 NLRB 624 (1971), enfd. in pertinent part 469 F.2d 871 (9th Cir. 1972); *Guild Industries Mfg. Corp.*, 133 NLRB 1719 (1961), 135 NLRB 971 (1962), enfd. as modified 321 F.2d 108 (5th Cir. 1963); *St Mary's Infant Home*, supra. Labor relations consultants are not immune from the proscriptions of the Act. Similarly, employers have been held responsible under the Act for the activities of other outside persons or groups, such as local civic or development organizations, as well as the outside persons or groups themselves, where employees may reasonably conclude that "the business leaders inveighing against the Union were serving in effect as organs of communication from management," even though the employer might not be liable under the "strict rules of agency." *Cagle's Inc. v. NLRB*, 588 F.2d 943, 947–948 (5th Cir. 1979), and cases cited therein.[17] Therefore, Respondents shared responsibility for Diamond's announcement and implementation of its decision to replace Walter Hake and Respondents violated Section 8(a)(1) of the Act by such actions.

The next question concerns Respondents' alleged responsibility for Randall Hake's captive audience speech of 12 May. As Blankenship acknowledged to Pierce, the speech was plainly unlawful. Hake made express and implied promises of benefit and redress of grievances in order to discourage employee support for the Union. However, he did so on his own initiative, without consulting Respondents. James Pierce prepared a text for Hake which did not contain any unlawful statements, but Hake simply used the text as a starting point, and went on to make his own remarks. Hake did not ask Blankenship to review his proposed speech. Hake did ask Blankenship to stop him if he said anything "blatantly illegal." However, I do not believe that a labor relations consultant or an attorney can be held responsible for unfair labor practices by failing to demand that his client submit all campaign speeches and literature to him for prior approval, or by failing to publicly embarrass or humiliate his client by informing his employees that their employer has violated the law. *St. Francis Hospital*, supra, 263 NLRB at 849, plainly stands for the principle that a consultant, by undertaking to advise an employer in that capacity, does not thereby assume responsibility for unfair labor practices committed by the employer or its supervisors without or against the advice of the consultant. Analogous law in the field of malpractice also indicates that a consultant or attorney should not be held responsible in these circumstances. Compare: *M & S Building Supplies v. Keiler*, 738 F.2d 467 (D.C. Cir. 1984), in which the court held, in sum, that an attorney who improperly advised his client to set up an alter ego operation in order to avoid coverage of the employer's warehousemen under a multiemployer collective-bargaining agreement, was not liable for the employer's losses as the

[15] Blankenship's brief (p. 21) contains a misleading quotation from *St. Francis Hospital*, which, taken out of context, falsely suggests that the Board held that a labor relations consultant cannot be held responsible for advising a client to violate the Act. Blankenship failed to quote the prefatory and key sentence, namely: "There is no evidence that [the consultant] advised its client to violate the Act." The Board went on to hold that "in these circumstances," the consultant should not be held responsible for unfair labor practices committed by the employer's supervisory personnel, over whom it had no control.

[16] *Resistance Technology* overruled *Cannon Electric Co.*, 131 NLRB 1465, 1468 (1965), insofar as *Cannon* held that the instructions would be unlawful even if not carried out or disclosed to the employees. However, *Resistance* made clear that the instructions would be unlawful if either condition were present.

[17] Blankenship asserts (Br. 19) that the Act imposes a "clear state mandate to apply the ordinary law of agency to the question of employer and union responsibility." The assertion is erroneous. See Sec. 2(13) of the Act.

result of a subsequent unfair labor practice proceeding, where the losses were actually caused by the employer's unilateral decision to use the alter ego operation as a means of avoiding contract coverage for its truckdriver employees. Even if Blankenship had stood up and publicly stated that Hake was unlawfully making promises to the employees, such action would not have neutralized Hake's unlawful speech. See *Faribo Turkeys*, 140 NLRB 1397 (1963). Therefore, I find that Respondents did not unlawfully counsel Diamond regarding the 12 May speech.

The remaining allegations of the complaint (par. 10(g) through (j)) concern Diamond's course of conduct in forming and dealing with the employee committee, and Respondents' alleged role in counseling such conduct. Respondents' actions in this regard fall between the outright and unequivocal advice given that Randall Hake replace his father, and the alleged acquiescence by silence in connection with Hake's 12 May speech. As found, after Blankenship first met with the employees, he met with Hake and advised that Diamond update its work rules. At Hake's request, Blankenship put his recommendations in letter form. Blankenship also gave Hake a sample "contract." However, Hake understood that unlike Blankenship's recommendation that he replace his father, these changes would not be negotiated or implemented until the representation question was resolved. Blankenship stated in his 17 April letter that Hake should consider adopting the proposed "contract . . . after we rid you of the union problems." Pierce told Hake not to use the sample policies until there was a decision on the election. Hake anticipated that the election would take place on 16 May, and that if the Union were defeated, this would allow sufficient time for him to meet with an employee committee and negotiate a new set of work rules that would cover wages and other conditions of employment prior to 1 July, Diamond's annual wage review date. When Hake learned that the election would be postponed because of the pending unfair labor practice charges, he telephoned Associates for advice, specifically asking whether Diamond could proceed with the plan to set up a committee to develop a new set of work rules. Blankenship, through Pierce, told Hake to go ahead and run the business as he saw fit. At this time, Blankenship was still Diamond's labor relations consultant. Hake could reasonably interpret Blankenship's statement as indicating that Diamond could lawfully proceed with the plan, which Blankenship had initially formulated and counseled. Hake acted on Blankenship's advice by implementing the plan. Blankenship may well have felt that as a result of Hake's speech, the damage was already done. However, even Hake told the employees that the plan would be implemented after the election. Not only did Blankenship fail to advise Hake that he was embarking on an unlawful course of conduct, but he affirmatively indicated that Hake could lawfully proceed with their plan. Therefore, I find that Respondents counseled Diamond's course of conduct beginning with the meeting on or about 14 May, and thereby became responsible with Diamond for that conduct. The employee committee was a labor organization within the meaning of the Act. By establishing, dominating, assisting, and supporting the employee committee, including dealing with the committee concerning wages and other terms and conditions of employment, Diamond violated Section 8(a)(1) and (2) of the Act. *Jet Spray Corp.*, 271 NLRB 127, 129 (1984); *Texas Bus Lines*, 277 NLRB 626 (1985); *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985), enfd. 804 F.2d 808 (3d Cir. 1986); see also *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211 (1959); *Lawson Co. v. NLRB*, 735 F.2d 471 (6th Cir. 1985). Therefore, by counseling such conduct, Respondents became responsible for such conduct, and consequently violated Section 8(a)(1) and (2) of the Act.

CONCLUSIONS OF LAW

1. Associates and Diamond are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Blankenship is an agent of Associates, and Associates and Blankenship were at times material agents of Diamond within the meaning of Section 2(2) and (13) of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act, and employee committee was at times material a labor organization within the meaning of Section 2(5) of the Act.

4. By counseling Diamond to announce and implement benefits and redress of grievances to its employees in order to discourage support for the Union, Respondents have violated Section 8(a)(1) of the Act.

5. By counseling Diamond to establish, dominate, assist, and support employee committee, Respondents have violated Section 8(a)(1) and (2) of the Act.

6. Respondents have not engaged in any other unfair labor practices alleged in the complaint.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have committed violations of Section 8(a)(1) and (2) of the Act, I shall recommend that they be required to cease and desist therefrom and from like or related conduct, to post appropriate notices, and to furnish and give appropriate notices to Diamond. Because Diamond is not a named Respondent in this proceeding, I cannot require Diamond to post such notices. The General Counsel requests that I recommend a broad remedial order that would require Respondents to cease and desist from engaging in any manner in unlawful conduct as an agent of Diamond or any other employer. I am sympathetic to the General Counsel's request, but Board policy precludes such an order. See *West Coast Casket Co.*, supra at fn. 1; *Chalk Metal Co.*, supra, 197 NLRB at 1133. In *Chalk Metal*, the Board restated its policy in unequivocal language, namely, "that a broad remedial order is appropriate whenever a proclivity to violate the Act is established, either by the facts within a particular case, or by prior Board decisions *against the respondent at bar based upon similar unlawful conduct in the past.*" (Emphasis added.) Here, as with respect to Selvin in *West Coast Casket*, there have been de-

cisions in which Blankenship, acting as consultant for a respondent employer, has been found to have committed unfair labor practices, but neither Associates nor Blankenship was named as a party respondent in any of the cases. Therefore, Blankenship's prior record cannot be used as the basis for a broad order. The facts of the present case also cannot be used as the basis for a broad order. As indicated, I have found that Respondents violated the Act by counseling, but not directly engaging in, unfair labor practices. The Board has never held that an attorney or labor relations consultant violates the Act by counseling unfair labor practices. Therefore, as the violations here found present a novel question of law, it cannot be said that Respondents, by such conduct, demonstrated a proclivity to violate the Act. In the present case, Diamond terminated Respondents' services, subsequently recognized the Union, and it is highly unlikely that Diamond will ever again retain Respondents. In this context, a narrow order can serve little practical purpose except as a warning to Respondents. However, the precedents indicate that the Board prefers to move cautiously in this area. Because I am recommending a narrow order, there are no special circumstances that would warrant a visitatorial clause.

[Recommended Order omitted from publication.]

Seattle-First National Bank *and* Financial Institution Employees of America, Local 1182, chartered by United Food and Commercial Workers International Union, AFL–CIO. Case 19–CA–11364

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On November 30, 1970, the Firstbank Independent Employees Association (Firstbank) was certified by the Board as the exclusive bargaining representative of the employees of Seattle-First National Bank (SeaFirst and/or the Respondent) in the appropriate unit.[1] Firstbank later voted to affiliate with the Retail Clerks International Union, AFL–CIO (RCIU) and changed its name to Financial Institution Employees of America, Local 1182 chartered by the Retail Clerks International Union (FIEA). FIEA petitioned the Board to amend its certification to reflect this change. The Board granted the petition and amended the certification.[2] SeaFirst refused to bargain with FIEA, alleging that because nonunion members of the bargaining unit were not allowed to vote, the affiliation election did not meet minimal due process standards thus rendering the affiliation invalid. FIEA filed unfair labor practice charges and the Board found that SeaFirst had violated Section 8(a)(5) and ordered SeaFirst to bargain with the FIEA.[3]

SeaFirst then petitioned the Court of Appeals for the Ninth Circuit for review, but before it issued a decision the Board, sua sponte, moved that the case be remanded. The motion was granted and on reconsideration the Board held that because nonmembers were not permitted to participate in the affiliation election the election was invalid. The Board dismissed the unfair labor practice charges and vacated the amended certification.[4]

Thereafter, FIEA moved the Court of Appeals for the Ninth Circuit for review of the Board's Decision and Order. The Ninth Circuit held that requiring that nonunion employees be allowed to vote on affiliation questions was inconsistent with the Act.[5] The Board petitioned the Supreme Court for review. The Court affirmed the Ninth Circuit's decision, holding that minimum due process standards were present in the affiliation election, and that dissatisfaction with the decisions' union members make may be tested by a Board-conducted representation as, for example, if it is unclear whether the reorganized union retains majority support.[6] The Supreme Court remanded the case to the Ninth Circuit, which in turn remanded it to the Board. Thereafter, the parties submitted statements of position. During the pendency of this case at the Board, the Board issued its decision in *Western Commercial Transport*,[7] in which the Board reviewed the impact of the Supreme Court's decision in Financial Institution Employees on the continuity of representative aspect of affiliation. The Board granted the parties' subsequent request to submit additional statements of position in light of that decision. The parties then filed additional statements of position and the Chamber of Commerce of the United States filed an amicus brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record, the statements of position and amicus brief and has decided to vacate its decision and order in *Seattle-First National Bank*, 265 NLRB 426 (1982), and to amend the certification and name the Financial Institution Employees of America, Local 1182, chartered by the United Food and Commercial Workers International Union, AFL–CIO as the employee's exclusive bargaining representative.

The Board has traditionally required that two conditions be satisfied before granting a petition for amendment of certification based on an affiliation: the first is that the affiliation election itself satisfy minimum due process standards; the second requires substantial continuity between the pre- and post-affiliation bargaining representative.[8] A determination of whether an affiliation has so substantially altered a union's identity that a new representation election is required rests on an examination of the changes wrought by the affiliation.[9] In each case continuity is determined by a factual comparison between the pre- and post-affiliation representative. In *Western Commercial*, the Board found that the affiliation of a small (136 employee unit), inde-

[1] The appropriate unit is:
All of the Employer's employees within the State of Washington, excluding professional employees, confidential employees, management trainees, and supervisors as defined in the Act.

[2] 241 NLRB 751 (1979).

[3] 245 NLRB 700 (1979). Additionally, after the Board amended FIEA's certification, the Retail Clerks International Union merged with the Amalgamated Meat Cutters and Butcher Workmen of North America to become the United Food and Commercial Workers International Union, AFL–CIO. The Board granted FIEA's motion to amend its name to reflect this change. Id at 700 fn. 1.

[4] 265 NLRB 426 (1982).

[5] 752 F.2d 356 (9th Cir. 984).

[6] *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192 (1986).

[7] 288 NLRB 214 (1988).

[8] *Hammond Publishers, Inc.*, 286 NLRB 124 (1987).

[9] *NLRB v. Insulfab Plastics*, 789 F.2d 961 (1st Cir. 1986), enfg. 274 NLRB 817 (1985). *Western Commercial*, supra at 218.

pendent union with an entity representing 8500 employees and affiliated with an international union, did not result in continuity of representative. Relying on changes such as the wholesale replacement of union officers, the removal of day-to-day contract administration from local hands, and the loss of control over the assessment and expenditure of dues, the Board determined that membership rights and organizational autonomy were so diminished as to alter the "fundamental character of the representing organization." *Western Commercial*, supra at 218. The Board thus concluded that these changes were "sufficiently dramatic" to raise a question concerning representation and render inappropriate an amendment of certification. In the instant case, the Respondent contends that the affiliation has similarly resulted in changes, with respect to officers, limitation on membership rights, increased power of the executive council, and interference with the authority of the membership to call strikes, negotiate contracts, and settle grievances, that are sufficiently dramatic to alter its very character and, therefore, to raise a question concerning representation.[10] We disagree.

The record indicates that before affiliation FIEA operated statewide and was governed by an executive council which formulated policy and controlled the union's relationship with the Respondent. Negotiation of new contracts, processing grievances and regulation of internal union affairs were all handled by committees appointed by the FIEA president. Economic sanctions on the unit level could be undertaken only after being approved by the executive council and ratified by the members of the affected unit. The FIEA constitution allowed for union expansion to include other labor organizations or employees of other banks, and for affiliations.

A close examination of Local 1182 after affiliation persuades us that there was sufficient continuity in the representative to warrant an amendment of certification and a finding that the Respondent is obligated to bargain with Local 1182. The Respondent contends that Local 1182 now has different officers and that this is an indication of dramatic change resulting from the affiliation. The record, however, shows that after the affiliation, Local 1182's officers, and their responsibilities, remained the same as those who served for FIEA. In the year since affiliation, there has been a natural turnover of individuals occupying these offices. There is no evidence, however, that replacement of officers was a condition of the affiliation or a result of any action taken by the International. Compare *Western Commercial Transport*, supra at 215.

The Respondent next contends that the FIEA constitution specifically limited membership in the union to the Respondent's employees, while no such restriction exists under th RCIU constitution. As examination of the provisions in question indicates that while article III of the FIEA constitution, entitled "*Membership*," does limit eligibility to employees of the respondent, that limitation is subject to change upon approval of the executive council, to allow the inclusion of members of other labor organizations. Additionally, article VIII, entitled "*Affiliation*," and article IX, entitled "*Expansion*," specifically allow for the inclusion of other labor organizations or employees of other banks upon approval of the executive council and ratification of whatever amendments to the constitution are required. We thus find that these provisions of the FIEA constitution are entirely consistent with the expanded membership eligibility available under the RCIU constitution of Local 1182 and are not indicative of lack of continuity.

The Respondent also contends that the differences in eligibility requirements to hold union office further distinguish the pre- and post-affiliation entity. Under the RCIU constitution, a member must be in good standing for 1 year before being eligible to hold office, while the FIEA constitution required that a member must be in good standing for only 1 month. We note that the FIEA constitution additionally required a member, once nominated for office, to maintain good standing up to the election. The constitution did not specify the maximum length of time between the notice of the election and the election itself. In light of this, a member may be required to remain in good standing for a substantially longer period than the provision prescribes, thereby diminishing the practical differences between the two provisions. We also find it significant that the RCIU provision concerns only the election of new officers, and does not require that the old officers must be replaced upon affiliation because they lack the requisite period of

[10] The Respondent has made no further argument relating to procedural due process in the affiliation election, so that question is not before us. The Respondent argues, however, that the Supreme Court's opinion is to be read as inviting the Board to include, as part of a due process component of the continuity inquiry, a general examination of "the extent of [employee] opposition to the affiliation." We do not read the Supreme Court's opinion as inviting such an inquiry, which would be tantamount to the Board's conducting an informal poll concerning the affiliation among those to whom, the Court held, no opportunity to vote in the affiliation election need be extended. Of course, if we find, on the basis of objective factors, that the changes in a bargaining representative are sufficiently dramatic to alter its identity, we will find under *Western Commercial*, that a question concerning representation is raised and a Board election would be called for if the union were to continue to seek representative status. Also, a question may still be raised in the traditional manner, by a timely employee-filed decertification petition or by proof of objection considerations for good-faith doubt. The Respondent's proposal for directly investigating employee sentiment in virtually any affiliation case has no support either in the statute, Board precedent, or in the Supreme Court's opinion in this case.

union membership. Thus, as noted above, the officers the FIEA retain their positions upon affiliation with RCIU.

The Respondent further contends that under the RCIU constitution, the local's executive council can accept or reject an employer's final contract offer without membership approval, whereas under the FIEA constitution all contracts were subject to the ratification of the membership. The evidence shows that under the RCIU constitution the executive council does have authority to accept or reject an employer's final contract offer, but can do so only after the failure of the membership of the affected local to approve a strike or other economic action. We find that under these circumstances the membership does have the opportunity to voice its approval or disapproval of a final offer and the executive council cannot bypass the membership as alleged by the Respondent.

Finally, the Respondent alleges that the RCIU constitution severely restricts the local's ability to call strikes, negotiate binding collective-bargaining agreements, and effectively to resolve grievances. Upon our examination of the comparable sections of the respective constitutions, we find no merit to this contention. Under the FIEA constitution the local unit could employ economic sanctions, including engaging in strikes, but only after an affirmative vote of two-thirds of the executive council and ratification of the strike by 60 percent of the members of the affected unit. If the unit should strike without the approval of the executive council, the striking members of the unit would be subject to expulsion, suspension, or fines as a result of intentionally violating FIEA policy and rules. By comparison, under the RCIU constitution, strike action must be approved by the executive council and a two-thirds majority of the affected local's voting members. The strike must also have the approval of the International president. The RCIU constitution indicates that the president's approval ensures compliance with the constitution and exhaustion of all amicable means of adjustment prior to engaging in economic sanctions in an effort to protect membership interests. If a local engages in a strike without approval, however, the penalty is only the denial of strike benefits.[11] The International also cannot force a local to participate in a strike.

With respect to local control of contract negotiations, the record indicates that under the RCIU constitution the terms of proposed collective-bargaining contracts must be submitted to the International president for approval *upon request* (emphasis added) prior to membership action. Donald Hofer, International vice president and director of the northwest division of the RCIU, testified that this requirement is to prevent sweetheart contracts that result in injury to other locals, and to safeguard the standards and integrity of the contract. Further, Hofer stated that during his association with the International this section of the constitution had not been enforced and the local unions negotiated their own contracts. The International provides assistance to a local only upon the local's request.

Finally, regarding grievance handling, the record shows that under the FIEA constitution grievances were managed by a grievance committee appointed by the president. Under the RCIU constitution, Local 1182's grievances are dealt with by the same personnel who were designated by the FIEA constitution to handle grievances. The International has assigned an advisory representative to assist the Local in these dispute resolution sessions.

Applying the test set forth by the Supreme Court in *Financial Institution*, as applied by the Board in *Western Commercial*, we find that the post-affiliation union meets the test of continuity. As set forth above, autonomy essentially remains at the local level, including day-to-day contract administration, handling of grievances, control of collective bargaining, and the calling of strikes. While some differences exist between the FIEA and the RCIU, these are not "sufficiently dramatic" to alter the identity of the bargaining representative and raise a question concerning representation. Accordingly, we find that by failing and refusing to recognize and bargain refusing to recognize and bargain with the RCIU the Respondent has violated Section 8(a)(5) and (1) of the Act.[12]

[11] The Respondent contends, citing *Hansen v. Guyette*, 814 F.2d 547 (8th Cir. 1987), that the International could impose a trusteeship on a local because it fails to obtain authorization to strike. As we acknowledge that the International's constitution confers broad and pervasive powers, the evidence here discloses that the exercise of such authority is reserved for only the most compelling situations, to wit: the *Hansen* case. In that extraordinary case, a local union engaged in a protracted and violent strike, which commanded national attention—in every sense an atypical series of events. In our view, the fact that an international may exercise this potential authority does not defeat the conclusion that in most situations decisions to strike remain at the local level.

[12] The Respondent contends that after affiliation Local 1182 possesses greater economic power than FIEA, thereby creating a different bargaining entity. We find this contention is without merit. See *Insulfab Plastics*, above at fn. 8 and *Hammond*, above.

The Respondent contends that differences in the handling of union finances, the amendment process, membership meetings, and physical facilities manifest a lack of continuity. Little record evidence exists regarding these matters. For example, no membership meetings had been held by the time of the hearing and no amendments had been proposed. The alleged changes in the physical facility involved the relocation of the

Continued

More relevant to our determination in this case is testimony that indicates in the previous 5 years trusteeship had been imposed on only 5 of approximately 215 locals, all as a result of financial irregularities. Of these five, one local requested the trusteeship in an effort to end chaos caused by factions within the local.

ORDER

The National Labor Relations Board orders that its Decision and Order in Case 19–CA–11364 (265 NLRB 426) is vacated in its entirety.

IT IS FURTHER ORDERED that the Board's Decision and Order in Case 19–CA–11364 (245 NLRB 700) is reinstated in its entirety.

IT IS FURTHER ORDERED that the Board's Decision and Amendment of Certification issued in Case 19–AC–23 (241 NLRB 751) is reinstated in its entirety.

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union's office from one room to another, just down the hall in the same building, and while different individuals controlled union finances, this was the result of turnover among the individuals holding the offices charged with financial responsibilities. We find these changes do not demonstrate a lack of continuity.

Stack Electric, Inc. *and* International Brotherhood of Electrical Workers, Local No. 110, AFL–CIO *and* International Brotherhood of Electrical Workers, Local No. 292, AFL–CIO

North Town Electric, Inc. *and* International Brotherhood of Electrical Workers, Local No. 110, AFL–CIO *and* International Brotherhood of Electrical Workers, Local No. 292, AFL–CIO

Bakken Electric, Inc. *and* International Brotherhood of Electrical Workers, Local No. 292, AFL–CIO

Fowser Electric Co. *and* International Brotherhood of Electrical Workers, Local No. 292, AFL–CIO. Cases 18–CA–8610–1, 18–CA–8611–3, 18–CA–8610–2, 18–CA–8611–4, 18–CA–8611–1, and 18–CA–8611–2

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On August 30, 1985, Administrative Law Judge David S. Davidson issued the attached decision. The General Counsel and the Charging Parties filed exceptions and supporting briefs; counsel for Respondents Stack Electric, Inc., Bakken Electric, Inc., and Fowser Electric Co. filed exceptions and a supporting brief; Respondent North Town Electric, Inc. filed exceptions; Respondents Stack Electric, Inc., Bakken Electric, Inc., and Fowser Electric Co. filed a brief in response to the opposing parties' exceptions, and the National Electric Contractors Association and the International Brotherhood of Electrical Workers, AFL–CIO jointly filed a brief amicus curiae.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Preliminarily, we note that the General Counsel did not allege, and does not contend, that any of the four Respondents in this consolidated proceeding individually meets the Board's standards for assertion of jurisdiction.

In addressing this threshold issue, the judge concluded that "for jurisdictional purposes the combined businesses of employers bargaining through associations may be considered if their employees comprise a multiemployer unit." However, as the judge also correctly noted, in order for employees of an individual employer to become merged into a multiemployer unit, there first must have been some indication that the employees in the single unit had given their assent to becoming part of the multiemployer unit. As the judge explained, such employee assent could be given by a union if the union had previously obtained majority support in that single unit. He further found, as a factual matter, that only in the case of Respondents North Town and Bakken was there evidence of employee assent to becoming part of the multiemployer unit. Specifically, the judge concluded that North Town's predecessor, Helms Electric, and subsequently North Town, had hired an employee for whom it made payroll reports, fund contributions, and dues contributions to Local 292; that for that period, North Town (and Helms before that) had a stable and permanent complement of that one employee and, after that employee left, a permanent and stable complement consisting of one employee who was a member of Local 110. Thus, the judge concluded that North Town's employees were merged into the multiemployer units under contract between the NECA Chapters and Locals 292 and 110. As to Respondent Bakken, the judge found that Bakken utilized the Local 292 hiring hall through 1980; and that Bakken's employees were therefore merged into a multiemployer unit and, because of that, the question of the Union's majority among Bakken's own employees was no longer material.

In considering jurisdiction over Respondent Fowser, the judge concluded that the full-time employee hired by Fowser was neither hired through the referral system nor a union member. Similarly there was no evidence that any of the four employees (employed essentially one at a time) of Stack were either members of the Unions or had authorized either of the Charging Party Unions to represent them. Accordingly, the judge concluded that neither Fowser's nor Stack's employees were merged into the multiemployer unit. He further found that there was no evidence that either Fowser's or Stack's operations by themselves met the Board's jurisdictional standards, and he therefore ordered that the complaints against Stack and Fowser be dismissed for lack of jurisdiction.

All parties have excepted to different portions of the judge's decision. Thus, the General Counsel, the Charging Parties, and the amici assert that the judge erred in finding no jurisdiction over Respondents Fowser and Stack. Specifically, these parties contend that signing the Letter of Assent *immediately* merged all the Respondents into a multiemployer unit, and that this result obtains irrespective of the wishes of the Employer's employees or indeed irrespective of whether the Employer

has (or had) any employees. Counsel for Respondents, on the other hand, contends that the judge erred in asserting jurisdiction over any of the Respondents. Thus, Respondents contend that the 8(f) agreements entered into by the Respondents and the Unions were subject to repudiation at any time. Respondents further assert that the complaints here should in any event be dismissed because all the Respondents employed one-person units, for which it is inappropriate to order bargaining, and contend that the decision to dismiss with respect to Respondents Fowser and Stack should also be grounded on these additional arguments.

We have decided to affirm the judge's result in part and reverse in part, but only for the reasons set forth below.

After the judge's decision, the Board held oral argument on several issues involving Section 8(f). Thereafter, the Board decided in *John Deklewa & Sons*,[1] to abandon the conversion and merger doctrines relied on by the judge, as they were applied to collective-bargaining agreements/relationships permitted under Section 8(f) of the Act.[2] In so doing, the Board held that, in light of the legislative history of Section 8(f) and the prevailing practice in the construction industry, the party to an 8(f) relationship who asserts the existence of a collective-bargaining relationship under Section 9(a) has the burden of proving the existence of such a relationship, through either (1) a Board-conducted representation election or (2) a union's express demand for, and an employer's grant of, recognition, based on a clear showing of support for the union among a majority of the employees in an appropriate unit. However, we also held in *Deklewa* that a union signatory to an agreement permitted by Section 8(f) acquires *limited* status as a representative under Section 9(a), to the extent that the 8(f) agreement may not be unilaterally repudiated during its term, and may be enforced during its term under the provisions of Section 8(a)(5) and Section 8(b)(3).

We further held in *Deklewa* that in determining appropriate units for election purposes, the Board will no longer distinguish between "permanent and stable" and "project by project" work forces, and single employer units will normally be appropriate. The merger doctrine was rejected in 8(f) cases because it can operate to bind a single employer and employees to full 9(a) status without providing employees the opportunity to express a representational preference, as Section 8(f) eliminates majority status as a prerequisite for signing a contract. We clearly stated, however, that we did not imply that multiemployer associations and bargaining could no longer be deemed appropriate in the construction industry. Thus, for the reasons set out in greater detail in *Deklewa*, the Board decided to apply the following principles in construction industry 8(f) cases:

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

Accordingly, we turn to consideration of the facts in this case in light of the reasoning and principles in *Deklewa*.

I. JURISDICTION

There is no question that all the Respondents here are "engaged primarily in the building and construction industry" within the meaning of Section 8(f) of the Act. The complaints do not allege, and the General Counsel specifically disclaimed, any intent to claim that any of the Respondents individually meet the Board's standards for assertion of jurisdiction. As noted above, the judge found that through application of conversion and merger doctrines, two of the Respondents became members of the multiemployer unit and, as part of that unit, were therefore subject to Board jurisdiction. Although the Board abandoned the merger and conversion theories in *Deklewa*, we nevertheless conclude that the Board has jurisdiction here; not only over Respondents North Town and Bakken, but over Respondents Stack and Fowser as well.

All four of the Respondent Companies signed the Letter of Assent A proffered by the Unions here. We conclude that the delegation of bargaining authority contained in those Letters of Assent is sufficient to warrant the assertion of jurisdiction because it indicates the individual Respondent's intent to be bound by group action, rather than individual bargaining. This is so irrespective of the facts that (1) none of the Respondents was a

[1] 282 NLRB 1375 (1987).

[2] Under the conversion doctrine, a collective-bargaining relationship/agreement permitted under Sec. 8(f) could "convert" into one cognizable under Sec. 9(a) simply on the basis of a showing that, during a relevant period, the union enjoyed the support of a majority of the employer's employees in an appropriate unit. Under the merger doctrine, the employer and the union could "merge" employees into a multiemployer unit.

member of the Association, and (2) that we find under *Deklewa*, as set forth below, that the appropriate units consist of each individual Respondent's employees. By throwing in their lot with the multiemployer association, at least for purposes of negotiating a collective-bargaining agreement, the Respondents joined forces with a group in an activity that has an indisputable impact on commerce so far as the Act we administer is concerned.

II. THE APPROPRIATE UNITS

As noted above, the Board has abandoned the conversion/merger doctrines relied on by the judge. Here, there were no Board elections or demands for, and voluntary grants of, recognition to the Unions premised on a showing of support for a union among a majority of any Respondent's employees. Rather, the record is clear that the Respondents and the Unions voluntarily entered into their respective 8(f) agreements (i.e., the Letters of Assent A proffered by the Unions) without regard to whether that Union had the support of a majority of the employees, or indeed without regard to whether there were any employees at the time. Accordingly, we conclude that there has been no showing that the agreements between the Respondents and the Unions are anything other than relationships governed by Section 8(f), and that the appropriate units remained those of the individual Respondent's employees.[3]

III. THE BARGAINING OBLIGATIONS

Under the first principle of *Deklewa*, these collective-bargaining agreements, although governed by Section 8(f), would nevertheless usually be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3), under the "strictly limited" 9(a) status which the Union enjoys during the term of that agreement. There is an exception to that general rule, however, which we find applicable to all four of the Respondents in this consolidated proceeding. In *D & B Masonry*, 275 NLRB 1403 (1985), the Board adopted the judge's discussion of this issue at 1408.

> It is settled that if an employer employs one or fewer unit employees on a permanent basis that the employer, without violating Section 8(a)(5) of the Act, may withdraw recognition from a union, repudiate its contract with the union, or unilaterally change employees' terms and conditions of employment without affording a union an opportunity to bargain. *SAC Construction Co.*, 235 NLRB 1211, 1230 (1978); *Sunray Limited*, 258 NLRB 517, 518 (1981); *Chemetrons Corp.*, 268 NLRB 335 (1983). The basis for permitting an employer to engage in this conduct was explained by the Board in *Foreign Car Center*, 129 NLRB 319, 320 (1960), as follows:
>
> > The Board has held that it will not certify a one-man unit because the principles of collective bargaining presuppose that there is more than one eligible person who desires to bargain. The Act therefore does not empower the Board to certify a one-man unit. By parity of reasoning, the Act precludes the Board from directing an employer to bargain with respect to such a unit. While we have held that the Act does not preclude bargaining with a union on behalf of a single employee, if an employer is willing, we have never held that an employer's refusal to bargain with a representative on behalf of a one-man unit is a refusal to bargain within the meaning of Section 8(a)(5).

In *D & B Masonry*, the judge found the evidence too "skimpy" to establish that the employees who were employed by the respondent there on an intermittent basis (in addition to the one permanent full-time employee) constituted a permanent and stable work force such as to require the respondent to bargain. An examination of the pattern of employment of those employees by the respondent there showed that during a period of some 19-1/2 months, there was only one regular full-time employee, although for 13 of those months the respondent at various times had also employed one of four other bricklayers.

In this proceeding, the parties stipulated that Respondent Stack employed only the following individuals, besides Stack himself, and only for the periods set forth below:

> D. Heuring: 6 to 7 weeks from July through December 1981, 13 weeks between April and July 9, 1982, and 1 week in October 1982.
>
> J. Arnold: 13 weeks between July 17 and December 1982.
>
> J. Doherty: 2 weeks in February-March 1983, and 1 week in January 1984.
>
> P. Trunk: 7 weeks in November-December 1983, and 14 weeks between January and May 1984.

As to Respondent North Town, it was stipulated that the only individuals employed in addition to Owner Roger Joyce were as follows:

[3] To the extent that our holding with respect to the appropriate unit in *Vincent Electric Co.*, 281 NLRB 903 (1986), and other similar cases, is inconsistent with our decision here, they are overruled.

D. Herlofsky: between January 1981 and July 1982.

S. Eyler: June through August of 1982 (though only at the same time as Herlofsky for 2 weeks in June).

G. Stimson: from late August 1982 through April 1983.

S. Eyler in January through March 10, 1984.

As to Respondent Fowser, the stipulation shows the following employees during the periods stated:

M. Berg: April 13 to June 12, 1980.

R. Engelhart: June 13, 1980, through December 1983. (Fowser's sons also performed odd jobs in the summer of 1983.)

The judge noted that Respondent Bakken employed one individual in 1979, and continued to do so thereafter (albeit with some turnover as to the individual employed). Payroll records in evidence show a single employee (albeit different individuals) working part time in different quarters, and Bakken testified without contradiction that the sole individual he employed averaged less than full time.

We deem the holding in *D & B Masonry*, supra, dispositive. Indeed, applying the rationale of that case to the facts here, we find these situations present an even stronger case as to each of the Respondents, and that the reasoning of *D & B* compels the conclusion that at all material times, each of the four appropriate units consisted of no more than a single employee. Hence, none of the Respondents in this proceeding was under a statutory obligation to bargain. Accordingly, we shall dismiss the complaints in their entirety.

ORDER

The complaints are dismissed in their entirety.

Florence I. Brammer, Esq., for the General Counsel.
Douglas Seaton, Esq. (Ponham, Haik, Schnobrich, Kaufman and Doty, Ltd.), of Minneapolis, Minnesota, for the Respondents.
Stephen D. Gordon, Esq. (Robins, Zelle, Larson and Kaplan, Ltd.), of St. Paul, Minnesota, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Administrative Law Judge. In these consolidated cases, the charges were filed on 25 January 1984, the complaints issued on 9 March 1984, and the amended complaints issued on 13 April 1984. The amended complaints allege violations of Section 8(a)(1) and (5) of the Act in that Stack Electric, Fowser Electric, and Bakken Electric each on 29 July 1983, and North Town Electric on 3 October 1983, unilaterally repudiated collective-bargaining agreements with International Brotherhood of Electrical Workers, Local 292 and in that Stack on 29 July 1983 and on 23 November 1983, and North Town on 3 October 1983 and on 23 November 1983 unilaterally repudiated collective-bargaining agreements with International Brotherhood of Electrical Workers, Local 110. Respondents deny the commission of any unfair labor practices.

A hearing in these cases was held before me in Minneapolis, Minnesota, on 29, 30, and 31 May 1984.[1] Briefs have been received from the General Counsel and the Respondents.

The principal issues in this case are whether, by signing Letters of Assent authorizing multiemployer associations to act as their collective-bargaining representatives, Respondents became obligated to adhere to successive collective-bargaining agreements negotiated between the Associations and the Unions and, if so, whether Respondents later unlawfully repudiated those agreements. Respondents challenge the Board's assertion of jurisdiction over them and raise a number of affirmative defenses.

On the entire record in this case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENTS

Stack Electric, Inc. is a Minnesota corporation conducting business from the Brooklyn Park, Minnesota residence of Patrick and Colleen Stack. North Town Electric, Inc. is a Minnesota corporation conducting business from the New Brighton, Minnesota residence of Roger and Margaret Joyce. Fowser Electric Co. is a sole proprietorship conducting business from the Long Lake, Minnesota residence of its owner Daniel Fowser. Bakken Electric, Inc. is a Minnesota corporation conducting business from the Plymouth, Minnesota residence of Alan and Sheila Bakken. All four named Respondents are engaged as electrical contractors in the building and construction industry.

Colleen Stack, sole owner and president of Stack Electric, on or about 10 October 1980, and on or about 16 April 1982, authorized, respectively, the Minneapolis Chapter, National Electrical Contractors Association (M-NECA) and the St. Paul Chapter, National Electrical Contractors Association (S-NECA), to act as the collective-bargaining representatives of Stack Electric,[2] to bargain with IBEW Locals 292 and 110, respectively.

[1] On 21 June 1984, the parties jointly moved that the hearing record be reopened for the purpose of entering Jt. Exh. 80, a stipulation concerning information compiled from materials subpoenaed by the General Counsel but not provided prior to the hearing's close. The motion was granted and the exhibit was received. Respondents' separate motion to reopen the record was denied.

[2] Stack Electric was a sole proprietorship at the time Colleen Stack, owner, signed the Letter of Assent with Local 292. On 12 April 1983, she notified Local 292 of the incorporation of Stack Electric to update the Local's records.

Margaret Joyce, sole owner and president of North Town, on or about 11 March 1981 and on or about 18 March 1981, authorized M-NECA and S-NECA, respectively, to act as the collective-bargaining representatives of North Town to bargain with Locals 292 and 110, respectively.[3]

Daniel Fowser, on or about 25 March 1979, authorized M-NECA to act as the collective-bargaining representative of Fowser Electric with Local 292.

Alan Bakken, on or about 11 April 1979, authorized M-NECA to act as the collective-bargaining representative of Bakken Electric with Local 292.

M-NECA and S-NECA exist, in part, for the purpose of representing, in the negotiation and administration of collective-bargaining agreements with the respective Unions, those employers who have signed Letters of Assent that so authorize the NECA Chapters.

During the calendar year ending 31 December 1983, collectively Respondents and the employer-members of each of the aforementioned NECA Chapters in the course of their business operations purchased and received at their facilities located within the State of Minnesota products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Minnesota.

Respondents contend that as each only employs one employee, they are not employers within the meaning of the Act. They contend further that jurisdiction cannot be asserted based on their relations with multiemployer associations because they were not members of the associations and never became part of the multiemployer units.

The evidence shows that each Respondent, at all times material, employed at least one and at times more than one employee. It is true that "the Board will not require an employer to bargain in a unit consisting of only one employee." *Stern Made Dress Co.*, 218 NLRB 372 (1975). But an employer of 1 is no less an employer within the meaning of the Act than an employer of 100.[4]

With respect to the second contention, for jurisdictional purposes the combined businesses of employers bargaining through associations may be considered if their employees comprise a multiemployer unit. *Nelson Electric*, 241 NLRB 545, 546–547 (1979); *Wayne Electric*, 226 NLRB 409 (1976). Lack of formal membership in the NECA Chapters is immaterial; the important factor is delegation of bargaining authority to the Associations to represent Respondents in collective bargaining coupled with the indication of an "intention to be bound in collective bargaining by group rather than by individual action." *Kroger Co.*, 148 NLRB 569, 573 (1964). However, for employees to become merged into a multiemployer unit there must also be some indication of the employees' assent to becoming part of the multiemployer unit. As set forth more fully below, I find that by signing Letters of Assent that authorized the Associations to represent Respondents in future collective bargaining, Respondents indicated their intent to be bound in collective bargaining by group rather than individual action, but that only in the case of North Town and Bakken is there evidence of employee assent to becoming a part of the multiemployer unit.

Thus, I find that Respondents North Town and Bakken have been at all times material employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction as to them. I find further that in the absence of evidence establishing that Stack Electric or Fowser Electric individually meets the Board's jurisdictional standards, jurisdiction may not be asserted over them.

II. THE LABOR ORGANIZATIONS INVOLVED

The Unions are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Each of the Respondents in this case was established by an electrician who had worked in the trade as a member of Local 292 for a number of years. Following their decisions to operate their own businesses, these individuals or their wives signed Letters of Assent "A" with the respective Unions. Respondents later repudiated the Letters of Assent and argued that they were not covered by the then-current collective-bargaining agreements between the Unions and NECA Chapters. The facts as to each of the Respondents vary in detail and are set forth below.

2. The Letters of Assent

Both Unions use the same standard form by which an employer authorizes the applicable NECA Chapter to act as its collective-bargaining representative with the Union. That form reads as follows:

Letter of Assent-A

> In signing this letter of assent, the undersigned firm does hereby authorize _____ as its collective bargaining representative for all matters contained in or pertaining to the current approved _____ labor agreement between the _____ and Local Union _____ IBEW. This authorization, in compliance with the current approved labor agreement, shall become effective on the _____ day of ___, ____. It shall remain effective until terminated by the undersigned employer giving written notice to the _____ and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the aforementioned approved labor agreement.

These letters have been used by the Unions for over 20 years. M-NECA represents over 125 employers signatory to such letters; S-NECA represents over 100 em-

[3] As owner of Helms Electric, the predecessor of North Town, Margaret Joyce previously had signed a Letter of Assent for Local 292.

[4] Respondents also contend that they do not meet the definition of employer in the collective-bargaining agreements between the Associations and the Unions. The facts do not support this contention.

ployer-signatories. Representatives from both NECA Chapters and from both Unions testified that throughout their long bargaining history employer-signatories of the letters routinely treat them as authorizing the NECA Chapters to bargain for them through successive collective-bargaining agreements for the indefinite future, until the employer-signatories timely withdraw their consent pursuant to the terms of the letters. New letters are not solicited or received at contract expiration time; some have been in effect for as long as 20 years.

3. The collective-bargaining agreements

During the periods at issue here, M-NECA and Local 292 had successive collective-bargaining agreements in effect for the following dates:

1 June 1976	31 May 1978
1 June 1978	31 March 1980
1 April 1980	30 April 1982
1 May 1982	30 April 1984

Article I, section 1.01 of the 1982–1984 agreement provides for the year-to-year continuation of the agreement unless it is specifically terminated or modified through procedures established in the agreement.

S-NECA and Local 110 had a collective-bargaining agreement effective from 1 May 1982 to 27 April 1984. On 7 October 1983, the parties extended it to 30 April 1986, as a result of bargaining that began no earlier than 9 August 1983 and ended on 21 September 1983. The extension was negotiated pursuant to article I, section 3 of the 1982–1984 agreement, which subjects the agreement to "change or supplement at any time by mutal consent of the parties."

4. Stack Electric

Before going into business, Patrick Stack went to see Owen Schleisman, business representative of Local 292, to find out what he had to do to go in business because he wanted to get commercial jobs. Stack also wanted to continue to make payments to union fringe benefit funds in order to get hospitalization coverage. Schleisman advised him that he could not sign a Letter of Assent but that his wife could. Schleisman gave him a copy to take home to his wife to sign.[5] Stack took the letter home and, on 10 October 1980, his wife Colleen Stack signed the Letter of Assent, effective 2 October 1980, authorizing M-NECA to act as Respondent's representative in collective bargaining with Local 292. Colleen Stack was sole owner of Stack Electric and continued as sole owner after it was incorporated on 2 December 1980.

In April 1982, Local 110 Business Representative Kelly approached Stack while working on a job in Local 110's jurisdiction and asked if he had signed a Letter of Assent with Local 110. When Stack said that he had not, Kelly told him he had better have one signed.

On 16 April 1982, C. Stack signed the Letter of Assent, effective that date, similarly authorizing S-NECA to act as Respondent's representative in bargaining with Local 110.

On 12 April 1983, C. Stack sent a letter to Local 292 to update its records by informing it that Stack Electric, previously a sole proprietorship, had incorporated as of 2 December 1980.

During Stack's initial visit to the Local 292 hall before his wife signed the Letter of Assent, Local 292 referred Stack to Stack Electric for employment. Stack runs the business with his wife and since the business became incorporated has been its vice president. Since the latter part of 1981 Stack Electric has employed one additional employee for substantial periods of time and perhaps two for short periods of time.

On 29 July 1983, Stack Electric's attorney notified M-NECA and the business managers of Locals 110 and 292 that Stack was withdrawing its bargaining authorization from NECA and that Stack did not consider itself bound to any agreements in effect after 30 April 1982. On 20 September 1983, the attorney for both Unions responded by letter, indicating that, pending his review of the matter, Stack was still bound to both contracts, and on 3 October 1983 the Union's attorney by letter reiterated and amplified the Union's position that Stack was bound to both contracts.

5. North Town Electric

In June 1980, Roger Joyce contacted Local 292 Business Manager Schleisman to find out what he had to do to become a union contractor. Schleisman told him he would have to sign a Letter of Assent. On 2 October he and his wife Margaret went to Schleisman's office where Schleisman repeated what he had said earlier and Margaret signed a Letter of Assent as sole proprietor of Helms Electric. Roger had known that it was necessary for his wife to own the business in order for him to work with the tools of the trade and receive fringe benefits.

In February 1981, North Town was incorporated with Margaret Joyce as president and sole owner, and it became the successor to Helms. When Margaret notified Local 292 of the change, she was asked to sign a new Letter of Assent, and on 11 March 1981, she signed a Letter of Assent for North Town, effective that date, authorizing M-NECA to act as North Town's representative with Local 292. On 18 March 1981, M. Joyce signed a Letter of Assent, effective that date, similarly authorizing S-NECA to represent North Town with Local 110.

At the time of the Joyces' initial visit to the Local 292 hall, Roger Joyce came off withdrawal status, paid dues, and was referred to Helms as an employee. When North Town was incorporated, Roger became its vice president, and he and his wife have run the business together. In January 1981 North Town hired Don Herlofsky, who worked continuously until July 1982.[6] Later, North

[5] Apparently, the reason for putting the business in Colleen Stack's name was to avoid a contractual requirement for employment of a full-time journeyman in addition to a working employer and also to make it possible for Stack to receive fringe benefits.

[6] The record does not show whether Herlofsky was referred by Local 292 but a monthly payroll report shows that Local 292 dues were deducted from his pay.

Town hired Warren Stimson on referral from Local 110. Stimson worked continuously from late August 1982 to April 1983. Payroll reports indicate that Stimson was a member of Local 110. In addition, Steven Eyler worked June through August 1982, overlapping with Herlofsky for only 2 weeks, and again from January through mid-March 1984. From February 1981 through November 1982, North Town made payments into the Local 292 benefits fund and from August 1982 through April 1983, North Town made payments into the Local 110 benefits fund.

On 3 October 1983, North Town's attorney notified M-NECA and Locals 292 and 110 that North Town was withdrawing its bargaining authorization from NECA and that North Town did not consider itself bound to any agreements in effect after 30 April 1982. On 16 December 1983, the Unions notified North Town that they considered North Town still bound to the agreements.

6. Bakken Electric

In 1976 Alan Bakken went into business as a sole proprietor. He talked to Local 292 Business Manager Thomas to find out what he could do to freeze retirement benefits he had earned. Thomas told him he should sign a residential Letter of Assent and he did. In 1979 his wife called Local 292 to ask what she needed to do to get electricians referred for commercial work. The Union mailed her a Letter of Assent which Alan Bakken signed on 11 April 1979 to be effective that date, authorizing M-NECA to act as Bakken Electric's representative with Local 292 with respects to the inside commercial agreement. Bakken later incorporated his business in 1981 because he believed that if he was an employee he could still work under union rules.

Before Bakken signed the Letters of Assent he had one other employee besides himself. After that he hired three or four employees through the Local 292 hall, never employing more than one of them at a time. He paid them at the contract rate and made fringe benefit payments on their behalf to the Local 292 fund at least through 1980. Thereafter, Bakken hired directly without going through the Local 292 hall and did not make fringe benefit payments for his employees. Bakken stopped paying dues for himself in July 1982 and did not consider Bakken Electric to be a union shop after that.

On 29 July 1983, Bakken Electric notified M-NECA and Local 292 that it did not consider itself to be bound by any agreements in effect after 30 March 1980 and that it retracted its authorization of NECA to bargain on its behalf. On 20 September 1983, union counsel indicated that, pending further investigation, it considered Bakken bound to the existing agreement and on 3 October 1983, the Union rejected Bakken's purported withdrawal.

7. Fowser Electric Co.

Dan Fowser went into business as a sole proprietor in 1977. Previously he had contacted Local 292 Business Manager Thomas to ask what he had to do. He wanted to become a union contractor so that if he failed in business he could return to work as a union member. Thomas told him that he would have to sign a Letter of Assent to get commercial jobs and that he might as well sign the Letter for the residential contracts as well in case he wanted to do residential work in the future.

On 25 March 1977, he signed Letters of Assent, effective that date, authorizing M-NECA to act as Fowser Electric's bargaining representative with Local 292 for both the commercial and residential contracts. He understood that he would pay dues to Local 292 and be a working member. He went into business about a month later. In 1980 Fowser hired a full-time employee who worked from April 1980 to December 1983 and he employed one other employee temporarily from mid-April through mid-June 1980. Neither was hired through the referral system nor were they union members.

On 29 July 1983, Fowser notified M-NECA and Local 292 that he considered himself to be bound to no agreements in effect after the expiration of the 1976–1978 agreement and that he retracted NECA's authority to bargain for him. Ensuing correspondence between the Union and Fowser was identical to that between the Union and Bakken as described above.

Concluding Findings

1. Contentions

There is no question that each of the Respondents ultimately took the position that they were no longer bound by the association agreements and atempted to repudiate them. The General Counsel contends that the Letters of Assent continued to bind Respondents to successive renewals of the agreements in effect at the time the Letters were signed until such time as they gave timely notice of termination to the Associations and the Unions. With respect to Local 292, the General Counsel contends that the notices given by all Respondents were ineffective until 30 April 1984, the end of the M-NECA/292 agreement then in effect. With respect to Local 110 the General Counsel contends that the notices were defective because they were sent to M-NECA and not S-NECA. In addition, the General Counsel contends that North Town's notice was untimely with respect to the extension of the 1982–1984 S-NECA/110 agreement. Therefore, the General Counsel contends that the untimely or unperfected repudiations of the agreements during their terms violated Section 8(a)(5) and (1) of the Act. Respondents contend that the letters did not authorize the Associations to represent them beyond the terms of the agreements in effect at the time they were signed, and that the attempts to withdraw were timely effective. In addition, they raise a number of affirmative defenses, including challenges to the Unions' majorities, the enforceability of the agreements as prehire agreements, alleged improper conduct by the Unions in obtaining Respondents' signatures on the Letters of Assent, alleged unfair representation of Respondents by the Associations, and alleged acquiescence by the Unions in Respondents' repudiation of the agreements.

2. The effectiveness of the Letters of Assent as authorization to the Associations to enter into further contracts

The Stacks, Joyces, Bakken, and Fowser all testified that they understood and intended that the Letters of Assent would bind them to only the collective-bargaining agreement in effect at the time they signed the letters. However, the reliability of this state-of-mind testimony is impunged by testimonial inconsistencies and by Respondents' actions.[7] Indeed, Respondents' actions show that they understood, as did the signers of similar letters with Locals 292 and 110, that the letters they signed invested the NECA Chapters with the Respondents' bargaining authorizations continuing into the future and were not conterminous with the collective-bargaining agreements then in effect.

The letters state that they remain effective "until terminated by the . . . employer . . . at least one hundred fifty (150) days prior to the then current anniversary date of the . . . [current] approved labor agreement." The term "current anniversary date" is uniformly understood to mean the expiration date of the current contract. The phrase "then current anniversary date" indicates, through use of the modifier "then," that changing anniversary dates were anticipated by those party to the Letters and contracts; changes in the anniversary dates, of course, can only come through renegotiated contracts.

Moreover, the employer signing the letter authorizes the NECA Chapter "as its collective bargaining representative for all matters contained in or pertaining to the current approved . . . labor agreements." Both agreements here contain clauses by which the agreements are automatically renewed unless renegotiated or specifically terminated by the parties. Thus, renegotiation of the contract itself is "contained in" the current contract, and the subjects of renegotiation are also matters contained in or pertaining to the contract.

The Board has previously considered the duration of virtually identical Letters of Assent and found that they extended representative authorization to an association beyond the expiration date of the contract in effect when they were signed. *Nelson Electric*, 241 NLRB 545 (1979), enfd. 638 F.2d 965 (6th Cir. 1981); *Rayel Electric*, 260 NLRB 1327 (1982). As noted in *Nelson Electric*, supra at 550, "it was the continuing authority to negotiate, which was granted to NECA and which has never been terminated, which is critical—not the adoption of the terms of a specific agreement."

Thus, based on the actions of the parties, the plain language of the Letters of Assent, and prior constructions of identical letters, I conclude that the Letters of Assent authorized the Associations to negotiate and bind Respondents to agreements subsequently negotiated between the Associations and the Unions until Respondents timely withdrew their bargaining authorizations. I reject Respondents' affirmative defense that the letters were effective only for the terms of the contracts in effect at the time they were signed.

3. Respondents' repudiation of the M-NECA/292 agreement

At the time Respondents repudiated the M-NECA/292 agreement (29 July for Bakken, Fowser, and Stack and 3 October for North Town) the current agreement still had a number of months to run until its 30 April 1984 expiration date. Although Respondents could prospectively withdraw M-NECA's authority to enter into any successor agreement with Local 292 on their behalf,[8] they could not in midterm repudiate the existing agreement for the remainder of its term without the approval of Local 292 and M-NECA, which was never given.[9] Accordingly, as I find below no merit to Respondents Bakken and North Town's affirmative defenses, I conclude that their repudiation of the M-NECA/292 agreements violated Section 8(a)(5) and (1) of the Act.

4. Respondent North Town's repudiation of the S-NECA/110 agreement

On 3 October 1983, North Town's counsel wrote Richard Parenti, secretary-manager of M-NECA, to notify him that North Town did not believe it was bound by the collective-bargaining agreements with Locals 110 and 292 and to request "that it receive no further correspondence from N.E.C.A. or from Local 110 or 292 on the subject of these agreements or their administration." In that letter counsel also took the position that North Town had never executed "a delegation of collective bargaining rights in connection with the 1982-1984 agreements between N.E.C.A. and Locals 110 and 292." In conclusion, the letter stated that North Town Electric "hereby gives notice of its withdrawal from membership in and retraction of any previous authorization of N.E.C.A. to act on its behalf as collective bargaining representative, pursuant to *Boro Burglar Alarm Co.*, 234 NLRB 58."

On 23 November 1983 counsel for North Town again wrote Parenti terminating its authorization of M-NECA to serve as North Town's collective-bargaining representative with respect to renegotiation of the current agreements between M-NECA and Locals 110 and 292. Counsel expressly disclaimed waiver of any position taken in the 3 October letter. Copies of both letters were sent to Locals 110 and 292 but not to S-NECA.

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[7] Fowser testified that he was told by Local 292 business manager that if he signed both the residential and commercial letters he would never have to come back again in the future. Bakken testified that he considered himself a union contractor until he stopped paying dues in July 1982, well after expiration of the agreement in effect when he signed his second Letter of Assent. Bakken, North Town, and Stack Electric submitted payroll reports and participated in benefit plans available only by contract after expiration of the contracts in force when their Letters of Assent were signed. The payroll reports showed that all three paid the wage rates established by the succeeding contracts. One of the payroll reports submitted by North Town was in response to a delinquency notice relating to a period after expiration of the initial contract term. In addition, North Town and Bakken utilized union referral procedures after expiration of the initial contract term, and C. Stack notified Local 292 of the incorporation of Stack Electric to update its records a year after expiration of the contract in effect when its Letter of Assent was signed.

[8] See *Electrical Workers IBEW Local 952 (D & R Electric)*, 275 NLRB 319 (1985).

[9] *Nelson Electric*, supra.

Counsel for the General Counsel contends that neither letter was effective to terminate S-NECA's authority to represent North Town in bargaining with Local 110 because neither was sent to S-NECA. Counsel for the General Counsel also contends that the 3 October letter was ineffective because it did not comport with the specified method of terminating an assent letter's authority.

Insofar as the record shows, the first time S-NECA became aware of the letters was during January 1984 when the assistant manager of S-NECA received copies from its attorney. On 24 January 1984, North Town's counsel sent copies of the 3 October and 23 November letters to S-NECA for the first time.

Although counsel for the General Counsel appears to contend otherwise, the 3 October letter conveys unequivocally North Town's intent to terminate S-NECA's authority to bargain for it. Not only may that intent be inferred from the statements of position with respect to the present agreement and the authority of NECA, but the letter specifically retracts any previous authority of NECA to act as its bargaining representative.

There is no question that the attempt to withdraw bargaining authority from S-NECA was timely with respect to the 1982–1984 association agreement with Local 110. That agreement provided:

> Sec. 1.01 AGREEMENT DATES—This agreement shall take effect May 1, 1982, and shall remain in effect through April 27, 1984, unless otherwise specifically provided for herein. It shall continue in effect from year to year thereafter from May 1 through April 30 of each year, unless changed or terminated in the way later provided herein.

The agreement provides further that either party desiring to terminate or modify the agreement must notify the other at least 90 days before the anniversary date and that the agreement shall be subject to change or supplement at any time by mutual consent of the parties.

Before 1983, for the previous several contracts, negotiations for extensions or new agreements typically began in January or early February of the expiration year. However, in 1983 negotiations began in the spring when the Association on behalf of the contractors sought to defer a wage increase due under the 1982–1984 agreement. Those discussions were unsuccessful, but discussions started again in August which led to the extension agreement signed on 7 October and effective on that date. Agreement on terms was reached in late September, subject to ratification.

S-NECA mailed communications describing the negotiations and the agreement on terms in September, but it did not mail copies to all contractors who had signed Letters of Assent. Rather, it mailed them to all members of S-NECA and to those contractors who were currently employing individuals under the collective-bargaining agreement based on their submission of payroll reports to the fringe benefits funds. Insofar as it appears, North Town did not receive the communications from S-NECA. North Town was not a member of S-NECA, and it did not file payroll reports or use employees referred by S-NECA after April 1983.

In *Retail Associates*, 120 NLRB 388, 395 (1958), the Board held:

> We would . . . refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each sides has committed itself . . . absent unusual circumstances.

Here actual bargaining negotiations to extend the 1982–1984 contract had begun and there was no mutual consent after the notice was given. However, the question remains whether the notice should be considered timely because of the terms of the Letter of Assent or the fact that negotiations began much earlier than customary and much earlier than the 90-day period mentioned in the contract. *Acropolis Painting*, 272 NLRB 150 (1984), offers guidance. There the Board found that an "unannounced premature commencement of actual negotiations could not foreclose the Respondents from withdrawing in accord with the agreed-upon procedure set forth in [the association agreement]."

In that case the agreement between the multiemployer association and the union provided that during January of the expiration year of the agreement any signatory party could withdraw from the agreement effective with its 1 July expiration date by giving written notice and that "said notice of withdrawal eliminates said party from participation in any negotiations regarding this Agreement." The agreement provided for automatic renewal in the absence of written notice of a desire to change or revise the agreement not less than 120 days before the termination date. The agreement in effect at the time the case arose ran from 1 July 1980 to 30 June 1983. Historically, the union and association had negotiated successor contracts in the spring of the year in which a contract was scheduled to terminate. In November 1982, however, the association and union agreed to early contract negotiations to grant employees covered by the contract economic relief from a 1 January 1983 pay raise called for by the 1980–1983 agreement, and in early December they reached agreement on a new contract to run from 1 January 1983 to 30 June 1987 which was ratified by the association membership on 14 December 1982 and by the union on 28 December 1982.

During the negotiations representatives of the association and the union were in disagreement over the rights of employer members to withdraw under the terms of the 1980–1983 agreement. Association representatives took the position that they could still withdraw during January 1983 while union representatives took the position that they could no longer withdraw once agreement was reached. When the respondents in the case sought to withdraw during January, the union wrote them that their letters were untimely, that the letters did not serve to remove them from the negotiations that took place

before they tried to withdraw, and that they were bound by the terms of the 1983–1987 agreement. All four respondents had been members of the association and at least two were in good standing at the time they sought to withdraw.

The facts in the instant case are substantially identical in most respects. Here, the Letter of Assent between North Town and Local 110 provided by its terms that the authorization of the S-NECA as collective-bargaining representative of North Town would remain in effect until terminated by written notice at least 150 days before the termination date of the current agreement. That agreement provided for automatic renewal in the absence of 90 days' notice of intent to terminate or modify. Historically, the parties had started to negotiate early in the year in which the contract was scheduled to terminate. In 1983 negotiations started almost 6 months earlier than normal, and the agreement entered into on 7 October 1983, more than 6 months before the termination date of the 1982–1984 agreement, extended its term through 30 April 1986.

The facts in this case differ with respect to the association membership of North Town, notice of the negotiations, and the positions taken by the Association and Union with respect to withdrawal. North Town was never a member of S-NECA. As it was not currently employing anyone on whom it was making reports to Local 110, it received no notices from S-NECA and insofar as the record shows had no notice of the negotiations which led to the extension of the 1982–1984 agreement.[10] There is no evidence that here the Association and Union discussed at all the impact of the extension of rights of employers to withdraw from multiemployer bargaining.

I conclude that these factual differences do not warrant a different result here from that reached in *Acropolis Painting*, supra. As a nonmember of S-NECA with no notice of any kind of the 1983 negotiations, North Town had if anything greater right to rely on the terms of the Letter of Assent it had signed than the respondents in *Acropolis* who were members of the association and at least some of whom had been sent notice of the extension negotiations before the agreement was reached and ratified. Although the dispute between the association and the union in *Acropolis* over members' withdrawal rights may have led some members to rely on withdrawal provision of the association agreement, the association and members had identical interests as parties to the contract. Certainly, absent agreement by the Association with the Union's position as to withdrawal, not present in either case, the contractual rights of a member vis-a-vis the Union could not be abrogated. Here, no less than in *Acropolis*, the terms of the Letter of Assent that was signed by North Town and Local 110 may be viewed as mutual consent to withdrawal from multiemployer bargaining regardless of whether bargaining for a new agreement has commenced. Inasmuch as there is no evidence that North Town knew of the negotiations or of the terms of the extension or withdrew because of dissatisfaction with its terms, there is no need to decide whether failure to withdraw after receiving such notice might render withdrawal equivocal or otherwise warrant a different result under *Retail Associates*. Thus, I conclude that the facts in this case are if anything stronger for giving effect to a withdrawal from multiemployer bargaining given timely with respect to the expiration date of the 1982–1984 agreement.

The question remains whether North Town gave timely notice in compliance with the Letter of Assent. The date 28 November 1983 was 150 days before 27 April 1984 and was thus the last date for timely notice during the 1982–1984 agreement. North Town gave notice to M-NECA and Local 110 on 3 October, clearly in advance of that date. But S-NECA did not receive a copy of the letter and had no other notice until January, well after the 1 December date.

Under *Retail Associates*, supra, 120 NLRB at 393–394, although an untimely withdrawal requires consent of both the union and association, a timely withdrawal does not require mutual consent of the association and union but only that it be unequivocal, be made in good faith, and contemplate relatively permanent abandonment.

Here, where it appears that Respondent's attorney mistakenly assumed that the Minneapolis NECA office acted as a central office for the NECA Chapters in the area, the withdrawal letter is not deficient by any of the criteria prescribed by *Retail Associates*. The Union was timely notified of North Town's unequivocal "retraction of any previous authorization of N.E.C.A. to act on its behalf as collective bargaining representative." Even after receiving the copy of the 3 October letter, S-NECA made no response and apparently chose not to exercise its right—contained in the Letter of Assent—to timely notification. Moreover, North Town's failure to direct its notice properly to S-NECA had no impact on any policy served by the rules laid down in *Retail Associates*. Because negotiations took place and were completed by choice of the Association and Union before the time provided in the Letter of Assent for withdrawal and before the North Town letter was sent, North Town's letter could have no impact on the negotiations. Also, because North Town had communicated to Local 110 its determination to withdraw before it knew of the extension agreement its decision could not have been influenced by the negotiations or their outcome and could have no more destabilized the multiemployer bargaining relationship than if S-NECA had been sent the 3 October letter on that date. Accordingly, I find that North Town's withdrawal notice of 3 October 1983 was effectively given and that North Town was released from the S-NECA/110 1982–1984 contract on its original expiration date.

However, as in the case of the M-NECA agreement discussed above, although North Town could withdraw prospectively S-NECA's authority to enter into any successor agreement with Local 110 on its behalf, it could not repudiate the existing agreement for the remainder of its original term. Accordingly, as I find below no merit to North Town's affirmative defenses, I conclude that its

[10] The testimony of Roger Joyce indicated awareness of negotiations for the 1982–1984 agreement, not its later extension.

repudiation of the S-NECA/110 agreement before 27 April 1984 violated Section 8(a)(5) and (1) of the Act.

5. Respondents' defenses

a. *The Unions' majority*

Respondents contend that the Letters of Assent and the agreements with Locals 110 and 292 are void and unenforceable because they were prehire agreements which never matured into enforceable collective-bargaining agreements. Counsel for the General Counsel contends that the units defined in the agreements are association-wide units, that the employees of each Respondent do not constitute separate bargaining units, and that the desires of the employees of the individual employers are therefore irrelevant.

In a single employer setting applicable case law with respect to prehire agreements is clear. A union and employer in the building and construction industry may unlawfully enter into a prehire agreement but it creates no presumption of majority status. A relationship thus established may be converted into a 9(a) relatioship on a showing that the union has obtained majority status in a permanent and stable complement of employees, but in the absence of such a showing, the agreement remains voidable, *NLRB v. Iron Workers Local 103*, 434 U.S. 335 (1978).

In a multiemployer setting the status of contracts between additional employers joining the multiemployer group and the union representing the multiemployer unit is less clear. The Board has certified multiemployer units without inquiring into the number of employees employed by individual employer-members of the group. *Central New Mexico Chapter*, 152 NLRB 1604 (1965), *Northern Nevada Chapter*, 131 NLRB 550 (1961). But in those cases there was an established history of multiemployer bargaining, and the issue of the status of employers joining the group by signing prehire Letters of Assent does not appear to have been raised.[11]

In *C.I.M. Mechanical Co.*, 275 NLRB 685 (1985), concurring Member Dennis squarely faced this issue, writing:

> An employer cannot bind its employees to representation in a multiemployer unit without the employees' express or implied consent. *Mohawk Business Machines*, 116 NLRB 248, 249 (1956). Typically, a union gives such consent, but to do so, the Union must be the employees' statutory bargaining representative. Otherwise, employees could become part of a preexisting multiemployer unit without in any way having expressed a desire to select the union as their collective-bargaining representative, and would be unable to challenge the union's status except in the multiemployer unit. If, however, a union attains majority status support among an employer's own employees, it will have gained the authority to give the employees' consent and to merge them into the multiemployer unit.

In that case the majority did not reach the issue because it found that the employer had not expressed a clear and unequivocal intent to engage in multiemployer bargaining. However, Member Dennis' analysis was also adopted in *Baton Rouge Building Trades Council v. E. C. Schafer Construction Co.*, 657 F.2d 806 (5th Cir. 1981).

This analysis is consistent with longstanding authorities and principles, and I have found no authority to the contrary. Accordingly, I conclude that the analysis set forth in Member Dennis' concurrence should be followed in this case.

To determine whether the relationship between the Unions and Respondents in this case matured into 9(a) relationships, the facts as to each of the Respondents must be examined separately.

At the time C. Stack signed the Letter of Assent with Local 292, the only employee of Stack Electric was Patrick Stack, who ran the business with his wife and became vice president when it was incorporated. As husband of the owner and as a managerial employee, Patrick Stack would be excluded from any collective-bargaining unit and was not an employee within the meaning of the Act.[12] Thus, the Letter of Assent with Local 292 was signed and the collective-bargaining agreement entered into at a time when Stack Electric had no employees. As Stack Electric, like the other Respondents was an electrical contractor performing work in the building and construction industry the agreement between Stack and Local 292 was an 8(f) agreement at the time of its inception.

As set forth below, there is also no evidence that Local 110 represented any employees of Stack Electric when C. Stack signed the Letter of Assent with Local 110, so that the agreement between Stack Electric and Local 110 was also an 8(f) agreement.

Since the latter part of 1981, for substantial periods of time Stack employed four different persons, essentially one at a time, but there is no evidence that any of these employees were members of Local 110 or Local 292 or authorized either Union to represent them. There is no evidence that Stack obtained their services by referral from either Union, reported their earnings to either Union, or paid fringe benefits on their behalf. Thus, it has not been established that Local 110 or Local 292 ever attained majority status in a permanent and stable complement of employees. Therefore, both agreements remained subject to repudiation by Stack. Consequently, following the analysis set forth in Member Dennis' concurrence above, Stack Electric's employees did not become a part of the multiemployer unit, and in the absence of any evidence that Stack Electric's business operations taken by themselves meet the Board's jurisdictional standards, I shall recommend that the Board not assert

[11] See also *Nelson Electric*, supra. Although the issue was not raised, it appears from the facts that the union had acquired a majority in a permanent and stable work force before the respondent tried to repudiate the agreement.

[12] Although Stack and Local 292 may have considered Patrick Stack a full-time journeyman electrician and not a working employer for purposes of contract enforcement, their agreement is not determinative of his status as an employee within the meaning of the Act.

jurisdiction over Stack Electric and that the complaints against it be dismissed.

North Town's predecessor, Helms Electric, had no employees when Margaret Joyce signed the Letter of Assent with Local 292. Like Patrick Stack, Roger Joyce was referred to North Town by Local 292, and he ran the business with his wife and later became its vice president when it was incorporated. Like Stack, he was not an employee within the meaning of the Act.

Within a month or two after the Letter of Assent was signed, Helms hired Don Herlofsky who worked for Helms from January 1981 until July 1982. The record does not show whether Herlofsky was referred by Local 292, but it does show that Helms and later North Town made payroll reports and contributions to the Local 292 fringe benefit funds and remitted union dues on Herlofsky's behalf. During the period of Herlofsky's employment, Helms and then North Town employed no other employees. I find that Helms and North Town had a stable and permanent complement consisting of Herlofsky, that Herlofsky had become a member of Local 292, and that Local 292 thus had a majority among Helms and North Town's employees. Thus, I conclude that the initial agreement between Helms and Local 292 became a 9(a) agreement and that the successor Letter of Assent executed after North Town was incorporated was likewise a 9(a) agreement.

After North Town signed the Letter of Assent with Local 110, the month after Herlofsky left, North Town hire Warren Stimson, a member of Local 110 on referral from Local 110. Stimson worked until April 1983 as North Town's only employee. Thus, at least by the time Stimson was hired, Local 110 represented a majority of a permanent and stable complement of North Town's employees. Accordingly, I find that under the principles set forth above, North Town's employees were merged into the multiemployer units under contract between the Associations and Locals 110 and 292. These contracts were thus not subject to repudiation by North Town as 8(f) agreements, and having become merged into the existing multiemployer units the question of whether either Union continued to represent a majority of North Town's employees was no longer material.

Bakken went into business in 1976. The Letter of Assent he signed at that time applied to the residential contract not at issue in this case. In 1979 Bakken signed the Letter of Assent applicable to the commercial agreement. Before signing the Letter of Assent, Bakken employed one employee in addition to himself and he continued to do so thereafter with some turnover of individuals. Bakken, as owner of his Company, is not an employee within the meaning of the Act. Although it is unclear when Bakken started to utilize the Local 292 hiring hall, he started to do so at some time after the first Letter of Assent was signed and continued to employ electricians referred by Local 292 through 1980. Thus, I find that at least after, if not before, the 1979 Letter of Assent was signed Respondent had a stable and permanent complement of employees that Local 292 represented. Accordingly, I find that Bakken's employees were merged into M-NECA unit under the contract between M-NECA and Local 292 that was not subject to repudiation by Bakken as an 8(f) agreement. Thereafter, the question of Local 292's majority among Bakken's employees was no longer material.

Finally, turning to Fowser, the evidence shows that Fowser signed Letters of Assent in 1977 when he went into business as a sole proprietor. Apart from himself, Fowser employed no one until 1980 when he hired a full-time employee and a temporary employee. Neither was hired through the Local 292 referral system and neither was a union member. Thus, there is no showing that Local 292 ever represented employees of Fowser. Accordingly, as in the case of Stack Electric, Fowser's employees did not become part of the multiemployer unit, and in the absence of any evidence the Fowser's business operations taken by themselves meet the Board's jurisdictional standards, I shall recommend that the Board not assert jurisdiction over Fowser and the complaint against Fowser be dismissed.

b. *Alleged unfair labor practices, misrepresentation, fraud, coercion, and duress*

Respondents contend that the Letters of Assent are tainted by unfair labor practices and related misconduct of the Unions at the time the Letters of Assent were signed and continuing thereafter. More specifically, Respondents contend that they were required to join and pay exactions to the Unions, that the Unions interfered with Respondents' choice of bargaining representatives, and that the Unions refused to bargain over any alternatives to signing the Letters of Assent as a basis for agreement between Respondents and the Unions.[13]

At the outset of the hearing counsel for the General Counsel moved to strike the affirmative defense based on the Unions' alleged unfair labor practices because it was barred by Section 10(b) of the Act. The motion was granted to the extent that the allegations of union unfair labor practices were based on conduct which occurred more than 6 months before the charges in this case were filed. Respondents' request that this ruling be reconsidered is denied. *Barrington Plaza & Tragniew*, 185 NLRB 962, 964 (1970).

Although this ruling disposes of most of Respondents' contentions, they are in any event virtually without factual foundation.[14]

Despite Respondents' claims that the Unions forced Respondents to sign Letters of Assent, insisted that they do so, and refused to consider other alternatives or to bargain individually with Respondents, the facts show an entirely different picture. Respondents went to the Unions, not vice versa. They asked the union business representatives what to do in order to become union contractors. When the business representatives told them

[13] Although these contentions were made collectively by all Respondents, in view of the dismissal recommended above as to Stack and Fowser, the remaining contentions will be considered only insofar as they apply to North Town and Bakken. If it were necessary to reach these issues in relation to Stack and Fowser, however, generally the same conclusions would follow.

[14] Record citations in support of this contention and indeed throughout Respondents' brief are largely to unrelated evidence or evidence that requires highly subjective and colored interpertation to draw from it the assertions Respondents base on it.

to sign Letters of Assent, they did not ask if there were other alternatives nor did they ask to bargain separately. The business representatives did not demand any action or refuse any action. They answered the questions asked them by Joyce and Bakken, and Joyce and Bakken accepted those answers. As the Unions represented no employees of Joyce or Bakken at that time, they had no duty to bargain with Joyce or Bakken at all; bargaining between them was entirely consensual. The contention by Respondents that the Unions had special obligations to Joyce and Bakkens as union members to tell them of other alternatives is baseless. The Unions' duty to Joyce and Bakken was only to represent them fairly as employees. Union membership conferred no obligation on the Unions when it dealt with them as prospective employers.[15]

When Joyce and Bakken approached the Unions initially it was because they wanted something from the Unions. In Joyce's case he wanted to be a union contractor, to work, and to receive fringe benefits. In Bakken's case, he wanted to freeze his retirement benefits and to obtain commercial referrals. Only later did each decide that he no longer wanted to be bound by the agreements he had made. Although Respondents contend that the Unions engaged in a continuing violation of Section 8(b)(3) of the Act by refusing to bargain individually with Respondents, the Unions' refusal to do so was hardly an unfair labor practice; rather it was a logical consequence of their position, supported by the complaint, that Respondents were bound by the existing association contracts.

Closely related are Respondents' contentions that the association agreements are void or unenforceable because of misrepresentation, fraud, duress, or coercion. They are rejected for the same reasons. Again most, if not all the allegations, if sustained, would constitute unfair labor practices that occurred more than 6 months before the charges in this case were filed. But more basic, the factual assertions are not supported by the evidence in the record. Respondents would have it that they were the objects of pressure from the Unions to sign the Letters and join the Unions "or else." They would have the Unions seen as aggressors who pressured Respondents, insisted that they sign the Letters and pay union dues, and deliberately concealed information from them. No fair reading of the record can lead to that conclusion.

c. *Alleged unfair representation by M-NECA and S-NECA*

Respondents contend that M-NECA and S-NECA unfairly represented them in contract administration and negotiations with the Unions and that the unfair representation constituted unusual circumstances that justified Respondents' withdrawal from the multiemployer bargaining units. They contend that the consequences of the unfair representation resulted in dire economic circumstances that also justified withdrawal from the multiemployer units. The gist of Respondents' contention is that the Associations favored large employers over small contractors by acquiescing in the Unions' insistence that each small employer be required to employ a full-time journeyman and pay full-time fringe benefits for him despite a past practice ignoring that requirement and by participating in the premature extension of the 1982–1984 S-NECA/110 agreement.

The evidence fails to establish any factual basis for their contentions. The Local 292 contract contains a requirement for employment of a full-time journeyman in addition to a working employer. The Local 110 agreement limits the amount of work which may be performed by an owner and describes a 40-hour normal workweek for employees. Both agreements contain exceptions in effect at all times material for periods of excessive unemployment. Both Unions permit individuals to put ownership in the names of their spouses to avoid restrictions on work by employers. There is no evidence that North Town was required to employ a full-time journeyman in addition to Joyce or that Bakken was required to employ a full-time electrician. The evidence as to grievances filed against them by the Unions show only that they protested the use of employees not hired through the union referral systems, not that they insisted on full-time employment for their employees. Moreover, the evidence shows that the small employers were represented in the membership and boards of both Associations, and there is no factual basis from which to conclude that their interests were subordinated to those of larger employers.

With respect to the extension of the S-NECA/110 agreement, Respondents assert that in reopening the 1982–1984 contract and reaching agreement to extend it for another 2 years fully 9 months before its expiration date and many months before the outset of renewal negotiations in any previous contract year, S-NECA engaged in conspiratorial negotiations to extend prematurely the 1982–1984 agreement, to prevent the defection of small employers, and to promote the interests of larger employers to the detriment of small employers like Respondents. This contention relates only to the complaint against North Town based on the Local 110 agreement.

There is, however, no evidence that these negotiations were conducted in secret, conspiratorially, or with intent to promote the interests of large employers over those of small employers. S-NECA communicated with contractors currently employing electricians under the Local 110 agreement during the course of the negotiations and reported to contractors the failure of an attempt earlier in the spring to negotiate agreement to adjust a wage increase due on 1 May 1983 to give relief to the contractors. Whether North Town specifically was notified of or was aware of the negotiations, it is clear that the negotiations were neither secret nor conspiratorial.

The outcome of the negotiations was to provide a 10-cent hourly increase in the employers' contributions for medical benefits, a 2-year wage freeze, and a reduction in apprentice wages for the first 2 years of apprenticeship.

[15] There is some irony in the contentions that the Unions should have protected Respondents from doing what they wanted to do and that they unlawfully exacted dues from Respondents when it was Respondents who came to the Unions to ask what they could do to become union employers while at the same time preserving for themselves the benefits of employees and, in Joyce's case, the right to be viewed as an employee. See *Nelson Electric*, supra, 241 NLRB 551 fn. 20.

Respondent contends that the provisions favored larger shops because only they could utilize apprentices. However, the ratios of apprentices to journeymen provided in the Local 110 agreement show no such favoritism.

The evidence Respondent adduced to show dire economic consequences of the alleged misrepresentation by the Associations is unworthy of reliance. It is speculative, based on off-the-top-of-the-head recollections, estimates, and questionable assumptions by witnesses who seemingly testified on these matters on the spur of the moment. If such evidence is to have any weight, it must have a more solid foundation than that which underlay the testimony of economic consequences proffered in this case. Moreover, even accepting that evidence at face value, it showed at most impairment of profit, not the kind of losses which would make continued operation under the association agreements impossible. Accordingly, I find no merit in this defense.

d. *The alleged acquiescence in Respondents' noncompliance with the agreements*

Respondents contend that these cases "cry out" for application of the doctrines of waiver, equitable estoppal, and related law because Respondents failed to observe various terms of the agreement with the acquiescence or agreement of the Unions and the Unions failed to take enforcement action.

Once again the evidence fails to support Respondents' claims. With respect to Bakken, although Bakken paid no local dues after signing the initial Letter of Assent, made no fringe benefit contributions on nonunion employees, did not pay contract wage scales to nonunion employees, and did not utilize referrals from Local 292 after 1980, none of these facts show acquiescence in contract violations by Local 292. At the time Bakken signed the first Letter of Assent he was a sole proprietor and, insofar as the record shows, he remained the owner after Bakken Electric incorporated. There is simply no showing that under the Local 292 contract Bakken was required to pay dues or make fringe benefit payments on his own behalf. As to remainder, there is no showing that Local 292 knew or should have known of Bakken's violations before a grievance was filed against Bakken in early 1983. It is common in the industry for employers with Letters of Assent not to work within the Union's jurisdiction for some period of time and to make no fringe benefit reports to the Union. The Union becomes aware of contract violations only if a business representative happens to visit a jobsite while the contractor is there.[16] There is no showing that that happened before the grievance against Bakken was filed.

North Town relies on the fact that its benefit coverage was terminated by Local 292 in December 1982, that North Town stopped fringe benefit contributions to Local 110 in April 1983, that Roger Joyce stopped dues payments to Local 292 in December 1982, that he never paid dues to Local 110, and that North Town did not pay union wage scales except to those employees who were referred by the Unions. With respect to Local 292, the evidence shows that Local 292 stopped accepting fringe benefit payments from Roger Joyce because North Town was then working as a St. Paul contractor. Joyce's own testimony supports that conclusion, at least in part. Although Joyce testified that he tried by telephone without success to talk to someone about the reason for termination, he did not contest the termination in writing or inform the Union that it was in error as to the location of his work. Terminating Roger Joyce's fringe benefits because he was working within Local 110's jurisdiction did not carry with it acquiescence in North Town's violation of the Local 292 agreement at times when North Town was working within its jurisdiction and, indeed, Local 292 filed a grievance only several months later when North Town was found working within its jurisdiction. There is no evidence that Local 292 was or should have been aware of North Town's contract violations before the grievance was filed. What has been said with respect to Local 292 is essentially applicable to North Town's relations with Local 110 as well.

Insofar as Respondents' contentions are based on delay by the Unions and their counsel in responding to the attempts of Bakken and North Town by letter to repudiate the contracts on 29 July and 3 October 1983, respectively, in the light of the length and complexity of the contentions made by Respondents' counsel, there is no showing of delay in response that would imply acquiescence by the Unions or of reliance on the delay by Respondents that would support their defense.

Accordingly, I find that there is no merit in the affirmative defenses advanced by North Town and Bakken, that they violated Section 8(a)(5) and (1) of the Act by repudiating the M-NECA/292 agreement in midterm, and that North Town violated Section 8(a)(5) and (1) of the Act by repudiating the S-NECA/110 agreement before its 27 April 1984 expiration date.

CONCLUSIONS OF LAW

1. North Town Electric, Inc. and Bakken Electric, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Stack Electric, Inc. and Fowser Electric are not employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act over whom the Board would assert jurisdiction.

3. International Brotherhood of Electrical Workers, Locals 110 and 292, AFL–CIO are labor organizations within the meaning of the Act.

4. All employees employed by employers who have authorized the Minneapolis Chapter, National Electrical Contractors Association, to bargain for them, who perform work as described in article III, section 3.12 of the Inside Construction and Maintenance Agreement, 1982–1984, between Local 292 and the Minneapolis Chapter constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By repudiating the collective-bargaining agreement between Local 292 and the Minneapolis Chapter of the Association on 29 July 1983, before its expiration date, Respondents Bakken Electric, Inc. and North Town Electric, Inc. have engaged in unfair labor practices af-

[16] A contention that Local 292 ignored a request for a referral by Bakken is wholly unsupported by the record.

fecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

6. All employees employed by employers who have authorized the St. Paul Chapter, National Electrical Contractors Associations, to bargain for them, who perform work as described in article III, section 3, of the Construction and Maintenance Agreement, 1982–1984, between Local 110 and the St. Paul Chapter constitute a unit appropriate for the prupose of collective bargaining within the meaning of Section 9(a) of the Act.

7. By repudiating the collective-bargaining agreement between Local 110 and the St. Paul Chapter of the Association on 3 October 1983, before its 27 April 1984 expiration date, Respondent North Town Electric, Inc. has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondents Bakken and North Town engaged in unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Bakken and North Town unlawfully repudiated the 1982–1984 M-NECA/292 collective-bargaining agreement and that North Town unlawfully repudiated the 1982–1984 S-NECA/110 collective-bargaining agreement, I shall recommend that they be ordered (a) to give retroactive effect to the repudiated agreements, (b) to make their employees whole for any losses sustained by them by the failure to honor the terms and conditions of the repudiated agreements, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest, as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977), and (c) to make whole the various fringe benefit funds for any contributions required to be paid under the terms and provisions of the agreements, as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[Recommended Order omitted from publication.]

Ad-Art, Inc.; Ad-Art, Inc. d/b/a Electrical Products Corporation *and* International Brotherhood of Electrical Workers, Local Union No. 591; International Brotherhood of Electrical Workers, Local Union No. 595 *and* International Brotherhood of Electrical Workers, Local Union No. 332

Ad-Art Inc., alter ego of Electrical Products Corporation *and* Local Union 569, International Brotherhood of Electrical Workers. Cases 32-CA-6047, 32-CA-6172, and 32-CA-6388 (formerly 21-CA-22907)

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On May 31, 1985, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed cross-exceptions accompanied by a brief memorandum, and the Respondents and Charging Parties Local Union No. 591 and Local Union No. 595 filed answering briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decidedto affirm the judge's rulings, findings,[2] and conclusions,[3] to modify his remedy,[4] and to adopt the recommended Order as modified.

AMENDED REMEDY

The General Counsel's cross-exceptions and supporting memorandum argue that the judge improperly deferred to an arbitrator's award concerning the Respondents' unilateral deletion of article V, section 11, of the Ad-Art–Local 591 collective-bargaining agreement and, as a result, failed to provide a make-whole remedy for employees who replaced unlawfully terminated employees at the Respondents' Oakland, San Jose, and San Diego facilities and who were not compensated at the applicable contract rate. The General Counsel's argument against deferral is based on the contention that the arbitrator's decision involved an issue of unit placement, composition, or scope. We do not find that to be an accurate characterization of the decision. The General Counsel also contends that the rights of the Charging Party Unions, Local's 595, 332, and 569, have been affected without according them due process as they were not present at, nor did they participate in, the arbitration proceedings. We note, however, that all the Charging Party Unions either support or acquiesce in the judge's decision to defer, and have not excepted to the judge's decision to defer. Under these circumstances, we affirm the judge's decision to defer to the arbitrator's decision.

We nevertheless conclude that the judge's recommended Order fails to include the appropriate remedy for the above-mentioned replacement employees at the Respondents' San Jose and San Diego facilities who may not be included in the arbitrator's award. We agree with the judge's analysis of the arbitrator's award as calling for backpay for employees referred from Stockton to other locations at the out-of-jurisdiction rates prescribed in the Respondents' contract with Local 591. The judge independently found, however, that the Respondents had unlawfully reassigned, to nonunion employees in both San Jose and San Diego, work previously done by unlawfully terminated union-represented employees at those locations.[5] As noted above, the arbitrator's award concerned only violations of the Respondents' Local 591 contract, covering work referred from Stockton. The unlaw-

[1] The Respondents have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In fn. 16 of his decision, the judge incorrectly states that J. Papais did not deny that when he signed the 1982 Local 332 agreement it contained the designation of "Ad-Art, Inc." as the employer. Nevertheless, in the absence of any other identification of the employer, the judge's finding that the contract designated Ad-Art, Inc. as the employer when Papais signed it is affirmed.

We correct inadvertent errors by the judge in his decision as follows: (1) in fn. 2, the date should be May 23, 1985; (2) in sec. C,2, par. 1, the union that filed a grievance on October 25 was Local 591, not Local 595; (3) the former Ad-Art employee whose testimony is described in sec. C,3, pars. 4 and 5 is Todd Reich, not Tom Reid.

There was no exception to the judge's finding that the Respondents violated Sec. 8(a)(5) and (1) of the Act by refusing to furnish certain information to Local 332.

[3] Because we have adopted the judge's finding that the Respondents' decision to terminate bargaining unit employees and transfer or reassign their work was motivated by the Respondents' desire to avoid their union contract obligations, we agree with the judge's conclusion that such decisions are not legitimate entrepreneurial decisions exempt from the Respondents' bargaining obligation. *Hydro Logistics*., 287 NLRB 602 (1987); *Strawsine Mfg. Co.*, 280 NLRB 553 (1986). Therefore, we find it unnecessary to rely on his alternative theory (in sec. D of his Analysis and Conclusions) that the midterm contract modifications violated Sec. 8(a)(5) of the Act whether the decisions involved mandatory subjects of bargaining.

[4] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 22 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[5] The judge found that the Oakland work was reassigned to Stockton employees.

ful reassignment 8(a)(5) violations found by the judge regarding the work at San Jose and San Diego affected employees who were not referred from Stockton and whose employment is therefore outside the reach of the arbitrator's award. Although the record is not clear whether the San Jose replacements were hired locally or referred from Stockton, it appears that at least two San Diego replacements were hired locally and that the work was also reassigned to employees from the Respondents' Cucamonga facility. All replacements performing work that should have been performed under the applicable collective-bargaining agreements are entitled to be made whole for any losses they may have suffered by reason of the Respondents' failure and refusal to honor the agreements, including all contributions the Unions would have received in accordance with the agreements. *Blumenfeld Theatres Circuit*, 240 NLRB 206, 218 (1979), enfd. mem. 626 F.2d 865 (9th Cir. 1980). Determination of the identity of any replacement employees who are not included in the arbitrator's remedy may be made in the compliance stage of this proceeding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Ad-Art, Inc.; Ad-Art, Inc., d/b/a Electrical Products Corporation; and Ad-Art, Inc., alter ego of Electrical Products Corporation, Stockton, Oakland, San Jose, and San Diego, California, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(m) and reletter the subsequent paragraphs.

"(m) Make whole the individuals who were hired at their San Diego and San Jose facilities to replace the unlawfully terminated employees for any losses they may have suffered by reason of the failure and refusal by the Respondents to honor the collective-bargaining agreements described above, including all contributions the Unions would have received in accordance with those agreements, with interest."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Electrical Workers Local Union 591 (Stockton) as the exclusive bargaining representative of all our employees in the bargaining unit found appropriate.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Electrical Workers Local Union 595 (Oakland) as the exclusive collective-bargaining representative of all our employees in the bargaining unit found appropriate.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Electrical Workers Local Union 332 (San Jose) as the exclusive collective-bargaining representative of all our employees in the bargaining unit found appropriate.

WE WILL NOT refuse to bargain collectively with Local Union 569, International Brotherhood of Electrical Workers (San Diego) as the exclusive collective-bargaining representative of all our employees in the bargaining unit found appropriate.

WE WILL NOT discharge employees and relocate sign hanging, installation, maintenance, and service work, or any other work encompassed within the Oakland, San Jose, or San Diego bargaining units, with the object of escaping the obligations imposed by a collective-bargaining agreement.

WE WILL NOT fail and refuse to apply to all our employees in the Oakland and San Jose bargaining units all terms and conditions of the current collective-bargaining agreements.

WE WILL NOT fail and refuse to execute a copy of the 1983–1986 agreement between the Electric Sign and Luminous Tube Industry of San Diego County (the Association) and Local Union 569, International Brotherhood of Electrical Workers.

WE WILL NOT fail and refuse to apply to all our employees in the San Diego bargaining unit all the terms and conditions of the 1983–1986 agreement between the Association and Local 569.

WE WILL NOT fail and refuse to supply Local 332 with necessary and relevant information on request.

WE WILL NOT bypass Local 591 (Stockton) and bargain directly or indirectly with the employees in the Stockton bargaining unit for which Local 591 is the exclusive bargaining representative.

WE WILL NOT discharge or otherwise discriminate against employees regarding to hire or tenure of employment or any other term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with IBEW Local 591 (Stockton) as the exclusive bargaining representative of all our employees employed in the appropriate bargaining unit.

WE WILL, on request, bargain collectively with IBEW Local 595 (Oakland) as the exclusive bargaining representative of all our employees employed in the appropriate bargaining unit.

WE WILL, on request, bargain with IBEW Local 332 (San Jose) as the exclusive bargaining representative of all employees employed in the appropriate bargaining unit.

WE WILL, on request, bargain collectively with Local 569, IBEW (San Diego) as the exclusive bargaining representative of all our employees employed in the appropriate bargaining unit.

WE WILL apply the terms and conditions of the current collective-bargaining agreement to all our employees employed in the Oakland bargaining unit.

WE WILL apply the terms and conditions of the current collective-bargaining agreement to all our employees in the San Jose bargaining unit.

WE WILL execute a copy of the 1983–1986 agreement between the Association and Local 569.

WE WILL apply the terms and conditions of the 1983–1986 agreement between the Association and Local 569 to all our employees in the San Diego bargaining unit.

WE WILL furnish Local 332 with the requested information necessary and relevant for its duties as exclusive bargaining representative.

WE WILL offer all sign hanger and installer employees terminated at the San Diego, Oakland, and San Jose facilities in November 1983 immediate and full reinstatement to their former positions of employment or, if their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any rights and privileges previously enjoyed, and WE WILL make all these employees whole for any loss of earnings they may have suffered as a result of our discrimination against them, with interest.

WE WILL remove from our files any reference to the termination of the San Diego, Oakland, and San Jose sign hangers and installers in November 1983, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel action against them.

WE WILL make whole, with interest, those employees who were hired in San Diego and San Jose to replace bargaining unit employees terminated at those facilities for any losses that they may have suffered by reason of our failure and refusal to honor the collective-bargaining agreements, including all contributions the Unions would have received in accordance with those agreements.

AD-ART, INC.; ELECTRICAL PRODUCTS CORPORATION

Patricia M. Milowicki, Esq., Valerie Hardy-Mahoney, Esq., and *Robert Petering, Esq.*, for the General Counsel.

Ronald Johnson, Esq., of Stockton, California, for the Respondents.

Sanford N. Nathan, Esq. (Neyhart, Anderson, Nussbaum, Reilly & Freitas), of San Francisco, California, for Locals 591 and 595.

Kathryn A. Sure, Esq. (Wylie, Blunt, McBride, & Jesinger), of San Jose, California, for Local 332.

Lewis N. Levy, Esq. (Levy, Ansell & Goldman), of Los Angeles, California, for Local 569.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard these consolidated cases in trial at Oakland, California, on various dates beginning May 8 and ending July 18 and at San Diego, California, on July 31, 1984. The cases arose as follows: International Brotherhood of Electrical Workers, Local Union No. 591 (Local 591 or the Stockton Local) and International Brotherhood of Electrical Workers, Local Union No. 595 (Local 595 or the Oakland Local) filed a charge in Case 32–CA–6047 on November 9, 1983, against Ad-Art, Inc. (Respondent Ad-Art) and Electrical Products Corporation (Respondent EPC) (collectively Respondents). Thereafter, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondents on December 30, 1983, in Case 32–CA–6047. On January 9, 1984, International Brotherhood of Electrical Workers, Local Union No. 332 (Local 332

or the San Jose Local) filed a charge against Respondents in Case 32–CA–6172. On February 27, 1984, the Regional Director issued an order consolidating cases, amended consolidated complaint, and notice of hearing against Respondents in Cases 32–CA–6047 and 32–CA–6172. Meanwhile, Local Union 569, International Brotherhood of Electrical Workers (Local 569 or the San Diego Local) filed an original charge and a first amended charge against Respondents in Case 21–CA–22907, on January 16 and March 1, 1984, respectively. On March 8, 1984, the Acting Regional Director for Region 21 of the Board issued a complaint and notice of hearing against Respondents in Case 21–CA–22907. Thereafter, Case 21–CA–22907 was transferred by the Acting General Counsel to Region 32 and renumbered Case 32–CA–6388. On April 30, 1984, the Regional Director for Region 32 issued an order consolidating all three cases for hearing.[1]

The complaint alleges in substance that Respondent Ad-Art is an alter ego of Respondent EPC and that Respondents constitute a single business enterprise. The complaint further alleges that Respondents violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act), by failing and refusing to apply the collective-bargaining agreements between Respondent EPC and the IBEW Locals 569, 595, and 332 to the operations of Respondent EPC, which were taken over by Respondent Ad-Art on or about November 30, 1983. Further, the complaint alleges that Respondents violated the Act by terminating employees represented by the three IBEW locals and by unilaterally reassigning the work of those employees prior to bargaining with the Oakland, San Jose, and San Diego Locals. Regarding the Stockton Local, the complaint alleges that Respondents engaged in violations of Section 8(a)(5) by directly dealing with and threatening employees and by unilaterally changing a provision of the collective-bargaining agreement dealing with compensation for work performed outside the geographical territory of the Stockton Local. Respondents contend that Ad-Art and EPC are entirely separate businesses and that Respondent EPC sold its assets to Ad-Art and went out of the electrical sign business. Further, Respondents deny the commission of any unfair labor practices. Regarding the complaint allegations concerning the Stockton Local, Respondents argued, at the hearing and in their posttrial brief, that the Board should defer to the grievance and arbitration provisions of the existing collective-bargaining agreement. After the arbitrator issued his decision, Respondents argued against deferral.

All parties have been afforded full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,[2] on the briefs filed on behalf of the parties, and on my observation of the demeanor of the witnesses, I make the following

[1] References to the complaint refer to both the consolidated complaint in Cases 32–CA–6047 and 32–CA–6172 and the complaint in Case 32–CA–6388.

[2] On May 23, 1984, I reopened the record to receive in evidence a copy of the arbitration decision.

FINDINGS OF FACT AND CONCLUSIONS[3]

I. JURISDICTION

Respondent Ad-Art is a California corporation with an office and principal place of business in Stockton, California, where it is engaged in the nonretail manufacture, sale, service, and installation of electrical signs.

At all times material until November 30, 1983, Respondent EPC was a California corporation with an office and principal place of business in Oakland, California, where it was engaged in the nonretail manufacture, sale, service, and installation of electrical signs.

During the 12 months prior to the issuance of the complaint, Respondents Ad-Art and EPC, in the course and conduct of their respective business operations, each purchased and received goods and services in excess of $50,000 directly from suppliers located outside the State of California. The complaint alleges, Respondents admit, and I find that Respondents Ad-Art and EPC are each an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, the answer admits, and I find that IBEW Locals 591, 595, 332, and 569 are each a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent Ad-Art has been engaged in the business of manufacturing, installing, and servicing electrical signs since at least 1958. Lou Papais is the president of Respondent Ad-Art and the owner of 50 percent of its stock. John Papais, Lou's brother, is Ad-Art's secretary/-treasurer and the owner of 25 percent of its stock. Dan O'Leary is Ad Art's vice president and the owner of the remaining 25 percent of its stock. L. Papais, J. Papais, and O'Leary hold the same offices with Respondent EPC as they hold with Ad-Art. Further, the stock of EPC is owned by L. Papais, J. Papais, and O'Leary in the same percentages as they own all the stock of Ad-Art.

In May 1978, L. Papais, J. Papais, and O'Leary formed EPC[4] for the purpose of acquiring the California assets of Federal Sign and Signal Corporation (Federal), a competitor of Ad-Art. From January 1979 until November 1983, Ad-Art and EPC had the following facilities in the following locations:

[3] The record consists of over 2600 transcript pages and over 500 exhibits. The factual findings are based on the record as a whole and my observation of the witnesses. Although these findings may not contain or refer to all the evidence, all has been weighed and considered. The credibility resolutions have been derived from a review of the entire record and exhibits, with due regard for the logic of probability, the demeanor of witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Regarding those witnesses testifying in contradiction to the findings their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief. In certain instances, I have set forth credibility findings.

[4] The original name of the corporation was Electrical Display Corporation, but within a short period of time, the name was changed to EPC.

Ad-Art:

Stockton: Main office and manufacturing plant plus sales, service, and installation.
Sacramento: Sales, service, and installation office.
Fresno: Sales, service, and installation office.
Reno, NV: Sales, service, and installation office.
Las Vegas, NV: Sales, service, and installation and light manufacturing plant.

EPC:

Oakland: Main office and manufacturing plant plus sales, service, and installation.
Cucamonga:[5] Manufacturing plant and installation.
San Jose: Sales, service, and installation office.
Los Angeles: Sales, service, and installation office.
San Diego: Sales, service, and installation office.

Regarding the Unions in this case, Ad-Art had a collective-bargaining agreement with Local 591 covering its manufacturing and sign installers at its Stockton location. Respondent EPC had an agreement with Local 595 covering its sign installers at Oakland, an agreement with IBEW Local 2131 covering its Oakland manufacturing employees, an agreement with Local 332 covering sign installers at its San Jose facility, and an agreement with Local 569 covering its San Diego sign installation employees as part of a multiemployer association.

During May 1983, Respondent EPC, in an attempt to cut expenses, consolidated management and accounting functions with Respondent Ad-Art. From May until November 1983, the employees of Respondent EPC were paid by checks drawn on an account of Respondent Ad-Art. In July 1983, Respondent EPC closed its manufacturing plant in Oakland.[6] In November 1983, Respondent EPC allegedly sold its assets to Ad-Art, including automobiles, trucks, machinery, equipment, furniture, fixtures, and leasehold improvements.

At the time of the hearing, Ad-Art was operating a sales facility at the former EPC Oakland office. EPC's salesmen were rehired by Ad-Art but the sign installers represented by Local 595 were terminated. Respondent Ad-Art is installing signs in the San Francisco Bay Area by using nonunion sign hangers operating out of its Stockton facility. In San Jose, the office manager, artist, and salespeople were retained by Respondent Ad-Art. The installers represented by Local 332 were terminated. The installation work has been performed by nonunion personnel and by alleged subcontractors. In San Diego, the two installers were terminated and Respondent Ad-Art operated on a nonunion basis until March of 1984 and thereafter performed the work with personnel from its Cucamonga facility.

Within this factual background, the complaint alleges that Respondent Ad-Art is an alter ego of Respondent EPC and that Respondents constitute a single business enterprise. The complaint further alleges that Respondents violated Section 8(a)(5), (3), and (1) of the Act by terminating the sign installers represented by the Oakland, San Jose, and San Diego Locals and by refusing to recognize and abide by the terms of the collective-bargaining agreements between the Unions and Respondent EPC. The complaint also alleges that Respondents violated the Act by reassigning the work of those bargaining unit employees without proper notice to and bargaining with the Oakland, San Jose, and San Diego Locals. Further the complaint alleges that Respondents violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish information to the San Jose Local regarding the relationship between Respondents Ad-Art and EPC.

During the time period when Respondents were transferring the assets of EPC to Ad-Art, Respondents sought certain contract concessions from the Stockton Local so that they could more economically perform work outside the geographic territory of the Stockton Local. The complaint alleges that Respondents violated the Act by directly dealing with and threatening employees represented by the Stockton Local and by unilaterally changing the provision of the collective-bargaining agreement dealing with compensation for work performed outside the geographic territory of the Stockton Local. Respondents denied the commission of any unfair labor practices and sought deferral of the Stockton matters to the arbitration process.[7] Further, Respondents contend that the Stockton Local agreed to amend the provisions of the contract in exchange for a 50-cent-per-hour wage increase.[8]

B. *The Relationship Between the Companies*

1. The formation of EPC and its bargaining history

As mentioned earlier, in May 1978 Respondent EPC was formed to purchase the California assets of Federal. Shortly thereafter, Clifford R. (Bob) Allen, a vice president of Federal, was hired to manage EPC. Although Allen was EPC's top official and aware of its contention that it was a separate company from Respondent Ad-Art, Allen testified that prior to working for Ad-Art he was the vice president of Federal. After laughter from the audience, Allen amended his answer and testified that he worked for EPC prior to being a vice president of Ad-Art.[9] In addition to this admission, an offer of employment which resulted in Allen's hire as general manager of EPC in 1978, indicated that Ad-Art, rather than EPC, was Allen's employer.

In May 1978, Allen held a meeting with the former Federal employees in Oakland and told the employees that Ad-Art had bought the facility. The former Federal sign hangers were transferred to Ad-Art's facility in Emeryville and worked with the Ad-Art employees at that facility until approximately January 1, 1979. The employees were carried on the payroll of Ad-Art. In early 1979, the sign hangers and installers consisting of Ad-Art and former Federal employees from Emeryville

[5] Also referred to as Ontario.
[6] Respondent EPC reached an agreement with Local 2131 covering closure of the manufacturing facility and severance pay to the employees.
[7] Respondents no longer seek deferral.
[8] The arbitrator decided this issue against Respondents.
[9] Allen became a vice president of Ad-Art after that Company took over EPC's operations.

were transferred to Oakland and became employees of Respondent EPC.

During the 6 months that the combined crew of sign hangers operated in Emeryville, Federal's former Oakland managerial, clerical, and sales employees became EPC employees. However, the Oakland manufacturing plant was closed until negotiations were concluded with IBEW Local 2131, a factory Local.

The 1978 negotiations between EPC and Local 2131 were conducted for the Company by Allen. However, Allen was given instructions prior to the negotiations by L. Papais, and Allen kept L. Papais informed regarding the progress of the negotiations. Allen reached tentative agreement with Local 2131 and submitted the proposed agreement to L. Papais "with the full knowledge of the Union that you needed to review, comment and approve before we finally agree." Allen testified that during negotiations he told Local 2131 that nothing could be agreed to without L. Papais' approval.[10] Subsequently, Allen executed the agreement with Local 2131 covering the Oakland manufacturing facility.[11]

At the time of the formation of EPC, Ad-Art's Emeryville sign hangers, servicemen, and installers were represented by the Oakland local pursuant to a contract effective by its terms from July 1, 1977, to June 30, 1980. In the middle of 1978, Allen notified the Oakland local that the former Federal sign installers would be "merged" with the Ad-Art sign installers and moved to Ad-Art's Emeryville location. While in Emeryville, the combined group of employees were paid by Ad-Art under the terms of the 1977–1980 bargaining agreement. In January 1979, when the merged group was moved back to the Oakland facility, EPC paid the employees under the terms of the 1977–1980 agreement.

In March 1980, Allen entered into negotiations with Local 595 for a succeeding agreement to the 1977–1980 contract. On September 22, 1980, Allen wrote L. Papais about the possibility of a strike and his plan to operate during a strike. Allen asked L. Papais to let him know if Papais disagreed with Allen's proposed course of action. Allen received no response from Papais. The strike ultimately settled and a collective-bargaining agreement was signed by Allen effective from July 1, 1980, until June 30, 1983.[12]

In San Jose, Ad-Art had a series of collective-bargaining agreements with Local 332 prior to the formation of EPC. The 1976–1979 agreement between Ad-Art and Local 332 was applied to the EPC employees after the formation of EPC. In 1979, in response to the San Jose Local's reopener letter, J. Papais notified the San Jose Local that Ad-Art no longer had employees in the San Jose area and that the employees had become employees of EPC. J. Papais stated that "Bob Allen, our General Manager and Vice President, will handle all present and future negotiations." Thereafter, Allen received a copy of Ad-Art's 1976–1979 agreement with the San Jose Local from J. Papais. J. Papais told Allen that Ad-Art's attorney would receive a copy of the contract because "he advises us as to how to handle contract matters." Thereafter, Allen entered into negotiations with Local 332 for a succeeding agreement. During negotiations, Allen proposed, inter alia, a "company" health and welfare plan. The company plan proposed by Allen was the health and welfare plan then in effect in Sacramento, an Ad-Art (not an EPC) facility. The 1979–1982 agreement subsequently entered into by EPC and the San Jose Local did not contain a "company" health and welfare plan.

In 1982, when the San Jose Local sought to negotiate a succeeding agreement to the 1979–1982 agreement, Allen was not available.[13] The San Jose Local ultimately negotiated with Ron Johnson, Ad-Art's attorney.[14] After an agreement was reached, the San Jose Local sent the 1982–1984 agreement to "Ad-Art a/k/a EPC" in Stockton for signature.[15] The agreement was signed by J. Papais and indicated the employer as "Ad-Art, Inc."[16]

EPC began operating the former Federal branch office in San Diego in 1978. In 1980, Allen executed a collective-bargaining agreement with Local 569 covering EPC's sign hangers and installers in San Diego. The agreement, effective by its terms from July 11, 1980, through July 10, 1983, was a multiemployer contract covering the employer-members of the Electric Sign and Luminous Tube Industry Association of San Diego County.[17] The agreement, signed by Allen, indicated the

[10] To the extent that L. Papais and Allen testified that L. Papais did not discuss the negotiations with Allen, their testimony is discredited.

[11] L. Papais also advised Allen concerning negotiations with IBEW Local 477 regarding the Cucamonga manufacturing facility in 1979.

[12] The following described employees of Respondents (the Oakland unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

> All full-time and regular part-time journeymen and apprentice electrician sign hangers, including but not limited to sign installers and servicemen, employed by Respondents at their Oakland, California facility; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

[13] Allen was in Saudi Arabia working on a major project of Ad-Art's at the Riyadh airport in Saudi Arabia.

[14] The union officials were told by Stan Benz, personnel director, that Johnson had authority to sign an agreement on behalf of the Employer.

[15] The following described employees of Respondents (the San Jose unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

> All full-time and regular part-time journeymen and apprentice electrician sign hangers, including but not limited to tube benders, shopmen, cleaners and servicemen, employed by Respondents at their San Jose, California facility; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

[16] Respondents contend that the name Ad-Art, Inc. was added after J. Papais signed the document. However, there is no credible evidence to support that contention. Jerry Cooper, Local 332's business representative, credibly testified that he received the document with the designation already on it. J. Papais did not specifically deny signing the document as received in evidence. Further, J. Papais similarly signed two prior agreements with Local 332 with the employer identified as "Ad-Art, Inc. and Ad-Art."

[17] All employees employed by the employer-members of the Electric Sign and Luminous Tube Industry Association of San Diego County who do the manufacturing, installing, alteration, dismantling, and connecting of all electrical and luminous tube displays and neon illumination, including its auxiliary equipment and structures for the support thereof, including footings, as well as the wiring, assembly, service, and cleaning of all such displays; also those employees who bend, repair, and pump luminous tubes used as conductors of electricity; also those who do the handling and installing of all glass and plastic fabrication, and including all assembly of signs and electrical material during fabrication, including the loading of signs on trucks, operation of trucks, including any equipment necessary to the erection, installation, and maintenance of signs,

Continued

employer as "Ad-Art." Neither EPC nor Ad-Art withdrew from the multiemployer association. As will be discussed in more detail, infra, in 1983, Ad-Art's personnel director wrote the Union stating that EPC was going out of business and therefore had no need to negotiate or execute a succeeding bargaining agreement.

2. Interrelationship of operations

As mentioned earlier, the former Ad-Art and former Federal employees commenced working as EPC employees in Oakland in January 1979. The Ad-Art trucks and other rolling stock with the Ad-Art name and logo were transferred from the Ad-Art Emeryville facility to the EPC Oakland location. An EPC logo was added to the trucks and other rolling stock so that the Ad-Art name and logo and EPC logo all appeared. The sign over the door to the facility bore the Ad-Art name and logo. Underneath the Ad-Art name in smaller letters was the name "Electrical Products Corporation." The telephone at the facility was answered as "Ad-Art," "EPC," or "Ad-Art/EPC."

The Oakland employees of EPC who had previously worked for Ad-Art continued to wear Ad-Art uniforms and caps while employed by EPC. The former Federal employees did not wear uniforms. When the Oakland employees were issued employee identification cards in 1980 and 1981, the cards bore a dual designation of Ad-Art and EPC. In 1981, EPC's employees began receiving paychecks that had the Ad-Art name and logo in the background. In May 1983, EPC's employees began receiving paychecks drawn on an Ad-Art account, which paychecks did not in any way indicate that EPC was the alleged employer.

The EPC employees of San Jose occupied the same premises they occupied as Ad-Art employees. The same employees—sign hangers, servicemen, office manager, foremen, salesmen, and artist—continued in their jobs without a break in service. No one was hired or fired. The 1976–1979 collective-bargaining agreement then in effect was continued without interruption. The employees continued to wear their Ad-Art uniforms.

Beginning in December 1978 the San Jose employees received EPC paychecks. In 1981, the EPC paychecks bore the name of Ad-Art and the Ad-Art logo in the background. From May 1983 until the alleged closure of the San Jose facility, the employees received Ad-Art paychecks. Beginning in 1982, the employees used company identification cards that indicated the employer as Ad-Art and EPC.

EPC acquired its initial active accounts from the purchase of the Federal assets and from Ad-Art leases in San Jose and the Bay Area. In 1980, Allen informed his staff members and department heads that "Electrical Products is responsible for maintaining EPC leases, Federal leases and the Ad-Art leases in the Bay Area, Los Angeles, and San Diego." The lease agreements provided that the sign company retained title to the signs. The customer paid a monthly rental fee that included maintenance, service, taxes, insurance, and financing.

When Federal sold its assets to EPC, the Federal sign leases were part of the acquisition; EPC actually bought Federal's interest in the leases and continued the maintenance on them. Ad-Art did not sell any of its leases in the Bay Area or San Jose area to EPC; rather, Ad-Art maintained title to the leases (and collected the monthly rental fees from the signs), but "subcontracted" out the maintenance of these leases to EPC. Ad-Art did not pay EPC for its services, but rather charged the amounts to an intracompany account.

The salesmen of Ad-Art at its Emeryville location transferred to Oakland and became EPC employees in 1979. These salesmen continued to service the same active accounts that they serviced prior to the transfer. The salesmen carried business cards, provided by EPC, which bore both the names of Ad-Art and EPC. Customer order forms often reflected the Ad-Art name, although the facility involved was the EPC Oakland facility. In addition, EPC salesmen advertised Ad-Art customers as their own when soliciting new business. In many instances, both Ad-Art and EPC represented themselves as one company for advertising purposes. Further, EPC salesmen signed contracts with parties indicating "Ad-Art/Electrical Products Corporation" as the sign company. EPC sales manager, Robert Ramsey, sold two jobs in San Francisco in 1983 in which he indicated Ad-Art, Inc. was the seller of the signs.[18] According to Allen, Ramsey, although an EPC sales manager, continually "forgot that the operation was in Oakland and not Stockton."

Even prior to the consolidation of April 1983, the operations of Respondents Ad-Art and EPC were greatly interrelated. As indicated earlier, after the formation of EPC, Ad-Art closed its Emeryville operations (its only sales and installation office in the San Francisco Bay Area) and transferred a combined Ad-Art/EPC staff to EPC's Oakland facility. Thereafter, the Bay Area was serviced by the Oakland facility and Ad-Art itself did not maintain an office in that geographic area. Also following the formation of EPC, Ad-Art ceased operating a sales, service, and installation office in San Jose. The Ad-Art facility became an EPC facility and all the employees were transferred to the EPC payroll without any break in service. Ad-Art was the leasee of the premises utilized by EPC in San Jose. However, EPC exercised the renewal option of the lease. There was no lease to EPC nor did Ad-Art sublet to EPC. Once EPC was formed, Ad-Art did not maintain offices in the San Jose area.

Although Ad-Art did not maintain offices in San Jose or the Bay Area, it continued to sell signs in those areas. These signs were installed by crews from EPC and on

tieing of tubing on racks and the blocking out of tubing; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act.

[18] Ramsey testified that EPC and Ad-Art were two separate companies and that after 1978 he had no relationship with Ad-Art. Ramsey was impeached by the testimony of credible witnesses and, more importantly, by documentary evidence and the testimony of his boss, Bob Allen. Ramsey's testimony was so effectively impeached that it could not be left unmentioned.

some occasions by joint Ad-Art and EPC crews. There was also joint manufacture of signs between Ad-Art's plant in Stockton and EPC's facility in Oakland. The companies billed each other for services performed; however, there was never any payment. The companies maintained an intracompany debt, but that debt was never paid.

Aside from the wholesale transfer of employees at the time EPC was starting up, there was little transfer of employees until the alleged closing of EPC in the fall of 1983. However, there was substantial interchange of management personnel. As previously stated, Allen, EPC's general manager, left his EPC duties to manage a job for Ad-Art in Saudi Arabia.[19] Allen is now a vice president of Ad-Art. Terry Long left Ad-Art to replace Allen at EPC. At that time Long's salary was split between Ad-Art and EPC. After several months, Long requested that he be paid by only one company to lower his FICA deductions. Long was then transferred to EPC's payroll and paid only by EPC, although Long continued to serve as assistant general sales manager for both Ad-Art and EPC. After the alleged closure of EPC, Long became a vice president of Ad-Art. When Long transferred to EPC, Bob Newman, an EPC salesman, was transferred to Ad-Art to replace Long.

Lower level managers have also transferred between the Companies. Ron Puksar, a supervisor for Ad-Art, had authority over EPC employees on a San Francisco job that lasted from 1977 through 1981. In 1981, Puksar was dropped from the Ad-Art payroll and placed on the EPC payroll the next day. Jackie Toschak, presently an office manager for Ad-Art, was transferred from Ad-Art to EPC when EPC was first formed. In 1981 Toschak was promoted to office manager of EPC's San Jose office. At the time of this promotion, O'Leary wrote her a congratulatory letter stating "Ad-Art is very fortunate to have a Jackie Artozqui Toschak." Toschak remained the office manager of the San Jose office when it changed from EPC to Ad-Art in 1983. Credit managers, accountants, and artists have also transferred between the two corporations.

During the period from 1979 to 1983, Ad-Art and EPC were held out to the public as a single entity. The telephone listing for EPC was as "AD-ART INC." or "AD ART ELECTRICAL PRODUCTS CORP." with an Ad-Art logo. The EPC employees wore Ad-Art uniforms and had identification cards that indicated Ad-Art/Electrical Products Corp. as their employer. The EPC salesmen carried business cards that indicated Ad-Art/Electrical Products Corp. as their employer. Further the salesmen used contracts that identified their Company as Ad-Art/Electrical Products. The salesmen presented drawings and blueprints to customers that, in many instances, identified the company as Ad-Art. In many instances licenses and permits obtained from Government agencies identified Ad-Art/Electrical Products or Ad-Art as the contractor.

Signs manufactured in Ad-Art's Stockton facility were shipped to EPC's Oakland facility approximately once a week. The bills of lading identified the destination as "Ad-Art, San Jose" and "Ad-Art Oakland." Intracompany memos sent to Ad-Art offices were also sent to EPC offices and on many occasions referred to EPC facilities as Ad-Art facilities. EPC utilized forms that identified the Company as Ad-Art/Electrical Products Corporation.

At times when EPC sign hangers and installers in Oakland or San Jose were hanging signs, Ad-Art employees from Stockton were sent into the area to help with the work. Conversely, when Ad-Art employees were hanging signs, EPC employees were sent into the Stockton area to help perform the work. On several occasions, EPC employees would start jobs and subsequently Ad-Art employees from Stockton would finish the job. On numerous occasions, Ad-Art and EPC crews worked side by side on jobs installing or repairing signs. Some of these mixed jobs are explained by the fact that EPC had a 115-foot boom truck. Ad-Art had no similar piece of equipment and, thus, would utilize the EPC equipment and its two-man crew when the need for such equipment arose. The crew of EPC's 115-foot boom truck, on occasion, received supervision directly from Ad-Art's, rather than EPC's, supervisors.

Customers of EPC on occasions made their checks payable to "Ad-Art" or "Ad-Art Electric." On one occasion, EPC performed work for a customer in San Diego in return for satisfaction of a debt owed to that customer by Ad-Art. As previously mentioned, EPC salesmen, including Sales Manager Ramsey, sold signs to customers on contracts indicating that Ad-Art was the seller. It is not clear whether the payment on such contracts went to Ad-Art or to EPC.

As indicated earlier, Ad-Art and EPC billed each other for services performed. Payment was never made for such services, however. The amounts were recorded in a ledger under "intra-company debt." At the time of the alleged closure of EPC, EPC was in debt to Ad-Art. Since the close of EPC, Ad-Art has been in debt to EPC, but no payments have been made and no interest has been charged.

3. The consolidation of Ad-Art and EPC

In April 1983, Ad-Art and EPC consolidated certain management functions. Respondent offered in evidence a "Management Agreement" dated April 26, 1983, between EPC and Ad-Art.[20] The agreement provided that Ad-Art shall provide "all accounting, bookkeeping, and other services related to the administration of the accounting functions of EPC arising in the ordinary course of business, including therein the collection of funds due EPC and the administration and payment of payables and payroll of EPC personnel." Under the agreement EPC agreed to pay Ad-Art $46,400 a month for such services.[21] This price was arrived at by L. Papais by

[19] While Allen was working in Saudi Arabia, EPC's Oakland facility commenced working exclusively for that project. EPC's signs then were manufactured by EPC's Cucamonga facility and Ad-Art's Stockton facility.

[20] The agreement was signed by L. Papais, J. Papais, and O'Leary. Each officer signed on behalf of both Companies.

[21] The services were not paid for, but were charged to the intracompany debt.

taking EPC's accounting costs and administration costs and deducting 20 percent. The consolidation of April and May 1983 can best be explained by Respondent's payment of the debt incurred in the formation of EPC. The creditors of EPC, who lent Respondents the capital to purchase the Federal assets, demanded that EPC assets not be merged with those of Ad-Art. The purpose of this demand was to prevent the claims of EPC creditors from being subordinate to the claims of Ad-Art creditors. This debt was retired in 1983, however. Thus in April 1983, Respondents were free to consolidate operations and save money as a result of the elimination of the duplication of certain functions.

Thereafter, on May 25, 1983, L. Papais sent a memorandum to all employees stating that "because of the recent consolidation of Ad-Art and Electrical Products, a Central Control Department has been established to centralize all of the company's job processing activities, including estimating, engineering, job checking and coordinating." Roger Wilkerson, an EPC manager, was placed in charge of the new corporate central control at Ad-Art's Stockton facility.

From May 1983 until their termination, EPC employees were paid by checks drawn on an Ad-Art account. Further, the 1983 W-2 forms for EPC employees showed Ad-Art as their employer for that entire year.

In April 1983, Ad-Art's credit manager advised all Ad-Art and EPC offices that all contracts, security agreements, lease agreements, maintenance agreements, and letter contracts "*must bear the name AD-ART SIGNS, INC.*, and no other firm."

As will be discussed in more detail below on November 30, 1983, EPC sold to Ad-Art all its assets, including automobiles and trucks, machinery, equipment, furniture, fixtures, and leasehold improvements, for their book value. Ad-Art allegedly paid the purchase price by canceling EPC's debt to Ad-Art, assuming EPC's debts, and incurring a debt to EPC for the remainder of the purchase price. EPC is still in existence and is leasing its Oakland facility to Ad-Art. The rent is added to the debt from the alleged sale. Financing costs were avoided by having EPC lease to Ad-Art rather than sell the Oakland facility. No payment has been made and no interest has been charged. In fact, Ad-Art's debt has continued to rise because the Oakland rent has not been paid, but simply added to the intracompany debt. According to Respondents, the price for the sale was negotiated by L. Papais, who represented both Ad-Art and EPC in the negotiations.

4. Common management

As indicated earlier, L. Papais, president, was the chief management official of both Companies. Although Respondent contends that Allen ran EPC and Papais had little to do with EPC, the evidence does not support this contention. L. Papais visited EPC's Oakland facility to confer with EPC's management staff once or twice a month. Further EPC's management staff would confer in Stockton with L. Papais once or twice a month. In May 1982, Allen went to Saudi Arabia to supervise a major Ad-Art project. Thereafter, L. Papais' visits with EPC's management in Oakland increased.

L. Papais also made personnel decisions for both companies. In 1979, L. Papais transferred employees from another of his companies to EPC's Oakland office. In 1982, L. Papais transferred Allen to Ad-Art's project in Saudi Arabia and transferred Terry Long, an Ad-Art manager, to replace Allen as EPC's general manager.[22] L. Papais replaced Long at Ad-Art by transferring an EPC employee to Ad-Art. In 1983, L. Papais moved an EPC plant manager from Cucamonga to Stockton to head the "Central Control Department."[23] When that manager subsequently left Ad-Art, L. Papais replaced him by transferring a manager from EPC's Oakland plant to Ad-Art in Stockton.

L. Papais purchased insurance for both Ad-Art and EPC under a master policy. The purpose of such a joint purchase was to reduce the insurance premiums. All billing and insurance premium payments were handled out of Ad-Art's Stockton office. This centralization of insurance matters resulted on one occasion in L. Papais using EPC's premium money, without the knowledge of Allen, EPC's general manager, to pay insurance obligations of Ad-Art. L. Papais also established policies and procedures regarding hiring that were applicable to both Companies. In 1980, L. Papais changed the lease commission payments for both Ad-Art and EPC salesmen and, in June 1983, changed the entire leasing system for both Companies. L. Papais approved any special financial arrangements for salesmen of both Companies.

In September 1983, L. Papais negotiated with Local 595 (Oakland) over EPC's intended closure and the possibility of an agreement with Ad-Art if Local 595 would agree to the Local 591 (Stockton) wage rate. L. Papais negotiated with Local 591 in October 1983 over modifications to the 1982–1984 collective-bargaining agreement covering Stockton employees.

John Papais was in charge of engineering production and installation. Although J. Papais testified that he "knew nothing" about the EPC operation, that testimony is overwhelmed by record evidence that J. Papais was regularly apprised of EPC's engineering, production, and installation. EPC salesmen would directly contact J. Papais to ascertain delivery dates for their signs. J. Papais was contacted whenever signs called for specialty parts. In 1981, Allen notified J. Papais of a change in expenditures and of a reorganization of the office. In 1982, J. Papais was notified of the changes in EPC department heads. In 1983, J. Papais issued a memo addressed to the art department at all Ad-Art and EPC locations dealing with specific instructions on "face replacements" on signs.

Ted Johnson, an installation foreman for EPC, testified that he reported to Dennis Livengood, Oakland's plant manager. Livengood in turn reported to J. Papais in Stockton approximately twice a month. On many occa-

[22] It is unclear who paid Allen's salary while he worked on the project in Saudi Arabia. At one point Allen testified that he was still paid by EPC while working in Saudi Arabia and at apother point Allen testified that the Saudi Arabia joint venture paid his salary. There was no payment to EPC for the utilization of Allen's services.

[23] The Central Control Department was established in 1983 to centralize all job processes, activities, including estimations, engineering, job checking, and coordinating for both EPC and Ad-Art.

sions Johnson's supervisors would tell him that they had to check with J. Papais regarding a matter of scheduling or expenditures. J. Papais coordinated the purchase of trucks for both Ad-Art and EPC.

Prior to 1983, J. Papais visited the EPC facilities about once a month. Starting in mid-1983, J. Papais began visiting the EPC plants on a weekly basis. In mid-1983, J. Papais told Ted Johnson that Johnson was to call him in Stockton twice a week regarding service and installation. Ted Johnson did as he was instructed and directly reported to J. Papais on matters related to scheduling and expenditures.

Dan O'Leary was the general sales manager.[24] Allen reported to O'Leary regarding general sales matters, discipline of salesmen, and salesmen's expenses. In June 1979, O'Leary sent Allen a memo that stated, inter alia, "as General Manager you are doing an outstanding job in servicing the Sales Department and, fortunately for Ad-Art your 'sales oriented' approach permeates the environment at the Oakland operations."

In 1982, O'Leary hired Terry Long as executive vice president and general sales manager of Ad-Art. Long's responsibilities included overseeing the sales operations of both Ad-Art and EPC, including visits to the facilities, sales meetings, and sales training programs. O'Leary was notified by Ramsey, EPC's sales manager, of all hires and terminations in the sales force. Allen reported to O'Leary on EPC's salesmen's expenses and their outstanding advances. O'Leary set the rules for EPC salesmen and on one occasion discharged an EPC salesman. O'Leary later informed Allen of this action. After being transferred from O'Leary's assistant sales manager to EPC's general manager, Long continued to consult with O'Leary regarding EPC's sales.

5. Control of labor relations

Stan Benz was employed by Ad-Art in 1981 as its personnel and insurance director. Benz' responsibility encompassed "all corporate activity pertaining to personnel and insurance matters." In this capacity, Benz prepared common vacation and holiday personnel policies for both EPC and Ad-Art. Benz administered the corporate health, life, and disability insurance policies that covered employees of EPC and Ad-Art. In 1982, Benz accompanied Ron Johnson, attorney for EPC and Ad-Art,[25] in negotiations with Local 332 (San Jose). Benz observed while Johnson negotiated the agreement that was subsequently signed by J. Papais.

In November 1983, James Meyland, a successor to Benz as personnel director, sent notice of EPC's closure to Local 595 (Oakland) and Local 332 (San Jose) and sent termination letters to EPC employees. Meyland signed these letters as EPC's "Personnel Director." In this proceeding, Respondents contended that Benz and Meyland had no authority to act on behalf of EPC. Meyland testified that he *was not* EPC's personnel director, but only Ad-Art's personnel director. Meyland is not credited on this point. Meyland attended a meeting with Johnson on November 17, 1983, at which they allegedly negotiated with Local 332 over the intended closure of EPC's San Jose facility. Meyland also attended with Johnson a bargaining session on November 22, 1983, at Local 595's office in Oakland. At this meeting Johnson, although claiming he was only representing EPC, stated that Ad-Art would sign an agreement with the Oakland local if it would agree to the same wage rate provided for in the Ad-Art collective-bargaining agreement with the Stockton local. As previously stated, L. Papais has participated in negotiations for both EPC and Ad-Art and J. Papais has signed bargaining agreements for both Companies.

During the period from 1979 to 1983, EPC used employment application forms that bore the Ad-Art logo and indicated the Company as Ad-Art Electrical Products Corporation. Further, EPC employees were evaluated on performance review forms that bore the Ad-Art logo and identified the employer as Ad-Art. As indicated earlier, employees of EPC received checks with the Ad-Art logo in the background until May 1983 when they began receiving checks drawn on an Ad-Art account.

In January 1983, Benz drafted a holiday pay policy covering both Ad-Art and EPC employees. After some comments by L. Papais, Benz signed a holiday pay policy in February 1983 that was distributed to both Ad-Art and EPC offices. In April 1983 Benz worked on a maternity leave policy for EPC employees. Benz also prepared a memo on safety policies for Ad-Art and EPC employees in 1983. A memo announcing a policy regarding expense money for installation foremen was issued by J. Papais in August 1983 and was directed to both Ad-Art and EPC employees. Although directed to both Ad-Art and EPC employees, J. Papais' memo identified the Company as Ad-Art.

Ad-Art's Stockton personnel office and L. Papais reviewed recommendations for employee raises made by EPC supervisors. One employee at EPC's Oakland facility was twice denied a recommended raise by L. Papais. As indicated earlier, Ad-Art had master policies for health, life, disability, workman's compensation, and comprehensive general liability insurance, which policies covered both Ad-Art and EPC employees.

C. *The Alleged Unfair Labor Practices*

1. Events in Oakland prior to the alleged sale

Prior to the July 1, 1983 expiration of its collective-bargaining agreement with EPC, Local 595 (Oakland) wrote a reopener letter to EPC with proper notices to the Federal Mediation and State Conciliation Services. On June 9, Thomas Sweeney, Local 595's business manager, and Sanford Nathan, the Union's attorney, met with Ron Johnson, attorney, and Jim Herman, then Ad-

[24] O'Leary was not called to testify in this proceeding.

[25] Johnson testified that he was general counsel for Ad-Art. According to Johnson, he has an outside service arrangement as well as an administrative arrangement with Ad-Art: "I get paid on a retainer basis for practicing law over the labor relations, and I get a salary in reference to administrative function, prime, is the credit area, because I have experience in there." Johnson testified that he is both an employee of Ad-Art and an independent contractor. His office is maintained at Ad-Art's Stockton facility and Ad-Art pays for his secretarial support. Johnson claimed to be on retainer to EPC. However, he received payment from Ad-Art and not EPC. Presumably, the amount of services to EPC was charged to the intracompany debt.

Art's personnel manager, at Local 595's office to discuss a succeeding agreement. Sweeney asked if Johnson had something in writing authorizing him to represent EPC. Johnson said he was not there to negotiate, but simply to inform the Union that EPC was considering closing its plant. Johnson said the Company would soon close so that it made no sense to enter into a new agreement. Sweeney asked Johnson why EPC was closing and asked for the Company's position in writing. Johnson promised to give a position in writing but never did.[26] Sweeney asked what would happen to the sign installation work if EPC closed its Oakland facility. Sweeney said if the plant closed and Ad-Art tried to use its installers from outside Alameda County, the employees would still have to be paid the local wage rate.[27] Nathan took the position that Ad-Art and EPC were one and the same. Johnson said he was there only on behalf of EPC. If the Union would agree to a wage rate similar to that paid in Stockton, however, Ad-Art would consider signing an agreement with the Union.[28]

On August 8 or 11, the same parties met again to discuss EPC's intentions. Johnson said he was meeting with the Union because it had filed unfair labor practice charges. Johnson said the company was closing in a few weeks and therefore there was no reason to negotiate an agreement. Nathan and Sweeney asked what would happen to the installation work. Johnson said that "Ad-Art has the customers and that Ad-Art just subcontracted the work to the EPC people." Johnson said he was there on behalf of EPC but would think about Ad-Art if a favorable wage rate could be worked out. At the end of the meeting, Nathan asked Johnson what the problem was and Johnson answered that it was the wage rate. Nathan said that if the Company sent employees from Stockton it would not save money because under the Stockton agreement the employees would be paid the higher rate. Johnson answered that the Company could send nonunion people or subcontract the work. Nathan proposed that the parties attempt to negotiate a new wage rate to make it cost effective for the Company to operate in Oakland. Johnson said he would not negotiate, but Ad-Art would agree to a contract with the Stockton wage rate.

On September 12, Sweeney and Nathan met with Johnson and L. Papais in Oakland. The Company took the position that it was about to go out of business in 60 days or less and would agree to a contract for 60 days. The Union asked for a 1-year agreement and an understanding about what was going to happen to the installation work. Nathan attempted, without success, to get a commitment that the Company would honor the agreement if either EPC or Ad-Art continued to operate in the Oakland local's jurisdiction. No agreement was reached at this meeting.

On September 14, Nathan spoke on the telephone with L. Papais and Johnson but no agreement was reached. A few days later, Nathan called Johnson and said that the Union accepted the Company's offer of a 1-year contract and a 50-cent-an-hour increase in fringe benefits. The Union would forgo a commitment on Ad-Art's part and leave open the question of whether Ad-Art and EPC were a single employer. According to Nathan, "We agreed to disagree" over whether the two Companies were a single employer.[29] Johnson said he would have to talk the matter over with L. Papais. On September 17, Johnson told Nathan that the Company would no longer agree to the 50-cent-an-hour increase.

On September 20, the Oakland employees went on strike. The next day the Union and EPC agreed to a 1-year contract extension and the 50-cent-a-hour increase in fringes. The agreement was signed on behalf of EPC by L. Papais. Respondent did not contact Local 595 about the closure again until November 1983.

2. Events in Stockton prior to the alleged sale

On October 18, Wayne Livingston, business agent for Local 591 (Stockton), received a call from Nick Amo, Ad-Art's installation supervisor, telling him that the Company was going to hire "some non-union sign hangers to work outside the area."[30] Amo told Livingston that L. Papais was attempting to reach an agreement with the IBEW International Union that would allow less expensive movement of sign hangers. Three days later, Amo called Livingston and told him that "Papais had hired two non-union hangers and intended to keep them non-union." On October 25, Local 595 filed a grievance with Ad-Art, protesting the use of the non-union installers.

On October 18, Respondents sent the Stockton local a letter requesting a meeting to discuss article V, section 11 of the collective-bargaining agreement. That section provided that the employees working outside the geographic areas of the Stockton local would be paid the local wage rate if that rate was higher than the Stockton wage rate.[31] The Union did not reply to this letter. On

[26] During this meeting Sweeney advised Johnson of some fringe benefit delinquencies. Johnson claimed to know nothing about the delinquencies and said he would look into the matter.

[27] The collective-bargaining agreements in Stockton, Oakland, and San Jose all provided that if employees worked outside the geographic jurisdiction of their local union they would be paid the local rate or their own contract rate, whichever was higher.

[28] The Stockton wage rate was substantially lower than the wage rate paid under the Oakland and San Jose bargaining agreements.

[29] Johnson did not deny this testimony by Nathan.

[30] The following described employees of Respondents (the Stockton unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

All full-time and regular part-time journeymen and apprentice production and maintenance employees, including, but not limited to, aluminum fabricators, assemblymen, loaders, haulers, painters, plastic fabricators, layout and pattern workers, metal fabricators, glass workers, plant and equipment maintenance workers, die makers, warehouse shipping and receiving workers, janitors, and journeymen and apprentice electrician sign hangers, including but not limited to, sign installers and servicemen, employed by Respondents at their Stockton, California facility; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

[31] Art. V, sec. 11 of the Stockton bargaining agreement provides:

On electrical sign work outside the jurisdiction as set forth in this Agreement, employees must conform and abide with the working conditions and shall receive the wage scales as set forth in that jurisdiction. Men shall not, however, be required to accept a lower rate of pay when covered in this Agreement, while working in another

Continued

October 26, L. Papais called a meeting of Ad-Art's Stockton installation employees. Don Howe, Local 595's shop steward, attempted to obtain Livingston's attendance at the meeting, but Livingston was unable to attend on such short notice. Present at the meeting were Howe, three or four sign installers, Ron Johnson, Meyland, Amo, and L. Papais. Although Johnson stated that negotiations should not take place without Livingston, L. Papais told the installers that he could not afford to pay the higher wage rates for work out of their geographic jurisdiction and that some sort of resolution had to be reached. Another meeting was scheduled for a time when Livingston and the other sign installers could be present.

On October 28, Livingston, Howe, and seven installers met with L. Papais, Meyland, and Amo. L. Papais told the employees that there was not much work in Stockton and offered the employees 25 cents an hour more when performing work outside of Local 591's jurisdiction. Papais said that if the employees did not accept his offer they would be looking for another job because their work would be done by others. One installation employee responded that Ad-Art had offered a $1.50 increase in negotiations the previous summer. Papais replied that he could not give them $1.50. The employer representatives left the room and the employees caucused. The employees were told by Livingston and Howe that the contract could not be changed. The employees proposed accepting 50 cents an hour presumably for meal money while on the road, although they had no intention of giving the Company anything in return. When the employer representatives returned, an employee told L. Papais that the employees would take the 50 cents an hour if something could be done. L. Papais replied he would pay 50 cents an hour. As the meeting was ending, L. Papais told Livingston that he wanted a letter of understanding. Livingston replied that he "wasn't changing the agreement . . . . I'm not going to pull the security clause or anything else." L. Papais said then there was no deal. Livingston answered that there was no deal. L. Papais said that the employees better be looking for another job. Livingston reiterated that there was no deal.

L. Papais instructed Meyland to send a letter of understanding to Livingston. The letter, dated October 31, stated that the Union had agreed to delete article V, section 11 from the collective-bargaining agreement in exchange for a wage increase of 50 cents an hour.[32] Livingston did not sign the agreement and protested the implementation of the agreement to Ron Johnson when Livingston first learned of it in early November. Johnson said that if there was no deal, the employees would have to return the extra 50 cents an hour and Livingston agreed that something would have to be done. Livingston then told the employees to put aside some money since they would likely have to return the extra 50 cents an hour.

In early November, L. Papais approached Howe and said that there had been an agreement. Howe replied that the 50-cent-an-hour increase had been discussed but no agreement had been reached. Respondents implemented the 50-cent-an-hour increase on October 31 and had been paying that wage rate at least to the time of the unfair labor practice hearing.

On October 25, 1983, Local 591 filed a grievance against Ad-Art based on the presence of nonunion sign hangers at Ad-Art's Stockton facility. On December 5, 1983, Local 591 filed another grievance against Ad-Art, based on Ad-Art's October 26 meeting with employees at the Stockton plant and its October 31 deletion of article V, section 11 from the collective-bargaining agreement.

On April 2 and June 5, 1984, Respondents and Local 591 arbitrated the two grievances. The issues before the arbitrator were (1) whether Ad-Art violated the union-security clause, article II, section 3, by hiring nonunion employees without giving Local 591 the opportunity to refer them, failing to inform these new nonunion employees of their obligation to join Local 591, and failing to compensate them according to the Local 591 contract, including its article V, section 11; (2) whether Ad-Art violated the contract's union recognition clause, article II, section 3, and its grievance procedure, by conducting the October 26, 1983 meeting with the employees in the absence of a Local 591 business representative; and (3) whether the two grievances were properly before the arbitrator in accordance with section 2-A of the timeliness provision.

On April 12, 1985, Donald H. Wollett, arbitrator, issued his decision finding that Ad-Art violated the contract in several respects including article V, section 11. Regarding the October 26 meeting, the arbitrator found that the grievance was untimely and, therefore, he did not reach the merits of that issue.

3. The alleged close of business

a. *Events in Oakland*

On November 22, 1983, a meeting was held at Local 595's offices to discuss the imminent closing of EPC's Oakland office.[33] Present for the employer were Ron Johnson and Meyland. The Union was represented by Nathan and Sweeney. Livingston of Local 591 (Stockton) was also present. Johnson told the union representatives that EPC was closing its doors on November 30. Johnson said the Company was closing its doors in Oak-

jurisdiction. Unless there is a reciprocal understanding between adjoining Local Unions on traveling sign crews, employees shall notify the Business Manager's office where work is to be performed, before going to work in such areas. When Local Union 591 sign men are available, outside shops shall not send more than one (1) man per truck, to work in Local 591 jurisdiction.

[32] The usual procedure was for the Union to prepare a letter of understanding if any addendum or modification was reached. I draw the inference that L. Papais varied from the usual procedure because he knew that Livingston had not agreed to deletion of art. V, sec. 11. In fact, art. V, sec. 11 had not been specifically mentioned at the meeting of October 28. Livingston was under the impression that L. Papais wanted him to delete the union-security provision.

[33] The Oakland manufacturing facility had already reached a closure agreement with the manufacturing local union.

land, San Jose, and San Diego, but would maintain the facility in Cucamonga. The Cucamonga facility would be an Ad-Art facility having a collective-bargaining agreement with IBEW Local 477. Nathan said that Local 595 was also willing to negotiate, but he requested to see the Company's books. Johnson offered EPC's books but Nathan said if EPC was closing down, it was Ad-Art's books that he needed to see.

On November 27, a help-wanted advertisement was run by Ad-Art in an Oakland newspaper, soliciting "sign installers/electricians" to apply for work at Respondent's Oakland facility. On November 30, Meyland sent letters to Local 595 and to the EPC employees informing them that the facility was closed and the employees were terminated. The sales and office personnel were transferred to Ad-Art's payroll.

Following the alleged closure of the Oakland facility, Ad-Art began utilizing nonunion installers from Stockton to perform work in the geographic area formerly serviced by the Oakland facility. These nonunion installers were given work orders each Monday morning by Amo, Ad-Art's installation supervisor, and assigned work for a week. Each Monday they would report the time spent and expenses for the preceding week and receive work orders for the following week. If the work was completed in less than a week, the employees called Amo in Stockton for additional orders.

Tom Reid, a former Ad-Art employee, testified that he was instructed by Amo to call Dick Robillard at the Oakland facility for his additional work orders. Robillard had been EPC's Oakland plant superintendent and had been transferred to the Ad-Art payroll on December 1. Reid picked up material and work orders from Robillard. While on jobs in the Bay Area, Reid received materials both from Stockton and Oakland. After his first 2 weeks of employment, Reid's only contact with the Stockton facility was his Monday morning dispatch. Thereafter he reported to Robillard on a daily basis by telephone and visited the Oakland office at least twice a week. Reid testified that he was told by Amo and Robillard that "it was illegal for him [Reid] to be at the Oakland plant and that he would be in trouble with 'the Union' if he were ever caught there." During the last week of January 1984, Reid was told by Robillard that he could no longer visit the Oakland facility and that Reid would have to telephone for orders and meet Robillard away from the Oakland office. Robillard then delivered materials to Reid at places other than the Oakland office. During the 10 months Reid worked for Respondent, he worked on over 100 jobs in the Bay Area. Those jobs were for customers for whom EPC's employees had previously performed work. Reid also performed work in the San Jose area for customers for whom EPC's employees had previously performed work.

Finally, Reid testified that after he was employed by Ad-Art for a month, and had been "hassled" by union employees in Stockton and in the field, he asked Amo if he were going to be allowed to join the Union. Amo answered that "John and Lou Papais would not allow a non-union sign hanger into the Union."[34]

Following the termination of EPC's Oakland employees, Ad-Art performed installation work in the geographic area previously serviced by Local 595 sign hangers. This work was performed by nonunion hangers such as Reid. The Oakland office staff—estimators, artists, coordinators, salesmen, and secretaries—were transferred to the Ad-Art payroll. Ramsey, first an Ad-Art salesman, then EPC's sales manager, and now again an Ad-Art salesman, testified that after EPC's closure he told all his clients that there would be no change in the operation and that it would be the "same location, just a different name." Although Respondents contend in this proceeding that they have no installation service at the Oakland facility, they advertised in January 1984 in a trade journal that Ad-Art had eight such locations that of necessity includes two former EPC facilities (Oakland and San Jose). As late as February 1984, Respondents were advertising for sign service personnel to apply for work at the Oakland facility.

b. *Events in San Jose*

On November 4, 1983, Meyland sent a letter to Jerry Cooper, Local 332's business agent, identifying himself as EPC's personnel manager and informing Local 332 that EPC was going to "cease operations in San Jose." Cooper called Meyland and arranged a meeting for November 17 at San Jose. On that date, Meyland, Ron Johnson, Cooper, and Dick Conway, a business agent for Local 332, met to discuss the intended closure. Johnson said that EPC would close its doors effective November 30. Cooper asked how that affected the San Jose operation because Local 332's contract was with Ad-Art. Johnson questioned that fact and Cooper produced the contract showing the employer as Ad-Art. Johnson said he was not negotiating on behalf of Ad-Art. Johnson told Cooper that Ad-Art intended to keep the San Jose sales office in operation, but would not need installation employees. He said installation would probably be performed by employees brought in from Ad-Art's Stockton plant. Johnson said that the San Jose employees should apply for work at the Stockton location. The meeting ended with Cooper saying he would contact the Union's lawyer to determine how to proceed with this matter.

On November 30, Meyland sent a letter to Local 332 and EPC's San Jose employees advising them that the San Jose facility was closed and the employees terminated. The sales and office personnel were transferred to the Ad-Art payroll and continued to work at the same location.

Notwithstanding Respondents' contention that it had no longer maintained a service and installation facility in San Jose, but only a sales office, the evidence shows that following the alleged closure, Respondents performed sign service and installation work on almost a daily basis.

[34] Amo denied saying that the Papaises would not allow a nonunion sign hanger into the Union. Amo testified that he told Reid that there were not any openings and that he told Reid that he could probably be a union member one day. I find Reid to be a much more credible witness than Amo and, therefore, I credit Reid's testimony over Amo's denials.

This work was performed by nonunion personnel and an alleged subcontractor who utilized the same equipment previously used by the terminated EPC employees.[35] In their posttrial brief, Respondents allege that the San Jose facility was closed after the instant hearing ended.

c. *Events in San Diego*

As previously indicated, Local 569 (San Diego) had a contract with the Electric Sign and Luminous Tube Industry of San Diego (the Association) that covered, inter alia, EPC's sign hangers at San Diego. The contract indicated that the employer was Ad-Art. On May 8, 1983, Local 569 sent a notice to EPC's San Diego facility of the termination of the 1980–1983 agreement and requesting negotiations for a successor agreement. Neither Ad-Art nor EPC responded.

On June 10, the Union sent a letter to Ad-Art at the San Diego facility notifying it that the Association negotiations were commencing on June 16. Neither Ad-Art nor EPC responded to this notice. The negotiations between the Union and the Association commenced on June 16 and resulted in an agreement between the Union and the Association for a collective-bargaining agreement effective by its terms from July 11, 1983, until July 1986. The Union notified Ad-Art of this agreement on September 19. Thereafter, on November 4, Meyland wrote the Union stating that EPC was ceasing operation in San Diego and for that reason there was no need to enter "into a collective bargaining relationship with IBEW Local 569." Neither Ad-Art nor EPC ever withdrew from the multiemployer association.

James Chufo, employed by Respondent since the purchase from Federal in 1978, was called at his home on November 11 by Earl Scudder, then superintendent at the San Diego facility. Scudder told Chufo that Respondents were going "non-union" and closing the plant. Scudder told Chufo to come into the facility on November 14 to pick up his final check. Chufo went to see Scudder on November 14 and received his final paycheck and a termination slip which read, "Ad-Art is no longer union." Scudder told Chufo that if he wanted a job he would be rehired but his pay would be substantially reduced. Chufo declined the offer.

Claud Rider was employed by Respondent for only 3 days.[36] On November 14, Rider reported for work and was told by Scudder that Respondents were going nonunion and that Scudder had received orders from "up North" to fire everybody and then hire them back in a week as non-union employees. Rider was also given a termination slip stating, "Ad-Art is no longer union."

Scudder testified that after Chufo and Rider were fired, he finished the jobs in progress with employees from the Cucamonga facility. Scudder later hired two workers as Ad-Art employees to do the work previously done by Chufo and Rider. Scudder testified that he had been told to fire Chufo and Rider by Roger Wilkerson (then manager of Central Control-Stockton). Wilkerson also told Scudder that Scudder was no longer employed by Ad-Art/Electrical Products Corporation, but by Ad-Art. In February or March 1984, Wilkerson instructed Scudder to close down the San Diego facility. Scudder was transferred to the Cucamonga facility.[37] Since March 1984, the installation and service work in the San Diego area has been performed by employees from the Cucamonga facility.

Scudder admitted that from November 14, 1983, until the closure in March 1984, aside from the discharge of the two Local 569 members, the only change was in the name of the business.

4. The request for information

On December 15, 1983, Local 332 (San Jose) filed a grievance alleging that Respondents violated the contract by terminating its sign hangers and installers and performing the work with nonunion personnel.

On January 4, 1984, Local 332, by letter, requested Respondents to furnish it with certain information relating to the business relationship between Ad-Art and EPC. The San Jose local cited its belief that the Companies were interrelated and the fact that the employees had received wages and fringe benefits from both Companies. In this same letter Local 332 grieved the failure of Ad-Art to follow the recognition clause, union-security clause, hiring procedure, and wage and fringe benefit provisions of the 1982–1984 collective-bargaining agreement.

Local 332 alleged that the requested information was necessary to determine whether Ad-Art and EPC were both bound to the 1982–1984 collective-bargaining agreement. Respondents never replied to the request for information.

Analysis and Conclusions

A. *The Relationship Between the Companies*

"A company which has not agreed to be bound by the collective-bargaining contract of another company may nevertheless be held to that contract if it is an alter ego of the signing company or if it may be said to constitute a single employer with that company." *Kiewit Sons' Co.*, 206 NLRB 562 (1973), vacated on other grounds 518 F.2d 1040 (D.C. Cir. 1975), affd. in part, vacated in part, and remanded 425 U.S. 800 (1976). The Board and the courts have often used the terms alter ego and single employer interchangeably. The U.S. Supreme Court delineated what it meant by an alter ego in *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249, 259 fn. 5 (1974):

> It is important to emphasize that this is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). Such

[35] Whether this alleged subcontractor was in fact an employee of Respondents has no effect on the conclusions.

[36] Scudder did not deny Rider's testimony that he (Rider) was told that he was being hired as a permanent employee. Rider had been hired to replace an employee who had failed to report for work for several days.

[37] The record does not disclose whether Respondents closed only its service operations or closed the entire San Diego facility.

> cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management.[38]

The legal principles to be applied in determining whether two factually separate employers are in fact alter egos are well settled. The Board has found alter ego status when two enterprises have "substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." *Denzil S. Alkire*, 259 NLRB 1323, 1324 (1982); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

Similarly, in determining whether enterprises constitute a single employer the controlling criteria are (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *Bacchus Wine Cooperative*, 251 NLRB 1552 (1980); *NLRB v. Don Burgess Construction Corp.*, supra; *Electrical Workers IBEW Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965); *Sakrete of Northern California*, 137 NLRB 1220 (1962), enfd. 332 F.2d 902 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965). The Board has stressed the first three factors, as well as the presence of control of labor relations. *Sakrete*, supra, 332 F.2d at 905 fn. 5. No one of the factors is controlling, however, nor need all the "controlling criteria" be present. *Burgess*, supra at 384; *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971). Single employer status, for purposes of the Act, depends on all the circumstances of the case and is characterized as an absence of an "arm's length relationship found among unintegrated companies." *Shellmaker, Inc.*, 265 NLRB 749, 753–754 (1982); *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980).

The ownership of both corporations is identical. L. Papais owns 50 percent, J. Papais owns 25 percent, and O'Leary owns 25 percent of the stock of each corporation. These three individuals also hold the same offices with each corporation. Although EPC had a general manager with responsibility for day-to-day operations, it is clear that L. Papais, J. Papais, and O'Leary had the ultimate responsibility in their repective areas of management. Thus, L. Papais had the ultimate responsibility for personnel and labor relations matters such as company-wide insurance, collective bargaining, hiring, pay raises, and sales commissions. J. Papais had the ultimate responsibility for scheduling, production, and cash expenditures for both Companies. O'Leary had the ultimate responsibility for sales and sales personnel for both Companies. The weakness of Respondents' contention that the Companies were separate is highlighted by Allen's testimony that prior to working for Ad-Art he worked for Federal Signs. Allen saw EPC and Ad-Art as the same Company. Further, Allen admitted that EPC Sales Manager Ramsey acted as if he worked for Ad-Art in Stockton. In fact, L. Papais, J. Papais, and O'Leary all used the name Ad-Art to encompass all Ad-Art and EPC facilities in intracompany documents. If such high level managers viewed the two companies as one, there can be no doubt that employees, customers, and other third parties were led to believe that the Companies were a single business enterprise.

Management and supervisors such as Allen, Long, Wilkerson, Toschak, and Ramsey were transferred through the Companies without a break in service. Allen, allegedly the top management official of EPC, was transferred to Ad-Art when that Company needed his services for a job in Saudi Arabia. EPC received no compensation for Allen's services. Long was transferred to EPC to replace Allen, and another EPC official was transferred to Ad-Art to replace Long. The exchange of management officials simply does not take place within unintegrated companies. Similarly wholesale transfers of employees such as the transfer from Ad-Art Emeryville to EPC Oakland, and the transfer of Ad-Art's San Jose employees to EPC San Jose do not take place within unintegrated companies.

During the period prior to the May 1983 consolidation, EPC utilized the Ad-Art name and logo on its buildings, trucks, rolling stock, business cards, contracts, drawings, blueprints, advertising, and paychecks. Moreover, EPC utilized the Ad-Art name on filings with governmental agencies. Following the consolidation in May 1983 only Ad-Art's name was used on contracts and on the payroll checks. Notwithstanding Respondents' contention that EPC and Ad-Art simply entered into a contract for accounting services, employees were notified of a consolidation, of a Central Control Department, and of the new procedure for contracts. Further, the employees began receiving their paychecks from Ad-Art rather than EPC.

Although the Companies billed each other for services, no payment was ever made, not even for the alleged sale. Both the service contract between Ad-Art and EPC in May 1983 and the sales agreement in November 1983 were negotiated by L. Papais on behalf of both Companies—hardly arm's-length transactions.

Regarding labor relations, the evidence leads one to conclude that no bargaining agreement could be reached by either Company without the approval of L. Papais. L. Papais signed agreements on behalf of both Companies and in 1983 engaged in critical negotiations on behalf of both Companies. Further, Ron Johnson, accompanied by Ad-Art personnel directors, negotiated on behalf of both entities. In prior years, J. Papais signed collective-bargaining agreements on behalf of both Companies. Both J. Papais and Allen signed labor agreements for EPC facilities that recited that Ad-Art was the Employer.

Personnel directors of Ad-Art worked on insurance and personnel policies for both Companies. Further, Meyland, then calling himself EPC's personnel director and now claiming only to have authority for Ad-Art, notified the Unions and employees of the closures in Oakland and San Jose.

Under all the circumstances there can be no doubt that EPC and Ad-Art were a single employer. Further, since May 1983 there can be no doubt that Ad-Art became the employer of the employees at the Oakland, San Jose, and

[38] See also *Burgess Construction*, 596 F.2d 378 (9th Cir. 1979), enfg. 227 NLRB 765 (1977).

San Diego facilities by consolidating with EPC and removing the "name only" distinction between the Companies. Ad-Art, after the consolidation, employed and paid the employees in accordance with the collective-bargaining agreements then in effect. It entered into an agreement on behalf of EPC with the Oakland local in September 1983. It reported to the Government, via the W-2 forms, that it was the employer of those employees in 1983. Thus, for the period from May 1983 until November 1983, Ad-Art had adopted the EPC collective-bargaining agreements and had assumed EPC's obligation under the agreements.

As can be readily seen, prior to May 1983, EPC was a subsidiary of Ad-Art, which was so controlled by Ad-Art as to constitute a single employer under the applicable case law. Between May and November 1983, Ad-Art's control over EPC increased. The distinctions between the Companies all but disappeared. Thus, there can be no doubt that Respondents constituted a single employer just prior to the alleged sale from EPC to Ad-Art in November 1983.

There also can be no doubt that since November 1983 Respondent Ad-Art has been an alter ego of Respondent EPC. See *Howard Johnson Co. v. Hotel & Restaurant Employees*, supra, 417 U.S. at 259 fn. 5 (1974).

By November 1983 Respondent EPC was no more than a corporate name for all practical purposes. Respondent Ad-Art had taken over the administration of EPC's business and was the only one of the two Companies selling or leasing signs. Further only Ad-Art was paying the wages and fringe benefits of the employees performing work for both Companies. The only change that took place in November 1983 was the name change from Ad-Art/EPC to Ad-Art. Respondents' supervisors, Scudder and Ramsey, admitted that the only change was in the name.

Respondents were simply attempting to avoid EPC's union contracts, and the financial obligations thereunder, by changing the name of the Ad-Art/EPC operations to Ad-Art, Inc. The employees discharged in San Diego were told that "Ad-Art is no longer Union"[39] but that they could be rehired for lower wages on a nonunion basis. Ron Johnson, in negotiations, stated wages were the problem and that he would not negotiate, but would sign a contract on behalf of Ad-Art if the Oakland employees agreed to the lower wage rate of the Stockton agreement. If the employees did not agree, Ad-Art would subcontract or perform the work nonunion. Prior to the sale, Ad-Art advertised for employees to perform the work of the Oakland employees. These nonunion employees worked out of Stockton. Amo told one employee, Reid, that the Papaises would not let nonunion sign hangers into the Union. Robillard told Reid that it was illegal for the employee to be at the Oakland facility and that Reid would be in trouble with the Union if he was seen at the Oakland facility. These statements by Respondents illustrate the clear intent, obvious from the entire record, that Respondents' purpose was to rid itself of the Unions and the unwanted wage provisions of their collective-bargaining agreements with the Unions. Respondents hoped to free themselves from the contracts by claiming only EPC and not Ad-Art was bound to these agreements. Collective-bargaining agreements cannot be so easily avoided.

The management and supervisors of the Companies remained the same. There was no change in the business purpose and the Companies continued to perform the same service for the same customers in the same geographic areas, using the same equipment. Ad-Art completed jobs that had been started by Ad-Art/EPC. Labor relations and personnel continued to be managed and controlled by L. Papais with the assistance of Ron Johnson and Meyland.[40]

More importantly, the alleged sale from EPC to Ad-Art cannot be viewed as a bona fide transaction. First, Ad-Art, the alleged purchaser, was merely a continuation of the selling corporation. Second, the transaction was entered into for the purpose of avoiding the contractual and statutory obligations to the Unions. See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 at 182 (1973). As noted earlier, Ad-Art never did pay the alleged consideration for its purchase.

Under the circumstances, I am persuaded that since November 1983, Respondent Ad-Art has been operating as a disguised continuance and alter ego of the former Ad-Art/EPC operations with the intention of avoiding its contractual and statutory obligations to the Unions.[41]

B. *The Unfair Labor Practices in Stockton*

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees." Section 8(d) of the Act defines the duty to bargain collectively, in relevant part, as prohibiting either party to a collective-bargaining agreement from unilaterally terminating or modifying the agreement during its effective term. Section 8(d) also grants each party to the agreement the right to refuse "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." Accordingly, an employer acts in derogation of its bargaining obligations under Section 8(d), and thereby violates Section 8(a)(5) and (1) by modifying a collective-bargaining agreement during the effective period of the agreement without the consent of the union. *Chemical Workers Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157, 185–186 (1971); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975).

[39] These statements were made prior to the alleged transfer from EPC to Ad-Art.

[40] In November 1983, Johnson, with Meyland at his side, negotiated with the Oakland and San Jose locals on behalf of both Ad-Art and EPC.

[41] Respondents contend that Ad-Art cannot be an alter ego because it was a long-established business rather than a newly created entity used as a disguised continuance. I find no merit in that argument. An employer may not avoid its collective-bargaining agreement by simply doing business under another name. This result is not altered by the employer's originality, or lack thereof, in choosing a name.

As discussed earlier, Respondents' attempt to avoid its obligations under its collective-bargaining agreement with the Oakland local included an attempt to delete article V, section 11 of the Local 591 (Stockton) collective-bargaining agreement. The General Counsel alleges that Respondents violated Section 8(a)(5) and (1) by directly bargaining with the sign hangers and bypassing Local 591 as their exclusive-bargaining representative.

Respondent attempted to renegotiate article V, section 11 during the term of the agreement. Local 591, having no obligation to bargain regarding that provision during the contract term, resisted Respondents' efforts. Thereafter, on October 26, in the absence of Business Agent Livingston, L. Papais told the employees that he could not afford to pay the higher pay for work outside the Stockton geographic area mandated by the bargaining agreement. At a second meeting, on October 28, in Livingston's presence, L. Papais attempted to negotiate a higher wage rate in return for relief from the provisions of the contract. Livingston did not protest this bargaining. At the conclusion of the meeting, however, Livingston told L. Papais that he would not agree to change the contract and that there was no deal.

Section 8(a)(5) creates an obligation on the part of an employer to bargain with an incumbent union as the exclusive bargaining representative of its employees in the matter of wages, hours, terms, and conditions of employment. It may not attempt to circumvent the exclusive status of the bargaining agent by attempting to deal directly with its represented employees. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944). An employer must deal in bargaining negotiations with the statutory representative and cannot bargain directly or indirectly with the employees. *NLRB v. Insurance Workers*, 361 U.S. 477 at 484–485 (1960). "The employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees." *General Electric Co.*, 150 NLRB 192, 195 (1964).

In the instant case, Respondents, unable to obtain relief from their contract with the Stockton local, sought to exert pressure on the Union by offering a wage increase to the employees and by threatening the employees with a loss of work opportunities if the Respondents' offer was not accepted. The Stockton local was under no obligation to change or bargain about the contract, during the term of the contract, and Respondents' attempts on October 26 and 28 to bypass the Union are inconsistent with their obligations under Section 8(a)(5). I, therefore, find that by this conduct Respondents violated Section 8(a)(5) and (1) of the Act. Under the facts of this case, I find Respondents' conduct was not privileged by Livingston's presence at the October 28 meeting. Respondents' unlawful conduct had required Livingston's presence at the meeting. Livingston made it clear. first, to the employees and later, to L. Papais, that he would not agree to change the existing contract. Under Section 8(d) of the Act, Livingston was privileged to refuse to bargain or change the agreement.

The arbitrator found that there was no agreement by Local 591 to change the contract and that Respondents violated article V, section 11 by working employees from Stockton in the jurisdiction of Local 595, without paying the Local 595 rate. Respondents were ordered to make the Stockton employees whole for such hours worked in the Bay Area after November 30, 1983. The arbitrator did not reach the direct dealing issue finding that the grievance was untimely under the contract.[42]

Respondents contended, prior to the award, that the unfair labor practices regarding the Stockton bargaining unit should be deferred to the grievance and arbitration procedure. The arbitrator has now ruled on the matter and Respondents now argue against deferral. Local 591 initially argued against deferral but now argues in favor of deferral. The General Counsel consistently argued against deferral.

In *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board held it would defer to an arbitration award when the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes of the Act. More recently in *Olin Corp.*, 268 NLRB 573, 574 (1984), the Board clarified its *Spielberg* standards by stating it would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. Further, in *Olin*, the Board stated that it would require that the party seeking to have the Board reject deferral and consider the merits of a given case affirmatively show that the above standards for deferral have not been met.

In applying the *Spielberg* and *Olin* standards to the instant case, I cannot defer regarding the direct dealing allegation because the arbitrator failed to reach the merits on that issue. The arbitrator dismissed the grievance on timeliness grounds. On the other hand, the alleged unilateral change was decided by the arbitrator.

The arbitrator's award meets the *Spielberg* standards. The proceedings were fair and regular, all parties agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes of the Act. Based on the facts presented, the arbitrator found that there was no agreement to modify the contract and, therefore, Respondents' deletion of article V, section 11 was a breach of the contract. The remedy was to apply the bargaining agreement including article V, section 11 to the employees that performed the work. There has been no valid reason shown why the Board should reject deferral to the award and consider the merits of that dispute.

Respondents contend that the arbitrator found that the work of installation and maintenance in Oakland and San Jose belonged to the Stockton unit and that the award would be "invalid" if I find that work belonged to the Oakland and San Jose units. I find no such conflict exists between the arbitrator's decision and my decision herein. I find below that Respondents unlawfully assigned the work of the Oakland and San Jose unit employees to nonunion employees in Stockton. The arbitrator simply found that while the work was being performed out of

[42] The time limitations under the contract are much shorter than the 6-month statute of limitations under Sec. 10(b) of the Act.

Stockton, the Stockton agreement, calling for the Oakland wage rate, should be applied. The arbitrator's remedy, calling for backpay for the employees performing the work is not inconsistent with the remedy calling for backpay for the employees that would have performed the work but for Respondents' unfair labor practices.

Finally, the possibility that Respondents might not comply with the arbitrator's award is not a deterrent to deferral. In *Malrite, Inc.*, 198 NLRB 241 (1972), enfd. in relevant part 494 F.2d 1136 (D.C. Cir. 1974), the Board stated:

> If the Board's deference to arbitration is to be meaningful it must encompass the entire arbitration process, including the enforcement of arbitral awards [through judicial procedures].

In *J & H Rainwear*, 273 NLRB 497 (1984), the Board reaffirmed the *Malrite* principles.

Accordingly, I shall defer to the arbitration regarding the alleged unilateral deletion of article V, section 11 of the Ad-Art–Local 591 collective-bargaining agreement. Accordingly, that allegation of the complaint will be dismissed.

C. *The Unfair Labor Practices in San Diego*

Both Respondents as a single employer were bound by the 1980–1983 multiemployer Association agreement covering the sign hangers and installers at San Diego. The Board, with court approval, has held that an employer may not withdraw from multiemployer bargaining once negotiations for either an initial or a successor agreement have commenced, absent unusual circumstances. *Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982); *Retail Associates*, 120 NLRB 388 (1958). In this case, Respondents never withdrew from the Association. The Respondents were bound by the multiemployer agreement negotiated by the Association in 1983 which, by its terms, is retroactive to July 11, 1983. By refusing to execute and abide by the association agreement, Respondents have violated Section 8(a)(5) and (1) of the Act.

In order to obtain more favorable wage rates in the San Diego area. Respondents discharged their two bargaining unit employees because "Ad-Art is no longer union." Respondents offered these two employees future work under nonunion conditions. Thus, I find Respondents violated Section 8(a)(3) of the Act by discharging employees Chufo and Rider because they were members of and were represented by Local 569. *Island Typographers*, 252 NLRB 9 (1980); *G & M Lath & Plaster Co.*, 252 NLRB 969 (1980).

The complaint alleges that Respondents unlawfully reassigned the work of the bargaining unit employees without prior notice to or bargaining with Local 569. As discussed above, I have found that Respondents violated Section 8(a)(3) and (1) of the Act by discharging the bargaining unit employees and replacing them with nonunion employees. The discharge of all bargaining unit employees to avoid the bargaining obligation also violates Section 8(a)(5) and (1) of the Act. *Helrose Bindery*, 204 NLRB 499, 504 (1973). The reassignment of the work to nonunion personnel and later to employees from the Cucamonga facility was a further violation of the 8(a)(5) obligation to recognize and bargain with the San Diego local.

D. *The Unfair Labor Practices in Oakland and San Jose*

In terminating their Oakland employees, represented by Local 595, and San Jose employees, represented by Local 332, Respondents similarly violated Section 8(a)(5), (3), and (1) of the Act. Rather than bargain with Local 595, Ad-Art/EPC simply discharged all the unit employees and began operating as the alter ego of Ad-Art. The use of an alter ego or "disguised continuance" to rid oneself of a union, even though motivated by economic considerations, is unlawful. *NLRB v. Lewis*, 245 F.2d 886, 887–889 (9th Cir. 1957); *G & M Lath & Plaster Co.*, supra. Further, when an employer discharges its employees to escape the obligations of its collective-bargaining agreements, these discharges violate Section 8(a)(5), (3), and (1). *Rushton & Mercier Woodworking Co.*, 203 NLRB 123, 124 (1973); *Helrose Bindery*, above.

The General Counsel further argues that Respondents, by reassigning the work of the unlawfully discharged Oakland and San Jose unit employees, also violated Section 8(a)(5) and (1) and Section 8(d) of the Act by making a midterm modification of its contracts with the San Jose and Oakland Local Unions. Both contracts at issue contained the following work preservation clause, which states, in relevant part:

> The Employer further agrees that he will not sublet, assign or transfer any work covered by this Agreement to any other person, firm or corporation if such subletting, assigning or transfer will cause the loss of work opportunities to employees in the Employer's establishment covered by this Agreement. Any such subletting, assigning or transfer shall be allowable after a mutual determination has been made by the representatives of the parties hereto that such action is not in conflict with the preceding sentence.

In the instant case, rather than bargain with the Unions over more favorable wage rates or the transfer of work to their Stockton location, Respondents unlawfully terminated all bargaining unit employees. In addition to the violations of Section 8(a)(5), (3), and (1), found above, I find that Respondents unilaterally transferred work in violation of the contract and Section 8(a)(5) and (1) and Section 8(d) of the Act.

The recent Board decisions of *Milwaukee Spring Division*, 268 NLRB 601 (1984),[43] and *Otis Elevator Co.*, 269 NLRB 891 (1984),[44] do not aid Respondents' case here.

In *Milwaukee Spring Division*, the Board stated that before it would conclude that an employer violated Section 8(d), it first must identify a specific term "contained in" the contract that the employer's decision modified.

[43] Reversing *Milwaukee Spring Division*, 265 NLRB 206 (1982).
[44] Reversing *Otis Elevator Co.*, 255 NLRB 235 (1981).

The Board would not infer a provision not to relocate a facility during the term of a contract. In the instant case, the contracts contained express provisions prohibiting the reassignment or transfer of work without the Unions' consent. Rather than bargain with the Oakland and San Jose Locals, who had no obligation to modify their existing contracts, Respondents simply discharged the employees and found other ways to perform the work. Thus, under *Milwaukee Spring Division*, Respondents violated Section 8(d) and Section 8(a)(5) of the Act.

In *Otis Elevator II*, the Board stated that "the critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, *i.e.*, whether it turns on a change in the nature or direction of the business, or turns on labor costs; *not* its effect on employees nor a union's ability to offer alternatives." See *Clinton's Ditch Co.*, 274 NLRB 728 (1985). In the instant case, the evidence is clear that Respondents' sole motivation in the transfer and reassignment of work was to avoid the labor costs of its contracts with the Oakland and San Jose locals. Aside from the name change, the only change in the operations was the performance of the work, covered by the contract, with cheaper nonunion personnel. In any event, whether Respondents' reassignment or transfer of the work was a mandatory subject of bargaining, since Respondents agreed not to reassign and transfer the work during the term of the contracts, their midterm modification of the contracts violated Section 8(a)(5) and Section 8(d) of the Act. *Otis Elevator Co.*, like *Milwaukee Spring Division*, only applies when there is no provision contained in the contract prohibiting the employer's conduct.

Finally, Respondents contend that the Oakland local waived its rights to seek liability against Respondent Ad-Art by executing an agreement only with EPC in September 1983. That contention has no merit. First, waiver must be clear and unmistakeable. See, e.g., *NLRB v. Item Co.*, 220 F.2d 956, 958–959 (5th Cir. 1955), cert. denied 350 U.S. 905 (1955); *C & C Plywood Corp.*, 148 NLRB 414, 416–417 (1964), enf. denied 351 F.2d 224 (9th Cir. 1965), revd. 385 U.S. 421 (1967). Silence in the bargaining agreement does not meet that test. See, e.g., *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 750–754 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964); *Sun Oil Co.*, 232 NLRB 7 (1977). Second, the undenied testimony of Nathan establishes that the Oakland local reserved its position that Respondents were a single employer, although dropping its demand for a written provision to that effect. The Oakland local did not waive its statutory right. It simply agreed with Respondents to resolve that dispute at another time and place. In light of such evidence, a waiver by Local 595 of its statutory rights cannot be inferred from its failure to name Ad-Art in the September 1983 agreement.

E. *The Refusal to Furnish Information*

It is well settled that an employer has a statutory obligation to provide a union, on request, with relevant information the union needs for the proper performance of its duties as a collective-bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In determining whether an employer is obligated to supply particular information, the question is only whether there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co.*, above at 437. As the Supreme Court has stated, the disclosure obligation is measured by a liberal "discovery-type standard," not a trial-type standard, of relevance. Ibid. Where the requested information deals with information pertaining to employees in the unit, which goes to the core of the employer-employee relationship, said information is "presumptively relevant." *Shell Oil Co.*, 441 F.2d 880 (9th Cir. 1971). Where the information is presumptively relevant, the employer has the burden of proving the lack of relevance. *Prudential Insurance Co.*, 412 F.2d 77 (2d Cir. 1969). "[B]ut where the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrower . . . and relevance is required to be somewhat more precise. . . . The obligation is not unlimited. Thus where the information is plainly irrelevant to any dispute there is no duty to provide it." *Ohio Power Co.*, 216 NLRB 987, 991 (1975); *Doubarn Sheet Metal*, 243 NLRB 821, 823 (1979). Thus, when the requested information deals with matters outside the bargaining unit, the union must establish the relevancy and necessity of its request for information. *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863 (9th Cir. 1977).

In cases when the employer, party to a collective-bargaining agreement, appears to be operating another company that might be so interrelated as to constitute a single employer or alter ego, the union party to that agreement is entitled to information from the employer regarding the nature of and relationship between the two operations, which may be relevant and useful to the union representing the employees in negotiating terms and conditions of employment with the employer, or administering and enforcing the collective-bargaining agreement. See, e.g., *Walter N. Yoder & Sons, Inc.*, 270 NLRB 652 (1984); *Associated General Contractors*, 242 NLRB 891 (1979), enfd. as modified 633 F.2d 766 (9th Cir. 1980); *Leonard B. Hebert, Jr. & Co.*, 259 NLRB 881 (1981), enfd. 696 F.2d 1120 (5th Cir. 1983). The union must demonstrate reasonable or probable relevance whenever the requested information ostensibly relates to employees outside the represented bargaining unit even though the information may show ultimately that the employees are part of the bargaining unit because of the existence of a single employer or an alter ego relationship. *Walter N. Yoder & Sons*, above.

In the instant case, the failure of Ad-Art and EPC to observe corporate lines, the fact that the bargaining agreement recited that Ad-Art was the employer, and the payment of the EPC employees by Ad-Art from May 1983 until the alleged close of business more than amply demonstrated the relevance of Local 332's request for information. The request for information was clearly necessary to determine whether Ad-Art was bound by the 1982–1984 agreement it was seeking to avoid by claiming only EPC was bound to the agreement, and was relevant and necessary to the grievance by Local

332 concerning the termination of bargaining unit employees and the transfer of bargaining unit work. Thus, Respondents' failure and refusal to provide the information violates Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondents Ad-Art, Inc. and Electrical Products Corporation are each employers within the meaning of Section 2(2), engaged in commerce and in business affecting commerce within the meaning of Section 2(6) and (7) of the Act, and collectively constitute a single employing enterprise and a single employer within the meaning of the Act.

2. International Brotherhood of Electrical Workers, Local Union No. 591, International Brotherhood of Electrical Workers, Local Union No. 595, International Brotherhood of Electrical Workers, Local Union No. 332, and Local Union 569, International Brotherhood of Electrical Workers are all labor organizations within the meaning of Section 2(5) of the Act.

3. By discharging the sign hangers and installers represented by Local 595 (Oakland), Local 332 (San Jose), and Local 569 (San Diego), Respondents violated Section 8(a)(3) and (1) of the Act.

4. At all times material, IBEW Local Union No. 591 (Stockton) has been the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time journeymen and apprentice production and maintenance employees, including but not limited to, aluminum fabricators, assemblymen, loaders, haulers, painters, plastic fabricators, layout and pattern workers, metal fabricators, glass workers, plant and equipment maintenance workers, die makers, warehouse shipping and receiving workers, janitors, and journeymen and apprentice electrician sign hangers, including, but not limited to, sign installers and servicemen, employed by Respondents at their Stockton, California facility; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

5. At all times material, IBEW Local Union No. 595 (Oakland) has been the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time journeymen and apprentice electrician sign hangers, including but not limited to sign installers and servicemen, employed by Respondents at their Oakland, California facility; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

6. At all times material, IBEW Local Union No. 332 (San Jose) has been the exclusive bargaining representative of the employees in the following appropriate bargaining unit within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time journeymen and apprentice electrician sign hangers, including but not limited to tube benders, shopmen, cleaners and servicemen, employed by Respondents at their San Jose, California facility; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

7. At all times material, Local Union 569, IBEW (San Diego) has been the exclusive bargaining representative of the employees in the following appropriate bargaining unit within the meaning of Section 9(a) of the Act:

> All employees employed by employer-members of the Electric Sign and Luminous Tube Industry Association of San Diego County who do the manufacturing, installing, alteration, dismantling and connecting of all electrical and luminous tube displays and neon illumination, including its auxiliary equipment and structures for the support thereof, including footings, as well as the wiring, assembly, service and cleaning of all such displays; also those employees who bend, repair and pump luminous tubes used as a conductor of electricity; also those who do the handling and installing of all glass, plastic fabrication and including all assembly of signs, and electrical material during fabrication including the loading of signs on trucks, operation of trucks, including any equipment necessary to the erection, installation and maintenance of signs, tying of tubing on racks and the blocking out of tubing; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

8. By transferring and reassigning the work of the employees in the bargaining unit represented by Local 595 with the object of avoiding its contractual and statutory obligations to IBEW Local 595 and by withdrawing recognition of the Union as the collective-bargaining representative of the employees, Respondents unlawfully modified the terms and conditions of the contract before the contract could be reopened pursuant to its provisions, thereby violating Section 8(d) and Section 8(a)(5) and (1) of the Act.

9. By transferring and reassigning the work of the employees in the bargaining unit represented by Local 332 with the object of avoiding its contractual and statutory obligations to IBEW Local 332 and by withdrawing recognition of the Union as the collective-bargaining representative of the employees, Respondents unlawfully modified the terms and conditions of the contract before the contract could be reopened pursuant to its provisions, thereby violating Section 8(d) and Section 8(a)(5) and (1) of the Act.

10. By refusing to furnish Local 332 with the requested information relevant and necessary to the Union's administration of its collective-bargaining agreement with

Respondents, Respondents violated Section 8(a)(5) and (1) of the Act.

11. The allegation that Respondents unilaterally deleted article V, section 11 of their collective-bargaining agreement with IBEW Local 591 shall be deferred to the decision of the arbitrator.

12. By attempting to bypass Local 591 and bargain directly or indirectly with the employees in the Stockton unit, Respondents violated Section 8(a)(5) and (1) of the Act.

13. By refusing to execute a copy of the 1983–1986 agreement between the Electric Sign and Luminous Tube Industry of San Diego County and Local 569 (San Diego) and by refusing to apply its terms to Respondents' employees in the bargaining unit, Respondents violated Section 8(a)(5) and (1) of the Act.

14. By transferring and reassigning the work of the employees in the bargaining unit represented by Local 569 with the object of avoiding its contractual and statutory obligations to Local 569, IBEW and by withdrawing recognition of the Union as the collective bargaining representative of the employees, Respondents unlawfully modified the terms and conditions of the contract before the contract could be reopened pursuant to its provisions, thereby violating Section 8(d) and Section 8(a)(5) and (1) of the Act.

15. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents Ad-Art, Inc. and Electrical Products Corporation engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and that they take certain affirmative action to effectuate the policies of the Act.

I will recommend that Respondents be ordered to offer immediate reinstatement to all sign hangers and installers terminated at the San Diego facility, all sign hangers and installers terminated at the Oakland facility, and all sign hangers and installers terminated at the San Jose facility to their former position of employment, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, anyone who may have been assigned or hired to perform the work that the employees had been performing prior to their unlawful terminations in November 1983. Further, Respondents will be required to make the employees whole for any loss of earnings they may have suffered by reason of their unlawful terminations, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be paid on the amounts owing and to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Olympic Medical Corp.*, 250 NLRB 146 (1980). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Regarding the San Diego bargaining unit, Respondents will be ordered to immediately execute a copy of the 1983–1986 agreement between the Electric Sign and Luminous Tube Industry of San Diego and Local Union 569, International Brotherhood of Electrical Workers and to apply the terms and conditions of that agreement retroactively to all the employees in the bargaining unit.[45]

As to the San Jose bargaining unit, Respondents will be ordered to provide Local 332 (San Jose), on demand, with the requested information concerning the relationship between Respondents Ad-Art and EPC.

Because the unfair labor practices were widespread and involved four of Respondents' locations, it can be inferred that the employees at Respondents' four other locations acquired knowledge of and were affected by these unfair labor practices. Accordingly, I shall recommend an order requiring Respondents to post notices at all their offices and facilities. See *Texas Gulf Sulphur Co.*, 195 NLRB 13 (1972), enfd. 463 F.2d 778 (5th Cir. 1972). Based on the nature and extent of the unfair labor practices, I will order a broad cease-and-desist order in accordance with the guidelines of *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[46]

ORDER

The Respondents, Ad-Art, Inc. and Electrical Products Corporation, Stockton, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with International Brotherhood of Electrical Workers, Local Union No. 591 as the exclusive bargaining representative of all employees in the bargaining unit found appropriate in Conclusion of Law 4, above.

(b) Refusing to bargain collectively with International Brotherhood of Electrical Workers, Local Union No. 595 as the exclusive collective-bargaining representative of all employees in the bargaining unit found appropriate in Conclusion of Law 5, above.

(c) Refusing to bargain collectively with International Brotherhood of Electrical Workers, Local Union No. 332 as the exclusive collective-bargaining representative of all employees in the bargaining unit found appropriate in Conclusion of Law 6, above.

(d) Refusing to bargain collectively with Local Union 569, International Brotherhood of Electrical Workers as the exclusive collective-bargaining representative of all employees in the bargaining unit found appropriate in Conclusion of Law 7, above.

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[45] The record indicates that Respondents ceased installation and maintenance work in San Diego in March 1984. However, it is not clear if Respondents still maintain a sales office and facility in San Diego. I leave to the compliance stage of this proceeding the determination of the extent to which Respondents are able to comply with the remedial order. See, e.g., *Engineered Control Systems*, 274 NLRB 1308 (1985); *G & M Lath & Plaster Co.*, supra, 252 NLRB at 980. Similarly, I leave to the compliance stage the determination of the extent to which Respondents are able to comply with the remedial order regarding their San Jose facility.

[46] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Discharging employees and relocating sign hanging, installation, maintenance, and service work or any other work encompassed within the Oakland, San Jose, or San Diego bargaining units with the object of escaping the obligations imposed by a collective-bargaining agreement.

(f) Failing and refusing to apply to all employees in the Oakland and San Jose bargaining units all terms and conditions of the current collective-bargaining agreements.

(g) Failing and refusing to execute a copy of the 1983–1986 agreement between the Electric Sign and Luminous Tube Industry of San Diego County and Local Union 569, International Brotherhood of Electrical Workers.

(h) Failing and refusing to apply to all their employees in the San Diego bargaining unit all the terms and conditions the 1983–1986 agreement between the Association and Local 569.

(i) Failing and refusing to supply Local 332 with necessary and relevant information on request.

(j) Bypassing Local 591 and attempting to bargain directly or indirectly with the employees in the Stockton unit.

(k) Discharging or otherwise discriminating against employees regarding hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activity protected by Section 7 of the Act.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of any rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with IBEW Local 591 as the exclusive bargaining representative of all employees employed in the Stockton appropriate bargaining unit.

(b) On request, bargain collectively with IBEW Local 595 as the exclusive bargaining representative of all employees employed in the Oakland appropriate bargaining unit.

(c) On request, bargain collectively with IBEW Local 332 as the exclusive bargaining representative of all employees employed in the San Jose appropriate bargaining unit.

(d) On request, bargain collectively with Local 569, IBEW as the exclusive bargaining representative of all Respondents' employees employed in the San Diego appropriate bargaining unit.

(e) Apply the terms and conditions of the current collective-bargaining agreement to all employees employed in the Oakland bargaining unit.

(f) Apply the terms and conditions of the current collective-bargaining agreement to all employees in the San Jose bargaining unit.

(g) Execute a copy of the 1983–1986 agreement between the Association and Local 569.

(h) Apply the terms and conditions of the 1983–1986 agreement between the Association and Local 569 to all Respondents' employees in the San Diego bargaining unit.

(i) Furnish, on request, to Local 332 the requested information necessary and relevant for its duties as exclusive bargaining representative.

(j) Offer all sign hanger and installer employees terminated at the San Diego, Oakland, and San Jose facilities in November 1983 immediate and full reinstatement to their former positions of employment or, if their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any rights and privileges previously enjoyed.

(k) Make these employees whole for any loss of earnings they may have suffered as a result of Respondents' discrimination against them, in the manner set forth in the remedy section of this decision.

(l) Remove from their files any reference to the termination of the sign hangers and installers at San Diego, Oakland, and San Jose in November 1983, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel action against them.

(m) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(n) Post at all their facilities in Nevada and California copies of the attached notice marked "Appendix."[47] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(o) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[47] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Highway, City, and Air Freight Drivers, Dockmen, Marine Officers Association and Helpers, Teamsters Local Union No. 600, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO *and* Central Hardware Company and Carpenters District Council of Greater St. Louis, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO and United Food and Commercial Workers Union, Local 655, affiliated with United Food and Commercial Workers International Union, AFL–CIO. Case 14–CD–783

July 29, 1988

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

The charge in this Section 10(k) proceeding was filed December 1, 1987, by Central Hardware Company (Central Hardware or the Employer), alleging that the Respondent, Teamsters Local 600, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by UFCW Local 655.[1] The hearing was held January 22, 1988, before Hearing Officer Lynette K. Zuch. Thereafter, Teamsters Local 600 and Central Hardware filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, Central Hardware, a wholly owned subsidiary of Interco, Incorporated, a Delaware corporation with its principal offices and a warehouse facility located in Bridgeton, Missouri, and nine hardware stores located in St. Louis, Missouri, and stores located in Alton, Fairview Heights, and Granite City, Illinois, is engaged in the retail sale of hardware and building materials. Central Hardware annually derives gross revenues in excess of $500,000 from the operation of its hardware stores, and purchases and receives goods valued in excess of $50,000, which are shipped directly to its St. Louis, Missouri and Illinois facilities from points located outside the States of Missouri and Illinois respectively. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We also find that Teamsters Local 600 and UFCW Local 655 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Central Hardware has participated in the annual Tinker Show at the Cervantes Convention Center since 1975. The Tinker Show is a consumer show designed to inform customers how to perform repairs around their homes. Since 1977, Central Hardware has assigned to its own employees, represented by UFCW Local 655, the tasks of unloading merchandise from trailers at the Convention Center and loading the trailers at the close of the Tinker Show. The most recent show was held September 11–13, 1987.

Central Hardware and Teamsters Local 600 stipulated that the Teamsters made demands on Central Hardware to assign the disputed work to Teamsters-represented employees at the September 1987 Tinker Show, that the Teamsters threatened to picket and picketed during the September 1987 show, and that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.

On December 11 and 15, 1987, about a month before the hearing, the NLRB received two letters from UFCW Local 655. The first letter said in part:

> It is the understanding of Local 655 that Local 600 has jurisdiction for the unloading of trucks to transport cargo directly to the exhibition floor or to a storage area. Local 655 has jurisdiction over the moving, handling, stocking and returning to storage of any materials whose unloading to the exhibition floor or to a storage area has already been completed by Local 600. We understand Local 600 has no claim to this work. Accordingly, it is the position of Local 655 that there is no jurisdictional dispute.

The second letter said:

> UFCW 655 disclaims any jurisdiction over the unloading of trucks to transfer cargo directly to the exhibition floor or to a storage area which is the jurisdiction of Teamsters Local 600.

[1] At the hearing, the Employer, Teamsters Local 600, and the Carpenters District Council of Greater St. Louis (Carpenters) stipulated that there was no dispute with respect to the Carpenters, whereupon the Carpenters left the hearing.

B. *Work in Dispute*

The disputed work consists of the unloading and loading of trucks for Central Hardware at the Cervantes Convention Center during the annual Tinker Show.

C. *Contentions of the Parties*

Central Hardware contends that the work in dispute should be awarded to employees represented by UFCW Local 655 based on the fact that it has a collective-bargaining agreement with UFCW Local 655 and no contract with Teamsters Local 600, employer preference, past practice, and economy and efficiency.

Teamsters Local 600 contends that there is no jurisdictional dispute because UFCW Local 655 has disclaimed an interest in the work. In the event the Board determines to the contrary, Teamsters Local 600 argues the disputed work should be awarded to Teamsters-represented employees based on a number of factors, including area and industry practice and relative skill.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

Teamsters Local 600 and Central Hardware stipulated that the Teamsters demanded the Employer assign the disputed work to Teamsters-represented employees, that the Teamsters threatened to picket and did picket when the Employer did not assign the work to Teamsters-represented employees, and that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. Teamsters Local 600 and Central Hardware also stipulated there is no agreed-on method for the adjustment of this dispute to which the parties are bound.

Regarding the purported disclaimer by UFCW Local 655, it is well established that when a party to a jurisdictional dispute effectively renounces its claim to the work in question, the Board considers the dispute to be at an end and quashes the notice of hearing. *Operating Engineers Local 369 (Sustin Co.)*, 255 NLRB 476, 478 fn. 1 (1981). It is also well established that the party raising such an issue "has the burden to satisfy the Board's requirements of a clear, unequivocal, and unqualified disclaimer of all interest in the work in dispute." *Operating Engineers Local 77 (C. J. Coakley Co.)*, 257 NLRB 436, 438–439 (1981). Teamsters Local 600 argues that the two letters that UFCW Local 655 sent to the Board constitute an effective disclaimer of the work in dispute. Based on the particular circumstances presented, we disagree.

First, we think it important to observe that the party which purportedly disclaimed the work is not the party asserting there was a disclaimer. UFCW Local 655 may, of course, show there was a disclaimer by another union, but merely introducing letters from another union, which, for reasons stated below, are best ambiguous, without presenting agents of the other union to testify in order to explain the ambiguous communications falls far short of establishing an effective disclaimer.[2] Further, although UFCW Local 655 sent letters to the Board in December 1987, it did not send these letters to the Employer. During roughly the same time period it was allegedly disclaiming the work in its letters to the Region, UFCW Local 655 was negotiating a new collective-bargaining agreement with the Employer. Despite the fact that it had been performing the disputed work for over 11 years and that it concurrently was sending letters to the Region allegedly disclaiming the work, UFCW Local 655 did not discuss the work in question during such negotiations, nor did it seek to clarify the work UFCW Local 655-represented employees were to perform at future Tinker Shows to exclude the disputed work. The failure of UFCW Local 655 to raise these matters during the negotiations in light of its long-existing practice of performing the work is conduct inconsistent with its disclaiming the loading and unloading work.

Under all the circumstances presented, therefore, we cannot conclude that Teamsters Local Union No. 600 has established that there was an effective disclaimer and that UFCW Local 655 has clearly, unequivocally, and unqualifiedly renounced interest in having the disputed work assigned to employees it represents.[3]

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

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[2] Although served with notice of the 10(k) hearing, UFCW Local 655 was not present at the hearing.

[3] *Operating Enginners Local 825 (Patock Construction)*, 285 NLRB 1211 (1987), is distinguishable. In that case a disclaimer was found effective where, unlike here, the disclaiming union renewed its disclaimer to the Region at the hearing and in its briefs to the Board. Further, there was no evidence in *Patock* that the allegedly disclaiming union engaged in conduct inconsistent with the existence of a disclaimer.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

There was no evidence presented that either union has been certified by the Board as the collective-bargaining representative of any of the employees involved. Accordingly, this factor is not helpful in determining the dispute.

Teamsters Local 600 and Central Hardware have no collective-bargaining agreement. Central Hardware and UFCW Local 655 have a collective-bargaining agreement which does not contain a description of unit work. Accordingly, we find that this factor does not favor either group of the employees involved.

2. Company preference and past practice

Central Hardware has assigned the work in dispute to its own employees represented by UFCW Local 655 since 1977. Central Hardware prefers to continue assigning this work to employees represented by UFCW Local 655. This factor favors an assignment of the work to employees represented by UFCW Local 655.

3. Area and industry practice

Robert Ramshaw, the Teamsters Local 600 business agent responsible for the Convention Center and the Teamsters' hiring hall, testified that Teamsters-represented employees have historically unloaded and loaded freight at the Cervantes Convention Center for all the shows and exhibitions that are held there. At the same convention center, UFCW Local 655-represented employees have performed the disputed work for Central Hardware for over 11 years. No evidence was presented as to which Unions represent employees performing freight handling for other exhibitions in the St. Louis area.

We find the record inconclusive regarding area and industry practice. Accordingly, these factors do not favor an award of the disputed work to individuals represented by Teamsters Local 600 or UFCW Local 655.[4]

4. Relative skills

Teamsters Local 600 claims that employees it represents are more skilled in performing the work in dispute because of familiarity with the unusual safety considerations of the Cervantes Convention Center. After reviewing the evidence pertaining to the skills of the two groups, we find that both are equally capable of performing the work.

Accordingly, we find that this factor does not favor either group.

5. Economy and efficiency of operations

We find, based on the testimony of Stephen East, the executive vice president of Central Hardware, that utilizing UFCW Local 655-represented employees is more efficient. East's testimony establishes that because of Central Hardware's employees' familiarity with the merchandise, it is not necessary to label the boxes to be loaded and unloaded and the employees require less supervision. Additionally, the Employer would need its employees at the Convention Center to set up the display booths even if it assigned the unloading and loading of the trailers to Teamsters-represented employees. Thus Central Hardware would have to compensate and manage its employees as well as Teamsters-represented employees for work currently satisfactorily performed by only one group of employees.

Accordingly, we conclude the record establishes that the factors of efficiency and economy of operations favor awarding the work to employees represented by UFCW Local 655.

Conclusions

After considering all the relevant factors, we conclude that employees represented by UFCW Local 655 are entitled to perform the work in dispute. We reach this conclusion relying on employer preference and past practice and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by UFCW Local 655, not to that Union

[4] Member Babson notes that, were the factor of "area practice" limited to the Convention Center, it is clear, as the Employer itself implicitly concedes, that this factor would favor employees represented by Teamsters Local 600 but he further notes the lack of evidence regarding the practice in the St. Louis area generally. Moreover, he notes Teamsters' contention that an agreement between it and certain other unions whose members perform work at the Convention Center gives it jurisdiction over loading and unloading freight at the Center, but he notes also that UFCW Local 655 is not a signatory to this agreement. He gives this agreement little weight, at the least because of the Employer's longstanding contrary past practice. Cf. *Operating Engineers Local 150 (Components, Inc.)*, 197 NLRB 569 (1972).

or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Central Hardware represented by United Food and Commercial Workers Union, Local 655, affiliated with United Food and Commercial Workers International Union, AFL–CIO, are entitled to unload and load trucks for Central Hardware Company at the Cervantes Convention Center during its annual Tinker Show.

2. Highway, City and Air Freight Drivers, Dockmen, Marine Officers Association and Helpers, Teamsters Local Union No. 600, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Central Hardware Company to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Teamsters Local 600 shall notify the Regional Director for Region 14 in writing whether it will refrain from forcing the Central Hardware Company, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

International Longshoremen's and Warehousemen's Union, Local 13; and International Longshoremen's and Warehousemen's Union, Local 63 *and* Sea-Land Service, Inc. (Pacific Division) and General Truck Drivers, Chauffeurs & Helpers Union, Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO,[1] Party in Interest. Case 21–CD–514

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On August 17, 1983, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondents filed exceptions and a supporting brief, and the Charging Party filed a brief in reply to the Respondents' exceptions and in support of the judge's decision. The Respondents then filed a motion to strike certain portions of the Charging Party's brief or, in the alternative, to file a supplemental brief.[2] The Charging Party filed a reply to the Respondent's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions, as modified below, and to adopt the recommended Order as modified, and set forth in full below.[4]

The facts are set forth fully in the judge's decision. The judge found, and we agree, that Respondent Local 13 violated Section 8(b)(4)(ii)(D) when its agent, Lomelli, threatened a work stoppage if employees represented by the Teamsters were permitted to perform the disputed work. Contrary to the judge, however, we do not find that Lomelli's threat can be attributed to Respondent Local 63. Evidence is lacking that Respondent Local 63 authorized Lomelli to act on its behalf, or that it ratified the threat either expressly or by its conduct. These circumstances distinguish this case from cases in which the Board has concluded that an agency relationship existed between sister locals. See, e.g., *Plumbers Local 119 (Kamtech)*, 264 NLRB 688, 690–691 (1982).

However, we agree with the judge's conclusion that the Respondents violated Section 8(b)(4)(ii)(D) by filing time-in-lieu grievances. In doing so, we rely on the fact that the grievances sought payments for work that was explicitly included in the Board's prior 10(k) award to Teamsters-represented employees or, as the judge found, "clear[ly]" incident to that work.[5] The Respondents therefore unlawfully sought to undermine the Board's award. *Longshoremen ILWU Local 32 (Weyerhaeuser)*, 271 NLRB 759 (1984), enfd. sub nom. *Longshoremen ILWU Local 32 (Weyerhaeuser) v. Pacific Maritime Assn.*, 773 F.2d 1012 (9th Cir. 1985), cert. denied 476 U.S. 1158 (1986).[6]

For the reasons set forth in the *Weyerhaeuser* decisions, supra, we reject the Respondents' contention that the Board is precluded from enjoining the grievances by *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). In *Bill Johnson's*, the Supreme Court held that "the Board may not halt prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact and law." 461 U.S. at 748.

In *Weyerhaeuser*, the Board applied the *Bill Johnson's* rationale to consider the Board's authority to enjoin a Section 301 lawsuit. The Board in *Weyerhaeuser* found that *Bill Johnson's* did not compel staying Board proceedings while the Section 301

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] We deny the Respondents' motion because, with one exception, we have not relied on those portions of the Charging Party's brief that the Respondents seek to strike. We note that the Respondents objected, inter alia, to the Charging Party's reliance on *Longshoremen ILWU Local 32 (Weyerhaeuser)*, 271 NLRB 759 (1984), in support of its argument that the Respondents have a "coast-wide policy" of misconduct. At the time of the Charging Party's brief and the Respondents' motion, *Weyerhaeuser* was still pending before the Board. Of course, we may now rely on *Weyerhaeuser* because it has issued, but we find it unnecessary to consider the Charging Party's argument that the Respondents have a coast-wide policy of misconduct.

[3] In sec. III,B, par. 3 of his decision, the judge erroneously referred to January 10, 1987, rather than to 1983. We correct this inadvertent error.

[4] We shall modify the judge's recommended Order to accord with our findings below, and we shall also order that Sea-Land, Container Stevedoring Company, Inc., and Pacific Maritime Association be reimbursed for the time-in-lieu payments that they made to the Respondents. Cf. *United Marine Division Local 333 (MOTC Acquisitions)*, 226 NLRB 1214 (1976).

The judge ordered the Respondents to cease and desist from failing and refusing to comply with the Board's previous Decision and Determination of Dispute, 258 NLRB 412 (1981). Noncompliance with a determination of the Board under Sec. 10(k) is not itself a violation of Sec. 8(b)(4)(D); it serves, instead, to trigger the issuance of a complaint. *Longshoremen ILWU Local 6 (Golden Grain)*, 289 NLRB 1 fn. 3 (1988). We shall modify the recommended Order and notice accordingly.

[5] Contrast *Broadcast Employees NABET (Metromedia)*, 255 NLRB 372 (1981), petition for review dismissed as moot 676 F.2d 711 (9th Cir. 1982), in which the 10(k) award's interpretation was open to reasonable doubt. The Board thus found lawful the union's Sec. 301 suit to arbitrate the employer's failure to assign work arguably not covered by the award.

[6] With respect to Local 63, we do not base our findings on the fact that its grievances sought payments for employees performing clerks' work. That work was not within the 10(k) award. Clerks' work arises, however, only when the disputed work is assigned to Local 13, contrary to the 10(k) award. Thus, Local 63's grievances undermine the award in the same manner as Local 13's.

In finding Respondent Local 63 violated the Act, we find it unnecessary to rely on *Detroit Building Trades Council (Chatham Supermarkets)*, 259 NLRB 970 (1982), cited by the judge.

suit was pending in a case in which the General Counsel alleged the respondent union unlawfully filed work-assignment grievances and the lawsuit despite a contrary 10(k) award. The Board relied in part on *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964), in which the Court held that Board's rulings under Section 10(k) "take precedence" over contrary arbitration awards, and that an employer who acts in accordance with a Board ruling will not be liable for damages under Section 301. Thus, the Board found *Carey* deprived the Section 301 suit of a reasonable basis in fact and law.

Like the respondents in *Weyerhaeuser*, the Respondents here filed grievances contrary to a 10(k) award. The grievances thus lacked a reasonable basis in fact and law, and *Bill Johnson's* therefore does not preclude the Board from enjoining the Respondent's grievances.

Accordingly, we conclude that by filing grievances with an unlawful motive and without a reasonable basis in fact or law, the Respondents violated Section 8(b)(4)(ii)(D) of the Act.

ORDER

The National Labor Relations Board orders that

A. Respondent International Longshoremen's and Warehousemen's Union, Local 13, Long Beach, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Filing time-in-lieu claims for work performed by members of General Truck Drivers, Chauffeurs and Helpers Union, Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Local 692), with an object of forcing or requiring Sea-Land Service, Inc. (Pacific Division) (Sea-Land) and/or Container Stevedoring Company, Inc. (Container), to assign, contrary to the Board's Decision and Determination of Dispute reported at 258 NLRB 412, the work described below to employees represented by International Longshoremen's and Warehousemen's Union, Local 13 (Local 13), rather than to employees represented by Local 692. The work consists of:

> The transportation and grounding of containers outside the container yard, and the work incident thereto, the return of such containers to the container yard, and the work incident thereto, the temporary staging of containers outside the container yard, and the work incident thereto, and the return of such containers to the container yard, and the work incident thereto, at the Long Beach, California, facility of Sea-Land Service, Inc. (Pacific Division), and at the nearby Pelican Pond area.

(b) Threatening to engage in a work stoppage with an object of forcing or requiring Sea-Land and/or Container to assign the work described above to employees represented by Local 13, rather than to employees represented by Local 692.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and cease filing time-in-lieu claims that have an object of forcing or requiring Sea-Land and/or Container to assign, contrary to the Board's Decision and Determination of Dispute reported at 258 NLRB 412, the work described above to employees represented by Local 13, rather than to employees represented by Local 692.

(b) Reimburse Sea-Land, Container, and the Pacific Maritime Association for any time-in-lieu payments made to it pursuant to claims filed on January 10, 11, and 18, and on March 29, 1983.[7]

(c) Post at its office and meeting halls copies of the attached notice marked "Appendix A."[8] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and mail sufficient copies of the notice to the Regional Director for posting by Sea-Land and Container, if they are willing, at all locations on the jobsite where notices to employees are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondent International Longshoremen's and Warehousemen's Union, Local 63, Long Beach, California, its officers, agents, and representatives, shall

1. Cease and desist from filing time-in-lieu claims with an object of forcing or requiring Sea-Land and/or Container to assign, contrary to the Board's Decision and Determination of Dispute reported at

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[7] The record does not clearly establish which of the Employers made the time-in-lieu payments. Of course, we intend that reimbursement be made only to the Employer that actually made the payments.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

258 NLRB 412, the work described below to employees represented by Local 13, rather than to employees represented by Local 692. The work consists of:

> The transportation and grounding of containers outside the container yard, and the work incident thereto, the return of such containers to the container yard, and the work incident thereto, the temporary staging of containers outside the container yard, and the work incident thereto, and the return of such containers to the container yard, and the work incident thereto, at the Long Beach, California, facility of Sea-Land Service, Inc. (Pacific Division), and at the nearby Pelican Pond area.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and cease filing time-in-lieu claims that have an object of forcing or requiring Sea-Land and/or Container to assign, contrary to the Board's Decision and Determination of Dispute reported at 258 NLRB 412, the work described above to employees represented by Local 13, rather than to employees represented by Local 692.

(b) Reimburse Sea-Land, Container, and the Pacific Maritime Association for any time-in-lieu payments made to it pursuant to claims filed on January 10, 11, and 18, and on March 29, 1983.[9]

(c) Post at its office and meeting halls copies copies of the attached notice marked "Appendix B."[10] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and mail sufficient copies of the notice to the Regional Director for posting by Sea-Land and Container, if they are willing, at all locations on the jobsite where notices to employees are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] As we noted above in fn. 7, we intend that reimbursement be made only to the Employer that actually made the payments.

[10] See fn. 8, above.

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT file time-in-lieu claims for work performed by members of General Truck Drivers, Chauffeurs and Helpers Union, Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO with an object of forcing or requiring Sea-Land Service, Inc. (Pacific Division) (Sea-Land) and/or Container Stevedoring Company, (Container) to assign, contrary to the Board's Decision and Determination of Dispute reported at 258 NLRB 412, the work described below to employees whom we represent rather than to employees represented by the Union described above. The work consists of:

> The transportation and grounding of containers outside the container yard, and the work incident thereto, the return of such containers to the container yard, and the work incident thereto, the temporary staging of containers outside the container yard, and the work incident thereto, and the return of such containers to the container yard, and the work incident thereto, at the Long Beach, California, facility of Sea-Land Service, Inc. (Pacific Division), and at the nearby Pelican Pond area.

WE WILL NOT threaten to engage in a work stoppage with an object of forcing or requiring Sea-Land and/or Container to assign the work described above to employees whom we represent rather than to employees represented by the Union described above.

WE WILL withdraw and cease filing time-in-lieu claims that have an object of forcing or requiring Sea-Land and/or Container to assign, contrary to the Board's Decision and Determination of Dispute, the work described above to employees whom we represent rather than to employees represented by the Union described above.

WE WILL reimburse Sea-Land, Container, and the Pacific Maritime Association for any time-in-lieu payments made to us pursuant to claims that

we filed on January 10, 11, and 18, and on March 29, 1983.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 13

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT file time-in-lieu claims with an object of forcing or requiring Sea-Land Service (Pacific Division) (Sea-Land) and/or Container Stevedoring Company (Container) to assign, contrary to the Board's Decision and Determination of Dispute reported at 258 NLRB 412, the work described below to employees represented by International Longshoremen's and Warehousemen's Union, Local 13, rather than to employees represented by General Truck Drivers, Chauffeurs and Helpers Union, Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. The work consists of:

> The transportation and grounding of containers outside the container yard, and the work incident thereto, the return of such containers to the container yard, and the work incident thereto, the temporary staging of containers outside the container yard, and the work incident thereto, and the return of such containers to the container yard, and the work incident thereto, at the Long Beach, California, facility of Sea-Land Service, Inc. (Pacific Division), and at the nearby Pelican Pond area.

WE WILL withdraw and cease filing time-in-lieu claims which have an object of forcing or requiring Sea-Land and/or Container to assign, contrary to the Board's Decision and Determination of Dispute, the work described above to employees represented by International Longshoremen's and Warehousemen's Union, Local 13, rather than to employees represented by General Truck Drivers, Chauffeurs, and Helpers Union, Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.

WE WILL reimburse Sea-Land, Container, and the Pacific Maritime Association for any time-in-lieu payments made to us pursuant to claims that we filed on January 10, 11, and 18, and on March 29, 1983.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 63

Lucy Acevedo, Esq., for the General Counsel.
William H. Carder and *Richard Zuckerman, Esqs. (Leonard & Carder)*, of San Francisco, California, for the Respondent.
Robert A. Attaway, Esq. (Barlow & Attaway), of Princeton, New Jersey, for the Charging Party.
Ann E. Isaac, of Iselin, New Jersey, for Sea-Land Industries, Inc.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Los Angeles, California, on May 17 and 18, 1983. The charge was filed on January 28, 1983, by Sea-Land Service, Inc. (Pacific Division) (Sea-Land).

Thereafter, on March 14, 1983, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by International Longshoremen's and Warehousemen's Union, Local 13, and International Longshoremen's and Warehousemen's Union, Local 63 (Respondents) of Section 8(b)(4)(ii)(D) of the National Labor Relations Act (the Act).

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for Respondent, and counsel for the Charging Party.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Sea-Land is a Delaware corporation engaged in the business of transporting containerized freight, and operates a marine facility in Long Beach, California. Sea-Land annually provides services valued in excess of $50,000 directly to customers who, in turn, annually sell and ship goods valued in excess of $50,000 directly to customers located outside the State of California. It is admitted, and I find, that Sea-Land is, and has been at all times material, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act; an employer within the meaning of Section 8(b)(4)(D) of the Act; and a person engaged in commerce or in an industry affecting com-

merce within the meaning of Section 8(b)(4)(ii)(D) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

It is admitted that the Respondents are, and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act; and that General Truck Drivers, Chauffeurs & Helpers Union, Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Teamsters) is and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue raised by the pleading is whether the Respondents have violated Section 8(b)(4)(ii)(D) of the Act by unlawfully attempting to cause Sea-Land to assign certain work to their members rather than to members of another labor organization, in violation of a prior Board Decision and Determination of Dispute.

B. *The Facts*

The facts are substantially as set forth in the Board's prior Decision and Determination of Dispute issued on September 30, 1981, involving the identical parties, and reported at 258 NLRB 412. In that case, the Board made the following determination at 415:

> Employees of Sea-Land Service, Inc. (Pacific Division), who are represented by General Truck Drivers, Chauffeurs & Helpers Union, Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are entitled to perform the work of the transportation and grounding of containers outside the container yard, and the work incident thereto, the return of such containers to the container yard, and the work incident thereto, the temporary staging of containers outside the container yard, and the work incident thereto, and the return of such containers to the container yard, and the work incident thereto, at the Long Beach, California, facility of Sea-Land Services, Inc. (Pacific Division), and at the nearby Pelican Pond area.

Thereafter, on October 14, 1981, Respondent International Longshoremen's and Warehousemen's Union, Local 13, filed a motion for reopening of record and reconsideration of decision, contending that the Board should reopen the record to consider relevant provisions of various contracts, which, as the original decision noted, were not admitted into evidence at the hearing. On January 28, 1982, the Board denied the motion as lacking in merit.

From the time of the 10(k) award until January 10, 1982, Sea-Land extensively continued the aforementioned work at Pelican Pond[1] utilizing Teamsters members, without incident. The work during this time included grounding and staging and also flipping, bundling, and unbundling of chassis (infra).

On January 10, 1983, Respondents submitted a grievance seeking time-in-lieu payments as provided by their contract with Container Stevedoring Company, which supplies Sea-Land with employees represented by Respondents for performing work related to the loading and unloading of ships at Sea-Land's marine yard. The grievance claim was that Respondents should have been given the work that was performed at Pelican Pond that very day by Teamsters members employed by Sea-Land. An immediate arbitration proceeding was held, in which the Teamsters were not a party, and on January 13, 1983, the arbitrator determined the issue in favor of the Respondents. Despite this arbitrator's award, and a prior arbitration award,[2] Sea-Land continued to use Teamsters employees to perform whatever work was required at Pelican Pond.

Gene Borg, a manager for Container Stevedoring Company, testified that on January 24, 1983, he received a call from Richard Lomelli, a relief business agent with Local 13. Lomelli stated he was calling to investigate a rumor that Sea-Land was doing work in Pelican Pond. Borg said he would investigate and call back. Thereafter, Borg called Lomelli and indicated that the "top handler," a large piece of equipment that lifts containers from the top four corners,[3] had been used by Teamsters employees at Pelican Pond. Lomelli said, "Lou [Louis Loveridge, president of Local 13] told me to go down to the Sea-Land facility, and if the Teamsters were using the top handler in the Pelican Pond, to walk the gang if they're working a ship." Borg's testimony stands unrebutted in the record.

As a result, to avoid a work stoppage that would interrupt the schedules of the sea-going vessels Sea-Land has discontinued using Pelican Pond. Respondents have claimed time-in-lieu payments for all work performed by the Teamsters at Pelican Pond on January 10, 11, and 18 and March 29, when Sea-Land removed the remaining empty grounded containers, and time-in-lieu claims in the amount of about $4300 have been paid.

Louis W. Rios is secretary-treasurer of Local 13. Rios testified that regarding the current dispute the officers of Respondent were instructed by officers of the International Union to follow the Board's Section 10(k) ruling, but to also follow the contractual grievance procedure and continue to file time-in-lieu claims because the work in dispute is work belonging to Respondents. Rios testified that it is Local 13's position that it is entitled to perform the work of the transportation and grounding of containers outside the container yard at the Pelican Pond; the temporary staging of containers at Pelican Pond and the work incident thereto; and the return of

[1] Pelican Pond is the name given to an unenclosed 1-acre paved area across the street from Sea-Land's marine yard.

[2] As noted in the Board's Decision and Determination of Dispute, in an earlier 1980 arbitration proceeding in which the Teamsters were not a party, the work at Pelican Pond was awarded to Respondents.

[3] The record shows that Teamsters members performed the same work at Pelican Pond with the top handlers as they had performed with forklifts, but that the characteristics of the top handler enable the various functions to be performed more safely and efficiently.

such containers from the Pelican Pond to the marine yard and the work incident thereto. In summary, Rios admitted that the Union is continuing to claim all the work that was the subject of the 10(k) hearing.

Respondents take the position that the more recent work performed by Teamsters at Pelican Pond in January 1983 was not work specifically covered by the 10(k) award. Rather, the work included not only grounding or staging, but also flipping of containers, and bundling and unbundling of chassis. As noted in the prior Board decision, "grounding" is defined as the removal of the container from the chassis and setting it on the ground; "staging" is the parking of the chassis and container as a single unit. "Flipping" is the removal of a container from a chassis and substituting another chassis; "bundling" is the stacking of chassis on top of each other for the purpose of transporting them elsewhere or simply to conserve space; "unbundling" is the removal of the stacked chassis as they are needed. The record shows that all the work, when performed in the marine yard, was typically performed by members of Respondents with whatever available equipment could get the job done. Similar work outside the marine yard has typically been performed by members of the Teamsters with whatever available equipment was necesary to perform the work. Moreover, it is crystal clear that the flipping, bundling, and unbundling of chassis at Pelican Pond is work incident to the transportation of containers. This is true simply because it is necessary to have chassis available to move the containers, and sometimes the containers need to be flipped from one chassis to another in the event that a particular chassis, for various reasons, may not be appropriate.

C. *Analysis and Conclusions*

Respondent Local 13 fully participated in the aforementioned 10(k) proceeding and is bound by the award notwithstanding it was not the charged party therein. *National Assn. of Broadcast Employees (NABET)*, 230 NLRB 75 (1977). In the instant matter, the record shows that the position of both Respondents are identical. Moreover, they must necessarily work together at Sea-Land's marine yard, Local 13 members performing longshoremen's work and Local 63 members performing the related clerks work in connection therewith. Therefore, I find that Local 63 is properly a party here, and is also bound by the aforementioned award. See *Detroit Building Trades Council (Chatham Supermarkets)*, 259 NLRB 970 (1982).

It is clear, and I find, that Lomelli specifically threatened Borg with a work stoppage if the Teamsters were using the top handler to perform work at the Pelican Pond. The fact that Lomelli singled out the top handler does not diminish the clear record evidence that Respondent's threat was calculated to secure the work awarded to the Teamsters, as the top handler is merely a piece of equipment that was substituted for forklifts, to perform the identical work the Board determined properly belonged to the Teamsters.

Respondents contend that the time-in-lieu claims are not violative of the 10(k) award. In *National Assn. of Broadcast Employees*, 255 NLRB 372 (1981), the Board stated at 374:

> [W]hen, as here, a respondent pursues its legal remedies for an arguably meritorious claim under a properly negotiated collective-bargaining agreement and the record fails to disclose extrinsic evidence of threats, restraint, or coercion of the employer, we are unable to conclude that it has done more than its status as employee representative authorizes.

In the instant case, however, Respondents' time-in-lieu claims cannot be viewed in isolation, but must be perceived as related to the Lomelli's threat, thus providing extrinsic evidence of the Respondents' unlawful intent in filing the time-in-lieu claims.

Further, contrary to the cases cited by Respondents, the instant factual situation is not one that may be characterized on "work preservation." In dismissing a 10(k) notice of hearing because the controversy legitimately involved work preservation rather than a jurisdictional dispute, the Board stated in *Seattle Building & Trades Council (Seattle Olympic Hotel)*, 204 NLRB 1126, 1127 (1973), cited by Respondent:

> Before the Board may proceed to a determination of dispute under Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. On the record before us, we are not satisfied that any such violation has occurred in this case.
>
> The present dispute is in significant respects similar to those cases in which the Board has found that a union was attempting to protect and preserve work which had traditionally been performed by its members and that such disputes are not the type of controversy Congress intended the Board to resolve pursuant to Section 8(b)(4)(D) and Section 10(k) of the Act. Further, the record herein fails to establish competing claims between classes of employees or any dispute over the assignment of particular work. Our conclusion is that Respondent picketed for a lawful objective, i.e., to regain work for four employee craftsmen who were members of the crafts which had traditionally performed the work for Olympic for many years along with Olympic's maintenance staff. Accordingly, we find that no jurisdictional dispute exists and we shall therefore quash the notice of hearing.

In the instant case the work that Respondents allegedly are attempting to "preserve" is the very work, and work incidental thereto as found which has been determined by the Board to belong to the Teamsters, following a threat by the Teamsters, as noted by the Board's decision, in the event the work was given to Respondents. Such work, outside the marine yard, has never been performed by Respondents' members but has always been performed by members of the Teamsters at various locations, even prior to Sea-Land's acquisition of Pelican Pond. The competing claims and disputes by the two labor organizations over the assignment of the work are crystal clear. Thus, I find Respondents' work-preservation claim to be without merit, as the dispute is singularly jurisdictional in nature.

On the basis of the foregoing, I find that the Respondents have failed to comply with the Board's Decision and Determination of Dispute, and by threats and the filing of time-in-lieu claims, have violated Section 8(b)(4)(ii)(D) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondents International Longshoremen's and Warehousemen's Union, Local 13 and International Longshoremen's and Warehousemen's Union, Local 63 are Labor organizations within the meaning of Section 2(5) of the Act.

2. Sea-Land Service, Inc. (Pacific Division) is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondents have engaged in unfair labor practices proscribed by Section 8(b)(4)(ii)(D) of the Act by failing and refusing to honor and comply with the Board's Decision and Determination of Dispute reported in 258 NLRB 412 by threatening a work stoppage to force or require Sea-Land Service Inc. (Pacific Division), and/or Container Stevedoring Company, to assign particular work to its members, and by filing "time-in-lieu" claims for work performed by members of the Teamsters, with an object of forcing or requiring Sea-Land Service, Inc. (Pacific Division), and/or Container Stevedoring Company, to assign the work described below to employees represented by Respondents rather than to employees represented by the Teamsters.

The work consists of:

> The transportation and grounding of containers outside the container yard, and the work incident thereto, the return of such containers to the container yard, and work incident thereto, the temporary staging of containers outside the container yard, and the work incident thereto, and the return of such containers to the container yard, and the work incident thereto, at the Long Beach, California facility of Sea-Land Services, Inc. (Pacific Division), and at the nearby Pelican Pond area.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent have engaged in unfair labor practices proscribed by Section 8(b)(4)(ii)(D) of the Act, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

[Recommended Order omitted from publication.]

American Pacific Concrete Pipe Company, Inc. *and* General Truck Drivers, Warehousemen and Helpers Union 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] Case 31–CA–10098

July 29, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On February 22, 1985, Administrative Law Judge Clifford H. Anderson issued the attached supplemental decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and both parties filed answering briefs.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions,[4] to modify the remedy,[5] and to adopt the recommended Order as modified.

The judge found that although the Respondent paid Donald Roland $20,000 to settle his backpay claim, Roland is entitled to additional backpay because the General Counsel did not approve the settlement agreement. The Respondent argues that the settlement was an accord and satisfaction barring litigation on Roland's backpay issue. We agree with the Respondent.

On November 23, 1983, a month before the present backpay specification proceedings began, Roland, the Respondent, and the Union signed an agreement waiving Roland's backpay claim against the Respondent in return for $20,000 from the Respondent. The judge expressly found in footnote 14 of his decision that the circumstances surrounding the backpay waiver were not coercive and Roland freely entered into the settlement. The General Counsel, who was apparently unaware that Roland had relinquished his backpay claim, subsequently refused to approve the settlement agreement.

In rejecting the Respondent's accord-and-satisfaction defense, the judge relied on *Michael M. Schaefer*, 261 NLRB 272 (1982), enfd. 697 F.2d 558 (3d Cir. 1983), which held that backpay is a public, not a private right, which only the Board or the Regional Director may settle.[6] In *Independent Stave Co.*, 287 NLRB 740 (1987), however, we recently held that in evaluating non-Board settlements the Board would examine all the surrounding circumstances including whether the charging party, the respondent, and the discriminatee had agreed to be bound, and the General Counsel's position regarding the settlement; whether the settlement was reasonable in light of the alleged violation, the risks of litigating the issue, and the stage of litigation; whether fraud, coercion, or duress were present; and whether the respondent has a history of violations or has breached previous settlement agreements.

At the outset, we recognize that the *Independent Stave* settlement occurred shortly after the complaint issued and before adjudication of the issues, and that the present case arose after Roland's dis-

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We agree with the judge that it is impossible to reconstruct Robert Craig's interim earnings because of his testimonial inconsistencies, the commingling of his personal and business affairs, and the lack of sufficient credible evidence to establish or even reasonably approximate income received during the interim periods. The judge concluded that Craig received substantial income that the record does not address. In addition, the record shows that Craig received interim income in the form of cash payments, the amount of which we are unable to determine with certainty.

We agree with the judge's treatment of Boothby's supplementary income, including the vacations Boothby took that the judge failed to mention in his decision. We find *NLRB v. Mercy Peninsula Ambulance Service*, 589 F.2d 1014 (9th Cir. 1979), on which the Respondent relies, distinguishable. Boothby's backpay period extended almost 39 months. He was employed in various jobs for 20 months during the period. In addition to Boothby's 59 specific attempts to find work, the judge credited Boothby's statement that the compliance forms did not reflect all the employers he contacted. We agree with the judge's finding that Boothby's search easily meets the Board's due-diligence standards and that the Respondent did not establish that he failed to mitigate his losses.

Moreover, in *Mercy*, the court relied on several factors to deny enforcement of the Board's backpay order, including the claimant's statement that he could have obtained employment after his discharge but chose not to do so. The court was unimpressed with "the quantity and the quality of (the claimant's) efforts and the fact that they were executed with such disinterest." *Mercy*, supra at 1019 fn. 6. Unlike the *Mercy* claimant, who had no interim employment, Boothby was employed for over half his backpay period, and there is no evidence that his attempts to find work were disinterested or insincere.

[5] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[6] In enforcing the Board's Order in *Schaefer*, the court held only that, under the facts of that case, the Board did not abuse its discretion in refusing to defer to two private settlement agreements. The court acknowledged that the Board and court authority exists approving "private settlement agreements negotiated in good faith involving mutual concessions and benefits." 697 F.2d at 561.

The judge observed that in *Stevens Ford*, 271 NLRB 628, 632 (1984), an administrative law judge, with Board approval, cited *Schaefer*. The factors in *Stevens Ford*, however, reveal that no private settlement agreement was ever negotiated. 271 NLRB at 630, 632. Therefore, reliance on the *Schaefer* doctrine was unnecessary to support the result the Board reached.

charge had been fully adjudicated and found to be an unfair labor practice. Although liability is established and the only issue now before us is the backpay amount due Roland, backpay litigation also entails risks and uncertainties that must be considered in evaluating the appropriateness of accepting a settlement agreement in lieu of pursuing further litigation. For example, a backpay claim cannot be perfected if it is shown that the discriminatee failed to mitigate losses, or the discriminatee's testimony about his interim employment is discredited. Further, issues regarding the validity of reinstatement offers or the discriminatee's fitness for re-employment can be and often are resolved against discriminatees in backpay litigation. Even if the discriminatee prevails at every step of the process, and in every particular of his backpay claim, he often must wait years to receive any backpay. If, in the interim, the employer's business has declined, the discriminatee may receive less than he won through litigation. These hazards are present to varying extents in all backpay litigation.

Here, the General Counsel contended that the Respondent owed Roland $41,502, but the Respondent countered that it owed him nothing because he allegedly failed to diligently seek interim employment and misrepresented his interim earnings. The record does not disclose precisely why Roland agreed to settle for $20,000, but the credited testimony of Union Business Agent Norman Holman establishes that in the settlement discussions, inter alia, the Respondent asserted that the interim employment list Roland submitted to the unemployment office was inconsistent with the list Roland submitted to the General Counsel; Roland ascertained that the judge's decision was subject to appeal by the Respondent; and Holman asserted, in response to a question from Roland, that the Repondent had lost money in 1983. Consequently, when Roland agreed to accept about half the backpay the Respondent owed him in theory, he was aware that the Respondent was prepared to challenge his evidence, the outcome before the judge was not necessarily final, and the Respondent's financial condition could make a future award problematic. Thus, Roland was informed of the full range of possibilities that could result from further litigation of his backpay claim. On the one hand, he knew that the General Counsel claimed that he was owed $41,602 and, on the other hand, he knew of the potential risks posed by the Respondent to actually obtaining a full backpay award.

We conclude that the settlement agreement meets the standard set forth in *Independent Stave*. First, the Charging Party, the Respondent, and the discriminatee have agreed to be bound. Further, the parties most directly interested in assuring that Roland's rights be vindicated—Roland and his Union—voluntarily agreed to release Roland's backpay claim in exchange for $20,000.[7] Second, the parties executed the settlement agreement about a month before the backpay hearing began, and the settlement was reasonable considering the uncertainties inherent in litigation. Third, the judge expressly found that there was no coercion exerted in obtaining Roland's backpay waiver. Finally, there are no additional circumstances that might lead us to question the settlement, such as alleged history of violations or breaching of prior settlement agreements. Under all the circumstances, we conclude that honoring the parties' agreement advances the Act's purpose of encouraging dispute resolution and that, conversely, no overriding public-policy interest would be served by addressing the backpay issue's merits. We overrule such cases as *Michael M. Schaefer*, supra, and *Stevens Ford*, supra, to the extent they are inconsistent with this ruling.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, American Pacific Concrete Pipe Company, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete the following from the second paragraph.

"Donald Roland $20,375.97"

2. Substitute the following for the third paragraph.

"IT IS FURTHER ORDERED that the backpay specification as to Robert Craig and Donald Roland is dismissed."

CHAIRMAN STEPHENS, concurring.

I concur in the result.

[7] The General Counsel's position is that because the settlement amount was less than the backpay specification, the Board must refuse to honor the parties' settlement agreement in order to fulfill the Board's public obligation. The amount of recovery, however, is only one of many factors to be considered in determining whether to honor the parties' private agreement.

Rachel D. Young, Esq., for the General Counsel.
Carlos Bea and *Robert W. Richardson, Esqs.*, of San Francisco, California, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. On July 23, 1982, the Board issued its Decision and Order in the above-captioned case.[1] The Board's Decision and Order was enforced by the United States Court of Appeals for the Ninth Circuit on April 28, 1983.[2] The Decision and Order provided, inter alia:

> 3. All employees who may have suffered any loss of pay and benefits beginning on April 1, 1980, shall receive backpay, with interest and benefits, in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). [Footnote omitted.] Because the record is not clear with respect to the particular employees who were recalled or rehired, or when they were recalled or rehired, we will defer such a determination to the compliance stage of the proceeding.
>
> 4. All employees who may have been required to pay dues, fees, and moneys pursuant to the collective-bargaining agreement with United Brick and Clay Workers, Local No. 820, shall be reimbursed, with interest, by Respondent.

A dispute having arisen, inter alia, over the amount of backpay due certain individuals under the Order's provision "number 3," supra, and the amount of money due certain individuals in recompense for dues paid under the Order's provision "number 4," supra, on September 23, 1983, the Regional Director for Region 31 of the National Labor Relations Board issued a backpay specification and notice of hearing, which was subsequently amended both at the hearing and after its close.[3] Respondent filed a timely answer, which answer was also amended at the hearing. The matter was heard by me in Los Angeles, California, on various dates in December 1983 and January, February, June, and October 1984.[4]

On the entire record, including posthearing briefs submitted by the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. DUES REIMBURSEMENT

The amounts of dues reimbursement alleged in the backpay specification as amended are essentially admitted by Respondent. Based on the stipulations of the parties, I make the following findings regarding amounts of money due the listed individuals, without interest:

William Martin[5]	$368.38
Robert Bornemann	428.26
Bobby Record	368.38
Ezell Record	378.28
Selvie Cole	15.00
Dennis Lilly	90.00
Robert Delgado	130.00
Jess Fernandez	80.00

II. BACKPAY

A. *Gross Backpay Determination*

There were three backpay claimants at issue: Charles Boothby Jr., Robert E. Craig, and Donald E. Roland. There was no dispute that their backpay period commenced on April 1, 1980, and extended through June 18, 1983. The General Counsel established, and Respondent does not dispute, the propriety of the backpay specification's backpay formula and the application of that formula to the three individuals involved here to produce gross backpay calculated on a quarterly basis. Accordingly, the gross backpay calculations as alleged in the backpay specification, as amended, are found to be correct.

B. *Deductions from Gross Backpay*

The parties closely litigated a variety of issues concerning each of the backpay claimants.[6] The complexity of the legal and factual arguments as well as the differing situations and circumstances of the claimants make it appropriate to discuss the contentions regarding each claimant separately.

1. Charles Boothby Jr.

a. *Argument and evidence*

Respondent challenges the General Counsel's backpay claim for Charles Boothby on several grounds. Initially Respondent asserts Boothby failed to mitigate his damages by actively seeking employment. Respondent further contends that Boothby's income during the backpay period as a housekeeper and as a beekeeper and as a member of the United States Air Force Reserve should be offset against any backpay due. Respondent argues that the failure to report such income in the proper manner requires that Boothby be penalized by denying him additional moneys otherwise due. Finally, Respond-

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[1] Reported at 262 NLRB 1223 (1982).

[2] 709 F.2d 1514 (mem.).

[3] Portions of the backpay specification withdrawn by the Regional Director at the hearing were the subject of litigation under the Equal Access to Justice Act. See *American Pacific Pipe Co.*, 271 NLRB 1171 (1984), reversed 788 F.2d 586 (9th Cir. 1986).

[4] Unfortunately the trial was posponed on several occasions because of the unavailability of relevant documentary evidence and the emergency unavailability of necessary witnesses.

[5] The parties stipulated the amount due and owing William Martin, with the following disagreement. The General Counsel contended that the noted sum alleged in the backpay specification is correct. Respondent argued that the General Counsel's amount was $10 too high because of an arithmetic error. There is no evident arithmetic error in the backpay specification regarding Martin. Inasmuch as Bobby Record's period of employment was identical to Martin, who was stipulated to be entitled to $368.38, I conclude that the larger amount is correct.

[6] In addition to the disputed amounts discussed, infra, the parties did not dispute the existence of certain interim earnings and expenses. Where not separately discussed, the earnings and expenses used here were admitted, stipulated, or supported by unchallenged, credible evidence.

ent raises a variety of additional defenses as will be discussed infra.

Concerning Respondent's claim that Boothby failed to mitigate his damages, Respondent argues that Boothby did not actively seek employment during the period. Boothby testified that he sought work from various employers during the backpay period, which efforts were at least in part reflected on the Regional Office compliance forms he prepared pursuant to the instructions of the Regional compliance officer. Respondent adduced evidence from certain agents of the employers that Boothby testified he contracted his employment search. In some cases, Respondent established that particular employers maintained a policy requiring all job seekers to file written applications but that no Boothby application could be found in the files. Concerning the Riverside Transit Agency, an employer Boothby asserted he contacted regarding employment, Respondent adduced evidence that at the relevant time Riverside Transit had a position available and that its practice was to list all job applicants on a log, which log contained no entry of Boothby's having ever applied for the position. Respondent further adduced evidence that with respect to at least one job application submitted by Boothby to Riverside Community Hospital, Boothby indicated he would not accept night or weekend work.

In rebuttal, Boothby testified that in his employment search he did not in each case submit an application or physically visit the employer's premises. Thus, for example, with respect to Riverside Transit, Boothby testified he had a telephone conversation with an employer's agent in which he identified himself as a job seeker with truckdriving experience and was told that he need not apply for the available position because busdriving was required.

Boothby received income through the backpay period associated with his activities as a beekeeper from the sale of beekeeping equipment, honey, the lease of bees, and receipt of pollination fees. The General Counsel contends that these revenues were supplementary income resulting from a longstanding hobby that had been maintained before the commencement of the backpay period, including the period of Boothby's employment with Respondent. Thus, the General Counsel alleges the income should not be considered as an offset to Respondent's backpay liability. Respondent contends first that the income should be deducted from any backpay obligation and, second, that Boothby's failure to disclose this income should be a factor in evaluating his credibility and should result in a penality being assessed for the wrongful withholding of such information. The General Counsel rejoins that the beekeeper income was not concealed but rather was not deemed by the General Counsel to be an offset to backpay.

Respondent argues that Boothby's annual 2-week active tour-of-duty with the United States Air Force Reserve constitutes a withdrawal from the job market for the period served. Respondent makes a similar argument with respect to a 2-week vacation undertaken by Boothby in August 1980. The General Counsel contends that service with the United States Air Force Reserve, even if not mandatory in the sense that application could be made for alternative means of serving, was undertaken during Boothby's employment with Respondent and hence could properly be continued during the backpay period without penalty to backpay recovery.

Further Respondent contends that the fact that Boothby sought medical care during what would have been working days if he was employed by Respondent removed him from being available to work on those days, thus justifying a proportional reduction in backpay. So too, Respondent contends that the backpay specification wrongfully includes health maintenance organization medical insurance premiums for the first two quarters of 1983 because Boothby's interim employers during that time maintained their own medical plans.

b. *Analysis and conclusions*

(1) Boothby's search for employment

It has long been clear that an employer may mitigate its backpay liability by establishing that the backpay claimant "will fully incurred" losses by a "clearly unjustifiable refusal to take desirable new employment." *Phelps Dodge v. NLRB*, 313 U.S. 177, 199–200 (1941). To establish such mitigation the employer's burden is to show that the individual "neglected to make reasonable efforts to find interim work." *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966). Success is not the measure of sufficiency of the discriminatee's search for interim employment; the law "only requires honest good faith effort." *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). "While the evidence may leave a question whether [the backpay claimant] could have been more diligent in seeking other employment, the highest standard of diligence is not required and doubts must be resolved against Respondent." *Otis Hospital*, 240 NLRB 173, 174 (1979).

In determining if the backpay claimant made a reasonable search for employment, the entire record must be considered in the context of the claimant's search over the entire backpay period. *Highview, Inc.*, 250 NLRB 549 (1980); *Saginaw Aggregates*, 198 NLRB 598 (1972); *Nickey Chevrolet Sales*, 195 NLRB 395, 398 (1972). Uncertainty in the evidence is to be resolved against the wrongdoer. *NLRB v. Miami Coca-Cola Bottling Co.*, supra.

Boothby's testimony with respect to his job search was credible and not effectively challenged by Respondent's evidence. Respondent contended that Boothby's outside income and his domestic circumstances should justify an inference of lack of motivation and diligence in seeking work. The Board has explicitly rejected such an argument in *Fibreboard Paper Products Corp.*, 180 NLRB 142, 148 (1969). Respondent further argues that its unchallenged evidence that in some cases Boothby did not actually receive or submit completed job applications to employers and, on at least one occasion, limited his job search to positions requiring work only during normal business hours and weekdays, impugns his credibility, and reveals a less-than-efficient job search.

I find Boothby's testimony consistent with Respondent's evidence for Boothby did not testify that he in each case left an employment application. Rather he testified

that he inquired of employers regarding availability of work and, when satisfied that no reasonable employment opportunity existed, he pursued the matter no further. Respondent's attempt to impeach Boothby here accordingly fails. (See, e.g., *Inland Empire Meat Co.*, 255 NLRB 1306 (1981); *Neely's Car Clinic*, 255 NLRB 1420 (1981).)

With repect to Boothby's job application on which he limited his employment availability to business hours and days, the record does not reflect that Boothby placed such a limitation on any other job application nor does it suggest that work would have been available had he not done so. Further even had Boothby placed such a limitation on each job application, it was not unreasonable for Boothby to try to obtain employment on the same basis he had experienced with Respondent. Respondent, who bears the burden in this area, has failed to establish that Boothby behaved unreasonably or with sufficient lack of diligence so as to toll backpay.

Considering the entire backpay period as a whole, including the periods in which interim employment was obtained at a wage rate in excess of that received from Respondent, and further noting that Boothby could not recall all the individual employers whom he contacted, but rather limited his itemization to the employers reported to the Board on its compliance forms, I find that Boothby's search for employment during the period easily meets the Board's standards for due diligence and that Respondent's efforts to prove failure of mitigation have failed.[7]

(2) The issues of supplementary income

The beekeeper income Boothby received presents issues of fact rather then law. The parties do not disagree with respect to to the law regarding additional income. Supplementary income received while employed by Respondent and continued during the backpay period is not treated as interim earnings deductible from backpay. *Cumberland Farms Dairy*, 266 NLRB 855 (1983); *Kansas Refined Helium Co.*, 252 NLRB 1156 (1980). Earnings from self-employment are however deductible from gross backpay. The issue then is whether the beekeeping revenues received by Boothby during the backpay period constituted a continuation of the supplementary income he had previously enjoyed or was rather and expansion of former supplementary income into part-time work of a type different from that undertaken during his employment with Respondent.

Considering the record testimony concerning the origin and amounts of the beekeeper moneys received by Boothby during the backpay period, I conclude that his beekeeping revenues did not constitute income of a kind different from that received during the period previous to the backpay period. Hence, I do not find that the revenues constitute an offset or diminution of Respondent's backpay obligation.[8] The revenues Boothby received derived from sales of honey, sales of equipment,[9] and the letting of bees for rent and other services. The supplying of these services did not occupy Boothby on a full-time basis nor would it have prevented him from accepting any employment offered. Disregarding the sales of equipment, which were in the nature of a divesture, the revenues received from Bootheby's beekeeping business during the backpay period, in the context of the record as a whole, convinces me that his beekeeper business remained supplementary and did not rise to the level of self-employment as argued by Respondent.

I also conclude that Boothby's active duty service in the United States Air Force Reserve during the backpay period does not rise to the level of a dereliction of his duty to search for employment or a withdrawal from the job market sufficient to reduce Respondent's liability. Nor would I find that the moneys received therefrom reduces Respondent's obligations. It is clear Boothby served his country during his employment with Respondent and that he continued to do so on an apparently unchanged basis during the backpay period. The fact that by request his duty time could have been avoided[10] is immaterial. Had Boothby continued in Respondent's employ he would not have varied his service pattern. Respondent's wrongful action in terminating him should not, under threat of diminution of backpay recovery, require him to abandon his regular course of conduct with respect to military service. Accordingly, I find Boothby's military service during the backpay period does not reduce Respondent's backpay claim in any way. I reach the same conclusion, given the paucity of evidence on the issue and the burden Respondent bears, on the issue of Boothby's August 1980 2-week vacation.

(3) Medical issues

With respect to the various days Boothby received medical treatment during the backpay period, I reject Respondent's argument that the mere fact that Boothby obtained such treatments during normal working hours would have precluded him from accepting work during those days, and thus should reduce backpay. The General Counsel argues, and I agree, that there is no record evidence that Boothby either would have been unable to work on particular days because of his ailments or that, had he been employed, he could not have obtained treatment during off-hours or in any other manner not inconsistent with continued employment. Accordingly, I shall not reduce Boothby's backpay claim as a result of his seeking medical treatments on various days during the backpay period.

[7] In reaching this decision, I have considered the additional arguments Respondent makes as discussed further, infra.

[8] With respect to beekeeper revenues received by Boothby, I accept the General Counsel's argument that Boothby's failure in some cases to report the bee income was not the result of a wrongful intention to withhold information that might reduce any ultimate backpay award, but was rather based on a conviction, shared by the General Counsel, that beekeeper revenues had been supplementary to his income during his employment with Respondent, remained supplementary during the backpay period, and hence did not affect Respondent's backpay obligation. Thus, I do not find the argued failure to report the income to be an adverse factor in evaluating Boothby's credibility or to justify any penalty of Boothby for withholding information relevant to the backpay specification.

[9] Boothby credibly testified that his need for revenue caused him to sell some of his beekeeping equipment.

[10] Apparently through the undertaking of correspondence studies or some other substitute for active service.

At relevant times Respondent maintained a health plan that provided, given certain deductibles, payment for covered medical services. Boothby during the backpay period maintained his own medical insurance through a health maintenance organization. Respondent does not contest recovery of policy premiums for the period when Boothby was not covered by an interim employer's health plan but argues that, because Boothby's employer in the first and second quarters of 1983 had a medical plan, Boothby need not have carried his own plan, thus obtaining double coverage, and hence Respondent should not be obligated for the premiums during that period. I reject Respondent's claim here. Continuity of health care coverage is a matter of concern to all. A backpay claimant need not self-insure or purchase individual health insurance coverage only for the period(s) of time during which he or she is unemployed and then be forced to drop such coverage during interim employments. Rather, a backpay claimant may, in my view, maintain equivalent health care coverage to that which the discharging employer provided and maintain that coverage through various interim employments even if interim employers offer health care packages of similar coverage. Not to allow such continuous coverage would be to require backpay claimants to change insurance coverage numerous times during the course of each year with the concommitant risk of supervening uninsurability through changes in health status. Assigning such an obligation and risk to a backpay claimant, given the loss of original health care coverage, which resulted from the discriminating employer's original termination, is unjust and unreasonable.

(4) Boothby's financial transactions and credibility

Considering the testimony of the backpay claimant in light of the arguments of Respondent, and relying on demeanor as well as the substantial and unchallenged testimony of Boothby as to the bulk of his activity, I find Boothby to be a credible witness who was not effectively impeached by Respondent's effort to show a failure of memory or suspicious circumstances regarding his bank accounts and other financial transactions during the backpay period. Having considered the record evidence of these varied transactions and Boothby's admitted confusion, mistakes, and omissions, I am convinced that such fallibilities were the product of a mind not attuned to financial detail as well as the result of the simple passage of time. On this record I reject Respondent's contention that Boothby was: (1) engaging in off-record transactions, or (2) attempting to withhold or conceal imterim earnings, or (3) transmitting interim earnings into other forms of revenues. Thus, in those situations where Boothby answered that he simply could not explain certain deposits to his bank account, I find no hidden agenda and insufficient evidence to find misconduct. During pretrial preparation by the General Counsel, Boothby recalled additional income that was included in the backpay specification on the opening day of trial. I find these events to have been caused by simple error or failure or recollection rather than willful withholding by Boothby. I reject Respondent's argument that the backpay claimant should be penalized in any way for that initial failure to disclose or for other inconsistencies in the record. In making this credibility resolution and associated findings of fact, I have considered that Boothby, in preparing loan applications, engaged in puffery in overstating his income from beekeeping. Given the record as a whole, and my evaluation of the demeanor of the witness, I do not find those statements undermine the credibility of Boothby's testimony at the hearing. See *Pat Izzi Trucking Co.*, 162 NLRB 242 (1966).

(5) Summary

Having found Boothby to be a credible witness, and having rejected Respondent's arguments that the backpay specification as to Boothby should be reduced as discussed, supra, I sustain the General Counsel's amended backpay specification and shall recommend that Boothby be recompensed consistent therewith.

2. Donald E. Roland

a. *Respondent's defense of accord and satisfaction*

The General Counsel's amended backpay specification seeks $41,602.52 plus interest on behalf of Roland.[11] On November 23, 1983, approximately 1 month before the commencement of the hearing in this matter, Roland and Respondent, with the presence and participation of the Charging Party, General Truck Drivers, Warehouse and Helpers Union Local 467, although without the participation or apparent knowledge of counsel for the General Counsel, entered into an agreement by which Roland waived all of his claims against Respondent in this matter in exchange for a payment of $20,000. The written agreement was entered into and the moneys paid on that date. Roland has not attempted to return the money or rescind the settlement transaction. Respondent claims this settlement is an accord and satisfaction barring further proceeding on the Roland claim.[12] The General Counsel argues that becuase the General Counsel did not enter into or approve of his private settlement, it is without force to limit the General Counsel's claims here other than as an offset against moneys ultimately received by Roland.

The General Counsel cites the recent Board decision of *Michael M. Schaefer*, 261 NLRB 272 (1982), in which the Board approved the following statement of the administrative law judge at 273:

> It is well settled that an individual may not waive, bargain away, or compromise any backpay which might be due him (or her) since it is not a private

[11] Interest charges, calculated pursuant to formulas referred to in the cited cases in the original decision in this matter, are not liquidated in a backpay proceeding. It may fairly be anticipated, however, that inclusion of interest in the claim as of 1985 would substantially increase the dollar amount sought.

[12] Independent of this matter and of no relevance save as background, Respondent brought suit against Roland based on the agreement and that litigation in turn became the subject of a Board unfair labor practice. Administrative Law Judge Richard J. Boyce issued a decision in the matter on Jan. 31, 1985, which as of the issuance of this decision was susceptible to appeal. [See *American Pacific Concrete Pipe*, 292 NLRB No. 133 (Feb. 21, 1989).]

right which attaches to the discriminatee, but is, indeed a public right which only the Board or the Regional Director may settle.

This Board decision was enforced by the United States Court of Appeals for the Third Circuit, 697 F.2d 558 (1983). The Board's decision in *Schaefer* has been cited by an administrative law judge with Board approval as recently as July 31, 1984, in *Stevens Ford*, 271 NLRB 628.

Respondent citing *Roadway Express v. NLRB*, 647 F.2d 415 (4th Cir. 1981), argues that it is elementary law that a release and settlement, if otherwise valid, bars a backpay claim. Respondent acknowledged the holding of the *Schaefer* case in colloquy during the hearing and did not address its holding on brief. Rather, Respondent emphasizes the Board's recent evolution of the deferral doctrine case, i.e., *Olin Corp.*, 268 NLRB 573 (1984), and its progeny, for the proposition that the agreement of the parties here should be deferred to and hence Roland's claim not further pursued. Respondent's argument is weakened by the language of the Third Circuit's decision enforcing *Schaefer* in which the court points out that, unlike deferral to an arbitratorial forum, *Schaefer* involved a simple settlement in liquidation of a disputed sum. Further, Respondent's arguments are weakened by the fact that both *Schaefer* and *Stevens Ford*, supra, are as recent or more recent than the Board's reinstitution of the deferral doctrine.[13] I conclude it is not necessarily certain that the Board would extend its deferral doctrine to private settlements in liquidation of disputed monetary amounts during backpay proceedings. More importantly, however, no Board case since *Schaefer* purports to specifically overrule *Schaefer's* holding or to modify its terms. Accordingly, and irrespective of any opinions I may or may not have regarding what the Board may do in futuro to the *Schaefer* doctrine, I am bound to follow *Schaefer* unless and until it is overruled by the Board or the United States Supreme Court. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). Accordingly, I decline to accept the agreement between Roland and Respondent as a limitation on the General Counsel's backpay specification regarding Roland save as an offset regarding moneys received by Roland.[14]

[13] A very recent case *Texaco, Inc.*, 273 NLRB 1335 (1985), seems to lend support to Respondent's arguments regarding the evolution of the Board's deferral doctrine. In that case, the Board, reversing an administrative law judge, held that a strike settlement agreement, which contained provisions that the union withdraw an underlying unfair labor practice charge, should be accepted despite the contrary view of the Regional Director acting on behalf of the General Counsel in his interpretation of his public rights. See also *Alpha Beta Co.*, 273 NLRB 1546 (1985).

[14] To avoid a remand, should reviewing authority differ with respect to this holding, I make the following alternative credibility resolutions with respect to the meeting between Roland, Respondent's agent, and the Charging Party's agent. I credit the testimony of Norman Holman, president business agent, and chief executive of the Charging Party, where his testimony differs from Roland and Robert Musser, Respondent's agent. Further, I find that the circumstances of the meeting were noncoercive and that, were the *Schaefer* doctrine not a bar, I would find the settlement agreement entered into by the parties was a freely entered into settlement that would prevent any further proceedings against Respondent concerning Roland's backpay.

b. *Roland's search for employment*

The backpay specification alleges that Roland found various jobs at least partially mitigating Respondent's backpay obligation through the third quarter of 1981 but that from the fourth quarter of 1981 through the second quarter of 1983[15] Roland was unable to find employment. Respondent attacks Roland's assertions that he made good-faith efforts to seek employment during the backpay period. Respondent's argument is based at least in part on a comparison of Roland's reports of his employment search to the State of California with his reports of employment search to the NLRB for the last quarter of 1982 and the first two quarters of 1983.

The Rolands testified that at the end of every 2-week period, Roland, with the assistance of Mrs. Roland, would fill out the State of California forms, which provided space for listing employers who were contacted during efforts to find employment.[16] The Rolands did not retain copies of the reports submitted to the State. The NLRB compliance form prepared by the Rolands as filled out much later. For example, the NLRB report on the last quarter of 1982 was completed by the Rolands in May 1983, as was the report for the first quarter of 1983; the report for the second quarter of 1983 was completed in July 1983.[17]

Respondent notes correctly that a comparison of the entries between the two forms on a day-by-day basis produces essentially complete disparity between the listings of employers contacted on given dates.[18] Further, each form identifies job searches as occurring on Saturdays or Sundays. Yet Roland testified at the hearing that he did not seek work on Saturdays or Sundays—most truck-driver employers being closed. Thus, these entries were clearly in error. Further Respondent submitted affidavits from certain of the companies that Roland reported contacting in his employment search in 1983,[19] which affidavits said variously that no job applications had been received from Roland in calendar 1983.

The General Counsel adduced testimony from at least two trucking concerns that Roland had in fact submitted applications to them consistent with his representations on his employment search reporting forms. Further, Roland testified credibly and in significant detail concerning the physical description of the employers' premises where he sought employment and described in detail

[15] With the exception noted and discussed infra.

[16] The documents in evidence make it clear that the information to be reported on the forms changed at least twice in the last quarter of 1982 and the first two quarters of 1983. Thus, certain forms provided the applicant an opportunity to indicate whether he left a job application, other forms did not provide space for making such entries; some forms asked the employment applicant to put down the names of specific individuals contacted during the job search, others did not.

[17] Respondent argues, relying in part on portions of Roland's testimony, that the NLRB compliance forms were filled out on a day-to-day basis. A close examination of the testimony of the Rolands convinces me this is incorrect. To the extent Roland testified in that manner, he was simply confused.

[18] There is much greater overlap when week-by-week comparisons are made and increasing correspondence the greater the time period compared.

[19] The General Counsel stipulated these affidavits would be receivable as substantive evidence.

the persons with whom he spoke and the conversations engaged in.

I have carefully considered the arguments of Respondent with respect to Roland's job search. Initially, I do not find the variation, which is often substantial, but in many cases is simply a matter of a day or two difference in the reported visiting dates of particular employers between the state and Board forms, to be of conclusive significance in evaluating the credibility of Roland. Roland testified that he did not in every case list the employers that he visited on each form and, further, that the Board forms were prepared from memory and at a time significantly after the state reporting forms.

Regarding the evidence from employers that Roland claimed he had contacted, (1) that the employers generally had the practice of accepting written job applications even if no employment was then available and (2) that Roland had not submitted an application in calendar 1983, this apparent contradiction is largely explained on examination of the record as a whole. Roland testified, for example, in the case of Kelly Moore Paints, that he had in calendar 1982 submitted an application to the employer and on subsequent visits did not submit an additional application but merely made sure the original was on file. Kelly Moore's agent's affidavit indicates that Roland did not physically submit an application in 1983. This is not inconsistent with Roland's testimony and Roland's testimony is corroborated by his job search report to the state on which he indicates he physically left an application with Kelly Moore on October 4, 1982.

The Board and the state reports do not indicate if applications were left at employers before September 1983. Thus, there is no way to ascertain whether Roland submitted job applications to other employers before that time and, like Kelly Moore, subsequently failed to submit a new application because of the existence of the prior application. The job reports indicated that Roland visited Sunshine Foods in November 1982, Ryder Rentals in September and October 1982, Dupont in December 1982, and Brockway Glass in December 1982. Regarding each of these employers, the affifavits submitted by Respondent merely assert that no application was physically submitted in 1983. This is not in contradiction with Roland's testimony or Roland's reports to the state.

Further Roland testified, and his reports to the State in some cases confirm this fact, although the state reports are not sufficiently complete as to be conclusive in other cases, that in his job search he would often contact the receptionist or other employees on the premises of an employer and. on learning that jobs were not currently available or foreseeable, would not submit a written application. Roland's reports to the state indicate that in the great majority of job search visits he did not submit written applications. Mrs. Roland corroborated the testimony of her husband with respect to his job search. Given all the above, and considering the record as a whole, I conclude that Roland's job searches were as reported and Respondent's effort to impeach or discredit Roland with respect to his efforts to find employment did not succeed.

c. *Roland's credibility and unreported income*

Respondent argues strenuously that the Rolands are in essence engaging in a scheme to defraud the Board and Respondent by falsifying their evidence in an effort to improperly increase any recovery in this matter. Respondent points to evidence that the Rolands have a habit of avoiding obligations, i.e., Roland's suggestion during settlement negotiations to Respondent that the $20,000 settlement check should be broken into smaller units to avoid certain banking law reporting requirements, and Mrs. Roland's admission that on one occasion she arranged for her employer to issue checks to her husband for her wages to conceal income properly paid to her that might be inconsistent with an insurance disability claim. Further, Respondent attacks the late admission of Roland that he had additional previously unreported income in the second quarter of 1983. Respondent also placed in evidence two checks to Roland from a West Valley Trucking Company dated May 1980 for $277.09 and $39.46, respectively, which were not explained by Roland. Further, Respondent points out that in completing certain forms such as an account card with the Chino Bank and in a job application to Guily Transportation, Roland asserted that he was working for an employer during periods of time for which Roland at the hearing claimed no employment.

I have considered these admitted misstatements by Roland and the remaining arguments with respect to the Rolands in evaluating their credibility. I have also considered the documentary evidence submitted by Respondent. I have determined the West Valley Trucking checks were not sufficiently explained by the General Counsel and therefore should be regarded as interim earnings and an offset to gross backpay in the appropriate quarter. Further I find that the unreported earnings estimated by Roland in the second quarter of 1980 to be "around $4,000.00" should also be an offset to gross backpay for the appropriate quarter. Based on my evaluation of the witnesses' demeanor and the record as a whole, I do not find that the West Valley Trucking income should be regarded as income that was concealed or intentionally withheld to penalize Roland beyond its deductions from gross backpay.[20] Because Roland's income in the second quarter of 1983 now exceeds gross backpay, it is unnecessary to determine if a penalty should be assessed against him in that quarter. I conclude that no greater penalty could be assessed this record. I further find that no other interim employment or earnings have been established by Respondent and the backpay specification sums, as modified, are sustained.

d. *Summary*

In summary I have found that over the entire backpay period, during which Roland found a variety of employment, Roland made a good-faith effort to seek employment. In reaching this conclusion I found the evidence adduced by Respondent was largely explained by Roland

[20] I am simply convinced that the West Valley Trucking income was simply forgotten by Roland. There is insufficient evidence in the record concerning these two checks to conclude otherwise.

or is otherwise not inconsistent with his testimony. Further, as noted previously, the Board regards testimony of the type submitted by Respondent here to be of relatively little value in challenging otherwise credible testimony regarding employment search. *Neely's Car Clinic*, 255 NLRB 1420 (1981). Accordingly, with the adjustments to backpay noted above, I sustain the General Counsel's backpay specification with respect to good-faith search for interim employment. I also rejected Respondent's argument that the Rolands generally concealed earnings and should be penalized as a consequence. I found, however, that additional earnings, as noted above, should be counted against gross backpay.

3. Robert Craig

a. *Argument and evidence*

At all relevant times Robert Craig was self-employed, initially working as an employee of a wholly owned corporation, Gunite Development, from November 1979 to May 31, 1983, from June 1–18, 1983, for R. Craig Trucking, a sole proprietorship. Craig reported on his Board disclosure forms and testified at the hearing to certain amounts he received as "wages" during the period. The General Counsel argues that amounts constitute interim earnings that should be deducted from gross backpay due to Craig but that no other sums should be so deducted.

Respondent argues initially that because Craig sought no work other than self-employment during the period, he should be barred from receiving any backpay at all. Second, Respondent argues that the sums identified by Craig as interim earnings are not accurate and, rather, Craig manipulated his business enterprises in such a way as to conceal earnings, prevent investigation and determination of actual amounts earned, and mislabeled expenditures as business expenses and other costs when they were in fact properly attributed to Craig as interim earnings.

Substantial and detailed evidence was adduced by Respondent by examination of Craig regarding many of his business transactions during the period. This evidence showed that Craig maintained less than rigorous or complete business records. Further, Respondent's examination revealed (1) that there was a substantial and ongoing commingling of corporate and other business transactions with the Craigs' personal finances, (2) that income statements and profit-and-loss statements were submitted to lending institutions that were at great variance from his oral testimony regarding his and his business entities' financial status during the backpay period, (3) that records offered into evidence did not allow clear identification of the nature and extent of certain transactions, and (4) that it was impossible to recreate the financial status of either Craig or his enterprises from the record evidence. Craig testified that his business efforts were financially unsuccessful and that he filed for personal bankruptcy under Chapter 11 of the Bankruptcy Act in mid-1983, but that the bankruptcy action was later voluntarily dismissed on his own motion.

b. *Analysis and conclusions*

As the General Counsel argues on brief, the Board and the courts have accepted self-employment as a proper way for a backpay claimant to attempt to mitigate his wage loss. These cases hold that self-employment should be treated like any other interim employment in evaluating backpay issues. *Kansas Refined Helium Co.*, 252 NLRB 1156 (1980); *Heinrich Motors v. NLRB*, 403 F.2d 145 (2d Cir. 1968). Accordingly, I reject Respondent's initial argument that simply because Craig did not seek other than self-employment he should be denied backpay. Rather, I shall consider Craig's self-employment and his employment by his wholly owned corporation to determine the amount and extent of interim earnings under normal Board standards.

The issue of interim earnings concerning Craig evolved into an issue of accounting and recordkeeping. The General Counsel characterizes the evidence with respect to Craig's maintenance of business records on brief as follows:

> The record indicates some expenses, other than strictly business expenses, were paid out of the income of Gunite Development of R. Craig Trucking. Craig testified that he had obtained several loans, at times using his home as collateral to finance Gunite or used his personal funds to keep Gunite operating, so he treated payment of nonbusiness expenses by Gunite as a way of recouping the funds that he had put into Gunite. Gunite paid the expense on vehicles and credit cards of Robert Craig's son Rick (who also drove for Gunite) in lieu of wages, because Gunite could not afford to pay Rick wages due. Craig was admittedly unsophisticated and a novice at operating a business and therefore some errors in bookkeeping may have been made. But it is not clear that payment of such expenses was in exchange for services Craig performed for the business, in fact some of them were substitutes of wages going to someone else.

The determination of the amount of interim earning by a backpay claimant is relatively simple when the backpay claimant and the backpay period employer(s) involved are separate entities who maintain normal records of wages and salaries paid. When the backpay claimant and the employer are the same entity, as in the case of R. Craig Enterprises, or backpay claimant is an employee and sole owner of a closely held corporation, as in the case of Gunite, sometimes difficult questions of bookkeeping, tax, and accounting rules must be analyzed to determine the correct amounts to apply to interim earnings as opposed to other nonearning categories such as business expenses. So too, difficulties may be caused when recordkeeping is informal and tax and other regulatory reporting forms are not prepared and submitted. An example of the close item-by-item scrutiny of transactions as part of the calculation of interim earnings is found in *Kansas Refined Helium Co.*, 252 NLRB 1156 (1980). In that case, specific expenses, indeed often individual receipts or disbursements on a check-by-check

basis were examined, applicable Internal Revenue Service decisional law considered, and testimony of an accountant received. Ultimately a detailed decision issued deciding a myriad of self-employment interim earning issues.

In the instant case the General Counsel did not contest the bulk of the lengthy and detailed examination by Respondent of Craig's irregularities in accounting and in recording the various transactions of the corporation, the sole proprietorship, and his personal affairs. So too on brief, the General Counsel makes no attempt, as Respondent did in detail, to address the specifics of particular business transactions and their accounting effects on profit and loss. Rather, the General Counsel made a general broad-brush equitable argument on Craig's behalf. The argument is essentially that while uncertainty exists whether Craig had certain interim earnings that should be deducted from his backpay claim, all uncertainties should be resolved against Respondent, the original wrongdoer in this case. Further, while the General Counsel expressly avoided condoning the irregularites of Craig, she argued his conduct should not be condemned and that Respondent should not be allowed to escape its backpay liability because of Craig's conduct for that would in her judgment be a penalty not consistent with the Board's policy of remedial as opposed to punitive action. She argues:

> To find that Craig is not entitled to backpay would provide Respondent with a windfall which it does not deserve, as it is at least partially responsible for the predicament Craig found himself in and for his response to that predicament and it would not serve to deter future violations of the Act by this and other Respondents. For these reasons Craig should not be denied backpay based on the evidence elicited by Respondent.

It is clear that regarding interim earnings "the burden is upon the employer to furnish facts which would . . . mitigate the liability." *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963). It is also true that the finding of an unfair labor practice is presumptive proof that some backpay is owed a backpay claimant. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).

Craig testified concerning the receipt of limited interim earnings. Respondent through a lengthy examination of Craig and by the submission of a variety of documents from Craig's businesses, established that Craig's unsubstantiated testimony regarding his interim earnings during the period could not be relied on standing alone. The record is clear and I find that the lengthy and detailed record of the accounting irregularities, reporting inconsistencies, and profit-and-loss statements prepared by Craig's accountant at Craig's direction, which indicates substantial earnings of the corporation, amply meets Respondent's burden of proof in refuting Craig's testimony concerning his interim earnings.

Respondent, having successfully impeached Craig through his business records, I find the burden of going forward shifted to the General Counsel to adduce other record evidence that could sustain the General Counsel's position that Craig's earnings were less than the amount of gross backpay.

Such a burden is not impossible to meet. What was required was to put into evidence records of the profit and loss of the commercial entities involved beyond the simple, discredited, oral testimony of Craig or to make efforts to rehabilitate Roland by making the transactions understandable and susceptible to supporting specific findings regarding earnings. In *Kansas City Refined Helium Co.*, 252 NLRB 1156 (1980), the administrative law judge, with Board approval, stated at 1159:

> I have considered Respondent's argument that [the backpay claimant] should be denied all backpay, and reject it. The Board has long recognized the value of utilizing social security records and income tax records in determining interim income, and has found that "poor recordkeeping, uncertainty as to memory, and perhaps exaggeration" do not automatically disqualify an employee from receiving backpay. *Patrick F. Izzi, d/b/a Pat Izzi Trucking Company*, 162 NLRB 242, 245 (1966), enfd. F.2d 241 (1st Cir. 1968). Through the use of the social security records, the [backpay claimant's] income tax returns, and additional evidence adduced at the hearing, it is possible to arrive at a "reasonable approximation" of interim earnings, which is all that the Board and the Courts require.

Because the dispositive aspect of the litigation of the Craig portion of the backpay specification is that the General Counsel made no effort to provide evidence that, as in the above-quoted case, could be examined by the judge to determine the interim earnings of Craig with even a "reasonable approximation," it is immaterial whether the General Counsel simply abandoned Craig and chose not to put on tax returns or other credible evidence that would buttress the General Counsel's claim regarding Craig, or whether not the evidence simply did not exist.[21] The record evidence as it stands sustains Respondent's argument that it is impossible to determine what earnings of the business entities should be attributed to Craig as interim earnings during the backpay period. Indeed, it is impossible to ascertain from the record what the profit and loss of either entity was during relevant periods. Thus it is not simply a matter of resolving uncertainty, as the General Counsel would frame the argument, with such uncertainties being resolved against Respondent in favor of the backpay claimant. The records introduced into evidence make it clear that the testimony of Craig regarding interim earnings, unbuttressed by any documentation whatsoever, cannot be sustained. Examining the documentary evidence taken from Craig's records, as submitted by Respondent, it is clear that it is absolutely impossible, even giving Craig's testimony regarding those records, that benefits of the doubt in all situations, to establish the profitability of the corporation

[21] An adverse inference is permissible under the circumstances that, since the General Counsel did not offer business records that would sustain Craig's position, such records would not have in fact supported him.

under any accounting system or what revenues should be counted as interim earnings in offset to the gross backpay found, supra. It is clear, however, and I find, that substantial income was received by Craig that was not addressed in any fashion by the General Counsel and that the confusion regarding specific amounts arises because of Craig and the General Counsel's failure to go foward after the initial impeachment of Craig by Respondent. This being so Craig must be assumed to have had interim earnings at least equal to gross backpay and hence no net recovery.

In summary I find that even though the burden of proof is explicitly on Respondent to all aspects of interim earnings of the backpay claimant, as Respondent had successfully proved that the uncorroborated testimony of Craig regarding interim earnings during the period may not be relied on. I further find that the General Counsel failed to adduce any evidence by which such interim earnings could be ultimately ascertained. That being so, I find that the record concerning Craig will not sustain a finding that his interim earnings can be ascertained with any certainty. This being so, and despite the burden on Respondent and the presumptions cited above, I conclude albeit with some reluctance,[22] that on the present record Craig is not eligible for any backpay whatsoever during the period.

III. SUMMARY

The above findings are reflected in the following computations regarding Boothby and Roland, respectively.

A. *Boothby*

Calendar Quarter	*Gross Backpay*	*Interim Earnings*	*Expenses*	*Net Interim Earnings*	*Medical Expenses*	*Net Backpay*
1980/2	$1,581.38	$1,077.00	0	$1,077.00	$209.58	$713.96
1980/3	5,713.43	28.50	0	28.50	229.44	5,914.37
1980/4	3,586.48	0	0	0	8.77	3,595.25
1981/1	4,701.90	1,764.75	0	1,764.75	135.78	3,072.93
1981/2	5,213.41		0	0	135.78	5,349.19
1981/3	5,027.98	0	0		135.78	5,343.76
1981/4	5,546.32	0	0	0	142.00	5,688.32
1982/1	1,248.18	261.15	$68.00	193.15	103.14	1,158.17
1982/2	4,735.00	1,018.07	72.00	946.07	206.28	3,995.21
1982/3	5,474.04	1,423.93	96.00	1,327.93	154.71	4,300.82
1982/4	3,979.05	3,697.63	0	3,597.63	162.79	444.21
1983/1	2,459.38	*	0	0	296.25	296.25
1983/2	3,344.14	*	0	0	473.20	473.20
Total Net Backpay						$40,345.64

* Exceed backpay.

B. *Roland*

Calendar Quarter	*Gross Backpay*	*Interim Earnings*	*Expenses*	*Net Interim Earnings*	*Medical Expenses*	*Net Backpay*
1980/2	$3,148.71	[23]$316.55	0	0	0	$2,832.16
1980/3	5,732.03	1,975.64	$150	$1,825.64	0	3,906.39
1980/4	5,079.48	2,853.50	660	2,197.50	0	2,881.98
1981/1	5,387.01	3,365.00	900	2,465.00	0	2,922.01
1981/2	5,424.11	6,316.48	900	5,416.48	0	7.63
1981/3	5,468.79	3,628.93	490	3,183.93	0	2,329.86
1981/4	5,847.25	0	0	0	0	5,847.25
1982/1	1,427.43	0	0	0	0	1,427.43
1982/2	4,334.30	0	0	0	0	4,334.30
1982/3	6,436.14	0	0	0	0	6,436.14
1982/4	4,806.88	0	0	0	0	4,806.88
1983/1	2,781.65	0	0	0	0	2,781.65

[22] Craig's testimony that the business entities were financial failures and that he was forced into bankruptcy raises questions, but does not meet the burden of the General Counsel given the explicit and extensive impeaching evidence offered by Respondent.

[23] Checks from West Valley Trucking, see analysis.

[24] Backpay claimant's estimated quarterly earnings, see analysis supra.

[25] Roland's total backpay is reduced by the $20,000 received from Respondent, discussed supra.

Calendar Quarter	*Gross Backpay*	*Interim Earnings*	*Expenses*	*Net Interim Earnings*	*Medical Expenses*	*Net Backpay*
1983/2	3,862.29	[24]4,000.00	0	0	0	0
Total Net Backpay						[25]$40,375.97

On the basis of the foregoing, and pursuant to Section 10(c) of the Act, I issue the following recommended[26]

ORDER

IT IS ORDERED that Respondent American Pacific Concrete Pipe Company, Inc., Los Angeles, California, its officers, successors, agents, and assigns shall forthwith pay to the following individuals the amounts listed after each name, plus interest to be computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Olympic Medical Corp.*, 250 NLRB 146 (1980),[27] less tax withholding required by Federal and state laws.

William Martin	$368.38
Robert Bornemann	428.26
Bobby Record	368.38
Ezell Record	378.38
Selvie Cole	15.00
Dennis Lilly	90.00
Robert Delgado	130.00
Jess Fernandez	80.00
Charles Boothby	40,345.64
Donald Roland	20,375.97

IT IS FURTHER RECOMMENDED that backpay specification concerning Robert Craig be dismissed.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). The specification of earnings by calendar quarter as set forth, supra, shall be used for purposes of interest calculated. Interest calculations for Roland shall take account of the date on which he received the offsetting $20,000 discussed supra.

Energy Cooperative, Inc. *and* Julius Sako. Case 13–CA–19985

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On April 24, 1981, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a brief in response to the Respondent's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The alleged violations in this case are based on the Respondent's withholding from sick or disabled employees benefits under its sickness and accident (S & A) benefit plan during a lawful economic strike at the Respondent's East Chicago refinery.

Local 7–210 of the Oil, Chemical, and Atomic Workers International Union (the Union) for many years represented Arco-Sinclair employees, including those at the East Chicago refinery. The Respondent purchased the East Chicago refinery in 1976 and agreed to honor the then-existing contract. In 1979 the Respondent entered into a contract with the Union containing a reopener clause permitting the Union to strike after January 8, 1980,[1] if the parties failed to reach agreement.

On January 8, the Union commenced an economic strike. Immediately, the Respondent ceased paying S & A benefits to 11 employees who had been receiving benefits before the strike began.

On April 15, the Respondent and the Union settled the strike and executed a memorandum of agreement. According to the agreement's terms, all unit employees received increases in wages and benefits. Further, in consideration of certain benefits not paid as a result of the strike, the Respondent agreed to pay the company portion of the employees' health insurance premiums, which the employees had assumed during the strike. The memorandum of agreement also expressly provided that payment of the insurance premium was in full settlement of any pending or future grievance or NLRB charge related to benefits.[2]

The judge found that during the economic strike the Respondent withheld S & A benefits from the 11 employees based on the fact that the remaining work force engaged in strike activities in violation of the Act. The judge rejected the Respondent's contention that the strike settlement agreement required dismissal of the complaint. The judge, relying on the Board's decision in *Emerson Electric Co.*,[3] held that the settlement agreement did not affect the Board's power to prevent unfair labor practices or warrant the Board's abdication of its jurisdiction or its obligation to enforce public rights.

In its exceptions, the Respondent argues that the complaint should be dismissed based on the parties' settlement agreement. For the reasons set forth below, we agree.[4]

The Board held in *Texaco, Inc.*, 285 NLRB 241, 243 (1987), that the withholding of contractual accident and sick benefits to disabled employees during a strike can be a violation of Section 8(a)(3).[5] The Board went on to note, however, that an employer may successfully defend against an allegation of discrimination or coercion in the denial of employee benefits by proving, inter alia, "that a collective-bargaining representative has clearly and unmistakably waived its employees' statutory right to be free of such discrimination or coercion."[6]

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[1] All dates are in 1980 unless otherwise specified.

[2] The full text of the pertinent provisions of the memorandum of agreement is as follows:

6. It is agreed that in consideration of certain benefits not paid as a result of the strike for each employee represented by Local 7–210, OCAW, as of January 8, 1980, and continuing on the active payroll as of the termination of the strike, the Company shall pay any Company contribution to the Medical, Life and Accidental Death & Dismemberment Plan owed or paid by the employee during the strike. It is further agreed by the parties that such payment is in full settlement of any grievance, NLRB charges or action pending or in the future related to the handling of all benefits during the strike.

8. The parties agree that they will not file any legal or National Labor Relations Board actions as a result of this strike and that any such action filed or pending will be withdrawn and become null and void.

It is understood and agreed that the Acceptance of this Memorandum of Agreement constitutes a full, final and complete resolution of all outstanding issues existing between the parties and the contract reopen provision is hereby cancelled in its entirety; and that this Memorandum of Agreement amends the Labor Agreement between the parties signed January 19, 1979, accordingly.

[3] *Emerson Electric Co.*, 246 NLRB 1143 (1979), enfd. as modified 650 F.2d 463 (3d Cir. 1981), cert. denied 455 U.S. 939 (1982).

[4] The Respondent also argues as a threshold matter that this case should be deferred to arbitration. Based on our finding below that the Union relinquished all pending and future claims with regard to the nonpayment of benefits during the strike, we find deferral to be inappropriate. We further find it unnecessary to address the Respondent's defense that the withholding of benefits was lawful under the collective-bargaining agreement.

[5] In *Texaco* the Board expressly overruled the *Emerson Electric Co.* theory of violation and held that whether an employer's witholding of accident and sick benefits to disabled employees during a strike violates Sec. 8(a)(3) will be resolved by application of the *Great Dane* test for alleged unlawful conduct. *Texaco*, 285 NLRB 241 citing *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1976).

[6] In *Texaco*, at 246, however, and *Texaco, Inc.*, 287 NLRB 903 (1987), the issue of whether similar strike settlement agreements waived such statutory rights was not before us. Thus, in neither case was it contended that the agreements applied to the charges filed by individual employees.

In *Texaco*, the Board cited *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), and *Conoco, Inc. v. NLRB*, 740 F.2d 811, 815 (10th Cir. 1984), for the proposition that an employee's statutorily protected right to receive such benefits free of discrimination can be waived.[7] In *Metropolitan Edison*, supra at 705, the Court noted that it "long has recognized that a union may waive a member's statutorily protected rights." In this regard, it stated:

> Such waivers are valid because they "rest on 'the premise of fair representation' and presuppose that the selection of the bargaining representative 'remains free,'" *NLRB v. Magnavox Co.*, 415 U.S. 322, 325, (1974) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956)); cf. *NLRB v. Allis-Chalmers Manufacturing Co.* [388 U.S. 175], at 180–181. Waiver should not undermine these premises. Thus a union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative. See *NLRB v. Magnavox Co.* [415 U.S. at 325].[8]

The Court went on to reject a union argument that although a union may waive collective rights it may not waive individual ones. It noted that in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), "the Court recognized that in securing the good of the entire bargaining unit, some differences in the treatment of individual union members might occur . . . ."[9] Waiver of an employee's statutorily protected right to receive benefits free of discrimination imposes no constraints on the employee's ability to choose a representative. It is directly analogous to a union's bargaining away its member's economic rights. Therefore, the right to receive contractual S & A benefits is clearly waivable by the Union subject to the duty of fair representation.

Assessing the clarity with which a statutory right must be waived, according to *Metropolitan Edison*, requires consideration of the circumstances of each case.[10] Thus, determining whether such a waiver has occurred depends crucially on context and the specific circumstances presented. A clear and unmistakable waiver can occur in any of three ways: by express contract language, by the parties' conduct including bargaining history and past practices, or by a combination of both.[11] In light of the entire record, we find such a clear and unmistakable waiver here.

The language of the parties' strike settlement agreement evinces a clear intent to give up certain benefits in exchange for other payments. In this regard, the pertinent provision of the memorandum of agreement states that, in consideration of benefits not paid during the strike, the Respondent agreed to pay its portion of the employees' health insurance premiums, which the employees had assumed during the strike. Immediately following this language is the further agreement by the parties that this payment is in "full settlement of any grievance, NLRB charges or action pending or in the future related to the handling of all benefits during the strike." Thus, it was expressly in return for the Union's relinquishment of all pending and future claims with regard to all benefits not paid during the strike that the Respondent agreed to provide a limited payment to all employees, including those who were sick or disabled during the strike. Finally, the strike settlement agreement states that acceptance of the agreement "constitutes a full, final and and complete resolution of all outstanding issues between the parties." This provision leaves no doubt about the parties' intent to finally and completely resolve all issues, including those related to the administration of employee benefits during the strike.

That this language clearly contemplates within the term "benefits not paid as a result of the strike" the contractual S & A benefits withheld from sick or disabled employees at issue here is reinforced by the relevant bargaining history. The strike settlement bargainers recognized the S & A benefit issue and explicitly dealt with the issue during negotiations. The Respondent's manager of industrial relations testified that, during negotiations leading up to the strike settlement agreement, the Union's representative asked that employees disabled prior to the strike be paid the S & A benefits that they had been denied during the strike. His unrebutted testimony reveals that he responded that the settlement package was all management could offer. Thus, the parties' conduct in negotiations additionally indicates that they understood that the settlement, which was ultimately agreed on, did not include S & A benefits payments.[12]

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[7] *Texaco*, at fn. 23.

[8] *Metropolitan Edison* at 705–706.

[9] Id. at 707.

[10] *Metropolitan Edison*, 460 U.S. at 709, cited in *Electrical Workers IBEW Local 1395 (Indianapolis Power) v. NLRB*, 797 F.2d 1027 (D.C. Cir. 1986); *Pertec Computer Corp.*, 284 NLRB 810 (1987); *Indiana & Michigan Electric Co.*, 273 NLRB 1540 (1985), enfd. 599 F.2d 227 (6th Cir. 1986).

[11] *C & P Telephone v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982), cited with approval in *United Technologies Corp.*, 274 NLRB 504, 507 (1985). See also *Challenge-Cook Bros.*, 282 NLRB 21 (1986), *Boise Cascade Corp.*, 279 NLRB 422 (1986), and *Suffolk Child Development Center*, 277 NLRB 1345 (1985).

[12] Moreover, our finding that the Union knowingly waived employee entitlement to S & A benefits is further bolstered by testimony that affected employees were aware of that fact when the settlement agreement was presented for ratification.

Based on all the above, we conclude that the parties' settlement agreement establishes that the Union clearly and unmistakably waived its sick and disabled employees' right to receive contractual S & A benefits for the duration of the strike.

Regarding whether to give effect to the private agreement between the Union and the Respondent with respect to the individual employee claim here, we emphasize that we adhere to the principle that the Board acts in the public interest to enforce public, not private, rights. Consistent with that view, however, we look favorably on private strike settlements that result in the amicable resolution of labor disputes and thus serve the public interest as well as that of the parties.[13] We must not disregard, therefore, a lawful and voluntary strike settlement agreement, but must determine whether giving full effect to the settlement agreement will effectuate the purposes and policies of the Act.[14]

Our analysis of the substance of the agreement and the circumstances in which it was reached convinces us that giving full effect to the Union's waiver of the employees' right to receive contractual benefits will effectuate the purpose and policies of the Act. We recognize that a statutory right, the employees' right to receive these benefits free from discrimination, is involved. It is for that reason that the clear and unmistakable waiver standard is applicable here. See discussion of *Metropolitan Edison* and *Texaco, Inc.*, 285 NLRB 242, supra at fns. 5–10, and accompanying text. But just as we apply that demanding standard when it is applicable and has been met, there are sound reasons for honoring the results of the collective bargaining that has produced the waiver of the statutory right.[15]

The employee rights involved here are the same rights the Board found to have been lawfully and effectively waived in its 1985 *Texaco* decision; see footnote 13 above. As the Board said in that decision concerning the policy reason for giving effect to the similar strike settlement agreement in that case:

> In order to promote the parties' desire to resolve their dispute voluntarily, we should provide every reasonable encouragement that their disputes be resolved on as comprehensive a basis as their strike settlement agreement would indicate. [273 NLRB at 1337.]

We note that in that *Texaco* case, the Union was the sole charging party, and no individual employee sought to litigate his rights, as distinguished from the instant case. We, however, do not find that this changes the result. The Union here is authorized as the exclusive bargaining representative to bargain on behalf of the employees regarding the receipt of the employee benefits. It did so here, and the Respondent was entitled to rely on the authority of the bargaining representative to establish employee entitlement to contractual benefits, and, further, to fully and completely settle all issues in dispute, subject to the duty of fair representation. To hold otherwise would frustrate the goal of achieving amicable resolution of labor disputes. In this regard, as we discussed at footnote 9 and accompanying text, the Supreme Court expressly recognized in *Metropolitian Edison*, supra, that a union may choose to waive individual rights, in securing the good of the entire unit.[16]

In short, we find that the Union has clearly and unmistakably waived employee rights, which were waivable by the Union, and that giving effect to the agreement of which this waiver was a part will effectuate the purposes and policies of the Act. Accordingly, the complaint is dismissed.[17]

CHAIRMAN STEPHENS, concurring.

I join the majority opinion but write separately only to suggest that the facts of this case do not afford us an opportunity to plumb the limits of the rule that we announce today. In this case we are presented with the question of whether to give effect to a strike settlement agreement, negotiated between an employer and a union, that purports to compromise and waive the rights of unit members *individually* to seek redress from the Board for alleged violations under the Act, specifically discrimination prohibited by Section 8(a)(3). The issue is unique insofar as the individual charging parties here were not signatories to the settlement agree-

[13] *Texaco, Inc.*, 273 NLRB 1335 (1985). In that case, the Board reevaluated and redefined the *Emerson Electric* approach toward settlement agreements relied on by the judge here.

[14] This policy is consistent with the one the Board articulated recently with respect to private settlements of unfair labor practice charges in *Independent Stave Co.*, 287 NLRB 740 (1987), which cites, inter alia, *Texaco, Inc.*, 273 NLRB 1335.

[15] Cf. *NLRB v. Magnavox Co.*, cited in *Metropolitan Edison*, discussed supra at fn. 7, and accompanying text (a waiver in derogation of certain basic employee rights by a bargaining representative is not permitted, even if the bargaining representative clearly and unmistakably agrees to it). We additionally note that there has been no fraud, unlawful coercion, or duress by any of the parties in reaching the settlement, that the settlement was to the overall benefit of all unit employees, and that the individual charge was not pending at the time the settlement was entered into. See *Independent Stave*, discussed above at fn. 14.

[16] See also *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987), affg. *Alpha Beta Co.*, 273 NLRB 1546 (1985), in which the court noted that a union is empowered to bind employees it represents wholly apart from their separate consent.

[17] To the extent that the Board's affirmance of the judge's conclusions in *Texaco, Inc.*, 259 NLRB 1217, 1218 fn. 2 (1982), enfd. 700 F.2d 1039 (5th Cir. 1983) (when the judge rejected a substantially identical employer contention about the effect of a similar settlement agreement with respect to charges filed by individual unit members) could be read as being inconsistent with the decision we reach today, that case is overruled.

ment, nor did the agreement itself expressly bar individual union members from filing future charges against the employer in connection with the strike; only the Union itself pledged to withdraw all pending charges and to refrain from filing any new, related charges, in consideration for which the Union obtained compensation that benefited both the unit employees as a whole and the alleged discriminatees who are the charging parties here.

A long line of Board and court decisions have firmly established the principle that a strike settlement agreement cannot oust the Board of jurisdiction to entertain statutory violations arising out of a strike.[1] Our decision today does not abandon these authorities, and indeed Section 10(a) would preclude a contrary holding that would give preclusive effect to all settlement agreements. Rather, in the exercise of our discretion, we give effect to the strike settlement here (by dismissing the complaint) because we conclude that to do so would comport with our basic mandate to effectuate the purposes and policies of the Act.

As the majority correctly observes, the Supreme Court's opinion in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), holds the key for identifying the relevant considerations. In that case, the Court faced the question of whether a union may waive the statutory protection afforded union officers against the imposition of more severe sanctions than those imposed on other employees for participating in an unlawful work stoppage. Relying on the collective-bargaining agreement, the employer had argued that the officers had failed to take affirmative steps to end the unit employees' unlawful work stoppage, and that that failure justified the imposition of harsher discipline. Although the Court ultimately held that the particular contract language involved did not support the employer's contention, the Court's mode of analysis and its observations regarding the power of a union as a bargaining representative to waive employee statutory rights is dispositive of the issues here. Initially, the Court analyzed the statutory right at stake. It sustained the Board's view that the union officers as individuals had a right to be free of discriminatory treatment, as prohibited by Section 8(a)(3), including matters relating to discipline. Looking beyond the impact of the employer's conduct on the particular union officers involved in the case, the Court identified the overarching statutory interest:

> Congress has sought to ensure the integrity of [the collective-bargaining] process by preventing both management and labor's representatives from being coerced in the performance of their duties. . . . If . . . an employer could define unilaterally the actions that a union official is required to take, it would give the employer considerable leverage over the manner in which the official performs his union duties. Failure to comply with the employer's directions would place the official's job in jeopardy. But compliance might cause him to take actions that would diminish the respect and authority necessary to perform his job as a union official. This is the dilemma Congress sought to avoid. [460 U.S. at 704–705.]

Having identified the statutory right not as an end in itself but as a means to protect the collective-bargaining process, the Court then turned to a consideration of the other factors that nevertheless supported the union's power to waive such a statutory right on behalf of an individual. The Court found that the imposition of additional affirmative duties on union officers to quell unlawful strikes (and the concomitant exposure to more severe discipline) did not impair the employees' basic choice of union representation. Id. at 706. Further, it found a vital link between these affirmative duties and the union's own prerogative to surrender a statutory right of considerable economic value—the right to strike. Ibid. The Court reasoned that the assumption of affirmative responsibilities by a union's officers may be something to which the union may agree in order to obtain something else of value that the union considers preferable for the unit as a whole. In that regard, the Court recalled the settled principle that in the negotiation of collective-bargaining agreements a union is to be allowed some latitude in agreeing to terms, which have a disparate impact among different classes of unit employees, subject to the the duty of fair representation. Id. at 707. Finally, the Court insisted, in agreement with a long tradition of Board and circuit court law, that the union could only effectuate a waiver of employees' statutory rights through clear and unmistakable manifestations of intent. Id. at 708.

In applying the foregoing mode of analysis to the instant case, I initially observe that the right being waived here actually consists of two interwoven strands: (a) the *statutory* right bestowed on individual employees to be free from discriminatory

[1] See, e.g., *Emerson Electric v. NLRB*, 650 F.2d 463 (3d Cir. 1981), enfg. 246 NLRB 1143, 1149 (1979); *Electrical Workers IUE Local 613 (Erie Technological) v. NLRB*, 328 F.2d 723 (3d Cir. 1964); *Machinists Local 743 v. United Aircraft*, 337 F.2d 5, 8–9 (2d Cir. 1964). Cf. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967) (NLRB has jurisdiction over unfair labor practice charge on employer's failure to rescind unilaterally instituted premium pay plan; employer's contractual defense that union waived right to bargain over pay plan does not divest Board of jurisdiction); *Erie Resistor Corp.*, 132 NLRB 621, 631 fn. 31 (1961) (dictum), affd. on other grounds but noted in 373 U.S. 221, 237 fn. 14 (1963), on remand 328 F.2d 723 (3d Cir. 1964).

conduct that discourages (or encourages) union membership (Sec. 8(a)(3)); and (b) a *nonstatutory* entitlement to S & A benefits payable during periods of disability, which are granted to employees individually solely by virtue of the Union's having previously obtained such benefits at the bargaining table.[2] The majority is correct to recognize the latter aspect and to allow the Union the power to barter a portion of that contractual right away (that is, to allow suspension of payments during certain circumstances) in return for other economic considerations that the Union in its discretion subsequently deems to be more beneficial to the unit as a whole.

However, we must not lose sight of the statutory right involved. As is evident from the holding of *Texaco, Inc.*, 285 NLRB 241 (1987), a decision that involved the same underlying labor dispute and strike as the instant one, it is prima facie unlawful discrimination for an employer to suspend payment of accrued S & A benefits to sick or disabled employees solely because unit employees engage in a protected strike. The vice of such conduct is that it "surely may have a discouraging effect on either present or future concerted activity."[3] Yet the fact that this discriminatory effect may occur does not necessarily foreclose the union from agreeing to tolerate it. The Court in *Metropolitan Edison* was willing to subject union officers to disparate punishment because such discrimination could be linked to the union's waiver of the right to strike. Similarly, in the instant case, there is a nexus between the discriminatory denial of the S & A benefits and the Union's decision regarding constraints it can accept on the employees' exercise of their right to strike. The Supreme Court has long recognized that a union does have the inherent authority as exclusive bargaining representative to agree to restraints on the statutory right to strike.[4] If a union can agree to waive the right to strike during a contract term or the right to refuse to cross a lawful picket line, the union can surely agree to tolerate a restraint such as the one in the instant case, which only burdens (in the sense of creating certain financial disincentives) rather than bans outright the exercise of the right to strike.

It is true that the waiver here was obtained under circumstances that were arguably different than the purported waiver that the employer in *Metropolitan Edison* thought it had obtained.[5] There the asserted waiver was part of a collective-bargaining contract that was presumably negotiated in a context free of unlawful coercion. Here, in contrast, there is antecedent unlawful conduct—the denial of S & A benefits—which normally triggers an obligation on the part of the Board to remedy and deter. However, this distinction should not necessarily limit the ability of the Union here to negotiate waivers of statutory rights. The unlawful discrimination was in direct response to the strike called by the Union, it ceased on termination of the strike, and it did not appear to have a lasting detriment to either the bargaining relationship or the ability of the employees to engage in protected concerted activity. Moreover, as noted above, the statutory violation was rooted in the contractual benefits that the Union itself had previously obtained. Under these circumstances, it was entirely appropriate for the Union to settle the statutory violations as part of a comprehensive overall agreement that restored labor peace, resolved the contract issues that gave rise to the dispute, and provided an overall improvement in the terms and conditions of the unit employees, including the discriminatees.

In sum, concerning the first branch of the *Metropolitan Edison* test, I conclude that the employees' statutory right to be free from discrimination is not simply an "economic" right, capable of union waiver because the union and the employer are able to assign a monetary value to the right and treat it like a bargaining chip. Because of the nexus here between the waiver of right against discrimination and the Union's privilege to waive the right to strike, I am satisfied that the Union had the power to enter into an agreement that might effectively lead to a dismissal of the discriminatees' charges against the Respondent. But whether a union, on behalf of particular employees and without their express individual consent, could waive other types of statutory violations in other contexts, in my view, would have to be carefully examined in future cases.[6]

[2] Without a contract, employees who are sick or disabled and cannot report to work would not have been entitled to compensation. See *General Electric Co.*, 80 NLRB 510, 511 (1948) (employer is not required to finance an economic strike against it by remunerating strikers for work not performed).

[3] *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[4] See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

[5] As noted above, a waiver of statutory rights was *not* found in *Metropolitan Edison*, but the Court reached this conclusion on the grounds that there was insufficient evidence of a clear and unmistakable waiver. As a threshold matter, however, the Court clearly sustained the power of the union to negotiate into the collective-bargaining agreement a limited waiver of its union officers' protection against discrimination.

[6] The record shows that at least some of the 11 discriminatees knew the terms of the settlement agreement, but it is uncertain whether all of them were so aware. Two of the discriminatees even participated in a ratification vote, although the record does not disclose how they voted. For purposes of establishing whether the Union clearly and unmistakably intended to waive the statutory rights of the charging party and other discriminatees, this evidence is certainly probative. However, I would not equate it with the evidence of individual express consent that the Board,

Continued

The remaining aspects of the *Metropolitan Edison* analysis—whether the Union's action comported with the duty of fair representation and whether the clear and unmistakable waiver standard was satisfied—do not require extended discussion. There is no evidence that the Union in reaching this settlement agreement engaged in any type of discriminatory conduct that might constitute a breach of the duty of fair representation.[7]

Furthermore, I agree with my colleagues' assessment that the Union did manifest a clear and unmistakable intent to compromise the charging parties' claims for relief under the Act.

MEMBER CRACRAFT, concurring.

Like my colleagues, I would dismiss the complaint because the Union clearly and unmistakably waived disabled employees' rights to sickness and accident plan benefits (S & A benefits) in the strike settlement agreement executed between it and the Respondent.[1] In doing so, however, I rely only on the language of the agreement—specifically, the second sentence of clause 6—and the undisputed fact that S & A benefits were discussed during the negotiations leading to the agreement.

The second sentence of clause 6 of the strike settlement agreement provides: "It is further agreed by the parties that such payment is in full settlement of *any grievance*, NLRB charges or action pending or in the future related to the handling of *all* benefits during the strike" (emphasis added). I read this sentence to mean that the Union exchanged the right to grieve the Respondent's handling of *all* benefits during the strike for the payment specified. Thus, the Union clearly and unmistakably waived any possible contractual claim to S & A benefit entitlement during the strike. The bargaining history of the strike settlement agreement shows S & A benefits were discussed in relation to settling the strike, which bolsters the finding that S & A benefits are encompassed within the Respondent's "handling of *all* benefits during the strike."

In conclusion, because the Union has clearly and unmistakably waived disabled employees' entitlement to contractual S & A benefits by forgoing its right to contractually grieve the matter, the Respondent cannot have committed an unfair labor practice by withholding these benefits.

in other decisions, has found relevant. See *Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985) (settlement negotiated by union was subsequently approved by apparently all affected employees), petition for review denied 808 F.2d 1342 (9th Cir. 1987); *Coca-Cola Bottling Co.*, 243 NLRB 501, 502 (1979); *Central Cartage Co.*, 206 NLRB 337 (1973). See also *Airport Parking Management Co.*, 264 NLRB 5, 13 (1982), enfd. 720 F.2d 610 (9th Cir. 1983) (Board decided not to defer to strike settlement agreement because, inter alia, no evidence that employees understood agreement to waive their right to pursue claims arising out of strike). Compare *Lectromelt Casting Co.*, 269 NLRB 933, 934 (1984) (strike settlement agreement gave discriminatees the option of accepting settlement on an individual basis; those who accepted it waived statutory rights whereas those who rejected it could pursue remedy with the Board), with *Hotel Holiday Inn De Isla Verde*, 278 NLRB 1027, 1028 (1986) (complaint dismissed on grounds of union-negotiated strike settlement agreement which "[a]ll the affected discharged strikers were aware of," did not object to, and by conduct indicated acceptance of its terms).

[7] See *Teamsters Local 310 (Duval Corp.) v. NLRB*, 587 F.2d 1176, 1181, 1184–1185 (D.C. Cir. 1978), on remand 243 NLRB 1157 (1979). Compare *United Aircraft Corp. (Pratt & Whitney)*, 192 NLRB 382, 388 (1971), petition for review denied in pertinent part on other grounds sub nom. *Machinists Lodges 743 & 1746 v. United Aircraft Corp.*, 534 F.2d 422, 450–451 (2d Cir. 1975), with *Laher Spring & Electric Car Corp.*, 192 NLRB 464, 466 (1971).

[1] Except for the circumstances mentioned below, I would defer this proceeding to arbitration in light of the history and quality of the parties' bargaining relationship, the absence of union animus, the Respondent's willingness to resort to arbitration, the scope of the arbitration clause, and the fact that contract interpretation is central to resolution of this dispute. See *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984). Due to the length of time this case has been at the Board, however, deferral at this point would be inequitable as it would only further delay disposition of the matter at issue.

Rochelle Golub, Esq., for the General Counsel.
Glenn R. Patterson and *Palmer Singleton Jr., Esqs.*, of Highland, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. The original charge in this case was filed on June 3, 1980, and amended on June 17, 1980. The original complaint issued on June 30, 1980, and was amended July 1, 1980. Respondent's answer to the complaint is dated July 7, 1980, and was amended July 1, 1980. The complaint alleged that immediately on the commencement of an economic strike at its Indiana facility, and continuing until the end of the strike, Respondent ceased paying sickness and accident disability benefits (S and A Benefits) to named unit employees[1] previously receiving such benefits and, by such act, has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act. In its answer, Respondent denies the commission of any unfair labor practices and affirmatively asserts that a memorandum of agreement between the Respondent and Local 7-210 of the Oil, Chemical, and Atomic Workers International Union acts as a bar to the filing of the complaint in this case. A hearing was held before me in Chicago, Illinois, on February 9 and 10, 1981. Briefs have been received from the General Counsel and Respondent.

On the entire record in this case and from my observation of the witnesses and their demeanor I make the following

[1] The alleged discriminates are: Julius Sako, Leroy O'Donnall, Paul Ferrantelli, Donald Hensley, Andrew Habzansky, Edward Kolesky, Jack Dowell, Harry Wickhorst, Jimmy Siokos, Robert Frisbie, and Mary Kasperek.

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

Respondent, a Delaware corporation, is engaged in the business of petroleum refining and processing with an office and principal place of business located at 3500 Indianapolis Boulevard, East Chicago, Indiana. During the year preceding issuance of the complaint, Respondent sold and shipped goods valued in excess of $50,000 from its East Chicago, Indiana facility directly to points located outside the State of Indiana. I find that Respondent is an employer within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE LABOR ORGANIZATION INVOLVED

Local 7-210, Oil, Chemical, and Atomic Workers International Union, AFL-CIO (the Union) is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Energy Cooperative, Inc. (ECI or Respondent) was formed in 1976 by nine agricultural cooperatives in response to the oil embargo of 1973–1974, during which these cooperatives lost their source of energy products, basically gasoline and diesel oil, to supply their farm member-owners. Seeking to find a secure source of such products, the cooperatives formed ECI and acquired an Arco-Sinclair refinery in East Chicago, Illinois. At the time ECI acquired the involved refinery in 1976, it agreed to honor the contract that existed between Arco, the previous owner, and the Union, as it pertained to the involved refinery. For many years prior to that purchase, and at all times material, Local 7-210 has been recognized as the bargaining representative of a unit of production and maintenance employees and a unit of clerical employees employed at the refinery. Successive collective-bargaining agreements between the Local and the respective owners of the refinery have historically conformed with an industrywide bargaining program or pattern developed by the Oil, Chemical, and Atomic Workers International Union. The most recent collective-bargaining agreement entered into by Respondent, the Local, and the International Union went into effect on January 8, 1979. Article XXXI provided for the reopening of negotiations on wages, health care benefits, and vacations no earlier than November 1, 1979. The reopening provision provided that in the event the parties could not reach agreement the International and the Local had the right to engage in an economic strike subsequent to January 8, 1980.

Pursuant to appropriate notice, Respondent ECI and Local 7-210 commenced negotiations on the reopened subject. The two meetings and other communications between the parties during the period from November 1, 1979, through January 7, 1980, focused on efforts to exempt Respondent from any industrywide strike action called by the International, on Respondent's assurance to conform to any pattern established for the industry in negotiations to settle a strike. Neither of the parties anticipated the strike at Respondent's refinery even if the International called an industrywide strike on or after January 8, 1980.

At a meeting called by Local 7-210 Secretary-Treasurer Dean Bainbridge, on January 7, 1980, for the same afternoon, Bainbridge presented Respondent's manager of industrial relations, Barry Brock, with a copy of a notice from the International's president that Local 7-210 would strike Respondent on January 8, 1980. Brock testified that he announced to the Local in 1978 a company policy that S and A benefits, among others, would be cut off in the event of a strike. Brock reiterated the policy at the January 7 meeting with Bainbridge. Bainbridge had earlier opposed Respondent's stated policy and again at the meeting opposed Respondent's intention to cut off the S and A benefits for those employees on medical leave. He also questioned Brock about Respondent's handling of insurance premiums. Bainbridge was told by Brock that he would get back to him on the issue of premiums. On January 8, 1980, at 4:15 p.m., the strike commenced.

Prior to and on January 8, 1980, the 10 production and maintenance unit employees and the clerical employee named in the complaint were absent from work on medical leave due to physical disabilities. Each had been receiving contractual S and A benefits prior to that date. Immediately on commencement of the strike, as admitted by Respondent, it terminated payment of S and A benefits to these 11 employed.

During the strike, Mary Kasperek died, and Harry Wickhorst received medical certification of recovery. The other nine employees involved remained physically disabled and were unable to work for the duration of the strike. Throughout the negotiations to settle the strike, the Local urged Respondent to reinstate the S and A benefits to those employees who had been receiving them prior to the strike. Ultimately, the strike was settled on April 12, 1980, and Respondent resumed payment of S and A benefits to the nine employees who were still disabled. The Local, on behalf of its employees, including employees named in the complaint, entered into a memorandum of agreement in which Respondent was released of all liability for its actions in relation to the strike, including alleged and potential unfair labor practices. Employees Andrew Habzansky and Harry Wickhorst participated in the ratification vote for approval of the memorandum of agreement, which ended the strike.

B. *Employer's Defenses*

The General Counsel urges that the controlling case with respect to the subject matter involved in this proceeding is *Emerson Electric Co.*, 246 NLRB 1143 (1979). The Board, in *Emerson Electric*, affirmed with modifications the recommended Order of an administrative law judge, holding that employees receiving sickness and disability benefits at the outset of the strike were, in general, entitled to continue to receive such benefits during the course of the strike unless such employees publicly declared their support for the strike. In the face of *Emerson Electric*, Respondent in this proceeding has raised a

number of defenses, none of which I find valid. These defenses will be discussed below in the order that appears most logical, though not necessarily in the order of their importance.

1. Respondent contends that the Board should have deferred this proceeding for arbitration. Relying on *General American Transportation*, 228 NLRB 808 (1977), Respondent urged that the instant case be deferred under *Collyer Insulated Wire*, 192 NLRB 837 (1971). Respondent's reliance is misplaced. In *General American Transportation*, the Board clearly stated its opposition to deferral in cases alleging violations of Section 8(a)(3) of the Act. The instant case involves individual protected rights arising out of the Act and neither Respondent nor the Local had ever indicated willingness to arbitrate the issues raised here. The Board has affirmed an administrative law judge's decision that issues similiar to those raised in this proceeding are not appropriate for deferral. *Kansas City Power & Light Co.*, 244 NLRB 620 (1979). I find that the issues involved should not be deferred for arbitration and find that they are properly before the Board.

2. Respondent asserts that *Emerson Electric* establishes an unconstitutional irrebutable presumption in violation of due process rights under the 14th Amendment to the United States Constitution to the extent that the Board has established a presumption that an employer violates the Act when it terminates its payment of existing S and A benefits to disabled employees during a strike. This argument is apparently directed at another forum and will not be discussed at length. However, I do not believe that the Board established an irrebutable presumption in *Emerson Electric*. If it had proper proof, Respondent could have shown that it acquired information that indicated that the employees whose benefits are to be terminated had affirmatively acted to show public support for the strike and, having acquired this information, and acting on it, terminated the benefits. As will be demonstrated, the applicant has not made such a showing, and failure to do so does not demonstrate that it was denied its due process rights, only that it violated the Act.

3. Respondent raised as an affirmative defense and motion to dismiss paragraph 8 of the memorandum of agreement executed by Local 7-210 and Respondent in settlement of the strike. In pertinent part, paragraph 8 provides that neither party to the memorandum will file any charges with the National Labor Relations Board as a result of the strike. At the hearing, Respondent indicated that paragraph 8 directly related to paragraph 6 of the memorandum in which the parties agreed that Respondent would pay its portion of the insurance premiums on behalf of employees during the strike "in consideration of certain benefits not paid as a result of the strike, and that such payment was in full settlement of any grievances, NLRB charges or actions pending or in the future related to the handling of all benefits during the strike." It is clear that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may established by agreement, law or otherwise," Section 10(a) of the National Labor Relations Act. The memorandum of agreement is not binding on the Board and does not warrant the Board's abdication of its jurisdiction or its obligation to enforce public rights. *Emerson Electric*, supra, and cases cited therein; *Lammert Industries Corp.*, 229 NLRB 895, 924 (1977). Respondent's motion is denied.

4. Respondent urges strenuously that *Emerson Electric* is not controlling and dispositive of the issues in this proceeding as the instant case may be distinguished on its facts from *Emerson Electric*. In *Emerson Electric*, supra at 3, the Board stated: "in rejecting this rationable, we conclude that an employer may not rely on such speculative grounds to justify the termination of existing disability benefits to employees which, as found here by the administrative law judge, had *accrued to them as a result of past work performed*." In the instant proceeding Respondent argues that the S and A benefits involved are not "accrued as a result of past work performed," within the meaning of *Emerson Electric*. Respondent urges that the collective-bargaining agreement provides that S and A benefits are wages, and that an employee is qualified so that the wages become due and owing if

(a) The employee is medically certified as being temporarily disabled and unable to work.

(b) The employee was normally scheduled to work during the period of disability.

The collective-bargaining agreement, article XI, states, inter alia

> 1. All regular employees shall receive wages during periods of physical disability by reason of sickness and injury, subject to the following rules and regulations.
>
> . . . .
>
> 8. Payments of wages during periods of physical disability shall be based on the employee's normal working schedule. In computing the number of days' pay an employee is entitled to receive under this Plan in any calendar year, pay allowance will be made for the actual number of normally scheduled working days within the period of such absence. Any pay for overtime work shall not be considered in determining rate of wages for the purpose of disability payment hereunder.
>
> . . . .
>
> 18. The Plan shall be subject to the Grievance and Arbitration Procedure of the Articles of Agreement.

Respondent contends that the S and A benefits plan set forth above is merely a wage continuation plan requiring that an employee actually be scheduled to work during the period of his or her disability to receive benefits. Respondent argues that because no union members were scheduled to work during the strike, none of the discriminatees were entitled to continue to receive benefits during the strike. In support of its position, Respondent argues that because paragraph 1 refers to benefits as "wages", and paragraph 8 refers to the employees "normal work schedule" and paragraph 1 denies payments of benefits to disabilities commencing during a vacation, leave of absence, or layoff, an employee must be actually scheduled to work to receive benefits under the plan.

I disagree. Paragraph 3, article XI, provides for greater benefits for more senior employees, demonstrating to me the benefits are paid to employees for work performed by them in the past, not in the present. When viewed in conjunction with paragraph 9, article XI, and the context of the entire contract, I find that the reference in paragraph 8, article XI, to an employee's normal work schedule describes the basis on which an employee's benefits are computed, rather than requiring an employee to actually be scheduled to work a particular day to receive benefits. Various other provisions of the contract contain similar language to establish norms for the employees' hours of work and rates of pay. Article VI of the contract defines the "regular schedule work hours" and the "regular" workweek for day employees and shift employees. Article VIII provides for pay differentials for shift employees "regularly assigned" to shift work. Article IV discusses the effect of a temporary assignment of an employee to a job classification other than "regularly assigned classification." It appears that an employee could become disabled while working in a classification or during hours other than those in which the employee normally works. In that event, article XI provides that benefits will be based on an employee's "normal work schedule." Moreover, article IX, on vacations, also sets out the basis for computation of the employees' vacation pay in substantially similar language to paragraph 8, article XI. It would be illogical to argue that to get vacation pay an employee must actually be scheduled to work at the time that employee is scheduled to take vacation because the amount of vacation pay is based on the "regularly scheduled workweek, exclusive of overtime."

As noted in the General Counsel's brief, the record is vague with respect to Respondent's operations to the extent that disabled employees are literally scheduled to work during their absence. It appears that while disabled employees are listed somewhere in order to retain their seniority in rank on a particular process crew or unit, another employee is temporarily transferred to that crew or unit to perform the scheduled work. Moreover, benefit checks are automatically prepared by the payroll department by computer from information about the employee's regularly scheduled workweek and rate of pay without regard for whether the employee is actually "scheduled" for work. Testimony of Respondent's employees establishes that the work schedule utilized during the course of the strike was prepared by Respondent in 1978 in anticipation of a strike and only contained the names of management personnel or personnel recruited from outside the refinery. No unit employees were included in that work schedule, even though Respondent admitted it had no idea how widespread support would be before the strike.[2] Moreover, there is no evidence in the record that failure to be "scheduled" to work during the strike affected unit employees' rights or benefits in respects any other than those at issue in this proceeding.

I believe the record clearly demonstrates that the sickness and disability benefits plan involved provides benefits to sick and disabled employees when they are phsically unable because of past work performed. An argument similar to that made above by Respondent in this case was rejected by the administrative law judge in *Emerson Electric*. In *Emerson Electric*, the administrative law judge found that S and A benefits which, as described in his decision appear very similar to those at issue in the instant case, accrue to employees who were receiving them at the start of a legitimate economic strike of other employees. As the administrative law judge's analysis and findings in this respect were upheld by the Board on review, I conclude that the S and A benefits here involved are "accrued" benefits within the meaning of *Emerson Electric*.

In a related defense, Respondent urges that it did not rely on speculative grounds to justify the termination of existing disability benefits to its employees and that it had a legitimate business reason for terminating such benefits. Respondent urges that the Board has failed to carry its burden of proof imposed in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). It urges that *Great Dane* clearly holds that there must be proof that an employer's actions fall within one or two categories before an 8(a)(3) unfair labor practice can be sustained. There must be proof that the employers' conduct was "inherently destructive" of employees' rights, or that the harm resulting from the employer's action was "comparatively slight." Respondent argues that because the named discriminatees were not entitled to wages for S and A benefits under the provisions of the collective-bargaining agreement for the reasons set out above, there was no adverse impact on employees that can in any way be held to be "inherently destructive." or to have a "comparatively slight" impact on those employees' rights.

Respondent states on brief that the Board in *Emerson Electric*, supra, found, by inference, that the employer's actions in that case were "inherently destructive" of employees' rights for several stated reasons. A review of the *Board's decision* in that proceeding will reveal that the reasons stated by Respondent were not mentioned by the Board, although they formed part of the reasoning underlying the decision reached by the administrative law judge. However, even if Respondent is correct that such reasons are necessarily implicit in the Board's decision, I believe all material aspects of *Emerson Electric*, which led to the Board's ultimate decision there, are also present in the instant case. The reason believed material by Respondent are

(a) Because the collective-bargaining agreement provided for payment of S and A benefits during the course of the strike due to the accrued and vested nature of those benefits.

(b) Because the employer had been notified prior to the strike by the Union that certain employees receiving S and A benefits would not be participating in the strike.

[2] In other testimony elicited by Respondent, it has taken the position that it believed the strike would be widespread because of the past history of strikers against the involved refinery. Based on research by some of its employees of earlier strikes, it appears that no refinery employee had ever crossed a picket line established by the Local. As noted earlier, however, none of the responsible personnel of Respondent had any actual strike experience with the Local.

(c) Because a number of employees receiving S and A benefits prior to the strike called the employer shortly after the strike and protested the denial of S and A benefits, specifically indicating to the Company that they were not in fact participating in the strike.

(d) Because the employer terminated S and A benefits before there was any showing of how widespread the strike would be.

(e) Because the employer relied on speculative grounds to justify the termination of those benefits to the employees.

Respondent urges that none of the facts are present in the record of this proceeding. I disagree. First, I have already found that the S and A benefits involved are accrued and vested benefits, at least within the meaning of *Emerson Electric*. Although Respondent may not have been notified specifically prior to the start of the strike that the involved discriminatees were excused from work by their sickness or injuries. Certainly, there is nothing in this record to indicate that at the outset of the strike Respondent had any positive knowledge that any of the discriminatees intended to participate in the strike.[3]

I believe that the Board's decision in *Emerson Electric* requires that an employer have some positive knowledge or proof that employees in the position of the discriminatees in this case actively intend to support a strike rather than placing a burden on the employees to expressly disavow the strike to the employer in order to continue to receive their benefits during the course of the strike.

Regarding Respondent's reason in paragraph (c), at least one discriminatee, Harry Wickhorst, notified a responsible management person on January 9 that he was not withholding his labor from the Respondent, but that he was off sick. This discriminatee was informed that his position made no difference whether he would get his benefits. As in *Emerson Electric*, the Employer Respondent in this proceeding did terminate the S and A benefits before there was any showing of how widespread the strike would be and, in my opinion, Respondent relied on speculative grounds to justify the termination of those benefits to the employees. It appears that the decision to terminate the benefits was made well prior to the actual institution of the involved strike or notification that a strike was imminent.

[3] Evidence was adduced that the Local prepared picket rosters from Respondent's seniority list, which included the names of all the discriminatees except Mary Kasperek. While it appears that these picket rosters were distributed among employees and/or posted at the refinery, there is no evidence that shows that management personnel of Respondent were aware of these rosters at the time that Respondent made or implemented its decision to terminate the disability benefits or that they played any role in the decision-making process. The picket rosters were amended shortly after the onset of the strike to reflect that the discriminatees were not participating in the picketing. Similarly, Respondent offered into evidence a copy of the Local's bylaws obtained from the Local pursuant to a pretrial subpoena to show that all union members were required to be supporters of any strike action. However, art. IV, sec. 4(8), of the bylaws merely permits the Local to take disciplinary action against members who engage in conduct that tends to render prosecution of a strike. There is no record evidence that Respondent's management was aware of the bylaws when a decision was made to terminate the disability benefits. Moreover, such provision is inadequate to prove that employees affirmatively acted to support the strike, especially in view of the Local's protest of the termination of the S and A benefits to employees who were disabled at the start of the strike.

Even if a legitimate business purpose for termination of existing S and A benefits rebuts a presumption of discriminatory motivation in accordance with the principles set forth in *NLRB v. Great Dane Trailers*, supra, I believe that Respondent acknowledges that the decision to terminate the S and A benefits during the strike had been grounded in a policy developed by the Respondent in 1978. The policy was implemented in the 1980 strike because of the following stated reasons:

> (1) Although the contract was reopened, the strike terminated Respondent's obligations under the contract.
>
> (2) S and A benefits are like wages and Respondent was not obligated by law to finance a strike against itself.
>
> (3) Respondent was obligated to conserve its resources.
>
> (4) It wanted to prevent fraud by preventing strikers from attempting to collect benefits by claiming they had suffered a disability during the strike. Respondent admitted that it had not distinguished between employees who were disabled prior to the strike and strikers may have attempted to make initial claims during the strike.

The S and A benefits issue is accrued benefits, and as found above, Respondent cannot claim any legitimate business purposes for its conduct on this ground (par. 2). The other stated "legitimate business purposes" urged by Respondent were considered by the administrative law judge and the Board in *Emerson Electric*, and rejected, and I do the same.

5. Respondent also argues that there is ample evidence in the record to prove that the employees showed public support for the strike within the meaning of *Emerson Electric*, and thus enmeshed themselves in the ongoing strike activity to such an extent as to terminate their right to continue disability benefits. With respect to discriminatees Sako, Wickhorst, Farrentelli, Dowell, Habzansky, and Siokos, Respondent argues that they publicly supported the strike by applying for unemployment compensation benefits in March. In each of the instances in which these discriminatees applied for state benefits, they indicated on their application forms to the Indiana Employment Security Division that they were entitled to benefits for the reason that they were on strike or involved in a labor dispute as of January 8, 1980. However, the testimony of these six discriminatees about their experiences in applying for unemployment compensation benefits reveals that, in spite of their explanations why they were applying for benefits, the government officials who aided them in completing the forms insisted that they put down that Respondent was on strike as the reason that they were "unemployed," and that other reasons were unnecessary since all the applications of employees in the oil industry were being processed together. I do not believe that an application for unemployment compensation benefits constitutes public support for a strike, where, as here, the employees' benefits were in dire financial straits because of the discontinuance of their S and A benefits. Moreover, Respondent did not ef-

fectively acquire information about these benefits applications until sometime during the preparation for the instant proceeding.

Respondent also relies on the fact that none of the discriminatees were fined or otherwise disciplined by the Union for failing to ratify or participate in the strike. It urges that though employees are not required to declare their position on the strike to an employer there is nothing to prohibit them from doing so to the Union, and had they so indicated their position in opposition to the strike to the Union, disciplinary action would have taken place. It must be noted that several of the discriminatees when asked at the hearing whether they did support the strike replied in the negative. I believe this to be immaterial in any event. The discriminatees are not required by the Board's decision in *Emerson Electric* to publicly disavow the strike to continue to receive disability benefits, only to refrain from publicly supporting the strike. Again, knowledge of whether the Union did or did not discipline the discriminatees for failure to support the strike would not come into the hands of Respondent until after the end of the strike.

Lastly, Respondent notes that two of the employees participated in the ratification vote that concluded the strike, and that each of the employees named in the complaint testified at the hearing that they would not have crossed the picket line to go to work but for their disability. Again, such information did not come into the hands of Respondent until after the end of the strike, and in any event do not constitute public support for the strike. As held by the Board in *Emerson Electric*, a showing of participation in the strike does not justify post hoc Respondent's initial termination of benefits to the discriminatees. Any employee, disabled or sound, who affirmatively demonstrates his support of the strike by picketing or otherwise showing public support for the strike, has enmeshed himself in the ongoing strike activity to such an extent as to terminate his right to continue disability benefits. The employees' actions in support of the strike, however, may not be used to deprive them of any benefits for time away from work prior to their supportive action. Based on the evidence presented in this case, I find that none of the discriminatees participated in the strike or lent public support for the strike within the meaning of *Emerson Electric*.

IV. THE REMEDY

Based on these findings and conclusions, I ultimately find and conclude that Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act. It having been found that Respondent unlawfully withheld S and A benefit payments to the discriminatees named in the complaint, it must be ordered, in remedy, to pay them what money was due them, with interest. The period for which such reimbursement must be made is from January 8 to April 12, 1980. Mary Kasperek died and Harry Wickhorst was certified medically able to work during the period of the strike. They will be paid what S and A benefits were due to them to the day of their death or recovery.

On the basis of these findings of fact and on the entire record in this case, I make the following

CONCLUSION OF LAW

By withholding from January 8 to April 12, 1980, payment of S and A benefits to the employees named in the complaint, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Prentice-Hall, Inc. *and* District 65, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO. Case 22–CA–11259

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On November 19, 1984, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed briefs in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

In adopting the judge's conclusion that the Respondent engaged in bad-faith bargaining, we have strictly applied the principles set forth in *Reichhold Chemicals*, 288 NLRB 69 (1988). We therefore disavow any reliance on the judge's reasoning to the extent that it may suggest that we will scrutinize wage offers to see if they are sufficiently generous, that we would require some substantial explanation for every concession that an employer declines to make, or that we believe that an employer is bargaining in bad faith if it does not offer all the benefits to one bargaining unit that it has offered to another.

We agree, however, that it is reasonable to infer from the totality of the evidence that the Respondent had no real intent to reach a collective-bargaining agreement with the Union. Rather, it behaved as if it was counting on the chance that the slim majority by which the Union won the election (a fact the Respondent's negotiator commented on more than once) and the passage of the certification year without any real prospect of a contract would culminate in a sufficient expression of employee dissatisfaction to permit the Respondent to do what it finally did when the certification year ended—withdraw recognition on the basis of an asserted good-faith doubt of union majority.

It is important to recognize at the outset that the employees possess, by virtue of the Union's certification, the right to strike or negotiate or both over every workplace grievance and to demand that the Employer give advance notice and a meaningful opportunity to bargain over any change it makes in the working conditions of unit employees (other than those basic shifts in the shape or direction of the business that are not mandatory subjects of bargaining). An employer of course may seek waivers that will eliminate or restrict the exercise of these rights during the term of a contract, but the Respondent's demands for sweeping waivers—viewed in the light of what it was offering in exchange—simply are not the behavior of an employer who is trying to achieve a collective-bargaining agreement. In this connection, we agree with the judge that the combination of the Respondent's proposals on management rights, grievance and arbitration, "sole recourse," and prohibitions against strikes rendered substantial portions of the proposed contract virtually unenforceable.

Finally, our basis for inferring bad faith is strengthened by the Respondent's tactic of pretending to concede on some matter particularly objected to by the Union, while retaining essentially the same provision in another clause in the Respondent's overall contract proposal (or transferring the provision to another clause), e.g., its deletion from

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge's decision contained several minor errors which do not affect his analysis or our decision: (1) In sec. II,C, the judge erroneously stated that Michael Senick acted as the primary negotiator for the Union in its negotiations for a second LLSD contract. The record reflects that Bernice Krawczyk acted as the primary spokesperson in that negotiation. (2) In sec. II,D,9, the judge inadvertently identified an employer proposal as having been made on July 12 rather than August 12, as the record reflects. (3) In sec. II,D,10, the judge stated that the bargaining unit consisted of approximately 50 employees "when bargaining first began," although the record reflects that there were 50 employees in the bargaining unit at the time of the representation election and is silent with respect to the number in January 1981 when bargaining commenced. (4) In sec. II,D,13, the judge stated that the second LLSD contract had been signed "even as the CSD negotiations continued." The record reflects that the second LLSD contract was reached some 6-1/2 months after the CSD negotiations had been broken off. (5) In sec. II,E, fn. 83, the judge inadvertently used October 18 rather than November 18 as the date on which the Respondent filed its RM petition.

[2] We disavow the judge's statement in fn. 27 of his decision that as early as June 11, 1981, the parties reached impasse on the management-rights issue, and his statement in fn. 93 that the Respondent's alleged delay in scheduling or attending bargaining meetings reflects on its motivation. Further, we disavow the judge's reliance on the manner in which the Respondent's counsel conducted direct and cross-examination of witnesses during the hearing either as a basis for discrediting Joseph Kelly's testimony or as evidence of the Respondent's bad faith bargaining.

In addition, although we adopt the judge's finding that the Respondent had asked the Union to poll employees on the issue of the waiver of certain Sec. 7 rights, we find it unnecessary, in view of our disposition of the case, to address this matter. Accordingly, we do not rely on the judge's discussion of *NLRB v. Magnavox*, 415 U.S. 322 (1974), and *Romo Paper Products*, 220 NLRB 519 (1975), as it relates to this waiver issue.

the seniority article of disciplinary action as a ground for loss of seniority while effectively retaining it in the Rules and Corrective Discipline article. This method of bargaining tended to stretch out the negotiations because it produced renewed controversies over old ground.

In sum, we acknowledge that the Respondent's negotiators appeared regularly at the bargaining table and that the negotiations resulted in movement and agreement on some subjects, but we are persuaded by the totality of the record evidence that the Respondent was not negotiating in good faith with a view to trying to reach a complete agreement with the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Prentice-Hall, Inc., Englewood Cliffs, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

William F. Grant, Esq., for the General Counsel.
James D. Madigan III and *John D. Canoni, Esqs. (Townley & Updike)*, of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was tried before me in Newark, New Jersey, on September 13, 14, 16, 22, 23, and 28, 1982. The complaint, which issued on January 13, 1982,[1] alleges that Prentice-Hall, Inc. (Prentice-Hall, Company, or Respondent) violated and is violating Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by negotiating with District 65, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union or District 65) in bad faith and with no intention of entering into any final or binding collective-bargaining agreement, and by withdrawing and withholding recognition from the Union. In its answers to both the original and amended complaint, Respondent denied the conclusionary allegations of violation of the Act. The General Counsel and Respondent each filed posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the posthearing briefs filed by the parties, I make the following

[1] Another complaint, in Case 22-CA-11298, with the same Charging Party and issued against the same Respondent, was first consolidated for hearing with the instant complaint by order and issuance of an amended complaint on January 25, 1982, and then later ordered severed by the Regional Director on motion made by Respondent.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a corporation[2] engaged in the publication, sale, and distribution of books and other printed matter. At all times material it has maintained its principal office and place of business in Englewood Cliffs, New Jersey, the only facility involved in this proceeding. Annually, Respondent, in the course and conduct of its business operations, publishes, sells, and distributes at the Englewood Cliffs facility books and other printed products valued in excess of $50,000, of which books and other printed products valued in excess of $50,000 are shipped from the facility in interstate commerce directly to points outside the State of New Jersey. Respondent admits, and I find, that Prentice-Hall is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union's Bargaining History with Prentice-Hall*

By the time District 65 organized the composition services department (CSD or the unit), it had already organized two other units at Prentice-Hall: a small clerical unit in a subsidiary just outside Boston, and the attorney-editors in the looseleaf services division (LLSD) located in Paramus, New Jersey. The clerical unit had signed its first bargaining agreement in September 1980, and the LLSD's first contract was in effect from June 1, 1980, until May 1, 1982. Negotiations for a second LLSD contract began in late March or early April 1982 and, following a brief strike immediately following the expiration of the first agreement, a new agreement was signed.

B. *The Unit*

The CSD was created by Prentice-Hall a decade before this case arose as an in-house alternative to private vendors for preparing manuscripts. The department's employees perform typesetting, proofreading, and pasteup tasks for which they compete with outside vendors. The overwhelming majority (95–96 percent) of this work is performed by outside vendors.

In September 1980, the Union filed its petition with the National Labor Relations Board (Board) to represent CSD employees. Prentice-Hall and District 65 entered into a stipulation for certification upon consent agreement for an election that was held on November 6, 1980. Twenty-five of the 48 employees who participated in the election[3] voted in favor of representation, and on No-

[2] Respondent filed two answers, one to the complaint, and another to the amended complaint. In its answer, Respondent admitted to being a corporation organized under the laws of New Jersey, and in its amended answer to being a corporation organized under the laws of Delaware. Because Respondent admits jurisdiction, and I so find, I have not resolved this inconsistency.

[3] Apparently, the unit consisted of 50 employees at the time of the election. Later, at the time of this litigation, CSD employed only 35 employees.

vember 17, 1980, the Board certified a unit consisting of all full-time and regular part-time advertising production coordinators, camera operators, compositors, pasteup artists, system operators, quality control personnel, control clerks, and proofreaders employed by the Employer in its CSD at its Englewood Cliffs, New Jersey facility but excluding all managerial employees, confidential employees, casual employees, watchmen, guards and supervisors as defined in the Act, as appropriate for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

C. *Bargaining Participants, Procedures, and Respondent's Notes of the Sessions*

Throughout the negotiations each party was represented by a chief negotiator accompanied by a negotiating team. Michael Senick and Joseph Kelly were the primary negotiators for the Union and Respondent, respectively.

Kelly was Respondent's vice president in charge of human resources. He had experience as both a negotiating committee member and as the principal spokesperson in contract negotiations for two other employers before coming to Prentice-Hall.

Prior to becoming employed by District 65, Senick, an attorney, had been an employee in Prentice-Hall's LLSD for 5-1/2 years. While still an LLSD employee he had been a member of that unit's negotiating committee for their first contract. The CSD negotiations represent the first time Senick had acted as the chief spokesperson in contract negotiations. He subsequently was the primary negotiator for the Union in its successful negotiations for a second LLSD contract.[4]

Kelly's committee was comprised of John Canoni, a partner at the law firm of Townley & Updike, with extensive background in contract negotiations; Peter Aschoff, manager of CSD; Michael Sweet, a participant in first contract negotiations between Respondent and LLSD; and James Madigan, an associate with Townley & Updike with no previous experience in collective bargaining. This committee remained intact throughout the course of the negotiations, although not all members were present at all sessions.

Senick's committee consisted primarily of unit employees and its composition varied from one meeting to the next. Bernice Krawczyk also attended some of the sessions before July 1981. She was in charge of District 65's publishing division and was Senick's supervisor at the Union.

Negotiations were initiated by Senick by letter in mid-December 1980. Kelly responded to this request by sending a letter offering two dates in mid-January for commencing bargaining. The parties ultimately met on January 22, 1981, and continued to meet at intervals until November 5, 1981.

Early in their negotiations, the parties agreed on ground rules for conducting their meetings.[5] It was also agreed that economic issues would be deferred until later in the negotiations.

At the first session the Union gave Respondent's committee a package of most of its proposals. Over the course of the next several sessions these were presented by various union committee members who explained the rationale behind each proposal and answered questions. Respondent later responded by delivering its own proposals and an explanation of its rationale for each.

Over the course of their meetings, tentative[6] agreement was reached on many issues,[7] but 15 proposals remained unsettled when negotiation broke down. These were: management rights, no-strike rules and corrective discipline, union security, arbitration, wages, seniority, subcontracting, jury duty, medical and life insurance, complete agreement, term of agreement, successors and assigns, holidays for part-time employees, and credit union checkoff.[8]

During the course of negotiations, Michael Sweet, a member of Respondent's negotiations team, made notes of each bargaining session. Kelly relied on these notes to refresh his recollection of the parties' negotiations when he testified at the hearing before me. (Tr. 1118.) At the conclusion of Kelly's direct testimony, Respondent produced the notes in response to the General Counsel's request. The General Counsel introduced these notes into evidence and they were admitted, without limitation, as to what was said at the meetings. (G.C. Exh. 7, Tr. 1127–1130.)

In its brief the General Counsel urges that the notes be relied on as an accurate representation of what occurred at the bargaining table. Respondent's counsel, Canoni, confirmed that the notes reflect what transpired at the meetings, "at least as reflected by the minutes." (Tr. 1127.) I have noted that the minutes are not necessarily complete and have relied on them only when they conflict with or supplement the testimony given at the hearing.

D. *Areas in Dispute*

1. Jury duty

On February 26, the Union presented its proposal for handling employees called to jury duty:

[4] All reference to the LLSD contract are to the first bargaining agreement which was in effect from June 1, 1980, until May 31, 1982, unless otherwise noted.

[5] These included, inter alia, recognition of full authority of Kelly to negotiate and initial tentative agreements, and the requirement that Prentice-Hall's executive committee and a majority of unit members present on behalf of the Union approve and ratify and contract.

[6] Tentative because final agreement on any single issue was clearly contingent on agreement on a contract as a whole.

[7] Agreement was reached on 23 proposals between April 1, and November 5, 1981. In the order in which they were agreed on they were: military service, savings clause (April 1); no discrimination, job posting (May 12); visitation rights, probationary period (May 27); access to records, overtime, information (June 6); recognition, leave of absence (June 11); personal days (June 24); profit sharing (July 16); bulletin board (July 23); bereavement leave (August 12); grievance procedure (September 3); sick leave, holidays, severance pay (September 24); other benefits, vacations (October 22); union stewards, workweek (November 5).

[8] A 16th proposal, proposed by the Union on February 12 and discussed briefly on March 12, entitled health and safety, was never raised again by the Union.

> An employee called to serve on Jury Duty or to appear as a witness in any legal proceeding shall receive his or her regular weekly salary during the period of such service.

Senick characterized this clause as essentially embodying the Company's current policy as expressed in YAYCO.[9]

Respondent's counterproposal, presented at the May 12 meeting, limited paid time off for jury duty to 10 days, permitted the Company to require verification from the clerk of the court, required 24 hours' notice to the Company, required the employee to report to work if released from duty during the workday, and was applicable only to persons whose employment exceeded 1 year.

After some discussion and a union counterproposal, Respondent dropped its 1-year requirement but restricted jury duty benefits to employees who had completed their probationary periods, and substituted "prompt" notice for its 24-hour notice requirement.

By September 3, conflict over this clause centered on the proposed 10-day ceiling on paid jury duty leave per calendar year. Kelly asserted that this limitation was consistent with the Company's current policy, although on cross-examination he admitted that it was not expressly included in YAYCO. His explanation for this discrepancy was that YAYCO merely set forth nonbinding company policy but a contractual agreement was obligatory and to avoid future misunderstandings should be explicit. Furthermore, Kelly asserted that CSD employees abused paid absences more than other company employees, and that because the cost to the Company tied into the total economic cost of the contract as a whole, the current proposal was reasonable. Kelly also stated that he had no obligation to propose anything in YAYCO.

As previously noted, before becoming a union negotiator, Senick had been an employee with Prentice-Hall's looseleaf editors division for 5-1/2 years. In response to Kelly's assertions, he stated that he was never aware of any time limitation on jury duty benefits during his tenure of employment, that no such limitation was imposed under the terms of YAYCO, and that he would not accept less than what other Prentice-Hall employees enjoyed.

On cross-examination, Kelly, who admitted that there was no time limit imposed on paid jury duty in the LLSD contract, reasoned that in the editors' unit 85 percent of the employees were attorneys and here not eligible for jury duty.

There was no further discussion of the jury duty clause following the October 22 meeting.

2. Successors and assigns

At the March 12 meeting, Senick explained that the purpose behind the Union's proposal was to bind successors and assigns to the terms of the contract and thereby avoid "being transferred into lawsuits" in the event of a transfer of CSD. In addition to binding its successors and assign under the clause, Respondent would also be required to give a 30-day notice of its intention to sell the business and, further, not to sell unless and until the purchaser first agreed to accept and assume in writing all terms of the agreement and to continue all existing rights of the employees. Kelly agreed to return with other language.

On April 21 Kelly informed the Union that this issue was covered by the management-rights clause where the Company reserved the "sole right to discontinue temporarily or permanently, in whole or in part, the operation of its business or to sell part or all of such business operation." Under these terms Prentice-Hall would retain the unconditional right to sell or otherwise dispose of its business.

The Union's desire to condition a sale or other transfer of CSD on the purchaser's acceptance and assumption in writing of the contractual terms established by the contract was in direct conflict with Respondent's desire to retain the unabridged right to dispose of this part of its business. Senick asserted that language binding successors to the contract was common, and Kelly countered that it was not in every contract.[10]

On May 12 Kelly offered what was to be Respondent's final proposal on this topic. This clause obligated Respondent to notify the Union 30 days prior to the sale or other disposition of CSD, as had been proposed by the Union in its prior proposal. Unlike the Union's clause, however, it did not bind the successor to the contract between CSD and Prentice-Hall and Senick objected to it on this basis.

Senick presented a new proposal on July 16: "This agreement shall inure to the benefit of and bind the parties and their successors and assigns." He characterized this language as a "very simple clause that's included in most agreements."[11]

Kelly formulated numerous hypothetical situations and inquired what the application of the clause would be in each case. It soon became clear that Senick had not anticipated all possible scenarios to which the clause might be applied. This discussion was soon terminated by Senick who admitted his lack of competence to respond to Kelly's questions regarding the legal consequences in specific circumstances.

No new proposals on successors and assigns were exchanged after July 16. Although it was discussed briefly on three more occasions,[12] no further substantive comments were made by either party.

3. Medical and life insurance

Among the Union's initial proposals was a clause continuing the employee's current level of benefits from the Company, and adding dental, optical, and prescription

[9] "YAYCO" is an acronym for "You and Your Company," which is essentially the Company's benefits handbook.

[10] At least two of a group of contracts that Respondent offered in evidence, in the publishing field, contain such clauses, *Winthrop Publishers, Inc.*, a subsidiary of Respondent, and *Amsco School Publications, Inc.*

[11] The terms of the proposals in these negotiations were frequently compared with those finally agreed on in the LLSD contract. That collective-bargaining agreement contains no provision dealing with successors and assignees.

[12] July 23 and 24 and October 5.

coverage equal to or greater than that provided by the Union's own insurance plan (District 65—Security Plan).

At the February 26 meeting, Senick defined this topic as an economic area and indicated a preference to defer further discussion of the clause until a later date. However, the Union did turn over a copy of its insurance plan, including the costs to the employer associated with it. Senick also responded to questions put to him by Kelly concerning the Union's plan dental, optical, and prescription coverage at the March 12 session. Senick also agreed to supply additional information so Kelly could compare the union plan's coverage and its cost to other plans. On July 8 Bernice Krawczyk made a presentation on the optical and dental benefits under the District 65 plan then in effect.

Respondent's first proposal on this issue was given to the Union on May 12. It continued the current coverage enjoyed by the employees, but did not add any of the additional benefits sought by the Union. The Company's clause expressly excluded matters involving insurance benefits from arbitration.

The Union dropped its demand for the prescription benefits from its proposal on July 8. Senick stressed the importance of dental and optical coverage.

On July 16 Kelly presented a company proposal which would give CSD employees the optical and dental coverage under the District 65 plan only if Respondent decided to extend some dental and optical coverage to other company employees in Bergen County, New Jersey. Kelly would not comment on whether ther were existing plans to cover other employees and admitted that other employees could get greater coverage than that provided under the union plan, while CSD employees would be limited to that plan's benefits.

The entire clause as provided for by the Company was not subject to arbitration under the agreement. The Company's notes reflect that Senick pointed out at the July 16 meeting that this lack of arbitrability was preventing the Union from agreeing to the clause.

The question of arbitrability of dispute arising under this clause was discussed further on July 21. At that meeting the Union submitted to the Respondent the same clause previously offered by Respondent, but without excluding arbitration. Kelly expressed concern over the Company's becoming involved in an arbitration of administrative matters outside its control. Senick acknowledged the validity of this concern and expressed his willingness to look at a proposal excluding problems with the insurance carrier from arbitration.

At the August 12 meeting Kelly reported that the Company would remain with its earlier proposal because he was unable to come up with acceptable language. However, he did invite the Union to submit a proposal for consideration. Senick responded on September 3 with language excluding insurance matters "within the sole control of the insurance carrier . . . [from] the grievance or arbitration provisions of the contract."

Kelly objected to this language, saying it was "too general," but agreed to look into it. On September 24 he returned to the table, restated his position that the language proposed by Senick was too broad, and that, because he too had been unable to come up with acceptable language, Respondent's earlier proposal continued to be its position on this clause.

On October 5 the parties' positions were clearly polarized on the question of arbitration. Kelly was particularly concerned about frivolous grievances. He maintained that the entire clause should not be subject to arbitration and placed the onus on Senick to convince him otherwise. In support of his position Kelly cited the Union's history of filing frivolous grievances,[13] and expressed an unwillingness to permit grievance and arbitration for this small segment of the employees complement when the remainder of the employees had no such coverage.

At their next meeting, held November 5, Senick expressed doubt that any agreement could be reached on this question unless one of the parties changed their position. Neither had and they scheduled a future meeting for November 19.[14]

4. Grievance and arbitration

Grievance and arbitration were first introduced by the Union in a single clause containing a four-step process for resolving disputes. The Company's proposal, submitted on April 21, treated the two clauses separately. Each of these clauses was discussed on numerous occasions during the course of negotiations, and agreement was eventually reached on the grievance clause. The arbitration clause remained unsettled when negotiations ended in November.

When the Union's proposal for a grievance and arbitration clause was first presented at the bargaining table on February 12, Senick told Respondent's negotiating team that this clause was one of particular importance to the unit because it allowed for an orderly resolution of problems arising both under the contract and in the workplace in general. Kelly objected to the absence of time limits for employees to raise grievances on the grounds that time constraints would help eliminate the frivolous grievances the Union had a history of bringing against the Company.[15]

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[13] See discussion, sec. II,D,4 at fn. 15, infra, regarding the Respondent's claims about its excessive arbitration burden and costs in the LLSD unit.

[14] This meeting never took place and November 5 was the final negotiation session.

[15] In the bargaining notes, Kelly refers to District 65's history of filing frivolous grievances over promotions. This reference pertains to the arbitration proceeding between the LLSD and Prentice-Hall which had taken place on 14 days between October 31, 1980, and January 19, 1981. The grievances, filed by 13 employees, were all dismissed by the arbitrator who found that Respondent had not violated the provisions of the collective-bargaining agreement when it refused to promote, upgrade, or reclassify the grievants under the terms of position description referred to but not set forth in the bargaining agreement, and that the Union was seeking to obtain, through arbitration, remedies it should have and failed to obtain in negotiations. Kelly implied that time limits would have barred these grievances on procedural grounds, thereby saving Respondent the time and expense of arbitration. On cross-examination Kelly estimated the cost of these proceedings at approximately $50,000: $3000 actually paid to the arbitrator, and $47,000 in costs of management's time and legal fees directly attributable to the proceedings. (Tr. 873–875.) With this kind of history, one would have concluded that, for the successor LLSD agreement, the Company would have insisted on more strict time limitations for pursuing grievances at each step of the process. Yet, a close examination of the two LLSD agreements in evidence reveals that

Continued

Shortly before the April 1 negotiations, Respondent had given the Union its package of proposals. Respondent's initial arbitration proposal permitted either party to seek arbitration, but only after the grievance procedure had been exhausted without yielding a satisfactory resolution of the dispute and after notice had been given to the other party. A mutually agreed-on arbitrator would then make a decision and finding, which would be final and binding on the parties. The grievance and arbitration procedures would be the "sole and exclusive means for the settlement of all disputes that may arise between [the parties]."

The substantive provisions of the proposal denied the arbitrator the authority to modify the contract and limited the scope of its interpretation. The arbitrator could not construe the contractual provision in question in any way that was inconsistent with the management's-rights clause.[16] In a conflict between management rights and any article or provision of the agreement the parties agree their intent is for management rights to prevail.

In addition, the arbitration proposal called for the costs of the arbitration proceeding to be paid by the loser, or, if there was no clear resolution, to be shared equally by the parties. Backpay awards would be limited to the grievant's regular compensation, less any unemployment or other compensation he could have received from any source during the relevant period. However, no award could date back further than the date that the cause of the grievance arose or the date before it was first reduced to a written presentation—whichever was later.[17] Each arbitration proceeding would be limited to one grievance from one employee, unless the parties had agreed, in writing, to the contrary.

Senick responded at the April 1 meeting by introducing another proposal. According to the Company's bargaining notes, he identified several problems that the Union had with management's grievance and arbitration clauses and stated that in its new proposal the Union had attempted to address both its own and the Company's concerns.[18]

Senick noted specifically that the Union had a problem with the time limits imposed by Respondent's grievance and arbitration proposals. The newest union arbitration proposal allowed either party 20 days from the date of receiving a response to the last step of the grievance procedure to submit the grievance to arbitration. The Company's proposal had allowed only 10 days from the date the final step in grievance was initiated and required 2 days' notice from the Union of its intention to file with the American Arbitration Association (AAA).

Senick also disagreed with Respondent's proposed language requiring that a mutually agreed-on arbitrator hear their disputes. He pointed out that this language was a modification of the voluntary rules of the AAA that the Union proposed be adopted.[19]

Kelly testified that his goal in these negotiations was to settle disputes at the bargaining table and to get a contract that could be administered with a minimum of disputes and resort to costly arbitration.[20] Concern was

after the complained-of arbitration proceeding, the new (1982–1985) LLSD agreement contained more liberal time limits for processing grievances at steps 2 and 3 and to final and binding arbitration. However, the successor agreement does contain a more detailed management-rights clause which, inter alia, specifically reserves to the Company the sole right to promulgate, revise, and change position descriptions as it deems necessary or advisable—the very subject matter to which the Union had asserted claims of breach in the unsuccessful LLSD unit arbitrations.

[16] The original management-rights clause read as follows:

MANAGEMENT RIGHTS

2.0 Prentice-Hall shall have the right to promulgate position descriptions, work rules and procedures relating to employment, and to revise and change such descriptions, rules and procedures from time to time as it deems necessary or advisable.

2.1 Prentice-Hall shall have the sole right: to conduct its business, direct and control its operations and manage its affairs as it deems necessary and/or expedient; to hire; to discharge; to layoff; to suspend; to promote; to demote; to assign duties to; to transfer employees; to increase or decrease the work force; to abolish; restructure or rearrange departments, functions, and operations; to transfer equipment, personnel and operations to other locations; to schedule work; to train personnel; to assign and change the work, duties, and job functions of specific employees including supervisors; to alter and/or change the type and nature of its operations; to promote and maintain efficiency in its operations or methods; to determine the materials to be produced or worked on by employees or by outside contractors or at other facilities; to determine the number, locations and sub-division of the department that may operate; to move the unit or any of its parts or areas to other areas or locations; to determine the schedules of production; to maintain order and efficiency at its operations; to determine the qualifications of employees; to determine job content; to determine the starting and quitting time; to determine the number of hours to be worked; to introduce new equipment, machinery or processes; to discontinue, temporarily or permanently, in whole or in part, the operations of its business or to sell part or all of such business or operations; to decide the nature of materials, services, supplies, equipment, or machinery to be used; to subcontract any or all of the operations, present or future; to determine the number of employees assigned to any particular operations; to determine the work place; to establish performance standards and evaluate employees; performance based on the standards, to establish, change, combine or abolish job classifications and the job content of any job classifications; to determine when overtime shall be worked and to require overtime; and to carry out the ordinary and customary functions of management. No such rights or authority shall be deemed waived or modified in whole or in part unless such waiver or modification is in writing and signed by the parties hereto.

2.2 Management shall have all other rights and prerogatives including those exercised unilaterally in the past even though not particularly enumerated above.

2.3 The failure of Prentice-Hall to insist upon a strict performance of any of its rights under, or of any of the terms or conditions contained in, this Agreement shall not be deemed a waiver or modification of such rights or remedies nor shall it be deemed a waiver or modification of its rights to insist upon a strict performance of all the terms and conditions of the Agreement thereafter.

2.4 Should the Union at anytime hereafter enter into an agreement with any publishing company or composition company operating within the Greater Metropolitan New York area or any other area served by Prentice-Hall, or should the Union in the case of any publisher or composition company with which it has a contract, countenance a course of conduct by such company enabling it to operate under more advantageous terms and conditions than is provided for in this Agreement, Prentice-Hall, party to this Agreement, shall be privileged to adopt such advantageous terms and conditions.

[17] It is obvious that, as a practical matter, the date on which the grievance is filed will never precede the date on which it arose. On May 12, the notes show that Senick "agreed" that the award should be backdated to the date on which the grievance occurred.

[18] The Union's proposal on this date still addressed grievance and arbitration in a single article. This immediate discussion will not address the grievance provisions unless necessary to clarify any references to the arbitration provisions.

[19] The voluntary rules were not placed in evidence by either party.

[20] Again Kelly's position was grounded in the Company's prior experience with District 65's looseleaf editor's unit described supra.

also expressed about the length of such proceedings. He also testified that there were other available means of enforcing the contract without arbitration—for example, in the courts as a contract suit. (Tr. 871.) This testimony is directly-contradicted, however, by the language of paragraph 6.1 of its arbitration proposal, maintained by Respondent to the very end, which provides that "It is the intent of the parties that the procedure set forth here and in Article 5, Grievances shall serve as the *sole* and *exclusive* means for the settlement of *all* disputes that may arise between them. [Emphasis added.]" Indeed, under questioning by me Kelly admitted that under paragraph 6.1 and paragraph 4.5 of Respondent's final proposal on rules and corrective discipline (the sole recourse for resolution of disputes regarding discipline and discharge shall be the grievance procedures, with absolutely no recourse to arbitration),[21] the Union could not bring a lawsuit disputing a Respondent disciplinary action and would be limited to grieving a disciplinary action, without any further recourse following the Company's rejection of it. (Tr. 1290.) In any event, it is also interesting to note that Kelly subsequently acknowledged that court suits were more expensive than arbitration and that the Company's negotiating committee never compared the length of arbitration to that of a court suit. (Tr. 882.)

On April 21, Prentice-Hall gave the Union another copy of its original article, with one very minor change. This proposal adopted the Union's language that the time limit for submitting a grievance to arbitration would begin to run from the date of the response after the final step in the grievance procedure. The limit itself remained the same (10 days) with 2 days' notice of the Union's intent to Respondent, but no reciprocal obligation on Respondent's part.[22]

The discussion again turned to the process of selecting an arbitrator. Senick again advanced the AAA selection process, arguing that it was fair and workable and preferable to delaying an arbitration. Kelly asserted that it was unlikely that both sides would exhaust list after list and that to argue otherwise was "simply a lack of trust."

Senick moved on and noted problems with Respondent's proposal that the loser in an arbitration would bear the total cost unless there were no clear-cut loser. In addition, he stressed the problems of having the rights outlined in the management-rights clause supersede in the case of a conflict between it and any other contractual provision. Senick was identified in the Company's notes as saying: "The way I read it, anytime there's a problem over a clause interpretation you say it's covered by Management Rights, the Union would be out of the ballpark. It is a clause we cannot accept, because it is all consuming. It cuts across-the-board at all our positions." The notes do not indicate any response by Kelly.

On May 12 the Union returned with a proposal that adopted some of the Company's language limiting backpay in settlement awards and permitting extensions of the time limits only by mutual consent. Failure to meet the time constraints would be deemed a waiver or settlement of the grievance, as Respondent had proposed. The Union's proposal also reduced the proposed time period for submitting grievances to 15 days from the 20 days in its original article.

The May 12 negotiation session dealt with arbitration briefly. The discussion focused primarily on the time limits imposed by Respondent's clause on initiating the arbitration proceedings.

> In the event the grievance procedure does not result in a satisfactory adjustment of the formal grievance in question within ten (10) working days after the Step 3 response,[23] either side may submit an eligible grievance in writing to arbitration before the American Arbitration Association (AAA) provided however, that 1) at least two (2) working days notice is given to Prentice-Hall prior to any filing with the AAA and 2) that such matter has been submitted to the AAA within (30) working days after it was first raised at the final step. It is agreed that only the New Jersey Office of AAA will be used. The AAA is not empowered to select any arbitrator the parties do not mutually agree on.

Respondent extended the 10-day filing period in the paragraph quoted above to 15 days in its next proposal, submitted on May 27. Senick was under the impression that this time period was a cooling off period, during which no action could be taken, and that by extending it in this context the Union effectively had even less time to file for arbitration than they had initially. Kelly clarified the intent of this language which was to give the Union 15 days after the step 3 grievance procedure in which to file.

Respondent also modified the clause covering the cost of arbitration. The expenses under this proposal would be paid by both parties equally regardless of the outcome of the dispute. Kelly characterized this as a "major economic concession."

Senick once again expressed his dissatisfaction with the language requiring mutual agreement on an arbitrator. Kelly submitted that in view of Respondent's "major economic concession" in this clause, he thought that the Union could consent to mutually agree on an arbitrator. Senick did not immediately connect an economic concession with the equal liability for the cost of arbitration and did not consider this in formulating the Union's position. Kelly defined his position, noting that Respondent had never gone beyond the second panel list in selecting an arbitrator. This assertion did not persuade Senick to accept the proposed language.

Regarding backpay awards, Kelly expanded on what "compensation from any other source" to be deducted from any award would encompass: "For example, unemployment. We should not be liable for compensation that an employee would have received but refused to. Federal or State subsistence would be other examples. If an

[21] See discussion, infra at sec. II,D,6, pars. 12-20.

[22] Kelly sated that Respondent would consider extending the same right of notice to the Union.

[23] Step 3 is the final step in Respondent's grievance procedure. At this stage the grievant or Union would have 7 days to bring the grievance to the vice president for human resources who would then have 7 days to give his response.

employee doesn't take a position elsewhere it could have, it's the employees [sic] problem."

As previously noted, backpay would only be retroactive to the date when the formal grievance was filed. Senick pointed out that he found this in conflict with the Respondent's proposed informal, and optional, first step in the grievance procedure. If an employee could only recover from the date of a written filing, then the Union would recommend this be done in every instance involving backpay. Kelly could not "imagine a situation where the employee would be penalized as a result of this clause" which was aimed at discouraging employees from delaying in bringing out the facts.

At the June 4 meeting, Senick returned with a union proposal that adopted Respondent's format of having separate clauses for grievance and arbitration. The first paragraph was substantially the same as Respondent's proposal, but was redrafted for greater clarity.

The second paragraph outlined a method of selecting an arbitrator where, if after two lists there was no agreement on an individual, the parties would have an additional 30 days to mutually decide on one, or the AAA would select one for them. Kelly found this language much closer to what the Company wanted, and agreed to come back with new language.

On retroactive backpay the Union proposed that it run from the time the Company was notified of the problem, whether orally or in writing. The Union's proposal omitted entirely the provision giving precedence to the management-rights clause over any other contract clause in a dispute, but adopted Prentice-Hall's language binding the parties to the arbitrator's decision, prohibiting the arbitrator from modifying the terms of the agreement, and allowing only one grievance from one employee at each arbitration unless the parties agreed in writing, to the contrary.

Discussion of this clause continued on June 11 when Kelly turned over Respondent's next proposal. It adopted the Union's language establishing the timeframe during which an arbitration could be filed, deleted its own requirement, which had been adopted by the Union, that only the New Jersey AAA office be used, and adopted the essence of the Union's proposal for selecting an arbitrator.

Regarding retroactive pay, Respondent deleted its previous requirement that it begin to accrue only from the time the grievance was presented in writing, thus bringing it into line with the Union's proposal. Senick questioned the computation of backpay based on compensation the employee could have received from other sources while the dispute with the Company was being processed. He asserted that this was too speculative and that the employee's compensation should be offset only by what was actually received. Kelly objected to this proposal because it would permit an employee to refuse another job offer and still get paid by Respondent. Senick speculated that narrower language could be found to address both parties' concerns.

However, Respondent's article retained the provision requiring deference to the management-rights clause in the event of a conflict between it and any other article in the agreement.[24] In response to Senick's objections, Kelly asserted that this clause was very important to Respondent, and that, if necessary, Respondent would be willing to defer agreement on arbitration until the management-rights clause had been more clearly defined.

Senick also expressed misgivings over Respondent's language limiting recourse for all disputes solely and exclusively to the grievance and arbitration clauses. He pointed out that a number of clauses were not subject to arbitration and stated that the Union required a means of enforcing the contract.[25]

Further discussions took place on September 24 and October 5. Senick testified that at the first of these two meetings he again raised the problem of resolving disputes in favor of management rights, and noted the lack of arbitration in many clauses. At the next meeting, according to the Company's notes, Senick clarified that the sole and exclusive recourse language applied to disputes that were subject to grievance and arbitration and that no action could be brought for breach of contract. He acknowledged that he could agree to this, but that he could not accept the language defering to management rights because it weighed too heavily in Respondent's favor. However, I find the attribution of this acceptance to Senick in the notes is misleading. Based on facts brought out in the course of the hearing, Senick's willingness to accept the grievance and arbitration proceeding as conclusive was based on the conjunction of the arbitration phase where the final determination was in the hands of a disinterested third party and not concerning those bargaining subjects only made grievable and subject to final determination by the Company.[26]

No further substantive discussion of this clause took place after October 5.[27]

Concerning the separate grievance clause, the history of its negotiations illustrates some of the bargaining tactics employed by Respondent particularly in seeking to eliminate or severely restrict the exercise by employees of their Section 7 rights. While, as earlier noted, agreement on a clause was ultimately reached before negotiations broke down, substantial time was expended at the sessions in grappling with the Company's demands in this

[24] Respondent's express intent was that if a conflict were established, then the case would be closed.

[25] Senick testified that at the first session after his receipt of the Respondent's initial set of proposals, held on April 1, he told the company representatives that "Under those circumstances, many of the clauses would be unenforceable. I would have no means of resolving disputes between us."

[26] This finding is grounded in discussions between the parties of both the arbitration clause and of the other subjects which Respondent expressly excluded from arbitration. (See, e.g., Rules and Corrective Discipline, sec. II,D,6, infra.)

[27] During the course of this meeting Senick said he would try to bring in an acceptable proposal dealing with the deference accorded management rights in this case of conflict with another contractual provision that the Union could not accept. Senick's response at the October 22 meetings shows that the matter had slipped his mind. I conclude, however, that the breach between the parties was so profound on the conclusive deference to be accorded management rights, each side maintaining its position as firm and unyielding and basic to its negotiating posture, that an impasse was truly reached probably as early as June 11, assuming, without deciding the matter here, that Respondent's proposal was made in good faith.

area, which delayed agreement on this clause and another as well. Thus, the Company's first counterproposal discussed on April 1 required a prior discussion between employee and department head before a complaint could be considered a grievance—a procedure which Senick noted unduly restricts the employees' access to the Union. Similarly, Senick criticized the Company's proposal for a 2-day limit from incident to grievance filing with the vice president as unduly short.

The Company's April 21 proposal also providing that "the degree of discipline imposed and the reasons for discipline are in the sole discretion of Prentice-Hall and shall not be subject to review under Article 6, Arbitration" was totally unacceptable to Senick, who informed the Company "we couldn't agree to any kind of a just cause standard that wasn't tied to an arbitration provision in some way."

From the very first company proposal before April 1, until shortly before agreement was reached in September, Respondent demanded that employees be prohibited from engaging in union activities on its premises, including union business of seeking to enforce the agreement through filing and processing of grievances. Meetings between employees and with the shop steward were to be on their own time and expense during nonworking time and off premises. Senick's position was that this was totally unacceptable.

Over time, the Company eliminated certain restrictive clauses in its grievance article, dropping on May 27 the requirement of a prior supervisor meeting, the clause providing the Company prevailed on a failure to meet time limits by either side, and severe restrictions on the filing periods. Although the language excluding discharges from arbitration was dropped in the grievance proposal it was still retained in the discipline clause. As to the prohibition on union activity on company premises, Senick by June 4 had proposed limiting such activities to employees' nonworktime. The Company's June 11 proposal now permitted an employee to meet with a steward to discuss a grievance during nonworktime in a nonwork area, but Senick commented "we don't think we can waive [employee statutory] rights."

On July 23, Senick noted the primary remaining difference on the grievance article was the on-premises agreement (relating to nongrievance union activity). Kelly continued to seek a waiver of that right. "Faced with the realities of a miniscule unit in a large company we would like to limit the unit to unit business." Finally, on August 12 the Company removed the prohibition of union activity on company premises from the grievance article but now incorporated it in a revised stewards' article. When Senick expressed anger at this tactic, Kelly assured him it would not be moved again but expressed the position that the prohibition was an extremely important clause and the Company was unwilling to remove it from the contract.[28]

[28] No such restriction appears in either the first or second LLSD agreement and none was sought by the Company in the second round of negotiations.

The stewards' article continued the prohibition until agreement on a clause was finally reached on November 5 at the last meeting when the Company agreed to change the prohibition from Prentice-Hall's premises to "in a work area." A company demand that union stewards be liable in the event of a job action was retained and agreed to by the Union in the final clause which the parties initialed.

5. Management rights[29]

Respondent's first contract proposal included an article in which it reserved certain rights within its exclusive domain. In addition, Respondent proposed that the rights reserved under the management-rights clause would take precedence over all other terms negotiated and adopted by the parties in the event of a dispute which could be resolved under either management rights or some other clause in the agreement.[30]

When this article was first discussed on April 9, Senick allowed that he had no problem in theory with including this type of provision in the contract. However, he stated that he was reluctant to agree to such a lengthy and broad proposal before knowing how it would fit in with the remainder of the contract. Kelly emphasized the importance Respondent attached to this proposal which, he added, incorporated Respondent's response to many of the Union's individual proposals.

A revised proposal was passed to the Union on April 21 which omitted language granting management "all other rights and perogatives including those exercised unilaterally in the past even though not particularly enumerated above." According to Kelly, this language had been the only target of the Union's criticism that Respondent had noted in their previous discussion. Senick's response (according to the Company's notes) was that the Union had "other problems" with this clause. His testimony at the hearing was that the proposal was still "too overbroad."

The issue of management rights came up again on July 23 when Senick questioned Respondent's inclusion of position descriptions as a reserved right when they had previously stated that no descriptions existed. Kelly explained that Respondent wanted to preserve its right to promulgated job descriptions if it desired them at some future date.

In addition, Senick expressed the opinion that Respondent's clause was redundant in part; and he objected to the Company's "most favored nation" language where the Company would be entitled to adopt any more advantages terms or conditions from future contracts negotiated by District 65 within the New York metropolitan

[29] Respondent's first management-rights proposal is quoted in its entirety in sec. II,D,4, at fn. 16, supra.

[30] This result would be achieved by the language proposed by Respondent for the arbitration clause:

> It is expressly recognized that for purposes of contract interpretation by any arbitrator if any Article or provision of this agreement conflicts in any way with Article 2, Management Rights, than the parties agree that their intent's for Article 2, Management Rights to prevail.

See discussion in sec. II,D,4, Arbitration, supra.

area. Kelly asserted that this was a starting position and expressed his willingness to entertain other proposals.

On August 12, Senick expressed his opinion that Respondent's clause was complicated and redundant. He then submitted the Union's first proposal covering management rights. In substance it delegated to Respondent all rights to manage the business "except as expressly modified or limited by this Agreement." This proposal bore great similarity to the one adopted in the looseleaf editors' contract.[31]

When Kelly returned with Respondent's next proposal on September 3, he noted certain deletions from the earlier proposal aimed at "tightening up" the language. However, he confirmed Senick's observation that the intent of the clause remained unchanged.

In response, Senick gave management a new proposal on September 24. It adopted some of Respondent's language enumerating the exact nature of the managerial rights reserved to Respondent, with the Union's modification "except as expressly modified or limited by this agreement."

Senick expressly rejected the Company's "most favored nation" language citing difficulty with its interpretation and application in practice. He also pointed out that Respondent had denied the Union's request to retain the right to have past practices continued.[32]

The parties were also divided over the concept of position descriptions. The Union's view was that it would like to see, discuss, and agree on them in the course of negotiations. Kelly's assertion was "that position descriptions are the sole right of management to create, administer, modify and eliminate."

On October 5, Kelly gave the union negotiators another copy of Respondent's earlier proposal. From the outset of the discussion he emphasized the clause in which none of the rights retained by Respondent under the agreement would be considered waived merely because Respondent failed to exercise them. He explained that Respondent wanted "to prevent the Union from filing grievances based upon what's done and not done."

Senick agreed to consider Respondent's desire to retain certain rights, and added that the Union would be more sympathetic regarding as yet unexercised management rights if Respondent moved on its "most favored nations clause." Kelly noted the applicability of its current proposal was limited to future contracts between District 65 and other composition and publishing companies in the metropolitan area. However, its original pre-April 1 proposal had also been so limited, specifically referring to like companies in the metropolitan New York area or any other area served by Prentice-Hall.

The parties remained in sharp disagreement over Respondent's desire to reserve the unilateral right to promulgate position descriptions. No mention of position descriptions was made in the Union's proposal because, as Senick explained, he did not want to negotiate an abstract proposal.

Kelly pointed out that the Union's proposal seemed inconsistent because, on the one hand, it acknowledged Respondent's "sole right to conduct its business . . . as it deems necessary and/or expedient, including without limitation, but on the other hand, only except as expressly modified or limited by this agreement." Further, Senick was asked to explain why the Union omitted such rights as the right to suspend, to promote, to demote, and to schedule overtime from its proposed management-rights clause although it granted management the right to discipline and discharge employees.

Senick explained that the intent behind the Union's proposal was to reach an agreement that would limit management's rights. Where a topic was covered under a separate clause, for example hours, the language of that clause would be controlling. Kelly responded that the Union's proposal failed to meet Respondent's needs, especially its exclusion of job descriptions.

On October 22 the Union returned with another proposal that incorporated verbatim the language of Respondent's clause preserving management's rights to insist on strict performance of any terms and conditions in the agreement even if not previously exercised. It remained otherwise unchanged and, according to Senick, Respondent maintained it still did not go far enough.

On November 5 Respondent came forth with another proposal. The only change was the "most favored nations" clause which would now give Respondent the option of adopting more favorable terms from any subsequent agreement between District 65 and any composition unit within the New York metropolitan area. Once again Kelly emphasized the importance of this clause to Respondent and pointed to the several changes that had been made in the clause as evidence of Respondent's willingness "to consider change and negotiate the specific language." In response to Senick's questions regarding this change, Kelly told him that the labor pool for CSD was the greater metropolitan area. Senick appeared satisfied with this explanation as to the scope of the clause because later in their discussion he acknowledged that this clause was "not much of a stumbling block now."

However, Senick was still not prepared to agree to the management-rights clause. He pointed out that the link between this article and the arbitration clause was unacceptable. Senick suggested Respondent delete the language in the arbitration proposal giving precedence to management rights in the event of a conflict and they would be much closer on both of those articles.[33] Al-

[31] The management-rights clause in the looseleaf editors' contract read as follows:

> Except as limited by this agreement, the Employer retains all of its rights, powers, discretion and authority, including but not limited to the exclusive right to hire, lay off, promote, assign duties to, transfer, discipline and discharge employees; to introduce new improved methods and facilities, and to carry out the ordinary and customary functions of management.

[32] See discussion in sec. II,D,12, Complete Agreement, infra.

[33] Neither the first nor the second LLSD contract contained a precedence clause and Respondent did not propose one for inclusion in the second agreement. By November 5, Respondent had made very few changes overall in its management-rights article. Compare fn. 16, supra. The provisions deleted were the right to: assign duties; alter the type and nature of operations; move the unit or any of its parts or areas to other locations; maintain order and efficiency; determine job content; and decide the nature of materials, services, supplies, equipment, and machinery to be used. These rights are management preogatives in any event. Two other changes, made April 21 and September 3 are noted above.

though Kelly agreed to consider it, no further negotiations were ever held.

6. Rules and corrective discipline

Among its initial proposals the Union included one on discharge and discipline which was first discussed on February 12. During a lengthy exchange it became clear that the parties were far apart on how warnings, disciplines, and discharge should be handled.

District 65 proposed that warning letters should be destroyed 1 year after execution, that employees should be given 3 weeks' notice before discharge for less than gross misconduct but under no circumstances should they be discharged for less than just cause, that employees and the Union should be given a 3-month notice before a layoff, and that disputes over discharge and layoff decisions should be decided by the grievance-arbitration process.

Respondent objected to the provision directing Prentice-Hall to destroy warning and disciplinary letters after 1 year claiming that it would both encourage recidivism and deprive the Company of a full and complete employment history for the individual. The Union's rationale was that an employee's lapse should not blemish his record indefinitely, and that a year was a reasonable length of time after which it should be purged.

The notice provisions for discharge or layoff were also objected to by Respondent. Kelly disagreed with the concept of an employee getting both notice under this provision and severance pay under the severance pay clause. In addition, Kelly saw no basis for requiring the Company to give 3 months' notice before a layoff. He pointed out that in 66 years, Prentice-Hall had never laid off an employee and that this provision would prevent the Company from acting quickly on a business decision. Senick defended the Union's position for both notice requirements on the grounds that employees need a reasonable transition period when these types of changes are being imposed on them.

The greatest areas of conflict in this article were the provisions concerning the applicable standard for discipline and discharge, review of company action under the clause by an arbitrator, and the operation of a progressive disciplinary provision which was proposed by Prentice-Hall and largely incorporated in the Union's proposal.

The Union proposed a just-cause standard for review of discharge and discipline. In the event of a disagreement which remained unsettled by the grievance procedure a final and binding determination could be made by an arbitrator. Kelly found this method of outside review totally unacceptable as illustrated by the following exchange taken from the Company's notes:

> Kelly (J.K.): . . . this in effect says an arbitrator will oversee a judgement that management makes.
>
> Senick (M.S.): Arbitrator routinely look at discipline and discharge situations. It is consistent with the Union-Management relationship.
>
> J.K.: If an action went to arbitration, tied to the job security clause, isn't that purely a management's judgment?
>
> M.S.: No.
>
> . . . .
>
> J.K.: You don't understand. Management has found an employee has violated a rule, then an employee has already been found to have violated the rule.
>
> Krawczyk (B.K.): You're saying, you are the one making judgment?
>
> J.K.: Yes.
>
> B.K.: We have a big disagreement.
>
> J.K.: You are right.

Management's counterproposal gave rise to a brief but heated discussion on April 1. Among other things, its proposal included a list of 33 causes for immediate discharge or other disciplinary action in addition to continuing in full force and effect all current rules and regulations and allowing Prentice-Hall to promulgate any new rules as it saw fit. Kelly's position was that the contract should spell everything out to avoid any future disagreement. Recourse for resolving disputes was to be solely through the grievance procedure, exclusive of arbitration.

On April 9, Senick responded with another union proposal that deleted all references to the notice for layoff and discharge provisions that had caused earlier debate. Its proposal required just cause for discharge and discipline, and provided a list of examples of behavior constituting just cause including "flagrant violation of reasonable company-wide rules and regulations set forth in writing." Senick emphasized the importance of the just-cause standard and resolution of disagreements by an outside arbitrator by characterizing their absence as an obstacle, if not a complete bar, to agreement.[34]

During this exchange Senick implied that Respondent was treating these unit employees more harshly than employees elsewhere in the Company and that, based on his own 5-1/2 years of employment with the Company, the list of rules was inconsistent with past practice. Some rules were considered too broad, particularly there was no recourse to arbitration. Especially noted as objectionable was the rule prohibiting "conduct that violates standards of decency and morality." Kelly defended his position on the basis of each situation being different and that decency and morality are a common clause and has been defined in many arbitration cases.

Progressive discipline was outlined in Respondent's article. Conceptually, progressive discipline was applauded by the Union, except that the Company had reserved to itself the right to elect not to follow the procedure. In Senick's view, reserving the sole right to discipline or terminate an employee without recourse to progressive discipline made the procedure meaningless and left the employees without protection. Kelly denied these assertions and the provision remained in the Company's proposal throughout the bargaining sessions.[35]

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[34] Recourse to arbitration was presumed unless expressly limited by the terms of the proposed article. See text accompanying sec. II,D,4, at fn. 21, supra.

[35] The "right to discipline" included the right to determine the nature of the discipline imposed. As originally proposed it could consist of

Continued

In its counterproposal on June 4,[36] District 65 proposed language which incorporated the Company's structure of progressive discipline and made its implementation mandatory except where the employee's conduct rose to the level of gross misconduct. Senick emphasized again the need for a just-cause standard and included language to that effect in his proposal.[37]

Kelly for Respondent returned to the negotiations on June 24 with another proposal which omitted the list of specific reasons for immediate discipline or discharge because it was redundant, those rights having already been covered to his satisfaction by the remaining language in the clause. From the company notes Kelly appeared to have emphasized that his goal in this clause was "to make it clear that only work rules and regulations are adopted in the contract and not any past practices." In all other respects Respondent's proposal remained essentially unchanged.

Senick asked for clarification of this proposal on July 8. Among other things, Kelly told him that he could not think of any situation where an employee had been deprived of seniority as a disciplinary measure, but he wanted to retain the Company's right to do so in light of the inclusion of a seniority clause in the ultimate contract.

The chief modification in the Union's July 23 proposal was its addition of Prentice-Hall's clause permitting the Company to adopt and enforce new rules and regulations, and its incorporation and ratification of all current company rules and regulations. Demands on which the Union remained firm were: just cause for discharge and discipline, mandatory use of the progressive discipline procedure in all cases except those involving gross misconduct, and recourse to arbitration for disputes. Senick also objected to the breadth of the Respondent's clause permitting it the right to mete out the discipline of its choice. Kelly defended this provision as allowing management to determine what was appropriate.

Kelly returned with Respondent's next proposal on August 12, and enumerated the changes which had been made in this article:

> [W]e dropped the . . . sentence . . . which read "the union agreed to aid P-H in every way possible in enforcing these rules and regulations, etc." . . . we dropped the . . . sentence . . . which read to the effect "P-H reserves the sole right to determine the appropriate disciplinary action, including discharge, to be taken for violations." Also we dropped the reference to loss of seniority as it is included in "any other action." . . . [Progressive discipline] . . . now read [sic], "to achieve this result the following procedure may be followed in any case, and will be followed in all cases involving poor or unsatisfactory job performance or excessive or habitual absenteeism or lateness." So with those types of cases we have contractually agreed to follow the corrective discipline procedure. [G.C. Exh. 7.]

The new proposal also omitted the Company's right to terminate an employee without cause on payment of 2 weeks' wages and clarified that its meaning of the requirement that an employee sign a reprimand or warning may not be used to imply that such action was proper, but only that the employees received written notice of the action.

It is clear from Kelly's presentation and the discussion that followed that many of the Company's modifications did not alter the substance of their proposal, as illustrated by the following exchange:

> M.S. [Senick]: I am confused regarding [progressive discipline] being a mandatory procedure. Wouldn't the reservation of right clause at the end of the article override this.[38]
>
> J.K. [Kelly]: Yes.
>
> M.S.: Although you dropped loss of seniority it is included in the phrase "any other actions."
>
> J.K.: Yes, it would be a possibility. . .
>
> M.S.: It would [sic] be argued that this is a significant regretion [sic]. Not only is there no Just Cause clause, but the Without Cause clause [which] provided for two weeks notice payment is no longer there. We can not except [sic] discharge without recourse to the arbitration provisions . . . [G.C. Exh. 7.]

The Union's next proposal was taken verbatim from the previous one offered by Respondent with two significant differences: progressive discipline would be the required procedure in all cases except where gross misconduct is involved and the entire article would be subject to grievance and arbitration.

By November 5, the distance between the parties had been narrowed still further. Respondent's proposal included language limiting discipline to just cause; the parties were still separated on the question of arbitration.[39] Kelly stated that the Company would consider it but that he really did feel this area was for management's sole review.

During the course of negotiations Kelly pointed out that no employee had ever been dismissed or suspended from Respondent's employ for disciplinary reasons, and that Prentice-Hall was a good place to work.[40] On this

"warning, loss of seniority, suspension, discharge or any other actions . . ."

[36] This article was also discussed briefly on May 12 when Kelly announced Respondent's intention to remain with its prior proposal (of April 9) until there had been further discussion. Senick testified that during the June negotiation session he asked if the Company was going to make a counterproposal, but Kelly said he was going to stand firm.

[37] Just-cause language did appear in the Company's "Grievance" clause also before the Union at this time, but a decision under the clause would still not have been subject to arbitration. Furthermore, the grievance procedure would be the sole and exclusive recourse for resolution of disciplinary conflicts where the Union disputed the Company's just cause for taking disciplinary action.

[38] The clause referred to reads as follows:

> Prentice-Hall reserves the right to terminate an employee or take any other disciplinary action in appropriate cases without recourse to the provisions of [progressive discipline].

[39] Senick told Respondent's negotiation team that if they deleted the no-arbitration clause he would concede to agree notwithstanding his reservations over progressive discipline being a discretionary procedure.

[40] Senick concurred with these statements.

tached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Local Lodge 1835, International Association of Machinists & Aerospace Workers, AFL–CIO.

WE WILL NOT make unilateral changes in terms and conditions of employment.

WE WILL NOT deal directly with our employees.

WE WILL NOT unlawfully lock out our employees, replace them, and offer them conditional reinstatement.

WE WILL NOT threaten our employees with discharge if they refuse conditional offers of reinstatement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make the below-named employees whole, with interest, for any losses of pay and benefits without prejudice to seniority and other rights that may have resulted from our unlawful lockout:

Angel L. Soto	Thomas Kron
Juan Barbosa	Chester J. Zuchnick
Charles E. Bandi	Leonard M. Forney
Domingo Rodriquez	Marguerite E. Krom
Stanley Della Gatta	Donald C. Vandermark
Harry W. Decker	Vincent T. Fox
Gene E. Elliott	Tomas Ruiz
Daniel Serrano	Theodore J. Hunt
William O. Vogt	Isabelle M. Fox
Vincent S. DiGuida	Robert M. Halstead
Jane T. Moran	Stanley F. Hunt
Walter H. Paffenroth	John A. Sezerba
Robert Hallcot	Mildred B. Ordway

CLEMSON BROTHERS, INC.

Louis Melendez, Esq., for the General Counsel.
John A. Pateracki Jr. and *Kevin P. Barry, Esqs. (Whitman & Ransom)*, of New York, New York, for the Respondent.
John L. Gallagher, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried at New York, New York, on 5 days between May 17 and July 9, 1982. The complaint, issued on April 19, 1982, alleges that Respondent failed to bargain in good faith with the Charging Party, unlawfully locked out all of its unit employees, permanently replaced its unit employees, made unilateral changes in terms and conditions of employment, offered its employees reinstatement on condition they forego benefits under the collective-bargaining agreement, threatened its employees with discharge, and unlawfully discharged its employees in violation of Section 8(a)(1), (3), and (5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent in September 1982, I make the following

FINDINGS OF FACT

I. JURISDICTION

Clemson Brothers, Inc., a New York corporation with an office and place of business in Middletown, New York, is engaged in the manufacture and sale of hacksaw blades and files. Respondent annually ships goods valued in excess of $50,000 directly to customers located outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent, an old family-owned business, and the Union have had a collective-bargaining contract for the period November 1, 1980, through November 1, 1983, the Company and the Union agreed, in view of the Company's claims that the business was not sufficiently profitable, that there would be no general wage increase but that there would be a cost-of-living allowance (COLA), payable in the second and third years of the contract.[1] In addition, article 33 of the contract provides

[1] The first year's COLA, due February 1, 1982, would have increased each employee's pay by $2 per week.

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for a wage and fringe benefit reopener at the end of the first year:

> (33.0) . . . Either party may serve a written notice upon the other sixty (60) days prior to November 1, 1981 to amend the wage rates and fringe benefits provided for in this agreement. Upon receipt of such notice, the other party will meet immediately and negotiate in good faith concerning the modifications proposed.
>
> (33.1) In the event that the parties fail to agree on the modifications proposed within sixty (60) days after receipt of the aforesaid notice, any limitation upon the right of the union to strike established by the terms expressed or implied of this agreement shall terminate on and after the sixtieth (60th) day following the receipt of the aforesaid notice. In the event of a strike or lockout the contract shall terminate.

Pursuant to article 33, on August 17, 1981, the Union notified Respondent that it wished to amend the wage rates and fringe benefits, and the parties met and negotiated from September 1981 to January 1982.[2] No agreement to amend the contract was reached, and the Company told the unit employees not to report to work on February 1, 1982, the day the COLA payment was due to be made. By the time of the trial, all the unit employees except one had been recalled by Respondent.[3]

A. *The Negotiations*

Joseph Schrade II, secretary-treasurer of Respondent, and Emil Jeker, its vice president, represented the Company at the negotiations. John C. Gallagher, grand lodge representative, represented the Union; he was accompanied by an employee-negotiating committee. In addition, a Federal Mediation and Conciliation Service (FMCS) mediator was present at some of the meetings.

In its proposal, the Union was seeking improved hospitalization benefits, an improved vacation schedule, three additional holidays, additional contribution to the IAM pension fund, 5 paid sick days, a $2-across-the-board wage increase, discontinuance of present job classifications and replacement with prior job classifications, additional paid personal days off, one-half hour paid lunch period, and increased sickness and accident benefits payments.

Respondent countered by proposing that the contract remain in force for one more year with no adjustments in wage rates or fringe benefits, waiver of the cost-of-living clause, elimination of certain holidays, fewer personal days off with pay, less vacation time, and the establishment of a hold harmless trust for the Company's liability under Federal pension legislation. The Company's avowed aim throughout the negotiations was to reduce unit labor costs by 30 percent over the next 3 years.

1. September 23, 1981

The first session of the negotiations was held on September 23, 1981. At this meeting, ground rules for the negotiations were agreed to by the parties.[4]

2. September 30, 1981

Gallagher testified that on September 30, the parties discussed the employee classification system and the Company indicated that it would not grant a wage increase. The Company confirmed that it had hired some salespeople. According to Schrade, the parties exchanged proposals and clarified their intent. The Company's representatives told the Union that Respondent had the funds to meet the Union's demands but that these were not realistic. Although Clemson Brothers had investments and capital, it was not earning a sufficient return on its manufacturing operation.

3. October 7, 1981

On October 7, according to Gallagher, the Union presented its proposal to increase disability payments and the various medical insurance programs. The parties discussed these demands, the hourly rate and the hold harmless Employee Retirement Income Security Act (ERISA) trust fund proposed by the Company. The Company was asking $1 per hour to be contributed to the fund from the employees' wages. The Union rejected this concept. On October 7, according to Schrade, he asked Gallagher for information about the pension fund portfolio. The latter told him to communicate directly with the fund director. The Union asked for information regarding the new work rules and the Company promised to produce information. Then, medical insurance was discussed.

4. October 14, 1981

On October 14, according to Gallagher, the parties discussed medical insurance. Jeker and Schrade said that orders had fallen off and business was down; Gallagher asked if they were "pleading inability to meet any demands, over poverty" and Respondent's representatives said "no, it just doesn't make sense to give any increase."

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[2] There were also negotiations in February and March 1982.

[3] Employee Robert Hallcot is on medical leave according to Respondent. The employees who were unlawfully locked out according to the complaint were

Angel L. Soto	Thomas Kron
Juan Barbosa	Chester J. Zuchnick
Charles E. Bandi	Leonard M. Forney
Domingo Rodriquez	Marguerite E. Krom
Stanley Della Gatta	Donald C. Vandermark
Harry W. Decker	Vincent T. Fox
Gene E. Elliott	Tomas Ruiz
Daniel Serrano	Theodore J. Hunt
William O. Vogt	Isabelle M. Fox
Vincent S. DiGuida	Robert M. Halstead
Jane T. Moran	Stanley F. Hunt
Walter H. Paffenroth	John A. Sezebra
Robert Hallcot	Mildred B. Ordway

[4] In his testimony, Gallagher mistakenly placed the first meeting on September 30, 1981.

According to Schrade, Jeker supplied certain cost information at this meeting.

5. October 16, 1981

On October 16, Gallagher testified, the Union presented a new proposal.[5] The Union asked that the Company withdraw its "take-away" program and it modified its vision care proposal. Furthermore, it dropped the holiday increase demand, decreased its pension demand, and decreased its sick leave demand. After a caucus, the Union decreased its wage demand to $1 per hour. The Company rejected the entire package. The Company stated that it had no intention of granting a wage increase. Again Gallagher asked if Respondent was pleading poverty or inability to meet the Union's demands, and again Respondent's representative replied, "no, it just doesn't make sense to grant any wage increases." Gallagher testified that he asked to see the Company's books once it claimed to be operating at a loss but that Joseph Schrade refused. According to Schrade, at this meeting, the Union cut its original proposals in half. It dropped some proposals and scaled down others. The Company said it was not going to increase its pension contribution rate and explained its fear of increased liability due to a change in the pension law. Schrade testified, "we never seriously considered" making increased pension contributions. Respondent's negotiators also told the Union that its was probably not realistic to discuss wage increases and that increases in any benefits would have to be made within a framework of decreasing labor costs.

6. October 27, 1981

On October 27, according to Gallagher, he again asked the Company to open its books to prove is was losing money, and again Respondent refused. The parties discussed Respondent's price list and the fact that it had last increased prices in February 1981. Joseph Schrade said that if the Union was willing to consider giving up some holidays, Respondent would be able to offer the Union an increase. The parties discussed the cost of disability insurance and the Union's vision program, and the Union reduced its wage demand to 50 cents per hour. The Company responded that it had no intention of granting a wage increase or additional benefits. The Union dropped its proposal to increase personal and sick leave. According to Schrade, at its meeting the Company provided information relating to disability income protection. The parties discussed the possibility of a wage increase. The Company discussed the competitiveness of the saw blade market and its difficulty in raising prices. The Company said it would consider an increase in benefits provided total labor costs to the Company were not increased. The Company again stated its goal to decrease unit labor costs 30 percent over 3 years.

7. October 30, 1981

On October 30, Gallagher testified the Company reported that it had still not heard from its insurance agent concerning disability costs. Gallagher told the Company that the employees' last wage increase had been in 1979 and asked Respondent if it had identified any other sources of cost cutting besides labor costs. The Company asked the Union to delete the COLA provision from the contract and extend the contract to November 1982. Jeker mentioned that profit sharing was a possibility but he offered no proposal relating to this subject. Jeker said the Company was losing money and Gallagher asked to see the books. At the membership meeting that day, the employees rejected the Company's offer to delete the COLA freeze the contract until 1982, and a majority of the employees voted to authorize a strike. However, Gallagher convinced the employees to continue negotiations in view of the fact that the COLA would soon take the effect and provide some economic relief.

According to Schrade, on October 30 the Company withdrew its proposals to reduce vacation, holiday, and personal time and withdrew the proposal for a hold harmless trust.

8. November 6, 1981

On November 6, the Company proposed profit-sharing plan to replace the COLA. According to Gallagher, the proposal was not well formulated and did not set forth details relating to how the plan would be administered or how profits would be computed. After this, Schrade and Jeker asked for the return of the proposal saying that it never should have been presented. The Union reduced its vision program demand at this session. Gallagher stated that he asked to see the Company's proposal. A profit-sharing proposal was given to the Union which was intended as a basis for future negotiations, especially the percentage rate. The company explained it was a skeleton proposal designed to elicit further negotiations, but Gallagher refused to discuss it saying it was "facetious." Gallagher said the Union had no ability to check the Company's profit figures. Schrade said he would present the Company's tax figures for this purpose but that he would not let the Union audit company books. The Union proposed a pension contribution of 5 cents, a reduction of its prior demand, and a 50-cent wage increase. The Union also modified its disability income proposal, revising it downward. The Company rejected the package as excessive, but said it wanted to keep talking. The Company was informed of the strike vote.

9. November 20, 1981

On November 20, according to Gallagher the Company said it would offer a wage increase in return for cutting holiday and vacation time. There was discussion of wages and business conditions, and discussion of the Company's pension liability.

The Company gave the Union the operating figures for the previous 5 years. In 1977, sales were $3,223,033 and the profit was $37,769. In the year ending June 1981, sales were $2,845,417 and the operating loss was

[5] On cross-examination, Gallagher stated that there had been no meeting on October 16; the only meeting was on October 14.

$280,222.[8] The Company promised it would have a wage proposal at the next meeting.

According to Schrade, at this meeting the Company said it might grant a wage increase in return for concessions in other areas of the contract relating to paid time off. The Union's last proposal and the Company's financial position were discussed. The Company explained that although it had liquid assets it was not profitable on its current operations. In fact, the Company was losing money. The Union responded by asking to see the books, saying that unless union accountants could verify the figures the Union could not consider them. The Company refused to permit the Union to inspect its books. The Company said it would not increase pension contributions. Schrade promised that the Company would make a wage offer at the next meeting. However, Schrade testified that before the next meeting, he was overruled by Richard Schrade, president of Respondent.

10. December 9, 1981

On December 9, Gallagher testified, Joseph Schrade said the Company wanted to eliminate the COLA and did not wish to give any raise. He refused to have a union accountant go over the Company's books. Schrade stated that COLA would be paid to any employee who was working on February 1, 1982. According to Schrade, at this meeting, the Company made no wage offer. It proposed a zero increase explaining that the manufacturing end of the business was not providing an adequate rate of return. At this session, the Company first indicated there might be anyone working on February 1, 1982, if the Union did not waive the COLA, by saying that COLA would be paid to anyone who was working on February 1.

11. January 26, 1982

On January 26, according to Gallagher, the parties met as a result of an urgent call from Emil Jeker. They discussed the COLA, and Schrade said the Company would not pay the COLA that was due on February 1. Gallagher again asked if the Company was pleading poverty or inability to meet the Union's demands, and Schrade replied, "No, it just doesn't make sense to pay it." Schrade said that if there was no agreement to waive the COLA, the plant would be closed. Jeker said Respondent wanted a wage freeze with a reopener later in 1982. The Union said this did not make sense based on past experience. The Union proposed a $600 bonus for each employee per year in lieu of the COLA, but the Company rejected this plan. The Company proposed a bonus of 5 hours' pay, or about $35, for each employee that year. Gallagher asked whether the Company was pleading inability to pay. Respondent's representatives replied that they had made an offer and that the plant would be closed if the Union did not agree to waive the COLA. The Company did not say it was terminating the contract nor that it was locking out the employees.

According to Schrade, on January 26, 1982, the Company twice stated that in the absence of a waiver of the COLA, the plant would be closed. The Company explained that it was not pleading inability to pay, only that it made no sense to pay. Gallagher offered to waive the COLA for a bonus of $600 per year. Schrade said this was a very positive proposal and "very constructive" but that the parties were far apart on the numbers. The Company offered 1 hour's bonus and the offer was amended to propose a bonus of 5 hours' pay for the second year of the contract and 10 hours' pay for the third year. The Union would not accept this.

Schrade testified that impasse was reached on January 26, 1982. The impasse occurred when the Company told the Union that time was running out and that a concession was needed, and the Union offered a bonus in lieu of the COLA but no agreement was ever reached. Respondent's managers had believed for some time that it was unlikely the parties would settle their differences. They had discussed locking out the employees as early as October 30, 1982, and sought the advice of counsel on this point.

B. *The Lockout*

On January 27, 1982, Respondent had a press release read to its assembled employees. The release stated:

> Clemson Bros. today announced the lay off of all hourly employees at the end of work on Friday 29 January 1982. The Company said that negotiations of freeze wages have been unsuccessful. In the absence of such an agreement the Company believes that continued operations under terms of the present labor contract to be uneconomical.
>
> The leadership of Local 1835 of I.A.M. which represents Clemson hourly workers has not informed the Company whether or not Company proposals have been presented to the membership for a acceptance or rejection.
>
> Clemson Bros. has had unsatisfactory operating results for several years.

Schrade testified that the notice used the term "lay off" instead of lockout in order to avoid sabotage. Schrade said the Company would not have laid off the employees if the Union had agreed to waive the COLA payments. The reason for the lockout of the employees was to employ economic pressure to cause the Union to accept the Company's terms and to avoid paying the COLA. The Company did not continue to make pension or dental plan contributions under the collective-bargaining agreement; however, Schrade said the Company did not consider the employees as discharged during the lockout.

[8] According to Vincent Fox, a member of the union negotiating committee, the Company mentioned as early as September 1981 that it had lost $280,000 in the preceding fiscal year.

Jack Judelson, Respondent's independent accountant for the last 18 years, testified that a new generation of the family has taken over the management of Respondent and is attempting to make it profitable. The business is overcapitalized and has excess cash to invest. At least 4 years ago, Judelson advised management that unless the business could show a net profit of at least $300,000 it should be sold or terminated. In the last 4 years, the Company's operating losses have totaled about $390,000 and $280,000 of this was experienced in 1981. The Company has a surplus generated by its investments, but this is declining due to the operating losses.

On January 29, 1982, the production manager gave each unit employee a layoff slip, a slip for unemployment insurance, a set of medical insurance conversion papers, and any severance pay due under the contract. Gallagher was notified of the layoff by the employees, but Respondent never notified him of its actions.

The plant did not close on February 1. There was inventory on hand and there were outstanding orders to fill. In addition, some goods in process could be finished rapidly. The clerical employees worked in the plant and three wives of company officials had skills and were put to work. In addition, 7 to 10 outsiders were hired. They were told that a labor dispute was in progress and they were not promised permanent employment. Schrade testified that five of these are still on the payroll performing nonbargaining unit work.

On February 12, 1982, Respondent addressed a letter to 19 of its 26 employees offering them their jobs at their old wages, but without payment of the COLA and without pension or dental plan contributions. The letter required acceptance by February 22, and warned that if the employees did not come back to work "we will attempt to find a replacement for you. Should we succeed, you may be permanently discharged." Respondent did not send copies to Gallagher or to any other union official.

The Company received identical responses from the employees accepting the offer to return to work but refusing to waive COLA, pension, and dental payments. Respondent did not permit the employees to return to work under their conditions and sent a letter to the employees stating that the offer to return to work was "cancelled" and that the Company "will attempt to replace you."

On April 27, 1982, the Company offered unconditional reinstatement to all of its employees agreeing to honor all the terms of the contract. Employees hired since February 1, 1982, were no longer to do bargaining unit work. This offer was accepted by the Union and the employees returned to work.

C. *Discussion and Conclusions*

1. Alleged bargaining in bad faith

The General Counsel argues that the Company negotiated in bad faith, requesting that employees who had foregone any wage increase for over 2 years agree to waive a COLA payment and to accept the reduction of other benefits. In lieu of the COLA, the Company proposed a bonus of 13 cents per week. This was unreasonable in view of the fact that Respondent acknowledged that it had the money to meet the Union's demands, but argued that it did not make sense to pay because the manufacturing operation was not sufficiently profitable. Further evidence of bad faith, according to the General Counsel, lies in the Company's refusal to permit the Union to inspect its books to verify its claim of unprofitability. The Company also reneged on its promise to make a money offer during the negotiations.

The General Counsel concludes that the totality of Respondent's conduct shows that the Company had a predetermination not to reach agreement; it knew the Union would not accept its proposals to waive the COLA and it made no offer that the Union could accept. The General Counsel urges that Respondent violated Section 8(a)(1) and (5) by bargaining in bad faith.

Respondent argues that it never made any claims of inability to pay during the negotiations; in fact, Respondent's representative acknowledged that the Company had the money to meet the Union's demands. Respondent concludes that it was therefore under no obligation to comply with the Union's request to produce financial books and records for inspection by the Union.

In *NLRB v. Truitt*, 351 U.S. 149 (1956), the Supreme Court said:

> Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. 351 U.S. at 152–153.

This rule relating to an employer's claims of inability to meet a union's demands has been construed by the Second Circuit in *Pressman Local 51 v. NLRB*, 538 F.2d 496 (2d. Cir. 1976).[7] In that case, Judge Hays rejected a mechanistic approach in determining whether an employer had indeed raised a claim of inability to pay:

> So long as the employer's refusal reasonably interpreted is the result of financial inability to meet the employees' demand rather than simple unwillingness to do so, the exact formulation used by the Employer is . . . immaterial. 538 F.2d at 500.

The employer in the circuit court had repeatedly met each of the union's wage demands with the response that it could not "reach" them. The court concluded that the "plain English meaning of this . . . reiterated statement clearly indicates that the Employer was claiming an inability to pay,"[8] and the court found that the employer's refusal to produce financial records requested by the union was a violation.

In the instant case, Respondent's officers advised the Union that its manufacturing operation was not profitable and that unit labor costs must be cut 30 percent over the next 3 years. The Company made it clear that but for some investments unconnected to the manufacturing operation, Clemson Brothers would have been operating at a net loss. Indeed, the Company read certain sales and loss figures to the negotiating committee across the table. The plain English meaning of the Company's statements was that the Company's manufacturing operation employing all the bargaining unit workers was losing money and that the Respondent could no longer afford to subsidize the manufacturing end of the business by a drain on its investments; a drastic decline in labor costs was necessary. This claim was tantamount to saying that the Company was unable to afford a wage increase. It is immaterial that the Company avoided using the magic

[7] Rev. *Milbin Printing*, 218 NLRB 223 (1975).
[8] 538 F.2d at 500.

words—inability to meet the demand. The fact is, the Company wished to convince the Union that the manufacturing operation could not meet the cost of improved wages and benefits. The truth of this analysis is proven by the Company's behavior at the bargaining table when it actually presented certain loss figures to the Union. As the Supreme Court said, "If such an argument is important enough to present . . . it is important enough to require some sort of proof of its accuracy."[9] Thus, having presented the figures, the Company should have been willing to have its books inspected by a union accountant, and its unwillingness in the face of a union request was a refusal to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

There is further evidence of Respondent's bad-faith bargaining: Respondent acknowledges that on November 20, 1981, it promised to make a wage offer at the next session and that it reneged on this promise. Further, although Respondent characterized the Union's willingness on January 26, 1983, to accept a bonus in lieu of COLA as "very constructive" and a step in the right direction, Respondent nevertheless locked out its employees on February 1, 1982, without engaging in further bargaining on this important concession.

2. Alleged unlawful lockout

The General Counsel argues that the lockout of the employees before impasse was reached was unlawful because it was designed to avoid paying COLA and avoid bargaining and was not supported by economic justification or the imminent possibility of a strike.[10] The General Counsel concludes that the lockout was inherently prejudicial and devoid of economic justification and violated Section 8(a)(3) and (1) of the Act, citing *American Ship Building Co. v. NLRB.*, 380 U.S. 300 (1965); and *Vore Cinema Corp.*, 254 NLRB 1288, 1293 (1981).

Respondent urges that the parties had reached an impasse in the negotiations. No further progress was likely after the meeting of January 26, 1982, because neither side was likely to compromise. Thus, Respondent concludes, in the face of a genuine impasse Respondent could institute a lawful lockout.

Based on my findings above as to Respondent's failure to bargain in good faith, I have concluded that no genuine impasse in the negotiations existed.[11]

In *American Ship Building*, supra, the facts showed that the parties had bargained to impasse in good faith and that the lockout was not based on hostility to the Union or a desire to avoid collective-bargaining obligations. In the instant case, the employer did not bargain in good faith and no genuine impasse was reached. Furtherance, it is clear that the lockout was motivated by Respondent's wish to avoid the COLA payment required by the contract and by Respondent's desire to avoid bargaining in a situation where it was unable to gain any further concessions from the Union. Respondent has presented no evidence of economic justification for the lockout nor evidence of an imminent strike. Indeed, Respondent's brief concedes that the lockout was "not motivated by economic considerations." Therefore, the lockout of February 1, 1982, violated Section 8(a)(3) and (1) of the Act.[12]

3. Alleged unlawful hiring of replacements

The General Counsel argues that the locked-out employees were discharged and permanently replaced in violation of Section 8(a)(3) and (1). In the alternative, the General Counsel argues that if the replacements were temporary, their use was inherently destructive of employee rights in that Respondent did not demonstrate a substantial business justification for using replacements.

The evidence does not show that the unit employees were discharged nor that their replacements were anything but temporary. However, since I have found above that the lockout was unlawful, it follows it that the temporary replacement of the employees was also in a violation of Section 8(a)(1) and (3).

4. Alleged unilateral changes

The General Counsel argues that Respondent violated Section 8(a)(5) by unilaterally ceasing the payment of COLA as well as payment of pension and dental plan contributions on February 1, 1982. The General Counsel contends that the contract had not terminated, as urged by Respondent, because the employees had been unlawfully locked out. Even if the contract had been terminated, Respondent had no right to make unilateral changes.

Article 33.1 of the contract provides that the contract terminates on a strike or lockout. However, since I have found that the lockout was unlawful, I find that the contract did not terminate. Thus, it was unlawful for Respondent to cease making any of the payments required by the contract, including pension and dental plan contributions and the COLA payment. I find that Respondent violated Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962).

5. Alleged unlawful conditional offer of reinstatement

The General Counsel contends that having been discriminatorily discharged, Respondent's employees were entitled to unconditional offers of reinstatement. Because Respondent did not make such offers initially, it violated Section 8(a)(3) and (1). I find that the offers of employment made to the unlawfully locked-out employees on February 12, 1982, were conditional in that they would have required employees to waive the COLA, pension, and dental plan payments provided by the contract. Having been discriminatorily locked out, the employees were entitled to unconditional offers of reinstatement; Respondent's failure to tender such offers of reinstatement; Respondent's failure to tender such offers violated Section 8(a)(3) and (1) of the Act. *K & E Bus Lines*, 255 NLRB 1022 (1981).

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[9] 351 U.S. at 152–153.

[10] According to the General Counsel, Schrade had decided on a lockout on October 30, 1981. However, the record shows that Respondent's officials only considered a lockout at this time, but had not reached a decision.

[11] *Pressman Local 51*, supra at 501.

[12] *American Ship Building*, supra; *Vore Cinema Corp.*, supra.

6. Alleged unlawful direct dealing

The General Counsel contends that Respondent dealt directly with its employees in violation of Section 8(a)(5) and (1) of the Act, and requests permission to amend the complaint to allege this separate violation. The General Counsel points out that Respondent's February 12, 1982 offer of conditional reinstatement was made by letter to the employees and that the Union was not notified and had no opportunity to bargain over the mandatory terms of employment sought to be changed by Respondent's offer.

Although this violation is not alleged in the complaint, the alleged unlawful activity was related to and intertwined with the allegations in the complaint and the matter was fully litigated. Therefore, I grant the General Counsel's motion to amend the complaint. *Doral Hotel & Country Club*, 240 NLRB 1112 (1979).

The facts concerning the reinstatement offer of February 12, 1982, are not in dispute and are conceded by Respondent. The reinstatement offer would have required employees to forego payments mandated by the collective-bargaining agreement. Respondent was attempting to change wages and other terms of employment by dealing directly with its employees. I find that Respondent violated Section 8(a)(5) and (1) of the Act by mailing an offer to employees which differed from the contract agreed to by the parties. *Mt. Airy Psychiatric Center*, 230 NLRB 668, 680 (1977).

7. Alleged unlawful threats

The General Counsel urges that Respondent threatened its employees with discharge in violation of Section 8(a)(1) when it informed them by letter of February 12, 1982, that they might be permanently discharged. The General Counsel states that the threat must be considered in light of Respondent's bad faith in the negotiations and the unlawful lockout.

I have found above that the lockout of the employees was unlawful and that Respondent's unilateral attempt to reinstate the employees at different wages and conditions of employment was unlawful. In this context, Respondent's statement that the employees might be discharged if they refused to accept the unlawful conditions imposed by Respondent on their return to work was coercive and interfered with the employees' rights in violation of Section 8(a)(1) of the Act.

8. Alleged unlawful discharge

The General Counsel contends that Respondent's letter of February 23, 1982, notified the employees that they had been discharged in violation of Section 8(a)(3) and (1) of the Act. The General Counsel argues that the employees' protected conduct in refusing the conditional offer of reinstatement was the motivating factor for the discharge.

The Respondent's letter of February 23, 1982, does not contain a notification of discharge. It merely states that Respondent will attempt to replace the employee. There is no evidence that any of the employees were discharged and this allegation of the complaint should be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Clemson Brothers, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Lodge 1835, International Association of Machinists & Aerospace Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to bargain in good faith with the Union, making unilateral changes in terms and conditions of employment and dealing directly with its employees, Respondent violated Section 8(a)(5) and (1) of the Act.

4. By locking out its employees, replacing them, and offering them reinstatement on certain conditions, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By threatening its employees with discharge if they did not accept conditional offers of reinstatement, Respondent violated Section 8(a)(1) of the Act.

6. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent did not violate the Act by discharging its employees.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that Respondent be ordered to cease and desist, and take certain affirmative action to effectuate the policies of the Act.

Having found that Respondent unlawfully locked out its employees but then offered them reinstatement, I shall direct that the employees be made whole for any losses of pay and benefits they may have suffered by reason of the unlawful lockout and that the previously accomplished reinstatement shall be without prejudice to the employees' seniority and other rights and privileges.

All loss of earnings and other benefits due under the terms of this Order shall be computed within interest in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *Isis Plumbing Co.*, 138 NLRB 716 (1962); and *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Clemson Brothers, Inc., Middleton, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with the Union, making unilateral changes in terms and conditions of employment, and dealing directly with its employees.

(b) Locking out its employees, replacing them, and offering them conditional reinstatement.

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[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Threatening its employees with discharge if they refuse conditional offers of reinstatement.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at all of its facilities copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Make whole the employees listed in footnote 3 above for any losses of pay and benefits without prejudice to seniority and other rights in the manner set forth in the remedy section of this decision.

(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

United Airlines Services Corp. *and* United Steelworkers of America, AFL–CIO

Support Services, Inc. *and* United Steelworkers of America, AFL–CLO, Petitioner. Cases 19–RC–11660 and 19–RC–11661

August 24, 1988

DECISION, CERTIFICATION OF RESULTS OF ELECTION, AND ORDER REMANDING FOR HEARING

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

The National Labor Relations Board has considered the Petitioner's objections to elections held on December 18, 1987, and the Regional Director's report recommending disposition of them. The elections were conducted pursuant to Stipulated Election Agreements. The tally of ballots in United Airlines Services Corp., Case 19–RC–11660, shows 145 for and 228 against the Petitioner, with 7 challenged ballots, an insufficient number to affect the results. The tally of ballots in Support Services, Inc., Case 19–RC–11661, shows 47 for and 50 against the Petitioner, with 10 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the Petitioner's exceptions and brief, and adopts the Regional Director's findings and recommendations regarding the Petitioner's Objections 6 and 10.[1] However, contrary to the Regional Director, the Board finds that Objection 8, which applies solely to Support Services, Inc., raises substantial issues of fact and law that can best be resolved on the basis of a hearing.

The Petitioner's Objection 8 alleged that Employer Support Services, Inc. released a letter dated November 30, 1987, in which it announced a change in the biweekly pay schedule so that the schedule would conform to the prior employer's practice of alternating its paydays with those of Government employees. According to the letter, this change was implemented to ease waiting lines in banks, credit unions, and stores. In support of this objection, the only evidence the Petitioner offered was a copy of the letter itself.

The Regional Director found that no additional economic benefit accrued to Support Services employees as a result of the change in payday. He accordingly concluded that there is no showing that the Employer's conduct in this regard warrants setting aside the election.

In its exceptions, the Petitioner relies on *R. Dakin & Co.*, 284 NLRB 98 (1987), to argue that a change in an employer's payroll system for purposes of employee convenience is a benefit that can influence the outcome of an election. The Petitioner further asserts that the Employer in the instant case, like the employer in *Dakin*, has failed to show that the change in paydays would have been made even in the absence of the Union's organizational efforts.

It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. *R. Dakin*, supra, quoting *Reds Express*, 268 NLRB 1154, 1155 (1984). In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits. *Uarco Inc.*, 216 NLRB 1, 2 (1974). See, e.g., *Singer Co.*, 199 NLRB 1195 (1972).

Applying the above-stated principles to the circumstances of this case, we conclude that the issues raised by the Union regarding Objection 8 may best be resolved pursuant to a hearing. In this regard we note that, contrary to the implication of the dissent, the Employer has not offered any explanation for its timing, i.e., for making this change in the biweekly payroll system during the pendency of the election.[2] Although the Employer may provide an explanation at the hearing, we cannot provide a rationale for it: it is the Employer's motive that is at issue. Compare *NLRB v. Great Dane Trailers*, 388 U.S. 26 at 34–35 (1967). We further note that additional information is needed to determine whether such a change constitutes a benefit reasonably calculated to influence the election results.

[1] In the absence of exceptions, we adopt, pro forma, the Regional Director's recommendation that the Petitioner's Objections 1, 2, 3, 4, 5, 7, 9, and 11 through 28 be overruled, and that the challenges to 8 of the 10 challenged ballots in Support Services, Inc., be overruled.

[2] The change is puzzling in part because this more convenient payroll schedule had been used by the Employer's predecessor on the maintenance contract, and the Employer could have implemented it at the outset simply by continuing the predecessor's practice. Instead, the Employer chose to implement a new schedule at the outset, and it then reverted to the predecessor's practice after the election petition was filed.

Accordingly, we shall order a hearing in Case 19–RC–11661 and we shall certify the election results in Case 19–RC–11660.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots in Case 19–RC–11660 have not been cast for United Steelworkers of America, AFL–CIO–CLC and that it is not the exclusive representative of the United Airlines Services Corp. employees in the following appropriate unit:

> All corrosion control tech. II, corrosion control tech. III, crane electrician A, crane electrician B, crane mechanic A, crane mechanic B, crane mechanic C, crane operator, electronic tech. III, engineering equip. operator, gardener lead, general maintenance worker, heavy equipment mechanic, heavy motor vehicle operator, housekeeper I, housekeeper II, HVAC mechanic, instrument cont. tech., laborer, lead electrician tech. III; lead engineer. equip. operator, lead housekeeper II, lead HVAC mechanic, lead locksmith, lead maintenance electrician, lead maintenance machinist, lead maintenance mechanic, lead motor vehicle mechanic, lead storekeeper II, lead woodcraft worker, light motor vehicle operator, locksmith, maintenance carpenter, maintenance electrician, maintenance machinist, maintenance mason, maintenance mechanic, maintenance painter, maintenance pipefitter, maintenance plumber, maintenance trades helper, maintenance welder, medium motor vehicle operator, millwright, motor vehicle mechanic, pest controller, railroad track worker, rigger, roof repairer, sheet metal mechanic, sign painter, stationary engineer, storekeeper I, storekeeper II, taxi driver, tractor operator, safety specialist, driver-messenger, vehicle inspector, or persons performing the functions described in the above job titles, employed by the Employer at its SUBBASE Bangor, WA facility, but excluding all computer production controller, drafter, librarian tech., photographer lab tech., accounting clerk, data entry clerk, stenographer, receptionist, fire fighter, computer operator, illustrator, photographer, radio dispatch clerk, security clerk, clerk typist, general clerk, dispatcher, security policeman, word processor, clerical salaried employees, office clerical employees, guards and supervisors as defined in the Act.

ORDER DIRECTING HEARING

It is ordered that a hearing be held in Case 19–RC–11661 before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised by Objection 8.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board concerning the disposition of the issues. Within the time prescribed by the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately on the filing of exceptions, the party filing them shall serve a copy on each of the other parties and shall file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the hearing officer.

IT IS FURTHER ORDERED that Case 19–RC–11661 is remanded to the Regional Director for Region 19 for the purpose of arranging and giving notice of the hearing.

MEMBER CRACRAFT, concurring and dissenting in part.

I agree with my colleagues and the Regional Director that the Employer did not engage in objectionable conduct under the circumstances of this case by disseminating a new employee handbook to employees during the 2–3 weeks prior to the December 18, 1987 election and by announcing (in writing) to the employees on December 16, 1987, that employees who did not require health insurance coverage under the Employer's plan could choose to have the Employer pay into such an employee's Individual Retirement Arrangement (IRA) account—but not directly to the employee—an amount equal to the amount of the health insurance premium. However, contrary to my colleagues, I also agree with the Regional Director's determination, which I find to be satisfactorily based on his administrative investigation, that the Employer also did not engage in objectionable conduct under the circumstances of this case by announcing (in writing) to the employees on November 30, 1987, that the schedule of paydays had been revised in order to alleviate overcrowding at nearby banks, credit unions, and stores, thereby "mak[ing] payday more convenient for you and your family."

R. Dakin & Co., 284 NLRB 98 (1987), relied on by the Petitioner in support of its objection regarding alteration of the pay schedule, is distinguishable. In that case employees complained about the pay schedule for 6 months prior to the employer's

alteration of the schedule immediately after the advent of union organizational activity. In such circumstances, it was proper to conclude that the alteration constituted a grant of benefit and that the employer did not adequately explain the timing of the grant.

The announcement about both the health insurance premium option and the revised payday schedule herein might, under other circumstances, be reasonably perceived by employees as grants of benefits. Nevertheless, I find that under the instant circumstances, the timing of both these announcements within the critical period is reasonably and adequately explainable by the fact that the Employer's operational startup period—with its predictably attendant need for clarification and revision of personnel policies such as those in question here—was virtually contemporaneous with the instant preelection critical period.

Accordingly, I find the Regional Director's resolution of these matters to be sufficient under the circumstances and I find it unnecessary to remand Objection 8 for hearing. I note the Petitioner's exception to the Regional Director's report does not claim that this objection should be resolved on the basis of record evidence but, rather, argues that the Regional Director's conclusion was erroneous as a matter of law.

United Food and Commercial Workers, Local 324, United Food and Commercial Workers International Union, AFL–CIO, CLC (Albertson's, Inc.) *and* John M. Cacas. Case 21–CB–9847

August 24, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On November 4, 1987, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[1] findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Food and Commercial Workers, Local 324, United Food and Commercial Workers International Union, AFL–CIO, CLC, Santa Ana, California, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Brian Sweeney, for the General Counsel.
Robert A. Cantore (Gilbert & Sackman), for the Respondent.
John M. Cacas, for himself.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding in which a hearing was held on 30 July 1987 is based on an unfair labor practice charge filed 17 March 1987 by John M. Cacas (Cacas) against United Food and Commercial Workers, Local 324 (Respondent) and on a complaint issued 13 May 1987 by the General Counsel of the National Labor Relations Board (Board) alleging that Cacas' employer, Albertson's, Inc., at Respondent's request, discharged him for failing to pay to Respondent the dues and initiation fee owed Respondent under the union-security agreement between Respondent and Albertson's, and that Respondent violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act (Act) because, prior to requesting Cacas' discharge, it failed to give him reasonable notice of the money he owed, failed to afford him an adequate opportunity to pay the money he owed, and failed to warn him he would be discharged if he failed to pay the money he owed. Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

On the entire record, from my observation of the demeanor of the witnesses, and having considered the parties' posthearing briefs, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER INVOLVED

Albertson's, Inc., the employer involved in this case, is engaged in the retail grocery business and operates stores located in the State of California. During the course and conduct of its business operations in California, Albertson's annually derives gross revenues in excess of $500,000 and annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside the State of California. Albertson's is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Under the circumstances, I find it will effectuate the purposes of the Act to assert jurisdiction.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

Albertson's retail clerks employed in its stores located in certain areas of southern California, including Santa Ana, California, are represented by Respondent for purposes of collective bargaining. During the time material, Respondent and Albertson's were parties to a collective-bargaining contract covering these employees. Article II of the contract contained a union-security agreement which, in pertinent part, included the following provisions:

> A. UNION SECURITY. All employees shall, as a condition of employment, pay to the Union the initiation fees and/or reinstatement fees and periodic dues lawfully required by the Union. This obligation shall commence on the thirty-first (31st) day following the date of employment by the Employer who is signatory to this Agreement, or the effective date of this Agreement, or the date of signature, whichever is later.
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> . . . .
>
> E. ENFORCEMENT. The parties hereto agree that this Article II shall be implemented and enforced as hereinafter set forth.
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> 1. *Introductory Letter.* This letter will be sent by the Union to the employee's home (if the Employer has complied with Article II-B of this Agreement

requiring the Employer to supply such home address to the Union), or to the store where the employee is employed.

(a) This letter will quote the language of Article II-A of this Agreement and advise employees of the Union's office hours and other matters relating to the employee's satisfaction of his obligations under Article II-A of this Agreement.

(b) A copy of this letter shall be sent to the Employer's Industrial Relations Department on the same date that the original of the letter is sent to the employee.

2. All employees will be billed for their appropriate initiation fee and/or reinstatement fee and/or periodic dues lawfully applied in accordance with the Bylaws of the respective Local Unions.

3. *Delinquency Notice.* This notice will be sent to the employee's home address (if the Employer has furnished the Union with such information); otherwise it will be sent to the store in which the employee works, with copies sent to the Industrial Relations Department of the Employer and to the store manager.

The delinquency letter is to be sent to the employee specifically advising him that:

(a) He is delinquent in his financial obligations to the Union;

(b) Advising him of the specific amount due;

(c) How the amount is computed;

(d) The date the sum must be received by the Union;

(e) The penalty for noncompliance, i.e., discharge if the obligation has not been met; and

(f) Address and telephone number of the Local Union and hours of operation.

4. *Termination Notice.* The termination notice shall be sent to the Employer involved. The copy to be sent to the employee shall be sent to the employee's home address (if the Employer has furnished the Union with such information). If the Employer has not furnished such information, the copy shall be sent to the employee at the store where the employee works.

(a) The termination notice will be sent at such time as the employee has ignored all efforts by the Union to obtain compliance with this Article II.

(b) The notice will advise the Employer that the employee has failed to comply with the Union Security Clause of this Agreement in that the employee has not paid the initiation fees and/or reinstatement fees and/or dues as lawfully applied. In addition, the notice shall advise that the Union has complied with the decisions of the National Labor Relations Board, as well as its own International Constitution and Bylaws with regard to the required procedural steps of notifying the employee of the delinquency.

(c) The termination notice shall also advise that the Union will not accept any payments from the employee or on account of the employee from and after the date thereof. The Union agrees that it will not in fact accept any such payments.

(d) The Employer shall terminate the employee at the end of the current week's work schedule after receipt by the Employer of the termination notice.

Respondent administers dues payments for approximately 22,000 members. It processes monthly dues payments for between 400 and 500 new members weekly, and does this in the following fashion. On employing a new hire in the unit represented by Respondent, the employers, including Albertson's, send Respondent a "notice of new hire" which gives the employee's date of employment, name, social security number, job classification, rate of pay, store location, and most of the time the employee's home address. It is not unusual, however, for the "notice of new hire" to fail to include the employee's home address. Respondent places all this information into its computer system and the system is programed to print out the above-described "Introductory Letter" at the appropriate time and if, in response to this letter, the employee does not fulfill his or her union-security obligation in a timely manner, the computer is programed to print out the above-described "Delinquency Notice" at the appropriate time. If Respondent has not been given an employee's home address, the "Introductory Letter" and "Delinquency Notice" are mailed to the employee at the store where he or she works. In all cases courtesy copies of the "Introductory Letter" and "Delinquency Notice" are mailed to the employer at the store where the employee works.

On or about 3 June 1986 Charging Party Cacas began work for Albertson's as a grocery clerk at its store 1650 located in Santa Ana, California. The clerks employed at this store are represented by Respondent and covered by the above-described union-security agreement. Previously, for approximately 1 year during 1985–1986, Cacas was employed by Albertson's as a grocery clerk in Las Vegas, Nevada, where the clerks are represented by one of Respondent's sister locals. The contract between that union and Albertson's did not contain a union-security agreement because Nevada is a so-called right-to-work state. Cacas did not join the Union or pay dues and fees to the union while employed by Albertson's Las Vegas, Nevada store. As a matter of fact no one ever asked him to join the Union while employed at Albertson's Las Vegas, Nevada store.

Although Cacas began work at Albertson's Santa Ana, California store on or about 3 June 1986, Albertson's did not notify Respondent of his employment until 10 November 1986, when Respondent received a "notice of new hire" from Albertson's notifying it of Cacas' employment. The notice, however, failed to give Cacas' home address and gave an incorrect social security number.

Cacas, throughout his employment at the Santa Ana store, worked the night shift, 12 a.m. to 8:30 a.m. or 9 a.m. On 8 September 1986 he was promoted to night crew chief, but on Friday, 21 November 1986, was demoted to his clerk position. During the time material, the manager of the Santa Ana store, known as the store director, was James Sidenglanz.

Louis Cruz, Respondent's business representative assigned to administer the collective-bargaining contract covering Albertson's clerks employed at the Santa Ana store where Cacas worked, testified he spoke to Cacas on 19 November 1986 for the first time about his obligation to comply with the contractual union-security agreement. In this regard, it is undisputed that during the latter part of November 1986 Cruz met with Cacas and the other members of the store's night crew, at the end of their shift, to listen to their grievances concerning Store Manager Sidenglanz, who had only recently assumed that position.[1] It is also undisputed that after listening to the night crew's grievances and their expressed feeling that if they could discuss their grievances with Sidenglanz' boss, District Manager Simonson, that Simonson would resolve them, that Cruz ended the meeting by stating he would try to arrange for a meeting between the night crew and Simonson.

Cruz further testified that after the meeting ended, Cacas came to him and discussed in greater detail his personal grievances concerning Sidenglanz. When questioned by counsel for the General Counsel as an adverse witness, Cruz testified that at this time, "I asked him [Cacas] if he had already joined the Union" and when Cacas answered "no," Cruz said nothing else to him concerning that subject. Later when questioned by counsel for Respondent, Cruz embellished and added significantly to this testimony; he testified, "I told him [Cacas] that I noticed that his name was not . . . in the book[2] . . . and . . . asked him if he had come in to join the Union, and he [Cacas] said no," and further testified that he responded by telling Cacas, "he had to come in and join the Union." Later when cross-examined by counsel for the General Counsel, Cruz, when asked what he said to Cacas concerning his financial obligations to the Union, testified, "I believe I said that he had to come down and join the Union" and when asked if he said anything else to Cacas on that subject, testified "I don't remember."

Cacas specifically denied Cruz asked whether he was a member of Respondent and denied Cruz stated anything to him about joining Respondent. I credit Cacas' and reject Cruz' testimony because Cacas' testimonial demeanor, which was good, was better than Cruz'. Also, as described above, Cruz' disputed testimony was not given in a straightforward manner.

On 26 November 1986, pursuant to the above-described article II(E) of its contract with Albertson's, Respondent mailed an "Introductory Letter" to Cacas. Because it had not been furnished with Cacas' home address by Albertson's, the letter was addressed to Cacas at the store where he worked. In addition, as was its practice, Respondent mailed a courtesy copy of the letter to the store where he worked. The letter quoted verbatim article II(A) of the contract, the contractual union-security agreement. The letter then, in pertinent part, stated that Cacas' failure to comply with his union-security obligation under article II(A) of the contract might result in his termination and informed Cacas he owed Respondent monthly dues of $21 a month for the month of December 1986 and owed an initiation fee of $275. The letter gave Respondent's address and office hours and advised Cacas to come to Respondent's office no later than the 31st day from the date of his employment to make arrangement for the payment of the $296 he owed Respondent. As is discussed infra, there is a dispute whether Cacas received this letter.

Toward the middle of December 1986, Cacas telephoned Cruz and asked whether he succeeded in arranging the meeting between Albertson's district manager, Simonson, and the night crew. Cruz answered in the negative. He explained that both himself and Simonson had been on vacation and that Simonson had failed to return his telephone calls, but assured Cacas he intended to arrange for a meeting between Simonson and the night crew. Nothing was stated during this conversation about Cacas' obligation to join Respondent or comply with the contractual union-security provision.

On 31 December 1986, pursuant to the above-described article II(E) of its contract with Albertson's, Respondent mailed a "Delinquency Notice" to Cacas. Because it had not been furnished with Cacas' home address by Albertson's, the notice was addressed to Cacas at the store where he worked. In addition, as was its practice, Respondent mailed a courtesy copy of the notice to the store where he worked. The "Delinquency Notice" advised Cacas he was "delinquent in [his] financial obligations to [Respondent]" and further explained, in pertinent part:

> Union records indicate that the following amounts are past due:
>
> Based on your classification of employment you must pay dues for the months of Dec. 1986 thru Dec. 1986 at $21.00 per month, equaling $21.00, and your initiation/reinstatement fee of $275.00 for a total of $296.00
>
> . . . .
>
> Under Article II of the collective bargaining agreement, it is your duty to meet the financial obligations imposed by the Agreement or your continued employment may be in jeopardy, and you will be subject to termination should you fail to meet your obligation.
>
> The amount owed must be received in the Union's office at the close of business on or before January 14, 1987. If you do not meet this obligation by the specified date, the penalty for noncompliance will be discharge from employment.—This is your final notice—

As discussed infra, there is a dispute whether Cacas received this notice.

During the first week of January 1987, Cacas telephoned Cruz and asked whether he had made progress in arranging the meeting between Simonson and the night crew. Cruz told him he had been unable to contact Simonson who had failed to return his telephone calls, but intended to keep on trying to arrange for a meeting between Simonson and the night crew. Cruz then asked

[1] Cruz places this meeting as occurring on 19 November 1986, whereas, Cacas places it as occurring during the last week of November 1986.

[2] Referring to the book Cruz maintains which lists the names of the employees employed in the several stores whose employees he is assigned to represent.

whether Cacas had been a union member while employed by Albertson's in Las Vegas. Cacas answered "no." Cruz told him he was required to join Respondent because in California, unlike Nevada, there was no right-to-work law. Cruz also explained to Cacas that under the collective-bargaining contract between Albertson's and Respondent, Cacas was required to join Respondent as a condition of his employment. Cruz gave Cacas one of Respondent's several telephone numbers and told him to phone that number and stated, "they will take care of you."[3]

During the first week of January 1987, Cacas, immediately after his above-described conversation with Cruz, followed Cruz' instruction and dialed the number that Cruz had given him, one of the several numbers for Respondent's office. A lady answered and Cacas either spoke to that lady or to another lady to whom the call was transferred. Cacas introduced himself and stated he had just spoken to Cruz who had told him to call this number and had told him that the person at this number would "take care of me as far as joining the Union." In reply to the lady's inquiry, Cacas stated his social security number and the lady punched that number into a computer. After a moment the lady told him she did not have any information concerning him[4] and asked how long he had been working for his employer. Cacas told her he had been employed by Albertson's since approximately May 1986. In response the lady asked, "And you have not received a notice yet?" Cacas stated, "No." The lady replied by stating, "But you have been talking to Lou Cruz" and Cacas answered, "Yes," he had just finished talking to Cruz and had been told by Cruz to call this call number and he would be taken care of. The lady told Cacas he would receive a notice from Respondent that would explain everything he needed to know about joining Respondent. Cacas asked why he had not already received this notice because he had been working for Albertson's for several months. The lady stated she "would not know" because "it is not her job."

The next day Cacas again called the number that Cruz had given him. He did this because, after considering the matter, he feared that because he had been employed by Albertson's for several months he would owe Respondent a lot of money and wanted to find out the amount he owed. He spoke to the lady who spoke to him the previous day or to another lady. He introduced himself and stated he was calling about how much he owed Respondent, that he had spoken to Respondent's business representative, Cruz, and to someone at that telephone number the previous day, that he had been told he would be receiving a notice from Respondent, but wanted to know how much money he owed Respondent because he had been employed by Albertson's for several months and wanted to be able to plan ahead prior to getting the notice so he could save a sufficient amount of money to pay what he owed. The lady responded by telling him she was unable to supply him with this information because she did not have it because it was someone else's job, but assured him he would be provided with this information very shortly in the notice Respondent was sending to him and apologized for not being able to help him.[5]

On either 22 January 1987 or 23 January 1987 at approximately 8:45 a.m., Cruz personally spoke to Cacas, in the presence of Sidenglanz, about Cacas' obligation to join Respondent.[6] Cacas, a witness for the General Counsel, Cruz, an adverse witness for the General Counsel, and Sidenglanz, a witness for Respondent, testified about this conversation. Their testimony follows.

Cacas testified he was on his way out of the store at the end of his work shift when he observed Cruz standing in the store's pharmacy. Cacas walked over to where Cruz was standing and asked whether Cruz had heard anything from Simonson, Albertson's district manager. Cruz replied, "Shh, shh" and indicated he did not want to talk about that subject while Sidenglanz was in the vicinity and pointed over Cacas' shoulder to where Sidenglanz was standing approximately five or six steps away. Cacas indicated he understood. Cruz changed the subject and asked whether Cacas had joined Respondent. Cacas answered "no" and explained he had telephoned Respondent's office using the telephone number Cruz had given him and was told he was supposed to receive a notice from Respondent. Cruz asked, "You haven't gotten no notice yet?" When Cacas answered "no," Cruz and Cacas went to where Sidenglanz was standing nearby in front of a check stand and Cruz asked him if he had received any notices from Respondent concerning Cacas. Sidenglanz replied he had not received anything. Cruz indicated that Sidenglanz by that time should have received notices from Respondent concerning Cacas. Sidenglanz repeated he had not received any notices. Cruz told Cacas he had to join Respondent and told him to go to Respondent's office that day and be there by 4 p.m. and gave him directions on how to get there. This summarizes Cacas' testimony.

Cruz testified he and Sidenglanz were standing at the front of the store, near the store's safe, which is adjacent to the store pharmacy, when Cacas approached them. Before Cacas could say anything, Cruz asked whether he had joined Respondent. Cacas answered, "No." Cruz asked whether Cacas received a message that he had to be at Respondent's office by 4 p.m. that day. Cacas

[3] The above description of Cacas' early January 1987 telephone conversation with Cruz is based on the testimony of Cacas, whose demeanor was good when he testified. Cruz did not deny his testimony.

[4] As I have noted supra, Albertson's had furnished Respondent with an incorrect social security number for Cacas.

[5] The above-description of Cacas' early January 1987 telephone conversations with the lady or ladies to whom he spoke when, in response to Cruz' instruction, he telephoned Respondent's office about joining Respondent is based on the undenied testimony of Cacas, whose demeanor was good when he testified. Respondent, based on the testimony of its Dues Department Supervisor Schultz, argues Cacas' testimony was inherently incredible because, if he is believed, the persons he spoke to deviated from certain established procedures in answering his inquiries, i.e., did not refer him to someone with the necessary expertise to answer his questions and did not punch his name into the computer when the social security number he gave failed to generate any employment information. Respondent's contention is without merit because in a labor organization of approximately 22,000 members it is not inherently incredible that on occasion some of its office clerical employees do not follow the procedures their supervisors assume they are following.

[6] Cacas dates this conversation as occurring 22 January, whereas Cruz and Sidenglanz date it as occurring 23 January.

stated he had not received the message. Cruz asked Sidenglanz whether he had given this message to Cacas.[7] Sidenglanz answered "no" and explained this was the first time Sidenglanz had seen Cacas since Cruz on 20 January had given him the message. The conversation ended at this time with Cruz telling Cacas he had better "take care of this" by 4 p.m. that day. Cacas replied he intended to go down and join Respondent that day. This summarizes Cruz' testimony.

Sidenglanz testified he and Cruz were walking toward the back of the store and Cacas was walking in the opposite direction on his way out of the store when Cruz asked, "Is that John Cacas?" Sidenglanz answered in the affirmative. Cruz then initiated a conversation with Cacas by stating, "Oh, you're Cacas" and told Cacas if he did not go to Respondent's office that day and take care of his dues payments he was going to be terminated. Cacas replied by stating, "I've never got a notice." Cruz asked Sidenglanz whether Sidenglanz had seen any notices. Sidenglanz replied he had not seen any notices addressed to Cacas. The conversation ended with Cruz telling Cacas, "You've got to get down and take care of it today" and Cacas stating, "I'll get it taken care of." This summarizes Sidenglanz' testimony.

I credit Cacas' description of his 22 January or 23 conversation with Cruz because he testified about the conversation on both direct and cross-examination in a straightforward and sincere manner and his testimonial demeanor, which was good, was better than Cruz' or Sidenglanz'. I also note that Cruz and Sidenglanz, in testifying about this conversation, not only failed to corroborate one another in several significant respects, but each presented essentially different versions of what allegedly took place. In view of these circumstances, I have credited Cacas' testimony.

On either 22 or 23 January 1987, the day Cruz told Cacas, as I have found supra, to be at Respondent's office by 4 p.m. that day and join Respondent, Cacas went to Respondent's office but did not get there until after 6 p.m. and found it was closed. The reason he was so late in getting to Respondent's office was that Cacas, who was 18 years old, did not own an automobile and it was not until his aunt, who he lived with, got home from work that he was able to borrow her automobile to drive to Respondent's office.

On the day following his 22 January 1987 conversation with Cruz, as Cacas walked by the company bulletin board on the way to his workstation, he inadvertently bumped against the bulletin board and knocked off one of the posted documents. When he stopped to tack it back on, he observed it dealt with the subject of his obligation to join Respondent, a subject that Cruz had recently been speaking about to him, so he removed the document from the bulletin board and took it with him to his workstation and read it during his break period. The document was a one-page memorandum dated 25 June 1986 from Albertson's regional labor relations director and was addressed to all the Company's employees who worked under "Retail Clerks Collective Bargaining Agreements" and was entitled "Your Termination Which Could Result From Failure To Pay Union Dues and Initiation Fees."[8] The memorandum described in detail the employees' obligation to pay initiation fees and dues to Respondent under the contractual union-security agreement and informed them of Respondent's obligation to send them an "Introductory Letter" explaining their obligation. The memorandum also stated in substance that if they failed to pay their dues and fees by the time stated in the "Introductory Letter," that Respondent would send them a "Delinquency Notice" describing in detail their obligation to pay Respondent's dues and initiation fees. The memorandum, among other things, also advised the employees that if they did not pay the moneys owed by the date specified in the "Delinquency Notice," that Albertson's would have no alternative but to terminate their employment.

On either Monday, 26 January 1987, or Tuesday, 27 January 1987, Cruz telephoned Sidenglanz and requested he terminate Cacas by the end of the week. Sidenglanz agreed.

It was not until 29 January 1987 that Cacas returned to Respondent's office to join Respondent and pay whatever moneys he owed. He testified he delayed before returning to Respondent's office because he had to wait until his aunt had a day off so he could use her automobile, and he intended to pay Respondent whatever moneyes he owed by using the $300 he had previously saved and another $300 from his 29 January paycheck.[9]

On 29 January when Cacas visited Respondent's office to join it and pay his dues and initiation fee, he was informed by Cruz that he was too late, that he should have followed Cruz' instruction and gone to Respondent's office the previous week and taken care of the matter then. Cacas told Cruz he had tried to get to Respondent's office but had arrived there late and told Cruz that he had in his possession $600 to pay whatever he owed Respondent. Cruz told him he was too late in tendering the money because Respondent had already sent Albertson's his termination notice, and that he could not get his job back unless Albertson's agreed to rehire him. Cruz showed Cacas copies of the 26 November 1986 "Introductory Letter" and the 31 December 1986 "Delinquency Notice" which Respondent had sent to the store where Cacas worked. Cacas, after looking at these documents, told Cruz he had never received any of them. Also during this meeting Respondent discovered Albertson's had given it an incorrect social security number for Cacas, which explained to Respondent's clerical personnel why the social security number given to them by

[7] Cruz testified that on 20 January 1987 he telephoned Sidenglanz and asked him to tell Cacas to join Respondent by 4 p.m. 23 January 1987, and that if he failed to join Respondent by that time, that Respondent would send a notice requesting his termination. Sidenglanz did not corroborate this testimony and, as described infra, failed to corroborate Cruz' testimony that Cruz during his conversation with Cacas asked Cacas whether he had received this message.

[8] There is no evidence how long this memorandum had been posted on the store bulletin board. Cacas had not observed it prior to this date. However, it probably had been posted previously because Cacas did not normally make a conscious effort to read the materials posted on the bulletin board, but only noticed those notices that were printed in large print, i.e., the minimum wage notice.

[9] 29 January was a payday.

Cacas had failed to generate any information from Respondent's computer.

On 30 January 1987, at the conclusion of his work shift, Cacas was notified by Sidenglanz that Respondent had terminated his employment.

On 30 January, after Sidenglanz told Cacas he was discharged and after Cacas had gone to Sidenglanz' office to get his final paychecks, Cacas telephoned Cruz and protested his discharge. He told Cruz he had not received any of the notices that Respondent had addressed to him in care of the store and, in support of this, stated he had just been to the store for his final paychecks and had observed the notices sent to him by Respondent on Sidenglanz' desk, and asked Cruz "if I received those notices, what are they doing right there in his office on the desk." Cruz replied by stating this was something they could not discuss over the telephone and agreed to meet with him the following Tuesday.

On Tuesday, 2 March 1987, Cacas and night crew employee Gordie Owens met with Cruz and Cruz' boss at Respondent's office. Cacas reiterated that he had not received any of the notices sent to him by Respondent. In order to determine whether this was true, Cruz telephoned the store and spoke to the store's bookkeeper, Jo Wilson, and after speaking with Wilson told Cacas and Owens that Wilson had told him she had no idea whether Cacas received the notices Respondent had addressed to him in care of the store, but that she did recall seeing an envelope addressed to him that had been left on the windowsill of the store's office. Owens stated he also remembered seeing such an envelope addressed to Cacas on the office windowsill.[10] The meeting ended with Cruz informing Cacas that Respondent intended to persuade Albertson's to put him back to work even if it meant going to arbitration.[11] Thereafter, on several occasions when Cacas spoke to Cruz about the matter, Cruz repeated Cacas should not worry but should give him a few more days, and assured him Respondent intended to persuade Albertson's to put him back to work even if it meant going to arbitration.

On 10 March 1987 Cacas, Owens, Simonson, Sidenglanz, Cruz, and another Respondent business representative, met at the Albertson's store where Cacas used to work and discussed the night crew's grievances and Cacas' rehire. On the subject of Cacas' rehire, in an effort to persuade Albertson's district manager Simonson to rehire him, Cruz argued Albertson's had never given Cacas the notices Respondent sent to him in care of the store. More specifically, Cruz explained to Simonson how Respondent had sent several notices to Cacas addressed to the store and that Store Manger Sidenglanz in effect had admitted Cacas did not receive the notices. Cruz stated he had no idea what happened to the notices when they got to the store but, in his opinion, it was "obvious" Cacas did not receive them. Simonson indicated he would consider rehiring Cacas and would notify Respondent in a few days whether it would do so.[12]

On or about 13 March 1987 Cruz notified Cacas that Albertson's did not intend to rehire him. Cruz also informed Cacas that Respondent had decided to drop the matter and did not intend to pursue it any further.

On 17 March 1987 Cacas filed the unfair labor practice charge in this case.

Either in April or May 1987 Cacas went to work as a clerk for Ralph's Grocery in one of its stores located in Santa Ana, California.[13] The clerks employed by Ralph's Grocery are represented by Respondent and apparently are covered by the same contractual union-security agreement as Albertson's clerks. Cacas quit his employment with Ralph's Grocery after working for approximately 1 month and at the same time moved from Santa Ana, California, to the northern part of California, and approximately 1 or 2 months after having moved received an "Introductory Letter" from Respondent, which had been forwarded to him from his old address in Santa Ana, California.[14]

As I have found supra, Respondent mailed Cacas an Introductory Letter and a Delinquency Notice on or about 26 November 1986 and 31 December 1986, respectively. Respondent did not have his home address, so these documents were mailed to him in care of the store where he worked and copies were mailed to the store itself. Cacas testified he did not receive either of these documents and that he first saw them when, as described supra, on 29 January 1987 Respondent's business representative, Cruz, showed them to him. Respondent contends Cacas' testimony is incredible. In evaluating this contention the following evidence is pertinent.

After its belated notification on 10 November 1986 from Albertson's of Cacas' employment, Respondent mailed Cacas an Introductory Letter on or about 26 November 1986 and, when he did not comply with that letter, mailed him a Delinquency Notice on or about 31 December 1986. Respondent did not have his home address, so, as was its practice in such cases, mailed these documents to him in care of the store where he worked and mailed copies to the store itself.

During the time material Store Manager Sidenglanz normally opened the mail addressed to and received by the store. On occasions when he was busy he did not open the envelopes on which Respondent's logo was printed, but assumed they contained either Introductory Letters or Delinquency Notices and left them unopened in the basket on the desk in the store office used by Madelyn Pool, who worked in the store 1 day a week, on

[10] No evidence was presented that either Wilson or Owens in fact remembered seeing an envelope addressed to Cacas on the office windowsill.

[11] The description of what was said at the 2 March meeting is based on the testimony of Cacas whose testimonial demeanor was good. Cruz testified Cacas stated he did not receive any of the notices addressed to him at the store. Cruz did not deny the remarks Cacas attributed to him concerning his telephone conversation with Wilson, nor did he deny that he ended the meeting by stating Respondent intended to make an effort to have Albertson's put Cacas back to work even if it meant going to arbitration.

[12] The description of the 2 March meeting is based on the undenied testimony of Cacas, whose testimonial demeanor was good.

[13] The parties appear to have stipulated that Cacas was hired by Ralph's Grocery on 11 May 1987; however, other record evidence (R. Exh. 8), indicates he was hired by Ralph's Grocery on 11 April 1987.

[14] The record reveals that on or about 14 May 1987 Respondent mailed an Introductory Letter to Cacas at his Santa Ana, California address and on or about 17 June 1987 mailed a "Delinquency Notice" to him at that address.

Thursday, doing the store's payroll. Sidenglanz, when it was not busy, normally opened all the envelopes addressed to the store and placed any Introductory Letters or Delinquency Notices in Pool's basket where they remained until she came to work on Thursday. The same was the case with unopened envelopes left by Sidenglanz in Pool's basket. On Thursday, Pool took whatever Introductory Letters and Delinquency Notices were in her basket and attached them to the employees' paychecks by means of paperclips. The envelopes containing the Introductory Letters and Delinquency Notices that were not addressed to the store, but to employees in care of the store, were treated differently. Sidenglanz' practice was to leave those envelopes unopened on the windowsill of the store's office for the employees to pick up. There is no evidence that Albertson's ever informed the employees, either verbally or in writing, that these envelopes would be there for them to pick up.

Each Thursday, during the time material, Pool prepared for distribution the approximately 105 employee paychecks, which between 8 and 8:30 a.m. were placed by her in alphabetical order in a cardboard box, which she left either upstairs in the store office or downstairs in the store's video room.[15] The employees, including the night crew, received their paychecks by walking up to the box and removing their checks, after signing for them on a piece of paper that had been left aside of the box. The box with the checks, whether it was located in the store office or in the video room, was not watched by anyone nor were the employees kept under surveillance as they removed their checks from it. Although Pool was present in the office when the employees came in to get their paychecks, there is no evidence that she stopped work and watched them remove their paychecks or that she otherwise kept employees under surveillance when they took their checks out of the box.

Sidenglanz testified he did not remember seeing Cacas' Introductory Letter or Delinquency Notice or an envelope addressed to Cacas. This was consistent with his further testimony that when he was told on 23 January 1987 that Cacas was complaining he had not received either an Introductory Letter or Delinquency Notice from Respondent, that Sidenglanz replied by telling Cacas and Cruz that Sidenglanz had also not seen those documents.

Pool testified she was absolutely positive she saw Cacas' 26 November 1986 Introductory Letter and the 31 December 1986 Delinquency Notice which were addressed to the store, and testified she was absolutely positive she paperclipped both of them to Cacas' paychecks. Pool further testified it was in May 1986 that she started attaching the Introductory Letters and Delinquency Notices addressed to the store to employees' paychecks and testified that in the approximately 14 months she has been doing this she has attached approximately 50 such documents to employees' paychecks and to her knowledge no employee has ever complained about not receiving the notices she has attached to their paychecks.[16]

The record also reveals that Sidenglanz and Pool on or about 1 April 1987 discovered the copy of the 26 November 1986 Introductory Letter which Pool testified she was absolutely positive she had attached to Cacas' paycheck. The alleged circumstances surrounding this discovery follow. Upstairs in the store, adjacent to the office, are several baskets used by department heads for purposes not revealed by the record. Sidenglanz testified he and Pool discovered Cacas' 26 November 1986 Introductory Letter addressed to the store, while they were looking for a grocery price book that Sidenglanz needed in order to find the price of an item for a customer, and when they could not find the book in the grocery manager's basket, where it should have been, they looked in the adjacent basket, the night crew chief's basket, and Sidenglanz found the 26 November 1986 "Introductory Letter" at the bottom of the basket. Pool testified she and Sidenglanz were looking for completed customers' check application cards which were supposed to be in the grocery manager's basket, but found them instead in the night crew chief's basket and, in the process of removing the check application cards from that basket, that either herself or Sidenglanz discovered the 26 November 1986 Introductory Letter laying in the basket. As I have found supra, Cacas' last day as night crew chief was Friday, 21 November 1986. Anyone employed at the store has access to the night crew chief's basket as well as the other baskets.

Cacas' testimonial demeanor was good when he testified he did not see an envelope addressed to him on the window sill of the store's office and that he never received copies of the 26 November 1986 Introductory Letter or the 31 December 1986 Delinquency Notice, either attached to his paychecks or by some other means. There is nothing in the way Cacas conducted himself that impugns his testimony. Quite the opposite, at all times he informed Respondent's clerical employees and Respondent's business representative that he had not received the notices that Respondent had mailed to him in care of the store where he worked. Moreover, no one from Albertson's disputed his complaint that Albertson's had not transmitted Respondent's notices to him. This despite the fact that Cacas and Cruz, Respondent's business representative, were taking the position in their dealings with Albertson's representatives that Albertson's had failed to transmit the notices to Cacas. Albertson's sole statement concerning this matter was Store Manager

[15] There is a dispute about where the box with the checks was left during the time material. I have not resolved this dispute because it does not affect the outcome of the case.

[16] Pool's testimony that to her knowledge no one ever complained they did not receive a notice she attached to their paychecks is suspect. As described in detail supra, on or about 23 January 1987 Store Manager Sidenglanz was advised that Cacas was complaining he did not receive an Introductory Letter or a Delinquency Notice. When confronted with Cacas' complaint, Sidenglanz admitted having no recollection of ever seeing either of those documents or an envelope addressed to Cacas. Thereafter, Respondent's business representative Cruz took the position in his dealings with Albertson's representatives that Albertson's should rehire Cacas because Albertson's had failed to transmit to him the Introductory Letter or the Delinquency Notice. Under the circumstances, I find it difficult to believe Pool's testimony that no one from Albertson's brought it to her attention that Cacas was complaining he had not received a copy of either the Introductory Letter or Delinquency Notice.

Sidenglanz' admission to Cacas and Cruz that he did not remember receiving correspondence from Respondent involving Cacas or addressed to Cacas. No one including Sidenglanz ever mentioned that Pool remembered having attached the relevant Introductory Letter or Delinquency Notice to Cacas' paychecks.

I realize that at the hearing in this proceeding, Pool, a member of Respondent, testified on behalf of Respondent that she was absolutely positive she had seen Cacas' 26 November 1986 Introductory Letter and the 31 December 1986 Delinquency Notice addressed to the store, and testified she was absolutely positive she paperclipped both of them to Cacas' paychecks. Pool's testimonial demeanor was not good when she gave this testimony. Also her testimony is suspect in view of Albertson's failure to notify either Cacas or Business Representative Cruz that Pool, the person who attaches the Introductory Letters and Delinquency Notices to the employees' paychecks, specifically recalled attaching those documents to Cacas' paychecks.[17] This doubt about the reliability of Pool's testimony is reinforced by the fact that on or about 1 April 1987, several months after the 26 November 1986 Introductory Letter was supposedly paperclipped to Cacas' paycheck by Pool, this letter was allegedly discovered by Pool and Store Manager Sidenglanz in the night crew chief's basket. I use the term "allegedly" because the circumstances of the discovery make the testimony of Pool and Sidenglanz suspect. First, Cacas had been replaced as night crew chief on 23 November 1986 and there is no explanation why the 26 November 1986 Introductory Letter would have been placed in the crew chief's basket and there is no explanation why Cacas' successor or successors as crew chief would not have discovered this letter and removed it. Second, there was no reason for either Sidenglanz or Pool to be looking for anything in the night crew chief's basket. Third, Pool and Sidenglanz gave different versions of why they happened to be looking in the night crew chief's basket on or about 1 April 1987 when they discovered the 26 November 1986 Introductory Letter. Fourth, Pool works at the store only 1 day a week, a Thursday, the day she handles the store's payroll, thus for her to have been involved with Sidenglanz in the discovery of the letter is a remarkable coincidence.

It is for all the foregoing reasons, and particularly Cacas' sincerity when he denied having seen an envelope addressed to him on the windowsill of the store's office and denied receiving the 26 November Introductory Letter or the 31 December Delinquency Notice, that I find Cacas did not receive either of those documents and was not shown them until 29 January 1987 when Cruz brought them to his attention. In so concluding I considered that Pool paperclipped copies of a 19 November 1986 Introductory Letter and a 26 November 1986 Introductory Letter to the paychecks of employees Leichtfuss and Catalfano. I am not persuaded, however, that establishing the Introductory Letters sent to the store concerning two other employees were paperclipped by Pool to their paychecks, warrants the inference that she also affixed Cacas' Introductory Letter or Delinquency Notice to his paychecks. In this regard, I note that the fact Albertson's may have submitted correct social security numbers to Respondent for employees Leichtfuss and Catalfano does not warrant the inference it submitted a correct social security number for Cacas—it in fact did not. Likewise, the fact that Pool paperclipped Leichtfuss' and Catalfano's Introductory Letters to their paychecks does not warrant the inference that, under the circumstances of this case, she also did so in Cacas' case.

I have also considered Respondent's contention that Cacas' testimony concerning several other matters was inherently incredible, thus indicating he generally was not a truthful witness, and considered its further contention that because two copies of the 26 November Introductory Letter and two copies of the 31 December Delinquency Notice were mailed by Respondent to the store where Cacas worked, and because under the store's procedure all four of these documents were supposed to be transmitted to Cacas, that the law of probability dictates he should have received at least some of those documents. I do not agree that Cacas' testimony referred to by Respondent was inherently incredible in whole or in part. Regarding Respondent's latter contention, I am persuaded that regardless of the probabilities involved, Cacas did not receive any of the documents in issue for, as I have stated previously, he impressed me as a sincere and conscientious witness when he denied receiving them. I am not prepared to speculate about what happened to those documents: whether all or some of them were not received by the store; whether all or some of them were not left for Cacas on the store office windowsill; whether all or some of them were not paperclipped to his paychecks; whether all or some of them fell off from his paychecks after being paperclipped. All I know is that when Cacas testified he did not see an envelope addressed to him on the store office windowsill and denied ever receiving the documents involved in this case, his testimonial demeanor was good and, under the circumstances of this case, the probabilities of the situation do not make his testimony inherently incredible.

B. *Discussion*

A labor organization seeking to enforce a union-security provision against an employee has a "fiduciary" duty to "deal fairly" with the employee affected. "At a minimum this duty requires that the Union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure." *NLRB v. Hotel & Restaurant Employees Local 568*, 320 F.2d 254, 258 (3d Cir 1963). Accord: *H. C. Macaulay Foundry Co. v. NLRB*, 553 F.2d 1198, 1201 (9th Cir. 1977). In *Teamsters Local 122 (Busch & Co.)*, 203 NLRB 1041, 1042 (1973), the National Labor Relations Board specifically defined the union's duty as including "a statement of the precise amount and months for which dues were owed, as well as an explanation of the method used in computing such amount," plus "an adequate opportunity to make payment." In addition, the union must specify when such payments are to be made

[17] As I have found supra, Cacas and Business Representative Cruz were complaining to Albertson's that Albertson's had not transmitted to Cacas the notices sent to him in care of the store.

and make it clear to the employee that discharge will result from failure to pay. *Western Publishing Co.*, 263 NLRB 1110, 1112 (1982).

In the instant case on 23 January 1987 when, pursuant to the provisions of its contractual union-security agreement with Albertson's, Respondent sent its request to Albertson's to terminate Cacas for his failure to meet his union-security obligations, Respondent had not advised him of the amount of his obligation, nor the method of computation, nor the deadline for such payment, nor clearly stated to Cacas he would be terminated if he did not comply with this obligation.[18] As described in detail supra, as of that date the only information that Cacas had received from Respondent was Business Representative Cruz' statement that he was required to join Respondent as a condition of employment and to telephone the Respondent's office to learn the details of this obligation. However, when Cacas, pursuant to Cruz' instruction, telephoned Respondent's office during the first week of January 1987 in an effort to learn more about his union-security obligation, he was not given any additional information, but advised he would be receiving a notice from Respondent that would explain everything he needed to know. In other words, when Respondent on 23 January 1987 requested Albertson's to comply with the contractual union-security clause and terminate Cacas for nonpayment of dues and an initiation fee, it had not furnished Cacas with any of the information the Board has found necessary to a union's fiduciary duty to deal fairly with an employee in enforcing a contractual union-security clause.[19] The record also reveals that as a result of Respondent's 23 January 1987 termination request, on 30 January 1987 Albertson's discharged Cacas. In view of these circumstances, I find Respondent violated Section 8(b)(2) and (1)(A) of the Act, by attempting to cause and causing Albertson's to terminate Cacas.

CONCLUSIONS OF LAW

By attempting to cause and causing Albertson's to discharge John M. Cacas on 30 January 1987, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(2) and (1)(A) and Section 2(6) and (7) of the Act.

[18] As described in detail supra, Respondent attempted to notify Cacas of his contractual union-security obligation by sending the above-described 26 November 1986 Introductory Letter and the above-described 31 December 1986 Delinquency Notice to him in care of the store where he worked. However, as I have found supra, Cacas did not receive them and did not receive the copies that had been mailed to the store and allegedly paperclipped to his paychecks.

[19] The fact that Cacas on or about 22 January 1987 did not visit Respondent's office in response to Cruz' request and thereafter failed to visit the office until Thursday, 29 January 1987, to find out about his union-security obligation, does not establish he was acting in bad faith or was willfully and deliberately attempting to avoid meeting his union-security obligation. Cacas did make an effort to visit Respondent's office on or about 22 January 1987, pursuant to Cruz' instruction, but was not able to get there until after it had closed because he did not own an automobile and it was not until his aunt, who he lived with, got home from work that he was able to use her automobile to drive to Respondent's office. The reason Cacas did not return to Respondent's office until Thursday, 29 January, was he waited until his aunt had a day off so he could use her automobile and he intended to use some of the money from his paycheck, Thursday was payday, to meet his union-security obligation.

REMEDY

Having found that Respondent violated Section 8(b)(2) and (1)(A) of the Act, I shall order it to cease and desist from engaging in such activity and to take certain affirmative action to effectuate the policies of the Act.

Having found that Respondent caused Albertson's, Inc., to unlawfully discharge John M. Cacas, I shall order that Respondent notify Albertson's, Inc. in writing, with a copy to Cacas, that it has no objection to the reinstatement of Cacas, and that it requests Cacas be reinstated. The Respondent shall be ordered to make Cacas whole for any loss of wages and benefits he may have suffered as a result of the Respondent's action until Cacas has been reinstated by Albertson's, Inc., to his former or substantially equivalent job, or he obtains substantially equivalent employment elsewhere, less his net interim earnings.[20] The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, United Food and Commercial Workers, Local 324, United Food and Commercial Workers International Union, AFL–CIO, CLC, Santa Ana, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Albertson's, Inc. to discriminate against any of its employees in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole John M. Cacas for any loss of wages or other rights and benefits he may have suffered as the result of its discrimination against him, in the manner set forth in the remedy of this decision.

(b) Notify Albertson's, Inc. in writing with a copy to John M. Cacas that it has no objection to the employment of John M. Cacas, and it requests that Cacas be reinstated.

(c) Remove from its records any reference to the unlawful discharge of John M. Cacas and notify him in writing that this has been done and that evidence of his unlawful discharge shall not be used as a basis for future action against him.

[20] *Sheet Metal Workers Local 355 (Zinsco Electrical Products)*, 254 NLRB 773 (1981).

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Post in conspicuous places, at its business office and meeting hall, including all places where notices to members are customarily posted, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt. Once posted, these notices shall remain posted for 60 consecutive days. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Deliver to the Regional Director for Region 21 signed copies of the notice in sufficient numbers to be posted by Albertson's, Inc. in all places where notices to employees are customarily posted, if it is willing. Ask the Employer to remove any reference to Cacas' unlawful discharge from the Employer's files and notify Cacas that it has asked the Employer to do this.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause Albertson's, Inc. to discriminate against John M. Cacas or any other employee in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act, except to the extent that those rights may be abrogated by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

WE WILL make whole John M. Cacas for any loss of wages or other rights and benefits he may have suffered by reason of our discrimination practiced against him, with interest, until he has been reinstated by Albertson's, Inc. or obtains substantially equivalent employment elsewhere.

WE WILL notify Albertson's, Inc. in writing with a copy to John M. Cacas that we have no objection to the reinstatement of John M. Cacas and we request that he be reinstated.

WE WILL remove from our files any reference to the discharge of John M. Cacas and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future action against him and WE WILL ask the Employer to remove any reference to Cacas' unlawful discharge from its files and will notify Cacas that we have asked the Employer to do this.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 324, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO, CLC

Howard M. Howes, Inc. *and* United Steelworkers of America, Local 14094, AFL–CIO–CLC. Case 9–CA–24194

August 25, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On November 3, 1987, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issues in this case are (1) whether the Respondent unlawfully polled its employees about their continued support for the Union and (2) whether, following its poll, the Respondent unlawfully withdrew recognition from and refused to bargain with the Union.

In 1972, the Respondent recognized the Union as the exclusive collective-bargaining representative for the Respondent's drivers, mechanics, and dispatchers. The most recent collective-bargaining agreement between the parties was for the period May 23, 1984, through May 23, 1987. At the time of the material events there were five employees in the bargaining unit—three mechanics and two spotters.

On March 13, 1987,[1] the Union notified the Respondent in writing that it wanted to begin negotiations for a new collective-bargaining agreement to replace the agreement due to expire on May 23. For asserted reasons discussed more fully below, the Respondent's vice president, Howard M. Howes, decided to conduct a poll of the employees in the unit to determine whether they still wanted to be represented by the Union. The Respondent conducted such a poll on March 21. All five employees in the unit voted "no" to the question of whether they wished to be represented by the Union. On March 30, the Respondent notified the Union, in writing, that it was withdrawing recognition of the Union, effective on expiration of the collective-bargaining agreement on May 23. The Respondent honored the terms and conditions of the collective-bargaining agreement until it expired, but refused to negotiate a successor collective-bargaining agreement with the Union.

The complaint alleges that the Respondent acted unlawfully, in violation of Section 8(a)(5) and (1) of the Act, by withdrawing recognition from, and thereafter refusing to bargain with, the Union. The Respondent denies that it acted unlawfully as alleged, and asserts that at the time it withdrew its recognition of the Union, the Respondent knew, based on the results of the poll, that each of the five employees in the unit had expressed a desire not to be represented by the Union. The Respondent further asserts that at the time it polled its employees about their desire to be represented by the Union, the Respondent had a good-faith doubt about the Union's majority status, based on objective evidence existing prior to the poll.

The judge found merit in the Respondent's defense. More specifically, applying the Board's established standard for determining whether an employer may lawfully conduct such a poll, the judge found that the Respondent had a reasonable doubt, based on objective considerations, that the incumbent Union continued to have the support of a majority of the employees it represents,[2] and was therefore privileged to conduct the poll and to rely on its results in withdrawing recognition from the Union. For the reasons discussed below, we disagree with the judge.

The judge found that the cumulative effect of eight factors, which assertedly prompted the Respondent to conduct the poll, were such that any reasonable person would doubt the Union's continued majority support. On reviewing these factors, individually and in their cumulative effect, we conclude that they do not support a reasonable doubt of the Union's majority status.

The judge found that the Respondent properly relied on questions asked by unit employee union member Mark Swinehart in late February or early March. According to the Respondent's vice president, Howard M. Howes, he mentioned to Swinehart, in passing, that the Respondent would soon have to negotiate another collective-bargaining agreement with the Union, and he wondered—aloud—who was going to be representing the Union on a local basis. According to Howes, Swin-

[1] All dates are 1987 unless otherwise stated.

[2] See *Thomas Industries*, 255 NLRB 646 (1981), enf. denied 687 F.2d 863 (6th Cir. 1982). In denying enforcement of the Board's order in *Thomas Industries*, the Sixth Circuit Court of Appeals rejected the Board's above-stated standard for when an employer may lawfully poll its employees about their continued support for an incumbent union, and held instead that an employer may lawfully conduct such a poll when it has substantial, objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal of recognition (i.e., even if that evidence would not, in itself, support a reasonable doubt about the incumbent union's continued *majority* support). 687 F.2d at 867. The instant case arises in the Sixth Circuit. The judge, noting these circumstances, found that the Respondent's polling was lawful under either the Board's or the Sixth Circuit's standard.

ehart questioned whether there was still a union that was active at that location, and whether a union was necessary at all. Howes testifed that he did not answer Swinehart's questions and that "at that point, I really terminated the conversation . . . any further conversation about any union."[3]

Contrary to the judge, we find that Swinehart's questions to Howes do not constitute objective evidence indicating that a majority of the unit employees no longer wanted to be represented by the Union. First, we find that Swinehart's questions to Howes were, at most, little more than rhetorical questions about the current state and future role of the Union in the Respondent's operation. Second, and in any event, Swinehart's questions certainly did not indicate that he no longer wished to be represented by the Union, but rather that he was concerned about the inactivity of the Union and was questioning, rather than rejecting, the fact of union representation.

Howes conceded that this brief encounter with Swinehart was the only specific conversation that he had with any employee about the Union. Swinehart made no reference, express or implicit, to any other employee. Thus, of the five unit employees in question, Howes spoke to only one of them about the Union, and even that one employee did not indicate to Howes that he no longer desired to be represented by the Union.

Howes further testified that he *overheard* "general derogatory remarks and comments that reflected a lack of interest in any representation of the union." However, Howes was only able to provide one example of having overheard any such remark within the year prior to the poll in question. In this regard, Howes testified that:

> Lloyd Hedges [a unit employee-union member], you know, he might say something about, you know, "we haven't seen any union out here for a long time. The only thing we've really got from this union has been breakfast, once a month", these sorts of comments.

Howes also testified that Hedges "bemoaned the fact" that it had been a year or more since the Union had conducted meetings or sent anyone to visit the Respondent's plant. According to Howes, those sorts of general comments from Hedges were common, "it was just common knowledge." Also in this context, Swinehart testified that while he could not recall precisely what comments Hedges made about the Union in Howes' presence:[4]

> "[I]t was, you know, just comments as far as, that we should, you know, something should be done, you know, to decide what to do with the union, as far as whether to keep it, or to get rid of it, you know, either way, just . . . in general that something should be done, to get it straightened out. . . . Just, you know, whether to—if we're going to have a union, lets get a representative, and, you know, have meetings regular and all that, or, you know, just to get rid of it altogether.

We find that Hedges' remarks, *overheard* by Howes, are no more indicative of a loss of majority support for the Union than were Swinehart's questions, posed directly to Howes. First, Howes was able to recall overhearing only two specific remarks by Hedges: (1) that Hedges had not "seen any union out here for a long time" and (2) "the only thing we've really got from this union has been breakfast, once a month." These remarks by Hedges do not constitute objective evidence indicating that a majority of the unit employees no longer wanted to be represented by the Union. At most, these remarks by Hedges could not reasonably be construed by Howes as anything more than one employee's oblique, tongue-in-cheek expressions of dissatisfaction with the recent performance of the Union. As with Swinehart's questions, Hedges' remarks did not indicate that he or any other unit employee no longer wished to be represented by the Union. Second, these remarks by Hedges are the only arguably disparaging remarks by an employee about the Union's performance that Howes could specifically recount at the hearing. (As seen, Swinehart's questions to Howes did not expressly or implicitly disparage the Union, much less demonstrate a desire to be rid of the Union.) Additionally, beyond Hedges' remarks, Howes could only testify vaguely, generally, and without attribution that he had overheard "general derogatory remarks and comments that reflected a lack of interest in any representation of the union." We find that such unsupported, summary testimony provides no probative, material support for the Respondent's assertion that it had a reasonable doubt, based on objective considerations, that the Union

[3] Swinehart's version of this encounter is generally consistent with Howes'. According to Swinehart:

> I asked him [i.e., Howes] about the union, just because there hadn't been any representation recently. I was just wondering where we stood with the union . . . and . . . what we could do about, or whatever, to see what was going on. And he said that we would just sort of have to wait, and see what happens . . . not really a definite reply. . . . Since there hadn't been any, really, union meetings, or anything, I just asked him how we stood with the union, or what was being done, and whether it was really, you know, necessary to have a union.

According to Swinehart, Howes did not respond to these questions.

[4] Hedges did not testify.

no longer had the support of a majority of the unit employees.[5]

The Respondent also relied on Howes' knowledge, through his unsolicited receipt of internal union correspondence, that none of the current unit members wanted to serve as local officers and that the local had recently been placed in administratorship by the parent union, United Steelworkers of America.[6] The record shows that no unit employee had served as a union officer or designated himself as a local union spokesman since April 1986. In late February or early March 1987, Don Baker, a former unit employee and former union recording secretary, sent to Howes several pieces of correspondence Baker had received in late 1986 or early 1987 from Steelworkers International headquarters and the Ohio AFL–CIO, in his former capacity as union recording secretary. Baker requested that Howes notify the International that Baker was no longer an employee or union officer and that the International should stop sending such correspondence to Baker. The correspondence in question, which Howes read, consisted of, inter alia: (1) A December 9, 1986 letter from the International president to Baker, advising him that in order "to assure the performance of the collective bargaining agreements or other duties of the bargaining representative," Local 14094 (i.e., the Union) was being placed under an administrator, Robert Andrews, and all the local officers were relieved of their duties.[7] (2) A January 30 letter from the International to Baker, and four other individuals addressed as union members, enclosing a copy of a report of the International Commission, which stated that Andrews had explained to the commission that "the membership of the local had declined to four members and that there was decided lack of interest in serving as an officer" and that "the lack of interest on the part of the remaining members is such that there is no objection to the imposition of administratorship." The report recommended that the administratorship of the Union be continued and that "serious consideration be given to the possibility of merging with a more active local, as it is unlikely that this unit will get much larger in the foreseeable future." (3) A February 25 letter from the International to Baker, advising him that the International executive board had adopted the above-described report and recommendations. (4) Two form letters, January 13 and February 5, from the Ohio AFL–CIO to "All Top Officers" (including, presumably, Baker, who received these letters), advising them that their local union had not paid per capita taxes (45 cents per member per month) to the Ohio AFL–CIO for 6 months or more.

We find, contrary to the judge, that the above union correspondence does not constitute an objective basis to support a reasonable doubt about the Union's continued majority status. First, there is no indication that any of the *current* unit members was even aware of the administratorship and per capita tax matters discussed in this correspondence. Second, even if they were aware of these matters, mere reluctance or unwillingness of any unit employees to seek out or accept union office is not an indication that a majority of employees no longer wish to be *represented* by a union. As the judge himself stated, "employees could have genuine desire to be represented by a Union but no interest whatsoever in being an officer or steward." Third, the correspondence asserts that four of the employees were union members, a clear majority of the five unit employees.

The Respondent also relied on the fact that only two of the five unit members had authorized dues checkoff. However, the failure of a majority of the unit employees to authorize dues checkoff is not indicative that a majority of the employees no longer want to be represented by the Union. First, the collective-bargaining agreement makes it clear that dues-checkoff authorization was entirely voluntary on the part of the employees. Second, and in any event, it is well settled that failure of employees to authorize dues checkoff does not indicate opposition to, or loss of support for continued representation by, the union in question.[8]

The Respondent also relied on the Union's apparent inactivity, as purportedly evidenced to Howes by the questions and remarks of Swinehart and Hedges, respectively, as set out above; the fact that the Union had not filed any grievances in over a year (since January 1986); and the fact that Howes had not seen or heard from any union official in approximately 8 months (since July 1986).

Contrary to the judge, we find that the above facts do not support the Respondent's asserted reasonable doubt about the Union's continued majority status. First, it is well settled that an absence of grievance activity, or even a union's general inactivity, vis-a-vis, an employer, is not an indication that a majority of the unit employees no longer

[5] Indeed, Swinehart's hesitant, almost tortured testimony, set out above, about what remarks Hedges might have made in Howes' presence not only fails to support the Respondent's contention but actually supports the notion that continued representation by the Union was still a decidedly open question.

[6] It appears from the record that the Union in question, Steelworkers Local 14094, the Charging Party, represents only the five-member unit involved in this case.

[7] Baker had not served as recording secretary since early 1985, and the last union officer had quit in April 1986.

[8] *Atlanta Hilton & Towers*, 278 NLRB 474 (1986).

wish to be represented by their union.[9] Second, under the particular circumstances of this case, which, as will be discussed below, were well known to and understood by Howes, the absence of grievance activity from early 1986 was not unusual, was reasonably foreseeable, and, in any event, was not indicative of a loss of support for the Union among the five unit employees in March 1987.

The Respondent had recognized the Union in 1972 as the representative of the Respondent's drivers, mechanics, and dispatchers. But beginning in September 1985 the Respondent's approximately 20 driver employees began to convert to independent contractor status, no longer employed by the Respondent. By March 1986, this conversion was essentially complete, and what had been a 25-employee unit composed mostly of drivers had become a 5-employee unit comprised 3 mechanics and 2 spotters. When the drivers *had been* unit employees, prior to 1986, they had been the principal source of grievances. Thus, according to Howes, he received 10 or 11 grievances from the Union during the 3 years prior to the conversion of the drivers to independent contractor status, and "most" of those grievances were filed by the drivers. Howes conceded that he did not have "too much trouble" from the mechanics and spotters remaining in the unit. Indeed, according to Howes, "I really didn't have too much trouble from anybody . . . no, I didn't. I didn't [have] many grievances, and we had a good relationship." Thus, by Howes' own account, he had enjoyed a good relationship with his employees; the Union had a history of not filing many grievances; most of the grievances that *were* filed were filed by the drivers; these drivers left the unit in late 1985 and early 1986; and Howes particularly did not have "too much trouble" from the five employees remaining in the unit—the mechanics and spotters. Under these circumstances, we find that Howes could not reasonably construe the absence of grievances since the drivers left the unit as an indication that a majority of the five mechanics and spotters remaining in the unit no longer wished to be represented by the Union. Indeed, as the judge himself states in the attached decision, "Some of the factors were ambiguous, e.g., no grievances could mean the members simply have no problems and that the Respondent was complying with the collective bargaining agreement and not reflect lack of interest in the Union."

For this same reason, we do not find that the failure of the Union to contact Howes during the 8 months between the resolution of the last grievance in July 1986 and the Union's March 1987 notification to the Respondent that it wanted to begin negotiations for a new collective-bargaining agreement to be an objective consideration on which the Respondent could base a reasonable doubt that the Union continued to have the support of a majority of the unit employees. Quite simply, the Union may not have felt any need to speak with Howes during these months.

Finally, the Respondent relied on the fact that for more than a year prior to the March 1987 poll in question Howes had not seen any union postings on the employee bulletin board. There is a bulletin board in the *drivers'* room, which is used for both company and union postings. The Union had regularly posted notices of union meetings, but Howes had not seen any such notices posted since about March 1986. However, it was in March 1986 that the drivers completed their conversion from their former status as unit employees, represented by the Union, to their current status as independent contractors, no longer represented by the Union. Thus, the absence of union postings on the drivers' room bulletin board is most reasonably explained by the fact that union notices ceased being posted there about the same time that the drivers themselves were ending their relationship with the Union, by becoming independent contractors. Although three mechanics and two spotters were still in the unit and represented by the Union, the drivers' room, according to Howes, was *not* used by the mechanics and spotters: "No, not really. That was *basically the drivers' room*. The *mechanics had their own room*, where they have a desk and their files and records." (Emphasis added.) The mechanics' room, located about 25 feet from the drivers' room, did not have a bulletin board.[10] Under all these circumstances, we find that there was no reasonable grounds for Howes to construe the absence of union postings on the bulletin board in the independent contractor drivers' room as an indication that a majority of the five mechanics and spotters—who had their own room, albeit without a bulletin board—no longer wanted to be represented by the Union.

In accordance with the above analysis, we find that none of the factors relied on by the Respondent in support of its asserted reasonable doubt

[9] See *Roman Iron Works*, 282 NLRB 725 (1987); *Cowles Publishing Co.*, NLRB 903 (1986); *Royal Vending Services*, 275 NLRB 1222 (1985). See generally *NLRB v. Flex Plastics*, 726 F.2d 272 (6th Cir. 1984) (an employer must consider a union's inaction from all of the circumstances before entertaining good-faith doubts of majority status). As seen in the following discussion, the Respondent did not reasonably assess the Union's inactivity in light of all the circumstances.

[10] The mechanics and spotters were nevertheless regularly and frequently in the drivers' room, picking up and leaving off reports.

about the Union's continued majority status constitutes in itself a sufficient objective consideration to support such a doubt. Nor do we find that these same individually insufficient factors, even when considered cumulatively, constitute sufficient objective considerations to support such a doubt.[11]

Thus, we conclude that the Respondent, lacking at the time reasonable doubt about the Union's continued majority status, acted unlawfully, in violation of Section 8(a)(1) of the Act, in conducting a poll of its employees to determine whether a majority of them still wanted to be represented by the Union. Having found that the poll was unlawful, we find that the Respondent was therefore not entitled to rely on the results of that poll in deciding to withdraw recognition from the Union. We further find that the Respondent was not otherwise entitled to withdraw recognition from the Union, and we conclude, therefore, that the Respondent's withdrawal of recognition from and refusal to bargain with the Union was also unlawful, in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Howard M. Howes, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, United Steelworkers of America, Local 14094, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times the Union has been the designated and recognized exclusive collective-bargaining representative of the Respondent's drivers, mechanics, and dispatchers.

4. By polling its employees to determine whether a majority of them still wanted to be represented by the Union, the Respondent violated Section 8(a)(1) of the Act.

5. By withdrawing recognition from and refusing to bargain with the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[11] In making these findings, we are, of course, applying the Board's well-established standard for when an employer may lawfully poll its employees to determine if a majority of those employees still wish to be represented by an incumbent union. As discussed in fn. 2 above, however, we are mindful that the case arises in the Sixth Circuit Court of Appeals, and that the court applies a different standard for determining whether an employer has acted lawfully in conducting such a poll. More specifically, the Sixth Circuit has held that an employer may poll its employees to determine their union sentiment if it has substantial, objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal of recognition. *Thomas Industries v. NLRB*, 687 F.2d 863, 867 (6th Cir. 1982). In our view, and as fully discussed above, we do not find that the evidence proffered by the Respondent constitutes "substantial, objective evidence of a loss of union support."

REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[12]

ORDER

The National Labor Relations Board orders that the Respondent, Howard M. Howes, Inc., Baltimore, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Polling its employees about whether they want to continue to be represented by the Union when at the time of polling the Respondent does not have a reasonable doubt, based on objective considerations, that a majority of the employees want to continue to be represented by the Union.

(b) Withdrawing recognition from and refusing to bargain with the Union at a time when either the Union has not actually lost the support of a majority of the employees in the bargaining unit or the Respondent does not have a reasonable doubt, based on objective considerations, that a majority of the employees want to continue to be represented by the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, recognize and bargain with the Union as the designated and recognized exclusive collective-bargaining representative of the Respondent's drivers, mechanics, and dispatchers.

(b) Post at its facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps

[12] The General Counsel has requested that the Order include a visitatorial clause. Under the circumstances of this case, we find it unnecessary to include such a clause. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT poll our employees about whether they want to continue to be represented by the Union unless we have a reasonable doubt, based on objective considerations, that a majority of our employees no longer want to be represented by the Union.

WE WILL NOT withdraw recognition from or refuse to bargain with the Union at a time when either the Union has the support of a majority of the employees in the bargaining unit or we do not have a reasonable doubt, based on objective considerations, that a majority of the employees want to continue to be represented by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL, on request, recognize and bargain with the Union as the designated and recognized exclusive collective-bargaining representative of our drivers, mechanics, and dispatchers.

HOWARD M. HOWES, INC.

Carol L. Shore, Esq., for the General Counsel.
Catherine Adams, Esq., of Columbus, Ohio, for the Respondent.
Robert Andrews, of Columbus, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On 4 April 1987, a charge was filed by United Steelworkers of America, Local 14094, AFL–CIO–CLC, the Union or the Charging Party, against Howard M. Howes, Inc., Respondent.

On 20 May 1987, the National Labor Relations Board, by the Acting Regional Director for Region 9, issued a complaint that alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) when it withdrew recognition from the Union and refused to negotiate with the Union concerning a successor collective-bargaining agreement. Respondent filed an answer in which it admitted that it withdrew recognition from the Union and refused to negotiate with the Union but denied that it violated the Act in any way because, it claims, it had a good-faith doubt of the Union's majority support that caused it to conduct a lawful poll that showed no support at all for continued union representation by the member of the bargaining unit.

A hearing was held in Columbia, Ohio, on 8 July 1987.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent and on my observation of the demeanor of the witnesses, I make the following

FINDING OF FACT

I. JURISDICTION

Respondent Howard M. Howes, Inc. is, and has been at all times material, an Ohio corporation with an office and place of business in Baltimore, Ohio, where it is engaged as a trucking contractor involved in the transportation of freight.

Respondent admits, and I find, that it is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that United Steelworkers of America, Local 14094, AFL–CIO–CLC is now, and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Issues*

Respondent admits that in a letter to the Union dated 30 March 1987, it withdrew recognition from the Union and refused to bargain with the Union regarding a successor collective-bargaining agreement to replace the one due to expire 23 May 1987. The Union had previously sent a letter to Respondent dated 13 March 1987 requesting bargaining regarding a successor agreement to the one due to expire 23 May 1987.

Respondent claims that it had a reasonable good-faith doubt as to the continued majority status of the Union among the bargaining unit members and conducted a

lawful poll in which all five unit members said they did not wish to be represented by the Union.

Because it is conceded by the General Counsel that the poll was conducted in accordance with the standards enunicated in *Strucksnes Construction Co.*, 165 NLRB 1062 (1967), and because the results of the poll were five to zero against continued representation by the Union, the only issue is whether Respondent could lawfully conduct the poll. In other words, did Respondent, when it conducted the poll on 21 March 1987, possess sufficient objective evidence to doubt in good faith the Union's majority support. If so, the complaint should be dismissed. If not, Respondent should be ordered to recognize the Union and bargain with it in good faith.

B. *Background and Discussion*

Since approximately 1972 Respondent has recognized the Union as the exclusive bargaining representative for its drivers, mechanics, and dispatchers. Respondent and the Union had entered into a number of collective-bargaining agreements, the most recent of which was effective by its terms for the period 23 May 1984 through 23 May 1987.

Beginning in September 1985 and because of economic difficulties Respondent began to restructure its work force. Its drivers went from being employee drivers who drove Respondent's trucks to independent contractors, who were not employees of Respondent and who owned and drove their own trucks. By March 1986 the net result of this restructuring, which was accomplished by attrition and with apparent union approval, was that the number of employees in the bargaining unit represented by the Union declined from approximately 25 employees, the vast majority of which were drivers, to 5 employees. The five employees remaining in the unit consisted of three mechanics and two spotters.

On 13 March 1987 the Union notified Respondent in writing of its desire to commence negotiations for a new collective-bargaining agreement to replace the one due to expire on 23 May 1987. At this time there were five employees, i.e., three mechanics and two spotters, in the unit. The mechanics and their dates of hire were Mark Swinehart (6 April 1982), Todd Bader (3 March 1986), and Tom Morris (15 August 1986). The spotters and their dates of hire were Lloyd Hedges (6 July 1963) and Don Young (1 July 1986).

Howard M. Howes, Respondent's vice president and the person in charge of labor management matters for Respondent, decided to conduct a poll of the employees in the unit to see if they still wished to be represented by the Union.

His reasons for conducting the poll were as follows:

1. Although the collective-bargaining agreement called for mandatory dues checkoff that would be activated when the Union submitted a written document from the employee authorizing dues checkoff to Respondent, only two of the five members of the unit, i.e., Lloyd Hedges and Mark Swinehart, had dues checked off.

2. None of the five employees in the bargaining unit was either a union officer or designated as a steward.

3. No grievances had been filed since January 1986.

4. For more than a year prior to the March 1987 poll Howes had not seen any union postings on the employee bulletin board.

5. With the exception of an arbitration hearing in July 1986 growing out of a grievance filed in January 1986 Howes had not seen or heard from Robert Andrews, the Union's business representative or any other union official.

6. In late February or early March 1987 Howes commented to employees Mark Swinehart that negotiations for a new contract would be coming up and he (Howes) wondered who would be representing the Union and Swinehart, according to Howes "questioned whether or not there was still a union that was active at the location, and whether or not a union was necessary at all,"[1]

7. On a number of occasions for about a year prior to March 1987 Howes heard comments from longtime employee Lloyd Hedges to the effect that the employees had not seen the Union at the workplace for a long time and the only thing the employees really got from the Union had been breakfast—an apparent reference to the fact that breakfast would be served at the union meetings that were held in the mornings—and, further, Hedges told Howes that the Union did not have meetings any more.

8. In late February or early March 1987 Don Baker, who formerly had been an employee truckdriver for Respondent and who was now an independent contractor and no longer in the unit, came to see Howes. Baker, who had been recording secretary for the Union when he was an employee, voluntarily gave a pile of mail to Howes, which mail Baker had received from the Union. Baker gave it to Howes because Baker had no interest in it because he was no longer a member, much less an officer, of the Union. Howes looked at this mail matter that disclosed that the members of the unit had so little interest in serving in union positions that the local had been placed in administratorship and Robert Andrews named as administrator.

Based on the above Howes concluded that Hedges and Swinehart, the only employees in the unit who were union members and who had their dues checked off, had little interest in continued representation by the Union, and that none of the remaining three members of the unit, i.e., Young, Bader, or Morris had any interest at all in the Union because they were not even members.

Howes consulted legal counsel and was advised how to conduct a poll of his employees to determine if they wished to continue to be represented by the Union. Counsel's instructions included written instructions, which contained the suggestion that the Union be contacted and offered the opportunity to be present at the polling. Howes did not call Robert Andrews, union staff representative, however, until the day before the poll and Andrews was not able to be present due to a prior engagement. There is no evidence that Andrews contacted any of the employees in the unit to talk to them about the poll although he was obviously at liberty to do so

[1] Employee Swinehart testified in Respondent's case and corroborated Howes' testimony that Swinehart asked Howes if having a union was necessary.

nor is there any evidence that Andrews sought to have the poll delayed until he was able to be present. The employees were told to report for a meeting on 21 March 1987, they did so, and were told for the first time that a poll was to be conducted. A local attorney, Bill Hayes, conducted the poll that was to be a secret written ballot. All five employees in the unit voted "no" to the question "Do you wish to be represented by the United Steelworkers of America?" Thereafter, Respondent withdrew recognition from the Union effective 23 May 1987 when the collective-bargaining agreement expired. Respondent honored the terms and conditions of the contract until it expired on 23 May 1987 but refused to negotiate a successor collective-bargaining agreement.

It is my conclusion that based on all the evidence available to Respondent that Respondent had an objective basis for doubting the Union's majority status such that it was authorized to conduct the poll. *Thomas Industries*, 255 NLRB 646, 647 (1981), enf. granted in part and denied in part 687 F.2d 863 (6th Cir. 1982). Any poll would be required to be conducted in accordance with the standards enunciated in the case of *Strucksnes Construction Co.*, supra.[2]

The cumulative effect of the eight factors noted above, which prompted Respondent to conduct the poll, were such that any reasonable person would doubt the Union's continued majority support. The only two members of the Union, Hedges and Swinehart, criticized the Union and Swinehart questioned the need for the Union and although neither circulated a petition to decertify the Union it was plainly apparent that at least Swinehart did not support the Union. None of the other three employees in the unit—Bader, Morris, or Young—were even members of the Union. None of the five were officers. There was no steward. There was no union presence and had not been for over a year. It would appear to a reasonable person that the employees were not interested in the Union and vice versa. When the Union was advised that Respondent was going to conduct the poll it did not even attempt to persuade Respondent to postpone the poll. Some of the factors were ambiguous, e.g., no grievances could mean the members simply have no problems and that Respondent was complying with the collective-bargaining agreement and did not reflect lack of interest in the Union. Further, employees could have a genuine desire to be represented by a Union but no interest whatsoever in being an officer or steward. But the cumulative effect of all the factors clearly establishes a good-faith doubt of continued majority support.

A poll is justified only if the employer has an objective basis for doubting in good faith the Union's majority status. The Board in *Thomas Industries*, supra, took the position that an employer must set forth objective evidence establishing that over 50 percent of the affected employees have rejected the incumbent union as their representative before the employer may take a poll. The Sixth Circuit, in enforcing in part and rejecting in part, the Board's decision in *Thomas Industries*, supra, adopted a different test and held that "an employer may poll its employees to determine their union sentiment if it has substantial, objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal." *Thomas Industries v. NLRB*, 687 F.2d 863, 867 (6th Cir. 1982). Under either test I conclude that Respondent in this case could conduct a poll.[3] Swinehart's comments to Howes and the failure of Bader, Morris, and Young to even join the Union reflect lack of interest in union representation by four of the five members or 80 percent of the unit and Hedges, the fifth and last member of the unit, was critical of the Union in numerous comments to Howes over a period of a year.[4] The combination of this and the other factors cited above permitted Respondent, in my opinion, to conduct the poll.

I note, however, as did the Sixth Circuit in *Thomas Industries v. NLRB*, supra at 869, that the filing of a decertification petition would have been a better way to handle the matter of determining continuing union support than conducting a poll. I conclude, in addition, that Respondent acted in good faith when I consider what it did in light of the totality of all the circumstances. *Celanese Corp. of America*, 95 NLRB 664, 673 (1951).

Although the results of a poll cannot be used to justify the taking of a poll I note that all five members of the unit voted unanimously against continued union representation and there was no evidence that any voter in the poll was coerced or tricked into voting "no" when he really wanted to vote "yes" regarding continued representation.

Lastly, the unit consists of only five employees and the Union is obviously at liberty to conduct an organizing campaign among these employees. Because this is a very small unit it does not appear that an organizing campaign will be too great an exercise if the employees change their mind and want representation.

CONCLUSIONS OF LAW

1. Howard M. Howes, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, Local 14094, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

[2] Absent unusual circumstances, the polling of employees by an employer will be violative of Sec. 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

[3] I note that Respondent, an Ohio corporation, is within the jurisdiction of the Sixth Circuit but that does not *necessarily* mean the Sixth Circuit would handle this case if the matter goes to the court of appeals. See *Arvin Industries*, 285 NLRB 753 (1987).

[4] Although new employees are ordinarily presumed to support an incumbent union in the same proportion as their predecessors (see *Cutter Supermarket*, 220 NLRB 507 (1975)), in the instant case the three new employees had nothing whatsoever to do with the Union.

Taino Paper Company, Inc. *and* Union de Tronquistas de Puerto Rico, Local 901, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] Case 24–CA–5551

August 25, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 3, 1988, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Taino Paper Company, Inc., Bayamon, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The General Counsel excepts to the judge's failure to recommend that the notice be posted in English and Spanish. We agree and order posting in both languages.

Efrain Rivera-Vega, Esq., for the General Counsel.
Manuel A. Nunez, Esq., of Hato Rey, Puerto Rico, for the Company.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This case was heard at Hato Rey, Puerto Rico, on 16 November 1987.[1] The case arose when Union de Tronquistas de Puerto Rico, Local 901, affiliated with International Brotherhood of Teamster, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Union) filed an unfair labor practice charge against Taino Paper Company, Inc. (Company) on 27 March. The charge was amended on 31 March and 22 May. Acting on behalf of the Board's General Counsel, the Regional Director for Region 24 investigated the charge and thereafter, on 27 May, issued a complaint and notice of hearing (complaint) alleging the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act).[2] The gravamen of the complaint is that the Company laid off 24 specifically named employees on 18 March without notice and without having afforded the Union an opportunity to bargain, as the exclusive representative of certain of the Company's employees, regarding the layoff and its effects. The Company answered, admitting many background and jurisdictional contentions made in the complaint, but denied all claimed wrongdoings.

All parties were given full opportunity to participate, introduce relevant evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs filed by the Company and the General Counsel have been carefully considered.

I conclude below, after examining the relevant evidence and applicable legal principles, that the Company violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION

The Company is a Puerto Rico corporation with an office and place of business located at Bayamon, Puerto Rico, where it is engaged in the manufacture and distribution of paper bags. Annually, the Company purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside the Commonwealth of Puerto Rico. The parties admit, and I find, that the Company is, and at all times material has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The parties admit, and I find, the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The issues may be generally summarized for discussion as follows:

1. Whether the Union was the collective-bargaining representative of the production and maintenance employees of the Company at the time of the 18 March layoff.

2. Whether the Company's decision to have a layoff was a mandatory subject of bargaining.

3. Whether the Company's failure to give notice to, and bargain with, the Union about the decision to have a layoff and its effects on unit employees violated the Act.

If it is decided the Company violated the Act, that would constitute an appropriate remedy. Each of the generalized issues may and, in most cases, will have

[1] All dates are 1987 unless otherwise indicated.

[2] I granted counsel for the General Counsel's unopposed motion to delete the 8(a)(1) allegations set forth at par. 9 of the complaint inasmuch as the parties had executed, and the Regional Director for Region 24 had approved, an informal settlement agreement remedying all 8(a)(1) allegations in that paragraph of the complaint.

intertwined therewith certain subissues that will also be considered.

B. *Background and Operative Facts*

The following chronological account of the background and operative facts is for the greater part admitted, stipulated to, or uncontested.

The Company commenced operations in 1984 and has from its inception been managed by Edgar Rodriguez (Rodriquez), its president. The Company manufactures paper and bread bags and obtains the basic raw materials for its production from either the United States or certain South American countries. The Company, at relevant times, employed approximately 35 or 36 production and maintenance employees. Prior to the March layoff, which is the only layoff at issue, the Company had three layoffs, each of which was brought about by an excess of finished products. The there pre-March layoffs occurred in October/Novermber 1984 (involving 20 employees), September/October 1985 (involving 10 employees), and January/February 1986 (involving 15 employees). Each of the pre-March layoffs lasted approximately 1 week.

The employees were selected for the layoffs in 1984, 1985, and 1986 based on seniority and in accordance with the *Unjust Dismissal Law of Puerto Rico Public Law No. 80 of 1976* (Pub. L. No. 80).[3]

Pursuant to a Board-conducted election held on 13 March, to which no objections were filed by the Company, the Union was selected as the bargaining representative for certain employees in an appropriate unit at the Company.[4]

On 16 March, the Company began contemplating the need to lay off certain unit employees. It is somewhat unclear whether the actual decision to have the March layoff was made on 16 or 17 March; however, it is undisputed the Company notified the employees involved in writing late in the work shift on the afternoon of 17 March that they would be laid off effective the next day, 18 March.[5] Twenty-four of the Company's 35 or 36 unit employees were actually laid off on 18 March.[6]

The employees were laid off according to seniority with certain exceptions.[7]

Portions of the first-shift and all the second-shift operations were discontinued during the March layoff. None of the laid-off employees received any wages or economic remunerations while they were on layoff status. The Company did provide medical coverage for the laid-off employees until the end of March. It also provided medical coverage for most, if not all, the employees that were returned to work during the month of April.

The Company did not notify the Union of the March layoff. Company President Rodriguez testified the Union was not notified because (1) the layoff was routine in that similar layoffs had occurred in the past, (2) the Union had not been certified and he did not know he needed to notify the Union, and (3) the layoff was unavoidable in that the Company could not pay employees when it had no work for them to perform.

It is undisputed that after the layoff occurred, the Union did not request, either orally or in writing, that the Company bargain with in concerning the layoff.[8]

On 23 March, the Board certified the Union as the collective-bargaining representative for the employees in the above-described appropriate unit.

President Rodriguez testified that all those laid off in March were recalled except for five or so who voluntarily resigned their employment with the Company.[9]

It is undisputed that following the March layoff, the Company laid off certain unit employees on 8 July and 9 September because of a surplus in finish products. The Company notified the Union, both telephonically and in writing, before the post-March layoffs took place. A rep-

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[3] Sec. 185(b) "Just Cause For Discharge" states in pertinent part: "Good cause for the discharge of an employee of an establishment shall be understood to be: (f) Reductions in employment made necessary by a reduction in the volume of production, sales or profits, anticipated or prevalent at the time of the discharge." Sec. 185(c) "Order of Retaining Employees" states:

> In any case where employees are discharged for the reasons indicated in subsections (d), (e), and (f) of the preceding section, it shall be the duty of the employer to retain with preference in the job those employees of greater seniority provided there are positions vacant or filled by employees of less seniority in the employment within their occupational classification which may be held by them, it being understood that preference shall be given to the employees discharged in the event that within the 6 months following their layoff the employer needs to employ a person in like or similar work to that which said employees were doing prior to the time or their discharge and within their occupational classification, following also the seniority order in the reinstatement, except, and in both situations, in those cases in which there is a clear and conclusive difference in favor of the efficiency or capacity of the workers compared, in which case the capacity shall prevail.

[4] The unit description is as follows:

> *Included*: All production and maintenance employees including operators, bonders (empacadores), machine tenders, and janitors employed by Respondent at Urbanizacion Industrial Minillas, Bayamon, Puerto Rico.
>
> *Excluded*: All other employees, office clerical employees, guards and supervisors as defined in the Act.

[5] The written notification, which was signed by President Rodriguez, stated in pertinent part:

> We regret to inform you that as of March 18, 1987 you are partially suspended from employment without pay until further notice due to lack of raw materials.

[6] The 24 employees involved were Herminio Arroyo Pantoja, Miguel Class Davila, Antonio Conde, David Colon, Carlos Cruz Pastrana, Ramon Huertas Rodriguez, David Lopez Ojeda, Efrain Lozada Fuentes, Edwin Maysonet Rivera, Ruben Marcano Reyes, Juan Merced Rosado, Nelson Nieves Ruiz, Hector Nieves Ruiz, Juan Ortiz Marcano, Carlos Pacheco, Manuel Padilla Ortiz, Carlos Ramos Ferrer, Juan Rivera Rivera, Luis M. Reyes Rosado, Luis A. Reyes Rosado, Ramon Rodriguez Reyes, Luis Rodriguez Coira, Juan Sanchez, and Saul Ventura Viera.

[7] All employees from No. 35, the least senior employee on a company-prepared seniority list, to No. 9 inclusive were subject to layoff. Marvin Rodriguez, a maintenance adjustor (No. 35 on the list); Jose A. Gonzalez de Jesus (No. 30 on the list), a maintenance tool-and-die maker; and Jesus Laureano Gonzalez (No. 11 on the list), a mechanic, were not laid off. Company President Rodriguez contends these three were needed to maintain equipment. Ivan Ajenjo Laureano, the least senior employee at the Company, was not laid off. The Company contends he was not included on its seniority list nor was he laid off because the Union had challenged his vote in the Board-conducted election on 13 March as being an administrative employee. Employee Ruben Marcano testified Baureano worked as a unit employee during the time of the March layoff and has thereafter continued to perform unit work.

[8] As is noted elsewhere in this decision, the Union did file the refusal-to-bargain charge against the Company on 27 March.

[9] The General Counsel was unable at trial to stipulate that all the laid-off employees had in fact been recalled. In his posttrial brief, however, he concedes most, if not all, have been recalled.

resentative of the Union informed the Company on both occasions it saw no problems with the layoffs and told the Company it could proceed with the layoffs.[10]

C. *Contentions of the Parties*

Highlights of the parties' contentions are briefly summarized as follows:[11]

The General Counsel contends the Union was the collective-bargaining representative of the employees in question at the time of the March layoff, that the Company acted without notice to or bargaining with the Union concerning the layoff, that the layoff was a mandatory subject of bargaining, that the layoff constituted a material, substantial, and significant change in the terms and conditions of employment of the unit employees, and that, as such, the Company was obligated to notify and bargain with the Union about the layoff. The General Counsel contends the Company's failure to do so violated Section 8(a)(5) and (1) of the Act.

The Company denies it had an obligation to bargain with the Union or that it violated the Act. More specifically, the Company contends its decision to have a layoff on 18 March was a managerial one of the sort that is at the core of entrepreneurial control and not subject to mandatory bargaining. The Company also contends it followed its past practice of laying off by seniority and of being in compliance with the laws of the Commonwealth of Puerto Rico and, as such, the layoff was routine and its actions were unavoidable. The Company further contends the Union waived any right it may have had with respect to bargaining because it did not make a request to do so.

D. *Discussions*

Inasmuch as the underlying representation proceeding resulted in certification, the Union was the collective-bargaining representative of the laid-off employees on the date they were laid off. Not only had the Union won the 13 March representation election prior to the layoff, but the Company had not filed objections to the election results. Therefore, at the time of the 18 March layoff the Company knew the Union would be, and it thereafter on 23 March was, certified as the collective-bargaining representative of its production and maintenance employees. When an employer, such as the Company, makes changes in terms and conditions of employment of unit employees after an election, but before a union is certified, it does so at its peril in the absence of compelling economic considerations. See *GMC Co.*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). See also *Clements Wire & Mfg. Co.*, 257 NLRB 1058 (1981).

I am persuaded the Company has failed to demonstrate "compelling economic considerations" that would have absolved it from being required to notify the Union and to bargain concerning the layoff. It would appear the underlying rationale for not requiring bargaining when there are "compelling economic considerations" is those situations in which an unforeseen occurrence having a major economic effect is about to happen that requires *immediate* action. *Angelica Healthcare Services*, 284 NLRB 844 (1987). Such might, for example, be the case when a major piece of machinery breaks down and there is *no time* to notify the Union before a temporary layoff is necessary. In the case sub judice, however, the Company knew as early as 16 March that a layoff was eminent, and on 17 March it notified the employees in question that there would be a layoff the next day, but *did not* notify the Union. Thus, the Company *had time* to notify the Union and, if requested, to bargain about the layoffs. The Company has made no showing that the situation was *so urgent* it could not have notified the Union.

The law is settled that an employer violates its duty to bargain with the exclusive representative of its employees by unilaterally implementing changes in terms and conditions of their employment. *NLRB v. Katz*, 369 U.S. 736 (1962). A layoff of unit employees, such as the one herein, falls within the scope of terms and conditions of employment over which an employer has an obligation to bargain. See, e.g., *U.S. Gypsum Co.*, 94 NLRB 112 114 (1951), and *Southern Coach & Body Co.* 141 NLRB 80, 81 (1963). The Company's contention that for it to have maintained its entire work force any longer than it did would have been "an unsound business practice" that would have made it "less competitive" and "hurt its economic stability" are insufficient defenses to justify the unilateral changes it made in the terms and conditions of employment of its unit employees. See *Van Dorn Co.*, 265 NLRB 864, 865 (1982), enfd. in part as modified 736 F.2d 343 (6th Cir. 1984).

The Company's contention that the March layoff, due in part to a lack of raw materials was not a mandatory subject of bargaining because it was an economically motivated decision within the meaning of *Otis Elevator Co.*, 269 NLRB 891 (1984), and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), is without merit. First, in order for the teachings of *Otis Elevator Co.* or *First National Maintenance Corp.* to be applicable, the Company would have had to have established that the layoff was a result of a change in the scope, nature, or direction of its business. This it failed to do. The fact the Company recalled the laid-off employees (except those who resigned) refutes any contention on its part that the layoff was a change in the scope, nature, or direction of its business. The Company's motivation for the layoff was an attempt to avoid labor costs. As Company President Rodriguez testified, the decision to have the layoff was based in part on a lack of available raw materials, but also in part because the Company did not wish to pay wages for its entire work force without work for all its employees to perform. Thus, the layoff was a mandatory subject of bargaining.

Even when, as in this case, the change involves a mandatory subject of bargaining, it does not completely resolve the issue of an employer's bargaining obligation. For a statutory bargaining obligation to arise regarding

[10] Seven unit employees were laid off on 8 July and the second shift was temporarily discontinued as a result of the 9 September layoff.

[11] I have not attempted to summarize all contentions made by the parties at this point in the decision; however, all contentions and arguments of the parties have been considered and, to the extent necessary, fully discussed.

any particular unilateral change that an employer implements, such must be a material, substantial, and significant one affecting terms and conditions of employment of bargaining unit employees. *United Technologies Corp.*, 278 NLRB 306 (1986). I find the layoff at issue had a material, substantial, and significant impact on unit employees. The layoff adversely affected 24 of the Company's 35 or 36 production and maintenance employees. Those laid off did not receive any wages or economic remunerations (except health coverage) during the time they were laid off. Additionally, the layoff caused the Company to cease its second shift operations altogether during the layoff.

In light of the above, it is clear the General Counsel has established a prima facie showing of an 8(a)(5) violation. The General Counsel has demonstrated, (1) the Union was the bargaining representative of the laid-off employees at the time of their layoff, (2) the layoff was a mandatory subject of bargaining, (3) the Company did not give notice to, nor did it bargain with, the Union about the decision to have a layoff or its impact on unit employees, and (4) the layoff constituted a material, substantial, and significant change in the terms and conditions of employment of unit employees.

After the General Counsel establishes a prima facie case, as he has done herein, it is incumbent on the Company to demonstrate that its refusal to bargain was priviledged. See *Van Dorn Co.*, supra. This it has failed to do.

The Company's contention that the March layoff was routine and that it followed past practice regarding implementing the layoff is no defense to its unilateral action. In the 3 years prior to the March layoff, the Company only had three other layoffs, each of which resulted from an excess of inventory and not as a result of a lack of available raw materials. Thus, in my opinion, the Company has not had a sufficient number of layoffs to demonstrate a past practice even if layoffs for excessive inventory were analogous to layoffs for a lack of available raw materials. Furthermore the pre-March layoffs took place before the Union was the collective-bargaining representative of the employees in question. The Company's past practices, prior to the Union being the representative of its employees, does not relieve it of its obligation to give notice to and bargain with the Union concerning laying off unit employees. See *Amsterdam Printing Litho Corp.*, 223 NLRB 370 (1976), enfd. 559 F.2d 188 (D.C. Cir. 1977). Furthermore, the Company may not justify its unilateral action in March by showing, as it did, that it thereafter, in two subsequent layoffs, gave notice to the Union concerning those layoffs. Such post-March layoff conduct is irrelevant regarding the legality of the Company's actions in March. It would be speculative to infer that because the Union did not request bargaining on the two post-March layoffs that it would not have requested bargaining concerning the layoff at issue.

The Company's contention that, because it complied with Pub. L. No. 80 and followed strict seniority in the March layoff, there was nothing the Union could have done to have avoided the layoff or those selected for layoff and it would have made "no sense" for it to have notified or bargained with the Union is without merit. First, Pub. L. No. 80 governs the discharge and not the layoff of employees in those cases when the layoff is for 3 months or less.[12] Because the Company contends all (except those who voluntarily resigned) were called before 3 months, Pub. L. No. 80 would not have governed or been applicable to the layoff. Second, even if Pub. L. No. 80 applied, it does not require strict compliance with seniority in that it allows an employer to retain less senior, but more efficient, employees. In this regard, the evidence demonstrates the Company did not follow strict seniority in selecting employees for the layoff. It explained it needed Marvin Rodriguez, Jose A. Gonzalez de Jesus, and Jesus Laureano Gonzalez to maintain its equipment, but it did not adequately explain why it retained Ivan Ajenjo Laureano, the least senior employee at the plant, to perform unit work during and after the layoff. Thus, the Company was not required to follow Pub. L. No. 80, nor did it select the employees for layoff by strict seniority.

I reject the Company's argument, alluded to above, that it would have made "no sense" to have notified the Union or to have bargained with it about the layoff because there was nothing the Union could have done to have changed the outcome. The Board has long held that the statutory duty to give notice and bargain is not limited to those situations in which mutually acceptable solutions are guaranteed or even reasonably likely. See *Awrey Bakeries*, 217 NLRB 730, 733 (1975), enfd. per curiam 548 F.2d 138 (6th Cir. 1976).

Finally, I find no merit to the Company's contention that the Union waived its right to bargain over the layoff because it made no request either orally or in writing to do so. It is undisputed the Union was confronted with a fait accompli at the time it learned of the March layoff. It is clear Board precedent does not require a union to request bargaining when confronted with a fait accompli. See *Migali Industries*, 285 NLRB 820 (1987).

Accordingly, I find the Company violated Section 8(a)(5) and (1) of the Act by unilaterally laying off certain of its employees on 18 March without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain regarding such acts and conduct and the effects of such acts and conduct.

CONCLUSIONS OF LAW

1. The Company, Tanio Paper Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Union de Tronquistas de Puerto Rico, Local 901, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

[12] This interpretation of Pub. L. No. 80 appears to be supported by the "Guidelines for the Interpretation and Application of Law No. 80," approved 30 May 1976 by the Office of the Solicitor, Department of Labor and Human Resources of the Commonwealth of Puerto Rico. I grant the General Counsel's unopposed motion to supplement the record to include as an exhibit applicable portions of the above-described document. I have labeled the Spanish translation as G.C. Exh. 4(a) and the English translation as G.C. Exh. 4(b).

3. All production and maintenance employees, including operators, bonders (empacadores), machine tenders, and janitors employed by the Company at Urbanizacion Industrial Minillas, Bayamon, Puerto Rico, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. The Union is now, and at all times material has been, the exclusive collective-bargaining representative of the above unit employees within the meaning of Section 9(a) of the Act.

5. On or about 18 March, by unilaterally laying off certain of its unit employees without prior notice to the Union and without having afforded the Union an opportunity to bargain regarding the layoff and its effects, the Company has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found the Company violated Section 8(a)(5) and (1) of the Act by laying off employees Herminio Arroyo Pantoja, Miguel Class Davila, Antonio Conde, David Colon, Carlos Cruz Pastrana, Ramon Huertas Rodriguez, David Lopez Ojeda, Efrain Lozada Fuentes, Edwin Maysonet Rivera, Ruben Marcano Reyes, Juan Merced Rosado, Nelson Rosado, Nelson Nieves Ruiz, Hector Nieves Ruiz, Juan Ortiz Marcano, Carlos Pacheco, Manuel Padilla Ortiz, Carlos Ramos Ferrer, Juan Rivera Rivera, Luis M. Reves Rosado, Luis A. Reyes Rosado, Ramon Rodriguez Reyes, Luis Rodriguez Coira, Juan Sanchez, and Saul Ventura Viera without notice to and bargaining with the Union, I shall order the Company, on request, to bargain with the Union concerining the 18 March layoff. I shall further order that the Company make whole the employees laid off on 18 March by paying them their normal wages from the date of their layoff until they were recalled to work.[13] Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[14] In the absence of special circumstances, the General Counsel's request for a visitatorial clause is denied. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[13] Any dispute concerning when any particular employee was returned to work can be resolved at the compliance stage of this case. Further, any dispute whether certain employees resigned rather than accept recall shall also be left to the compliance stage of this case. I reject the Company's contention that any remedy requiring backpay in the circumstances of this case would be punitive rather than remedial. See, e.g., *Intersystems Design Corp.*, 278 NLRB 759 (1986).

[14] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[15]

ORDER

The Company, Taino Paper Company, Inc., Bayamon, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally laying off employees without notice to or bargaining with the Union as the exclusive representative of its employees in the below-described appropriate bargaining unit prior to making such changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith, with the Union as the exclusive representative of its employees in the below-described bargaining unit concerning the 18 March layoff. The appropriate unit is:

> *Included*: All production and maintenance employees including operators, bonders (emplacadores), machine tenders, and janitors employed by Respondent at Urbanizacion Industrial Minillas, Bayamon, Puerto Rico.
>
> *Excluded*: All other employees, office clerical employees, guards and supervisors as defined in the Act.

(b) Make whole those employees laid off on 18 March for any loss of pay suffered as a result of this unlawful conduct in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Bayamon, Puerto Rico facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally without notice to or bargaining with the Union layoff employees in the following bargaining unit, which is represented for the purposes of collective bargaining by Union de Tronquistas de Puerto Rico, Local 901, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO:

Included: All production and maintenance employees including operators, bonders (empacadores), machine tenders, and janitors employed by Respondent at Urbanizacion Industrial Minillas, Bayamon, Puerto Rico.

Excluded: All other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith with Union de Tronquistas de Puerto, Local 901, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as the exclusive bargaining representative of our employees in the above-described unit concerning the layoff on 18 March 1987.

WE WILL make Herminio Arroyo Pantoja, Miguel Class Davila, Antonia Conde, David Colon, Carlos Cruz Pastrana, Ramon Huertas Rodriguez, David Lopez Ojeda, Efrain Lozada Fuentes, Edwin Maysonet Rivera, Ruben Marcano Reyes, Juan Merced Rosado, Nelson Nieves Ruiz, Hector Nieves Ruiz, Juan Ortiz Marcano, Carlos Pacheco, Manuel Padilla Ortiz, Carlos Ramos Ferrer, Juan Rivera Rivera, Luis M. Reyes Rosado, Luis A. Reyes Rosado, Ramon Rodriguez Reyes, Luis Rodriguez Coira, Juan Sanchez, and Saul Ventura Viera whole for any loss of pay they may have suffered as a result of their being laid off on 18 March 1987, with interest.

TAINO PAPER COMPANY, INC.

Montgomery Ward *and* Warehouse Employees Local Union No. 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Case 5–CA–18197

August 25, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 27, 1987, Administrative Law Judge Thomas A. Ricci issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Charging Party filed cross-exceptions and a supporting memorandum.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order[2] as modified below.

The Charging Party excepts to the judge's failure to pass on and find the 8(a)(3) and (1) allegation that the Respondent discriminatorily transferred John Wagnon from his position as merchandise handler in the warehouse to receiving clerk in the customer pickup area. We find merit in this exception.

Wagnon began employment with the Respondent in May 1983 and worked as 1 of 10 merchandise handlers in the warehouse. Approximately six of the merchandise handlers, including Wagnon, were receivers who unloaded and delivered incoming merchandise. Wagnon was the most senior receiver and the only one with keys to the unloading doors. As a merchandise handler, Wagnon regularly came into contact with all warehouse employees, approximately 25. He was a known union adherent who initially contacted the Union in late May to early June 1986, attended the initial organizational meeting, became a member of the union-organizing committee, wore union buttons, solicited authorization cards, distributed union literature, and "set up shop" in the break room to discuss the Union with fellow employees during their common breaks and lunch periods.

On July 3, 1986, Wagnon was transferred to the position of receiving clerk in the customer pickup center. As the customer pickup attendant, Wagnon worked alone unless a backlog occurred and he requested assistance. His lunch and break periods no longer coincided with those of other employees. Two weeks before his change in job assignments, Wagnon was told by Lawrence E. Loveland, receiving and shipping supervisor, that the customer pickup attendant was coming into the warehouse and Wagnon could train him because Wagnon was the senior receiver. Precipitately, Loveland told Wagnon that someone else would perform the training and, without discussion, Wagnon was transferred to the customer pickup department. Based on the Respondent's animus, as demonstrated by the Respondent's other unfair labor practices, its admitted knowledge of Wagnon's union activities, its unlawful suspension of Wagnon on June 25, and the unexplained and abrupt transfer of Wagnon, the senior receiver in merchandise handling, to the customer pickup area, we find that the Respondent was seeking to take Wagnon out of circulation and to isolate him from other employees because of his union activities. Accordingly, we conclude that the Respondent discriminatorily transferred John Wagnon from his position as merchandise handler in the warehouse to the position of customer pickup attendant in violation of Section 8(a)(3) and

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's findings that Thomas Cato was in charge of distribution centers all over the eastern United States, that all 22 technicians take the Respondent's vans home at the end of the workday, and that Douglass was fired on June 20, 1986, the day after the first union organizational meeting. The record establishes that Thomas Cato is the vice president in charge of distribution over 16 distribution centers and 2 fashion distribution centers nationally. The record further establishes that the Respondent employs 22 field technicians and 9 shop technicians at its Landover, Maryland facility. Approximately six to eight field technicians participate in a shuttle program that requires them to drive the Respondent's service trucks home at night. Their work assignments are delivered to their homes, and they begin their routes directly from their homes each morning. Finally, the complaint alleges that about June 23, the Respondent terminated its employee, John Douglass. In its answer, the Respondent admits that about June 20, 1986, it discharged Douglass. The record establishes that on June 20, Douglass received a corrective action notice (G.C. Exh. 4) that read, "Violation No. 1" with no violation name, type, or action taken. Thereafter, on June 23, 1986, the same corrective action notice was changed to read, "Violation No. 6, Violation Name—Fraudulent/Deceptive practices" and stated, "Employee is to be terminated per R.L. Quillen area 16 area service manager." (G.C. Exh. 2.)

The Respondent contends that the judge resolved only 6 of 10 allegations that it unlawfully granted improved conditions of employment. The Charging Party excepts to the judge's failure to find that the Respondent unlawfully provided coverage for its employees under a health maintenance organization. The judge did conclude that the Respondent unlawfully granted "improved conditions of employment such as medical insurance." We find it unnecessary to pass on additional allegations that the Respondent unlawfully granted improved conditions of employment, as the remedy would not be affected.

[2] The Charging Party excepted to the judge's failure to include an expungement remedy in his recommended Order. We shall order the Respondent to remove any reference to the transfer, suspension, and discharge of John Wagnon and to the discharge of John Douglass from its records.

(1) of the Act.[3] *Fountainview Place*, 281 NLRB 26 (1986); *Sealectro Corp.*, 280 NLRB 151 (1986).

ORDER

The National Labor Relations Board orders that the Respondent, Montgomery Ward, Landover, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Transferring, suspending, discharging, or in any other way discriminating against its employees in retaliation for their protected union activity.

(b) Coercively interrogating employees concerning their union support or union activities.

(c) Telling employees it is aware of their individual union activity.

(d) Offering to take employees to the union hall to assist them in canceling their union authorization cards.

(e) Soliciting grievances from employees to dissuade them from engaging in union activities.

(f) Granting improved conditions of employment to induce employees to withhold support from the Union; provided, however, that nothing herein shall be construed as requiring it to vary or abandon any economic benefit or any term or condition of employment that it has established.

(g) Inviting employees to form an employee committee to deal with the Respondent in place of a collective-bargaining agent.

(h) Threatening to close its plant and discharge its employees.

(i) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer John Wagnon and John Douglass immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them with interest to be computed in the manner prescribed in *New Horizons for the Retarded*.[4]

(b) Remove from its files any reference to the unlawful suspension and discharges of John Wagnon and John Douglass and notify the employees in writing that this has been done and that the suspension and discharges will not be used against them in any way.

(c) Post at its facility in Landover, Maryland, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[3] As we have found that the Respondent violated Sec. 8(a)(3) and (1) by transferring John Wagnon from his position as merchandise handler receiving incoming supplies to the position of customer pickup attendant prior to his discharge, we shall order the Respondent to reinstate Wagnon to the position of receiver in merchandise handling from which he was removed on July 3.

[4] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, suspend, or otherwise discriminate against any of you for supporting Warehouse Employees Local Union No. 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO or any other union.

WE WILL NOT discriminatorily transfer employees and isolate them from other employees in order to restrict their union activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT tell employees that we are aware of their individual union activities.

WE WILL NOT offer to escort our employees to their union hall to assist them in canceling their signed union authorization cards.

WE WILL NOT solicit grievances from our employees for the purpose of satisfying them and thereby encouraging them to abandon their prounion resolve.

WE WILL NOT invite our employees to form an employee committee to deal directly with management in place of a union of their choice.

WE WILL NOT grant improved conditions of employment to encourage employees to abandon their prounion resolve; provided, however, that nothing herein shall be construed as requiring us to vary or abandon any economic benefit or any term or condition of employment that we have established.

WE WILL NOT threaten to close our plant and discharge our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer John Douglass and John Wagnon immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his suspension and/or discharge and that the suspension and/or discharge will not be used against him in any way.

MONTGOMERY WARD

Steven J. Anderson, Esq., for the General Counsel.
Alexandra M. Goodard, Esq. and *James J. Kupka, Esq.*, of Chicago, Illinois, for the Respondent.
Roy Essex, of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge. A hearing in this proceeding was held on 12, 13, and 14 January 1987 in Washington, D.C., on complaint of the General Counsel against Montgomery Ward (Respondent or Company). The complaint issued on 26 September 1986 on a charge filed on 7 July 1986 by Warehouse Employees Local Union No. 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Union or Charging Party). The issues presented are whether the Respondent discharged two employees in violation of Section 8(a)(3) and committed other violations of Section 8(a)(1). Briefs were filed after the close of the hearing by the General Counsel and the Respondent.

On the entire record and from my observation of the witnesses I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Montgomery Ward, an Illinois corporation, is engaged in the retail sale of goods and services. Its business location at Landover, Maryland, is involved in this proceeding. During the 12 months preceding issuance of the complaint, a representative period, in the course and conduct of its operations, the Respondent derived gross revenues in excess of $500,000. During the same period it sold and shipped from its Landover, Maryland facility products, goods, and materials valued in excess of $5000 directly to points outside the State of Maryland. I find that that the Respondent is an employer within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Warehouse Employees Local Union No. 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

This case turns entirely on questions of credibility. In the very heat of a union organizational campaign among the employees two men were discharged, both overtly active in the movement, one of them actually the moving force. The complaint alleges both men were discharged as a technique to curb the union activity. Denying that charge, the Respondent asserts they were terminated for having violated the work rules in effect. Considering the record as a whole, which side is to be believed? When the two men were fired they were told the reason was violation of the rules. But the management agents who participated in that decision also testified about other things that happened during the critical period. If they were not telling the truth about conversations and activities by the Respondent, their credibility about the major questions becomes suspect.

The more direct questions of credibility involve what was said and done by the participants in the whole story. The witnesses disagreed concerning conversations that took place, including critical talks given by one of the Respondent's top officials. These questions do not call for inferences or conclusions to be drawn from the facts. They go instead to the very question of what was said and, in fact, done by the participants. But there is a direct relationship between the two credibility prob-

lems—one to resolve questions of intent or motivation in the minds of the supervisors when they fired the two men. The testimony concerning four critical events that took place will set the story straight.

The union organizational campaign started in late April and early June 1986. The Respondent, of course, learned about it. On 25 June Tom Cato, a vice president of the Respondent whose office is in Chicago and who is in charge of warehouse and distribution centers all over the Eastern United States, like the one involved in this case, came to Landover. It was the first time he had ever visited that location seriously. His purpose was to speak to the employees, whom he gathered in groups of 12, 15, or 20 in separate meetings that day. Dixie Zais, an employee, testified about what Cato told the group. From her testimony:

> He talked about the Company, about being new with the Company, and that he was learning, that if we had any suggestions or questions that had to do with the Company to, please, ask him. Some people had questions. He also said he knew the union was trying to come in, and that he did not like to deal with third parties . . . .
>
> Q. Can you remember any other suggestions that employees made to him at that meeting?
>
> A. Some of them suggested putting files on microfilm. They needed supplies in the ladies' room, just things like that.

Cato came back to Landover again on 1 July and this time spoke to all the assembled employees in a large conference room. Regarding his talk that day, Zais testified:

> He just came back to tell us that he had taken care of some of the suggestions and problems we had. Some of the people wanted medical cards. He got that for us. Some of the people wanted HMO. He had taken care of that. The meeting only lasted 4 or 5 minutes, and we went back to work.

John Wagnon, then an active employee, testified that with a number of local supervisors sitting beside him, Cato spoke as follows:

> The whole meeting was prefaced with a statement by Mr. Cato that he knew there was union activities going on and he just wanted to let everybody know that if they wanted to get their cards back that they could do so. And I believe it was Mr. Cardemon who further mentioned that the company could even give them a ride down to the union hall to get them back if they would like. And after that, they proceeded to tell us about many changes that were going to be occurring at Montgomery Ward, such as we were now going to be issued medical insurance cards because everybody had been complaining that they had no card to present in time of emergency at a hospital. So the statement was made that we were now going to be getting all those.
>
> Q. In relationship to medical insurance, did the subject of HMO come up at that meeting?
>
> A. Oh, yes and a document was passed out."

Cato then listed the changes and conditions of employment that had been decided on. These included: repair on machines that had been neglected, medical insurance card for each employee, reviews and evaluations to be on time henceforth, errors in pay would be adjusted without delay. Wagnon also recalled as follows:

> They went on to say that there will be the establishment of an employee feedback committee, which we hadn't had in the past, and if they didn't have an open door policy before they sure had one now, and that one of the regional supervisors, I guess it was Schmidt, would be coming in from time to time to meet with the employees, and Mr. Cosentini was now going to meet with the feed back committeee every month I believe it was. And then they further went on to us tell we were going to have benefit sessions with Anna Curry, the personnel specialist.

Cato also distributed to each employee that day a written note entitled "Implementation of HMO," explaining this was an opportunity for each employee to enroll in a form of health insurance. Wagnon made clear these were all matters directly tied to the complaints that had been voiced by the employees during Cato's earlier meetings, in which he had solicited their grievances.

Cato was not offered as a witness by the Respondent; therefore there is no direct contradiction from him of what the employee witnesses heard him say. Several supervisors of the Landover location were present when Cato gave his talk. A number of them testified at the hearing but did not refer to those talks at all. Pat Cosentini, one of the top men at Landover, testified regarding the talks in question. In substance his total testimony is not a contradiction of anything the two witnesses—Zais and Wagnon—said. Throughout his direct testimony Cosentini tried to create the impression that Cato's visit was no more than the usual concern of the Chicago office regarding how things were going on at Landover, that the conditions of employment listed by the Government witnesses were the usual problems of the place, things that did not really change. He said the Company always had an open-door policy, which has not changed. He said management always had meetings with the employees, and gave as an example the Pizza Blast (a company party) as an example. He even said that the Company had planned to improve security—one of the demands voiced by the employees—before the meetings Cato held. The witness' talk in direct testimony was evasive, generalized, and an obvious attempt to remove the subject of the Union entirely from Cato's talk those 2 days. But on cross-examination, Cosentini admitted Cato asked the employees to state their problems, and enumerated virtually the entire list of complaints mentioned by the earlier witnesses. He went on that at the 1 July meeting Cato told the employees that he had been able to make changes as they had asked and added that the employees should bring their problems to the personnel office, where they would be remedied. Asked had Cato announced the formation of an employee committee to resolve problems, the witness said:

> He [Cato] indicated that there's some people that were going to have, instead of the group meetings we were having, that we have smaller meetings and have individuals represented from each area, to form a committee.
>
> Q. And he announced that that was going to happen henceforth at that meeting?
>
> A. He announced that he was going to review that with management and get our feeling on it and put that into play.

Asked did Cato say there would henceforth be an "open policy," Cosentini answered:

> Well, something to that effect. . . . The employees came to him and talked about open door policy and he implied that we shall have it if we didn't have.

Cosentini's final admission, at the very end of his testimony, was that management "certainly was aware" of the union activity when Cato first came to Landover on 25 June. Moreover, he even said:

> He [Cato] was aware of the activity that was going on and he expressed his opinion.
>
> Q. What was his opinion?
>
> A. He felt like he didn't like to deal with a third party operation. Words to that effect.

That the distribution center manager deliberately tried to create a false impression of the purpose of Cato's appearance at the Landover location could not be clearer. His testimony is the starting point of the Respondent's discredited defense against the basic complaint. Cato's talks reveal clearly the Respondent's planned program to put a stop to the self-organizational campaign among the employees in complete defiance of the proscriptions of the statute. The case therefore starts with a complete finding of multiple violations of Section 8(a)(1) of the Act. Based on the direct testimony of Zais and Wagnon, which I credit, I find that (1) by soliciting grievances from the employees, (2) by acceding to their resultant demands, including improved safety conditions in the workplace, opportunity to enjoy the Company's health insurance plan, and an improved evaluation system and quick payment of salaries, (3) by suggesting the creation of an employees committee . . . to negotiate conditions of employment in the place of an outside union bargaining agent, and (4) by telling the employees that thereafter the Company would keep an "open door" policy to hear and consider their grievances, all for the purpose of influencing them away from their prounion resolve, the Respondent violated Section 8(a)(1) of the Act.

One other offer that Cato made to the assembled employees on 1 July must be mentioned here. He told the employees that if they wished to get back their union cards they could do so. Cardemon, the supervisor, also present then, added, as Wagnon also testified, that if the employees so wished, the Company would give them a ride to the union hall to get cards back. This testimony stands completely uncontradicted. I therefore also find that by offering to assist its employees to withdraw from the Union, the Respondent again violated Section 8(a)(1) of the Act. This finding is important because other employees also testified about such assistance being offered them by other supervisors.

Employee Natalie Menage testified that after the 1 July meeting by Cato ended, she was called to the office. As she approached the office, a company guard said to her, "We'll go to the union and get your card back." When she asked what the man was talking about, the guard repeated "We'll go get your card from the union hall." At this point Cosentini passed by and escorted Menage into the office of Operations Manager Cardemon. There, as Menage continued to testify, the conversation was:

> He said I heard a rumor that you want your card back that you signed and they won't give it back to you, and I said, "I don't know what your talking about." He said it again, and I said "I don't know what your talking about.' He said the card that you signed.

The employee said nothing about having signed the card, and she just left the office.

Called by the Respondent, Cardemon admitted calling Menage to his office on 1 July. He said his reason was because another employee, Linda Williams, a supervisor, had told him the employee was being harassed and therefore he should talk to the girl. He explained that by mistake he called Menage to his office instead of "Lisa," whom Williams had mentioned. Cardemon denied having offered to assist the employee get her union card back. His story is that all he said was he had heard the girl was being harassed and wished to help her have it stopped. Asked had he inquired of Menage what she was being "harassed" about, the witness said no. Asked had she told him what the harassment was about, again he said no. Finally, and most importantly, asked had the supervisor beneath him told him what the harassment of the girl was about, again the witness gave a clear "no." In short, Cardemon's testimony is that he talked for a while in the privacy of his office with Menage without either of them ever mentioning what the harassment was about. Can one believe such testimony?

Cardemon was followed on the witness stand by Linda Williams, the supervisor under him. She said, as plainly as can be, that when she spoke to Cardemon about the alleged harassment she said it was pressure put on an employee about joining the Union. Whatever other finding may be warranted on this record, one thing is absolutely clear, Cardemon lied on the witness stand. The Respondent's own witness proved that. By telling employee Menage he had heard she wanted her union card back—right after Cato's speech to all the employees offering them improved conditions of employment to get them out of the Union, and even offering to take them to the union hall to assist them in rejecting the Union—Cardemon was continuing the overall scheme of the Respondent to put a stop to the union campaign. His mere statement about knowing about Menage's union activity was a violation of Section 8(a)(1) of the Act and I so find.

Again the credibility finding, dictated by the direct testimony of the Respondent's own witness, ties in with

the indirect question of credibility—why were the two men fired? —because the top managers, like Cardemon, were all involved in the management talks that took place when those two decisions were made.

On 19 June John Douglass, a field technician who uses a company van to go from one assignment to another all day long, stopped on his way home from his last assignment at a plaza mall where there is a restaurant called Big Boy. He stayed there several hours with the company van parked in the general parking lot, attended a union meeting held there, then had dinner, and drove home. The rule is that the technicians who use company vans for work, and there are about 22 of them at this location of the Respondent, take the van home at night, but may not use the van for "personal use." The record is replete with all kinds of situations where vans have been used, permissively, for having dinner or for other urgent situations, for by the employees.

James Custer, Douglass' immediate supervisor, testified that that same evening, 19 June, after going home from work, he drove to the same plaza mall to go shopping, arriving at 6:20 p.m. When he parked his car, he recognized Douglass' company van parked nearby. He said he watched it a while, knew it was not supposed to be there, and then went into a store to look for something. He said he was in that store for an hour but did not find what he wanted, and he went back to his parked car. I doubt anyone could spend a whole hour in a store just looking for something he could not find. He found Douglass' company van still parked in the same place, and then just sat in his own car until 10 p.m., doing nothing more than looking at it. At 10 o'clock he saw Douglass come out of the restaurant and drive away. Custer did not talk to Douglass then; he did not go near him, he just went away.

Douglass was fired the next day. Why did Custer just sit and watch that man for 3-1/3 hours? He knew it was a company van; he knew it was Douglass' van; if he was not sure, there was no reason for him to worry about that, because the number on the van was all he needed to connect it with the proper technician. He knew the employee was not working—at that late hour—in that area. If all he was concerned about was the violation of a company rule—as he said at the hearing, he had all he needed right away. Against these realities, Custer's explanation did him no credit. He said he wanted to see who was going to get into the truck, to see what the truck was doing there. His explanation does not make sense. He had to have another reason. Did he know there was a union meeting going on in that restaurant then? Did he want to see who would come out at the end of the meeting? I do not know. But one thing I am sure of—he was not telling the truth when he said he just sat 3-1/2 hours watching for no coherent reason.

This business of the men not telling the truth has a direct connection with what went on the next day when, for a myriad of added reasons—all recorded but entirely unexplained—Douglass was discharged. See below.

There is one other direct credibility resolution called for by the conflicting testimony that is best resolved now, because it goes to the heart of one of the two 8(a)(3) violations alleged in the complaint. On 11 July John Wagnon, whose starting time was 6 a.m., telephoned in about 6:30 to say he could not come to work that day. He spoke to Lawrence Loveland, his supervisor. He told Loveland that during the night and later in the morning his wife had been very sick, had bled badly, had been taken to the hospital, and suffered a miscarriage. He added that hospital doctors had advised him to take her to see her personal physician quickly, and that therefore he could not come to work that day. Loveland's answer, as Wagnon recalled, was "[W]ell, I hope she is okay, and here is my home phone number, my phone number." Wagnon said, at the hearing, he did not understand why Loveland gave him his personal phone number; but he took the general conversation as acceptance of his excuse for not working that day.

When Wagnon next reported for work, on 14 July, he was fired after some talking with supervisors. There, Loveland took the position, which he repeated at the hearing, that he had not given Wagnon permission to take the day off. Three weeks earlier, on 20 June, Wagnon had been given a written warning for too many latenesses and absences, with explicit wording that the next offense would mean a 3-day suspension without pay. That warning was issued and signed by Loveland. On 25 June Wagnon was penalized for excessive absences and tardiness by suffering 3 days' suspension without pay. And again the formal punishment notice issued was signed by Loveland. Without question Loveland knew, on 11 July, that one more full absence by Wagnon meant discharge. If Loveland's thinking at the time of Wagnon's 6:30 a.m. call was that the man must be discharged outright, and never mind his family responsibility and his wife's critical condition of the moment, would he have so graciously asked to be kept informed of the lady's dangerous condition? In an office memo he wrote later—the same day— "I gave him my home phone number and asked him to call me if anything serious developed." No man asks another to lean on him in moments of stress if at the same time he intends to destroy the other. Loveland's state of mind—correctly understood by Wagnon then—was that the employee could take the day off with full permission. Later, on thinking it over, with management agents helping him decide, it was deemed a good cover to get rid of the prounion man. Loveland's statement at the hearing that he did not intend to excuse the man's 1-day absence—absences that have time and again been excused, as this record amply shows—was just not true. This credibility finding verges as much on intent as on fact, but it is compelled by human experience no less. A supervisor does not tell a subordinate who he knows is going to be discharged to stay in touch with him.

There were other unfair labor practices committed that shed light on the two discharges to be considered. Early in June Supervisor Williams asked Zais "if I knew about a union trying to come in the warehouse." When Zais answered that she did not, Williams continued, still as Zais recalled, by saying "she heard that the union was trying to come in and that Coyote was trying to start one." (Coyote is a nickname by which John Wagnon was known.) Zais also testified that on 27 June Williams again talked about the Union to her, this time in the pres-

ence of several other employees. "Linda told us the union was trying to come into the warehouse, and if it did that we would probably close down, that Wards would not have two union locations, such as Baltimore and us, that close together, and that they would combine us in an area inbetween the two of us. . . . She said that our jobs would be questionable, whether we would have a job or not." Zais' testimony about that 27 June talk with Williams was corroborated by Menage, who was also present. "She said that if we went union, the plant would close down. The warehouse would close down. . . . She said because they wouldn't have two unions so close together in Baltimore as a union, too, and they would close us down and get a different warehouse." Late that same week Williams again asked Menage what she thought about the Union.

Zais was also questioned by James Schmidt, one of the highest officials at this location of the Respondent. In the 3 years Zais worked there as a clerk, Schmidt had never once spoken to her. Zais said he came into her office and just sat down to chat with her:

> He introduced himself, and he asked me what I thought about the meeting the day before with Mr. Cato, the vice-president, and we discussed the meeting, and he said that he heard that the union was trying to come in the warehouse, and he did not want that. He asked me what I thought about it, and I said, well, I had never really thought that much. It was kind of personal.
>
> And Mr. Schmidt said that I was a good worker, that he would like to keep me, and he said that he was going to talk to Mr. Thompson later, and he kiddingly said I'm going to ask you what he thinks about you, and I said, well, he's going to tell you that I was a good worker.

Williams denied all the testimony by Zais and Menage about all that union talk. Schmidt did not appear as a witness. Of course I credit Zais, as well as Menage. The uncontradicted testimony about Schmidt's intimidating talk with Zais serves perfectly to prove it was a policy of the Respondent at that point to further its antiunion campaign by resorting to intimidating tactics. When a top official of so large a company chats amicably with a simple clerk, asks does she agree with the company's position that the union is a bad thing, and, when she equivocates, tells her he is going to see that she advances in the company, the threat of discrimination should she choose to favor the union could not be clearer. Williams was simply following the pattern set by her superiors.

I find that by interrogating employees about their union sentiments, and by telling them that their place of work would be closed by the Employer if they should favor the Union, the Respondent violated Section 8(a)(1) of the Act.

One other incident merits little comment. Robert Kemp, a receiving clerk, testified that on 21 June Cardemon, already mentioned above, talked to him at work: "Mike [Cardemon] asked me how the union was going. I said, 'You scared everybody off, man' I said 'I don't think we're going to have it,' like that. He said, 'Before we get the union here, we'll close the warehouse completely down.' He said, 'We'll close down and move to the Laurel somewhere.'" Cardemon denied having so spoken to Kemp. I do not credit him. Not only does he stand discredited, as explained above, but his threat to this employee is in complete accord with the conduct, undenied, of a supervisor of his superior—Schmidt. In keeping with the Respondent's policy, this was but another violation of the statute, and I so find.

Wagnon

This man, a merchandise handler, was the principal activist in the union movement. He contacted the Teamsters in late May and, after talking it up with 15 or 20 other employees, he arranged a union meeting for 19 June, when six or seven men signed union cards. The very next day he was given a "corrective notice," another phrase for a warning, based on his earlier tardiness and absences. His last offense—a late arrival—had occurred 15 days earlier. Beginning that same day Wagnon started obtaining signatures to union cards in the plant, getting 10 to 15 the first day. He put union stickers on his car, usually parked in the company lot, distributed stickers to other employees, wore a Teamsters Union button at work, gave out many pamphlets to others, and did all this in the break room and lunchroom on the company premises.

On 24 June he was given a 3-day suspension without pay for having been absent the day before. His position was then, and as he repeated at the hearing, that Loveland, his immediate supervisor, had given him permission in advance of that absence. The supervisor denied that. During his 3 days off, Wagnon continued his open activities on behalf of the Union in front of the plant—giving out his literature to the employees as they came and went. When he returned to work, after losing 3 days, again he talked the Union up during lunch and break periods, giving out leaflets again to others. Normally, supervisors come and go in the break room also.

On 11 July came the incident in which Wagnon called in early in the morning to tell Loveland he could not come in because of his wife's critical illness, and when Loveland asked him to keep the supervisor informed concerning the wife's progress or increasing danger.

On his next workday, Monday, 14 July, when Wagnon arrived on time, at 6 a.m., he spoke to Loveland and showed the medical certificates dated 11 July about his wife's illness. He did not want Loveland to think he had made up the story. Loveland's response was "I hope she's fine, you know, I hope she's okay." Less than a half hour later— about 6:30—Wagnon was called to the office and discharged. Loveland stated clearly at the hearing that he was involved in that decision, as well as the earlier criticisms and penalty imposed on Wagnon.

Considering all the related factors, I find that the Respondent suspended Wagnon for 3 days, and then discharged him, because of his union activity. That the Respondent was opposed to his union movement, even to the extent of committing a great number of very marked violations of the statute, could not be clearer. The intent to stop the union campaign regardless of legality is

shown again and again in this record. Wagnon was the most active of the employees. The Company may not have known that it was he who started the ball rolling, but there can be no doubt it very soon learned he was the most active of all the employees. Since Loveland expressed concern about Wagnon's wife's dangerous condition, as he said to the man during the critical conversation on 11 July, if he in fact believed that day's absence was going to cost the man his job, the least he would have done was tell him he had better come to work. He did not. This means one thing and one thing only. After thinking it over, and after consulting with the other managers of the location who had been doing their share in the Company's program, he, together with his colleagues, decided it was a good pretext case—i.e., fire the man to stop union activities and make it appear the objective was to enforce a company rule.

That the supervisors, or managers, have discretion in deciding whether a lateness, or an absence, is to be excused was shown again and again on this record. Even the supervisors admitted as much. Tedschi, the superior who, as Wagnon testified, told him on 24 June he could have the day off to get his children enrolled in school, said the situation for permitting latenesses or absences required "extenuating circumstances."

On 20 June, the very day of the union meeting that Custer watched for 3-1/2 hours, Wagnon got his first warning notice. By that time his record showed 12 occurrences—that is, violations. The rule, as written, calls for warnings after only six "occurrences." His last violation occurred on 5 June. Why did the Respondent wait so long before issuing the intimidating document? The supervisor's explanation that they were too busy means nothing to me in these circumstances. Wagnon's next criticism came on 25 June. He said he had talked to Loveland twice about his obligation to take 24 June off from work. Tedschi, also told by Wagnon of his problem, marked the man's timecard that day as okay for the absence. Later, he changed it; the card, received in evidence, shows clearly it was doctored after the event. At the hearing Tedschi testified he changed it later because Loveland told him he could not recall having given permission. Loveland contradicted him at the hearing, saying he did not tell Tedschi he could "not recall" giving permission. The only explanation must be that the supervisors decided, again after the event, to change their stories in order to cover their ulterior motive. The facts must all be taken together. This was the very day—25 June—when Cato came to Landover from Chicago to solicit grievances and to promise to satisfy the employees' demands to coerce them into giving up the union idea. I find that, by suspending Wagnon for 3 days and by discharging him on 14 July 1986, the Respondent violated Section 8(a)(3) of the Act.

Finally, the record shows many other employees who were excused for absences for many reasons. There was no objective reason for treating Wagnon differently than all the others. If ever there was a case of extraordinary circumstance, this was one of them. See *Associated Milk Producers*, 259 NLRB 1033, 1035 (1982).

John Douglass

The case of John Douglass starts with the fact that to me the reason now advanced by the Respondent for having discharged him is unbelievable, and therefore false. He was a very active unioneer; the Company without question was opposed to the Union, even to the extent of committing calculated unfair labor practices; the discharge came at the very moment after the first regular union meeting was held by the employees, where Douglass was seen and reported by his supervisor. See *Shattuck Denn Mining Corp v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact—here the trial examiner—required to be anymore naif than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.

Douglass worked 12 years for this Company and not once did the Respondent find fault with him or his performance. It will be enough to quote from the testimony of his supervisor, Custer:

> He worked there for about 12 years when this happened, is that correct?
>
> A. Yes.
> Q. And he was a pretty good employee?
> A. Yes, sir.
> Q. He never missed time from work?
> A. Not much, no.
> Q. Ever late to work?
> A. I don't think so . . . .
> Q. . . . Did you ever notice a problem with his coming late to work?
> A. No, sir.
> Q. Did he get along with the other employees?
> A. Yes, sir.
> Q. Was he good at fixing—what kind of stuff did he fix.
> A. Major appliances. Refrigeration mainly.
> Q. Did he do that good?
> A. Yes, sir.
> Q. Did customers call up and say he came and fixed my refrigerator but it still isn't fixed?
> A. It happens to everybody.
> Q. Often?
> A. Here and there, yes.
> Q. Well how about compared to other employes? Did they call up more or less frequently for John Douglass?

A. Probably less frequently.

Accordingly, the picture shows a perfectly desirable employee fired without notice or warning in advance. A man named Hoffman also worked under Supervisor Custer but was not authorized to take his company van to his house at night. One day he did that, against the rules, because he was using the van "for personal reasons." He had an accident in front of his house. Hoffman was neither fired nor disciplined for such personal use of the company van. At the hearing Custer said he did not know of any difference between the Hoffman incident and that of Douglass.

Logan was a field technician like Douglass, also taking his van home at night. One day Minasi, the company supervisor over Custer who later participated directly in Douglass' discharge, went to Logan's home looking for a certain company tool that was needed. But the van was not there. It was Logan's day off from work, and the van was not to be used for "personal use." Minasi learned that Logan had driven the van away somewhere. Logan did not testify and Minasi tried to explain the incident on the ground that Logan later told him—Minasi—that he had taken the truck somewhere to have it cleaned. This hearsay evidence will not do to explain away the further admission by the supervisor that inside Logan's van that day he saw a barbecue pit, admittedly not a company tool. Like Hoffman, Logan also went off scot free—with neither punishment nor criticism.

That Douglass was treated differently from his coworkers is clear. All Douglass did on 19 June was to stop on the direct route home from his last assignment and have dinner. There is much evidence in this record that employees did that at times, without criticism. The only difference in Douglass' case is that he stayed at the same location much longer to attend the union meeting. But insofar as the Company's interests in the man was concerned, this made no difference; the van was never moved from near the restaurant.

A look at the Company's discharge records involving Douglass serves to strengthen the finding that its now advance reason is false. Again and again the management people repeated the reason for discharge was personal use of the van, precisely quoting its written rule. One document—labeled corrective action notice—signed by Custer and a higher supervisor, says the reason was "unauthorized use of a company vehicle . . . left unattended." What did the fact the van stood by itself—unattended—on the parking lot have to do with the personal use rule? Another document, also labeled corrective action notice, is dated 23 June, also signed by Custer and the highest supervisor. This one adds another offense by Douglass: "Fraudulent—deceptive practices." There is not a word of explanation in the record for this added and totally different reason for Douglass' discharge. The supervisors themselves were unable at the hearing to explain it. This means, of course, that management knew its first recorded reason was not a good one.

The only reason I can see in this record for the Respondent's change of position is certain testimony by Minasi. When told, on 20 June, that he had violated the rule by stopping for dinner, Douglass protested on the ground that Minasi had told him he was permitting him to do that. When asked by the other managers had he so told Douglass, Minasi equivocated, saying both no and that perhaps Douglass had "misinterpreted" what he had said. His own handwritten statement, added to the discipline document, reads: "This may have been misinterpreted by Mr. Douglass."

With all this—a very desirable employee summarily dismissed without a word of warning after 12 years of perfect service; disparate treatment of one man against a number of others who committed worse offenses—if offense it was; and doubletalk in the Respondent's own records regarding why it did what it did—the conclusion is inescapable that the supervisors were not telling the truth about why Douglass was fired. But a reason they had to have. In the light of the timing—right after the man came out of a union meeting, the Company's knowledge of the union activity, interrogation of employees before Douglass was discharged, and the Respondent's proven intent to put a stop to the union movement—the only rational explanation of the dismissal of this man is furtherance of the Company's program to ensure the end of the union activity.

On 6 June the Company held a meeting with a number of supervisors present, including Minasi; 30 employees were present. Douglass testified, without contradiction, as follows:

> He [Minasi] was saying he was getting a lot of flak from the other technicians that they didn't want to do this. They didn't want to do that. They were overworked, and he said he's not going to listen to it. If you don't like the way things are run around here, Anna Curry [personnel manager] is sitting right here . . . come up here. He'll fill out papers and pay you, and you can hit the road.

Douglass spoke up to complain that "the work was unreal. It was getting too much." As the meeting was ending Douglass spoke up with "What we need is a union." Minasi testified he did not hear the man make that statement. His testimony is no more credible than that of Custer, that after sitting for 3-1/2 hours looking at Douglass' van in the parking lot 2 weeks later in order to "see who was going to get into the truck" he had no knowledge of a union meeting having taken place. I have no doubt the managers knew all along of Douglass' union activity.

In conclusion I find that by discharging Douglass the Respondent violated Section 8(a)(3) of the Act.

THE REMEDY

The Respondent must be ordered to cease and desist from again committing the unfair labor practices found. John Wagnon and John Douglass must be reinstated to their former positions, and they must be made whole for any loss of earnings they suffered in consequence of the illegal discrimination against them. Because of the nature of the unfair labor paractices committed, the Respondent must be ordered to cease and desist from in any other manner violating the statute hereafter.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, which occurred regarding the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. By suspending John Wagnon without pay for 3 days and by discharging John Wagnon and John Douglass, the Respondent has violated, and is violating, Section 8(a)(3) of the Act.

2. By the foregoing conduct, by interrogating its employees concerning their union activities, by telling employees the Respondent is aware of their individual union activity, by offering to escort employees to their union hall to assist them in canceling their union authorization cards, by soliciting grievances from the employees to avoid bargaining with their chosen representative, by granting improved conditions of employment such as medical insurance, improved safety equipment on operation machinery, and faster and more efficient evaluation and pay, by inviting its employees to form an employee committee to deal with the Company concerning condition of employment, and by threatening to close its plant and to discharge its employees, all for the purpose of inducing its employees to abandon their prounion activity, the Respondent has violated and is violating Section 8(a)(1) of the Act.

3. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

G. Heileman Brewing Co., Inc. *and* Local Union 309, International Brotherhood of Electrical Workers, AFL–CIO. Case 14–CA–17796

August 25, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT[1]

On December 13, 1985, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order, as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, G. Heileman Brewing Co., Inc., Belleville, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(a) and (b).

"(a) Failing or refusing to recognize and bargain collectively in good faith with Local Union 309, International Brotherhood of Electrical Workers, AFL–CIO as the exclusive collective-bargaining representative of the employees in the appropriate unit consisting of all maintenance electricians employed at its Belleville, Illinois plant, or unilaterally changing the wages, hours, and other terms and conditions of employment of the unit employees without prior notice to the Union and without affording the Union an opportunity to meet and bargain concerning such matters as such representative.

"(b) Terminating maintenance electricians at its Belleville plant without affording the Union prior notice and an opportunity to negotiate and bargain concerning any change in subcontracting arrangements and its effect on the unit employees."

2. Substitute the following for paragraph 2(b).

"(b) Recognize and, on request, bargain in good faith with the Union as the exclusive bargaining representative of the unit employees."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recognize and bargain collectively and in good faith with Local Union 309, International Brotherhood of Electrical Workers, AFL–CIO as the exclusive bargaining representative of our employees in the appropriate unit consisting of all maintenance electricians employed at our Belleville, Illinois plant.

WE WILL NOT unilaterally change the wages, benefits, and other terms and conditions of employment of the unit employees without prior notice to Local 309 and without affording Local 309 an opportunity to meet and bargain concerning such matters as such representative.

WE WILL NOT terminate maintenance electricians at our Belleville plant without affording Local 309 prior notice and an opportunity to negotiate and

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[1] Member Johansen did not participate in the decision on the merits.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established practice is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In part III,A, of his decision, the judge inadvertently ascribes to G. Heileman Brewing Plant Manager Allen LaCombe's testimony that in early 1981 he could not use electrician Alfred Valetin because Valetin was not eligible to do construction work outside the Heileman plant. The decision is corrected to reflect the testimony of Lowry Superintendent George Fischer Jr. We also modify the remedy portion of his decision to reflect that the Respondent is found to be in violation of Sec. 8(a)(1) and (5) and not Sec. 8(a)(1) and (3).

We do not adopt the judge's finding that the Respondent violated Sec. 8(a)(5) by breaching contractual obligations to the Union. The complaint alleged only that the Respondent violated Sec. 8(a)(5) by the unilateral subcontracting of the electrical maintenance work to Bienco Electric Co. (Bienco), and the issue of whether the Respondent breached a collective-bargaining agreement with the Union was not fully litigated. We shall modify the recommended Order and notice accordingly.

Member Cracraft notes that in its brief the Respondent does not contest the judge's finding that the decision to subcontract the electrical maintenance work to Bienco was a mandatory subject of bargaining.

In light of the other reasons given by the judge for rejecting the Respondent's waiver defense, Member Cracraft finds it unnecessary to rely on the judge's finding that the Respondent "was in fact bound by a collective-bargaining agreement, effective through August 1985."

[3] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

bargain concerning any change in subcontracting arrangements and its effects on the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Gerald Warden, Joseph Poell, Lawrence O'Dell, Elwood Harres, Albert Lorentzen, Tom Chasteen, and Dave Pusa immediate and full reinstatement to the positions of employment which they occupied in December 1984, either jointly with Lowry Electric Company, it being willing, or if not, as our employees, dismissing if necessary anyone who may have been hired or assigned to perform the work that they had been performing prior to January 1, 1985, or if their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights, privileges, and benefits previously enjoyed, and WE WILL make them whole for any loss of earnings and benefits they may have suffered by reason of their unlawful terminations, with interest.

WE WILL recognize and bargain in good faith with Local 309 as the exclusive collective-bargaining representative of the unit employees.

WE WILL reimburse the various trust funds established under the prevailing basic inside agreement between Southwestern Illinois Division, NECA and Local 309, for any failure of contributions from Lowry Electric Company by reason of our failure to employ maintenance electricians under the subcontracting arrangement.

G. HEILEMAN BREWING, INC.

Stephen D. Smith, Esq., for the General Counsel.
Ralph E. Kennedy, Esq. and *Daniel R. Begian, Esq.*, of St. Louis, Missouri, for the Respondent.
Sally Barker, Esq., of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at St. Louis, Missouri, on 19, 20, and 21 August 1985. The charge was filed on 8 January 1985 by Local Union 309, International Brotherhood of Electrical Workers, AFL–CIO (the Union). The complaint, which issued on 11 June 1985, alleges that G. Heileman Brewing Co., Inc. (the Company or Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act. The gravamen of the complaint, in sum, is that (1) the Company and Lowry Electric Co. (Lowry) were joint employers of employees performing electrical maintenance work at the Company's Belleville, Illinois facility, (2) the Union was the designated and recognized collective-bargaining representative of these employees in an appropriate unit, and (3) the Company violated its bargaining obligations by subcontracting the electrical maintance work to Bienco Electric Co. (Bienco) without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain concerning such subcontracting and its effects. The Company by its answer denies these allegations, and further contends that the complaint should be dismissed by reason of the General Counsel's failure to join Lowry and Bienco as parties to this proceeding, and that the Union failed to exhaust its contractually established grievence and arbitration procedure.[1] All named parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel, the Union, and the Company each filed a brief.

On the entire record in this case[2] and from my observation of the demeanor of the witnesses, and having considered the briefs submitted by the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, an Illinois corporation, maintains an office and brewery at Belleville, Illinois, where it is engaged in the production and distribution of beer, related malt beverages, and other products. In the operation of its business, the Company annually sells and ships from its Belleville plant, goods and materials valued in excess of $50,000 directly to points outside of Illinois. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the named Respondent is an employer engaged in commerce, I find that it would effectuate the policies of the Act for the Board to assert its jurisdiction in this case.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background: The Brewery Operation, the Union's Representative Status, and Developments Leading to the Subcontracting Arrangement Between the Company and Lowry*

The Belleville brewery has been in existence since at least the early 1940s. From 1954 until 1975 Carling Brewing Company operated the brewery. In 1975 Carling was acquired by National Brewing Company, the resulting firm being known as Carling National, and in April 1979 that firm was acquired by the Company. (The plant itself has sometimes been called the Stag Brewery, although many brands of beer are produced there.) The brewery employees have for many years been represent-

[1] These procedural arguments are closely related to and dependent upon my findings concerning the merits of the present case. Therefore I shall consider them in that context.

[2] Errors in transcript have been noted and corrected.

ed by various labor organizations. The Teamsters Union represented the production and some maintenance employees. District #9 of the Machinists Union, Local #101 of the Plumbers and Pipefitters Union, and the present union have historically represented the plant maintenance employees in their respective crafts. Since the 1940s the Union has represented the maintenance electricians as the brewery, and those employees were, until August 1980, covered by a series of collective-bargaining contracts between the Union and the firm operating the brewery. On acquiring the brewery, the Company assumed the bargaining obligations of its predecessor. As of that time there was in effect a collective-bargaining contract between Carling National and the Union covering the maintenance electricians at the plant, and effective by its terms from 15 April 1975 through 14 April 1979. The Company initially anticipated that it would close the brewery. In March 1979 the Company jointly negotiated a closing agreement, entitled "Craftsmen Memorandum of Understanding" with the three maintenance craft unions. The agreement covered the effect of termination of operations, including servance pay, and specifically provided that if the Company resumed operations, it would operate under the existing collective-bargaining contracts for 90 days, after which the contracts would be open for negotiations or modifications.[3] Following the acquisition the Company laid off its employees, including the maintenance electricians. However, the Company subsequently decided to resume operations at the brewery, and in August the Company recalled the eight maintenance electricians who had previously worked there.[4] Thereafter the Company negotiated new or modified contracts with the Machinists and Pipefitters Unions, but requested that the present Union await the outcome of those negotiations. In the meantime the electricians worked under an extension agreement of the 1975–1979 contract, which provided for a 70-cent-per-hour wage increase. The Company eventually executed contracts with the Machinists and Pipefitters Unions which each provided for annual wage increases ranging from 40 to 47 cents per hour over a 3-year period. In early 1980 the Company and the Union commenced their negotiations, and the maintenance electricians continued to work under an extension agreement. Union Assistant Business Manager James Hankins, accompained by maintenance electricians Gerald "Red" Warden and Alfred Valentin, represented the Union, and all three were presented as the General Counsel witnesses in this proceeding. Plant Manager Allen LaCombe and Industrial Relations Manager Charles Rhein represented the Company, and they were presented as Company witnesses. I am not persuaded that any of these witnesses gave a complete and accurate picture of the 1980 negotiations. Hankins was not credible in certain specific respects, and the employees tended to be somewhat vague in their recollection of the negotiations, LaCombe and Rhein, while denying certain specific aspects of Hankins' testimony, were sparse in their description of the negotiations, and did not specifically explain how it came about that the Company proposed subcontracting the electrical maintenance work. However, on considering the overall tenor of the witnesses' testimony, a clearer picture emerges. It is evident that the Company was concerned about the wage disparity between the electricians and the other maintenance crafts. It is undisputed that the electricians were paid at a higher rate than the machinists and pipefitters. In response to my question, Plant Manager LaCombe testified in sum that in 1980 the Company wanted to subcontract the electrical work becuase (1) the Company was finding it difficult to obtain qualified, competent electricians, which sometimes had to be done on short notice; and (2) the Company initially planned to operate the brewery on a seasonal basis, and therefore needed an electrical subcontractor in order to be assured of a ready pool of electricians. However, this would not explain whey the Company proposed subcontracting after the negotiations were under way. (Rhein testified that LaCombe proposed subcontracting at the second bargaining session in 1980.) Electricians Warden and Valentin both testified, in sum, that the parties were having difficulty in reaching agreement on the terms of a collective-bargaining contract, and that the Company proposed subcontracting as a means of breaking what appeared to be a deadlock in negotiations. By subcontracting to a union firm, the Company would not be able to reduce the electricians' wage scale. However, it would be in a position to disvow responsibility for electricians' wage rates. Therefore, although I do not credit the testimony of Hankins in all its aspects, I credit his testimony to the effect that the Company proposed subcontracting as a means of justifying to the other union, why the electricians were receiving a higher rate of pay.[5]

The Union was not adverse to the idea of subcontracting, although it expressed some concerns. Hankins asked if the Company might eventually train Teamsters, i.e., production unit employees, to perform electrical maintenance work. LaCombe answered that the Company would not do this. The employees expressed concern about what would happen to them. LaCombe answered that they could be transferred to the contractor's payroll.[2] Both parties understood that the electrical mainte-

[3] The closing agreement was nominally between Carling National and the unions, because the Company was awaiting SEC approval for its acquisition of Carling National. Plant Manager Allen LaCombe and Industrial Relations Manager Charles Rhein, who signed the agreement for Carling National, remained in their respective position after the acquisition.

[4] The eight electricians were Gerald Warden, Joseph Poell, Elwood Harres, Lawrence O'Dell, Edmond French, Alfred Valentin, Albert Lorentzen, and Lindell Zimmerman.

[5] I do not credit Hankin's testimony that LaCombe referred to the other union contracts as "crap." I find it unlikely that LaCombe would so disparage the contracts he had negotiated and thereby encourage the Union to demand higher wages. I also do not credit Hankins' testimony that the Pipefitters and Machinists took wage cuts in 1979. Rhein and LaCombe testified in detil concerning the wage increase negotiated for the other units, and their testimony was corroborated by Pipefitters Business Agent Joseph Nebgen, who was presented as the General Counsel's witness. Nevertheless, as indicated, the electricians were paid more than the other company employees, and this resulted in problems when the Company negotiated with the other uniors.

[6] This finding is based on the credited testimony of LaCombe and Rhein. I do not credit Hankin's testimony that LaCombe wanted the contractor to agree to a seniority list in order that the Company could retain

Continued

nance work would be contracted to a union firm, selected by the Company, which was a signatory to the area contract between the Union and the local chapter of National Electrical Contractors Association (NECA), a multiemployer bargaining association. Therefore the employees would be covered by that contract, except to the extent that different terms and conditions were negotiated. The Union agreed that the Company and the Union could negotiate shift differentials and starting times which differed from those in the NECA contract, and they did so. The Union informed the Company that under the NECA contract, there would have to be a working foreman on the job. By July 1980 the Company and the Union reached agreement on the terms and conditions of subcontracting insofar as they affected the employees. However, they did not reduce their agreement to writing. Instead the Company next selected a subcontractor. The Company awarded the electrical maintenance work to Lowry, an established union electrical contracting firm which was a member of NECA and signatory to the current NECA contract with the Union. It is undisputed that at all times the Company and Lowry were and are separately owned, and operated and controlled firms, engaged in different businesses, and did not constitute a single employer under the Act.

On 5 August 1980 the Union and Lowry executed a "Maintenance Work Supplement to the Prevailing Inside Agreement Between Local Union 309 of the I.B.E.W. and Lowry Electric Company," which by its terms was limited to the performance of maintence work at the Company's brewery. The phrase "prevailing inside agreement" referred to the current NECA contract, and the agreement signed on 5 August 1980 constituted an addendum to the NECA contract (I shall hereafter refer to the agreement as the "Addendum"). The Addendum, which was effective by its terms for the duration of the NECA contract, specifically incorporated all the provisions of the prevailing NECA contract except as modified by the Addendum. (The current NECA contract was scheduled to expire on 1 September 1981.) The Addendum incorporated the shift schedules and premium pay rates which were negotiated and agreed on by the Union, and contained additional provisions which imposed requirements on the Company. Thus the Addendum required both Lowry and the Company to post their safety and health rules "at conspicuous places throughout the job," and provided that Lowry and the Company "reserve the right to send into the area of work as many supervisors and engineers either deems necessary but they shall not perform any work." On 6 August 1980 the Company and Lowry entered into a written contract agreement whereby Lowry agreed to "provide all supervision and labor according to" the Addendum. However, Lowry was not required to furnish tools or materials. Under this contract, the Company agreed to provide Lowry "with information as to seniority of electricians, size of crew needed from time to time and dismissal of employees." The Company further agreed to reimburse Lowry for the cost of wages, fringe benefits funds under the NECA contract and other payroll costs imposed by law, plus a 3-1/2-percent contractor fee. On signing its agreements with the Company and the Union, Lowry commenced providing maintenance electricians at the brewery, using the seven employees who had until then been working regularly for the Company (all of those recalled in August 1979, except Zimmerman). The Company informed Lowry that it wanted Warden as foreman, and he was so designated. Assistant Business Manager Hankins testified that about 1 September 1980 he prepared and Lowry and the Union signed a memorandum of understanding which listed the seven employees in order of their seniority, based on company employment records, and provided that they would be laid off and recalled in accordance with their seniority date. A comparison of this memorandum with prior Company seniority rosters indicates some minor different in seniority dates, but the employees maintained their positions on the seniority roster (in order, Warden, Poell, O'Dell, Harres, French, Valentin, and Lorentzen). Hankins testified that he mailed a copy of the memorandum of understanding to the Company. Plant Manager LaCombe testified that he never saw the memorandum. Hankins testified that he prepared the memorandum because the Company requested such an agreement. As indicated, I have found that the Union requested and the Company agreed that the present employees would be retained. Hankins further testified that the Company and the Union agreed that the Addenda agreements between Lowry and the Union would be renewed on an annual basis and concurrently with the NECA contracts. The Addendum and each renewal provided that it "shall run concurrently with the term" of the NECA contract and "shall apply to any contractor who has been recognized by a Letter of Assent to" the NECA contract. However, a comparison of the contract agreements between the Company and Lowry, the Addenda agreements between Lowry and the Union and the NECA contracts indicates that although they were usually executed in August, they did not always run for concurrent periods. The Addenda agreements were renewed annually, effective as of 1 September of each year (1981–1984). The contract agreement between the Company and Lowry, originally effective for a 2-year period, was renewed on 5 August 1982 for an additional 2-year period, and was renewed on 5 August 1984, effective until 31 December 1984. (The circumstances concerning this last renewal will be discussed at a later point in this decision.) The NECA contract which was in effect from 1 September 1979 to 1 September 1981 was periodically renegotiated and successive contracts were effective from 1 September 1981 through 31 August 1983, 1 September 1983 through 31 August 1984, and 1 September 1984 through 31 August 1986. The Company never signed the Addendum agreement or renewal, did not participate in NECA negotiations, and never signed a "Letter or Assent" to be bound by the NECA contract, although the NECA contract provided that it would apply to all firms who signed such letter of assent. The Union routinely informed the Company of

its experienced employees. The Union, rather than the Company, was concerned about the job security of all of those employees. Because subsequent developments, it is evident that the Company valued some of those employees, but was not satisfied with the performance of others.

changes in pertinent wage rates and benefit payments under the NECA contract. The Company had maintenance subcontracting arrangements at other plants. However, although Lowry had numerous contracts to perform electrical work, including from time to time, jobs at the brewery, this was its only maintenance contract.

As indicated, there are some conflicts in testimony concerning the agreements among the Company, Lowry, and the Union. Resolution of these conflicts has been hampered by the fact that the individuals who executed the initial Addendum agreement between Lowry and the Union were not presented as witnesses in this proceeding. However, on consideration of the pertinent documents, particularly the contract agreement between the Company and Lowry, certain salient and crucial facts emerge. First and foremost, the Company contractually agreed that the electrical maintenance work would be performed in accordance with the Addendum and the NECA contract. Specifically, the Company agreed that Lowry would provide supervision and labor in accordance with the Addendum, and the Addendum expressly incorporated "all of the provisions" of the NECA contract except as modified by the Addendum. Second, it is evident from the comparison of the Addendum with the testimony concerning the negotiations between the Company and the Union that the Addendum, although not signed by the Company, was in fact negotiated by the Company and reflected the results of those negotiations. Moreover, the Company indicated its approval of the Addendum when it signed the contract with Lowry, thereby agreeing that maintenance work would be performed in accordance with the Addendum. Third, it is evident from the language of the contract agreement and the Addendum that all parties anticipated that the Company would exercise supervisory authority over the maintenance electricians. The Company specifically agreed to provide Lowry with information about "dismissal of employees." This provision would be superfluous unless the Company actually had the power to terminate the employees. This power was particularly significant for the regular employees who had previously worked for the Company, and who, as will be discussed, continued to perform most of the maintenance work. If the Company wished to terminate an employee who had initially been furnished by Lowry, then Lowry could simply transfer that employee to another job. However, the employees who had previously worked for the Company were not qualified under the NECA contract to perform outside construction work. Therefore the Company had life or death power over their jobs. The contract agreement further provided that the Company would provide Lowry with information about "seniority of electricians." This information would also be superfluous unless, as was actually the case, the Company understood and agreed that the employees who previously worked for the Company would be retained by reason of and in accordance with their seniority with the Company. The Addendum provided that both the Company and Lowry reserved the right to send supervisors and engineers into the work area, "but they shall not perform any manual work." It is evident from this provision that the Company, Lowry, and the Union anticipated that the Company would have at least authority to supervise the manner in which the maintenance electricians performed their work. As will be discussed, only the Company regularly sent supervisors "into the area of work."

B. *Day-to-Day Operations Under the Subcontract Between the Company and Lowry*

After the Company subcontracted the electrical maintenance work to Lowry, the electricians who were formerly on the Company's payroll continued to perform their work in the same manner as they had done before. They did not fill out a job application for Lowry. They continued to report for work at the brewery, and never had occasion to report to Lowry's facility. They punched the same timeclock (using the Company's cards) as the maintenance employees who were directly employed by the Company (pipefitters, machinists, and some oilers). As agreed by the Company and the Union, they worked the same shifts as the other maintenance employees. Those shifts differed both from the shifts worked by the Company's production employees and from Lowry's employees engaged in outside work. As working foreman, Gerald Warden compiled weekly timesheets from the daily timecards, and turned in the sheets the Company Electrical Superintendent Richard Voss, who forwarded them to Lowry. Lowry prepared the paychecks, made all deductions, and sent the checks to Voss. Warden or an acting foreman would pick up the paychecks and distribute them to employees. The electricians' weekly pay period was the same as that for other Lowry employees. There were normally seven maintenance electricians regularly on duty during a 24-hour period. Four electricians worked the day shift (7 a.m. to 3 p.m.). Two, including Warden, were assigned to the bottle shop and two to the brewhouse. The facilities were about one block apart. Two electricians were assigned to the second shift (3 to 11 p.m.). They were based at the bottle shop, but serviced the entire plant. One electrician was assigned to the third shift (11 p.m. to 7 a.m.). When replacements were needed, Voss would notify the Lowry vice president and superintendent, George Fischer, who would refer them from Lowery's complement of employees. From time to time, Lowry furnished electricians on a temporary basis in accordance with the Company's needs, e.g., as replacements for employees on sick leave or vacation, or to meet special maintenance problems which required additional help. These employees worked on other Lowry jobs when they were not working at the brewery. However, the Company needed permanent replacements when Edmond French died and Alfred Valentin retired. Lowry furnished replacements, and two of these (Tom Chasteen and Dave Pusa) worked at the brewery on a permanent basis and became part of the regular crew. As indicated, the remaining electricians, who had formerly been on the Company's payroll did not work on other Lowry jobs.

The maintenance electricians were primarily troubleshooters, i.e., their function was to correct electrical problems and maintain electrical equipment in such a manner as to assure continuity of production operations.

Therefore their work was complementary to that of other maintenance employees and closely involved with production. The electricians furnished their own hand tools, and the Company furnished all power tools and other supplies and equipment. Lowery did not furnish any tools and materials. Lowery also did not regulary assign a supervisor to the brewery. Lowry Vice President and Superintendent Fischer testifeid that during the period from August 1980 through December 1984 he went to the brewery only 5 or 6 times in connection with maintenance work, although he regularly visited other Lowry jobsites and indeed, went to the brewery some 25 to 30 times during the same period in connection with other jobs or bidding for jobs. Fischer explained that he had no reason to go to the brewery in connection with maintenance work because he did not know what had to be done. It is evident from the nature of the work involved that Fischer was correct. The work of the maintenance electricians was so closely related to the Company's normal production operation that only the Company could exercise meaningful supervision over that work. Nonetheless the Company contends (Br. 21, 36) in sum that the maintenance electricians were skilled personnel who were capable of performing their work as needed, without supervisory direction, and that consequently neither the Company nor Lowry supervised their work on a regular basis.[7] To a considerable extent the Company's position is accurate. The electricians performed most of their work on an "as needed" basis. Superintendent Voss, production or other maintenance employees, and even rank-and-file production employees could and did inform the electricians of needed repairs simply by paging them over the plant intercom system. An announced "red" condition meant a breakdown which stopped production and therefore had to be handled immediately. An announced "green" condition meant a less serious problem which did not require priority attention. When electricians (usually on the first shift) were unable to reach or complete jobs on their shift, then Superintendent Voss, Warden, or another electrician (usually Joseph Poell, who worked with Warden and sometimes served as acting foreman) would enter the jobs Voss' ledger book. When electricians on succeeding shifts reported to work, they would check the ledger book to see what jobs remained to be done. Usually second- and third-shift electricians had more time to perform nonpriority work. As these jobs were completed, the electricians would so indicate in the ledger book. Under this system, it was seldom necessary for Voss or any other supervisor to exercise supervisory rather than technical discretion by deciding to what work had to be performed and which employees should perform the work. This did not mean that the electricians worked without day-to-day supervision. Rather, the evidence indicates that when supervisory authority was exercised, it was usually done at the first level by Superintendent Voss, and at a higher level by Plant Manager LaCombe or Industrial Relations Manager Rhein, usually in consultation with the Union or Lowry. The complaint in this case alleges, and the anwser admits, that Voss is and was at all times material the Company's electrical superintendent, and a supervisor and agent of the Company within the meaning of the Act. If so, then it is difficult to see who Voss would be supervising unless it were the maintenance electricians. In fact, Voss was their supervisor, and they so regarded him as their supervisor.[8] Joseph Poell testifeid about two instances in which a question arose concerning the placement of certain electrical switches. In each instance Voss decided how and where the switches should be installed, although the electrician or electricians involved preferred to do it differently. Electrician Alfred Valentin similarly testified concerning two occasions on which another company maintenance supervisor instructed an electrician to redo certain work which in the opinion of the supervisor had not been done properly. Poell testified that when he reported to work each day, he and Voss would discuss what jobs had to be performed, and they would go through the ledger book and work orders together. When the Company needed an electrician or electricians to work overtime, Voss would so inform Valentin, who was the Union's shop steward, indicating how many were needed and when they would work. Valentin, in accordance with prior practice before subcontracting, would assign those employees with the least accumulated overtime in order to equalize distribution of overtime. He would post their names on the electricians' bulletin board, and if an employee declined overtime, he would give it to someone else. Lowry was never notified of such overtime work unless more electricians were needed, in which case Voss called Lowry Superintendent Fischer, indicating time and shifts. Voss was present about 10 percent of the time that the electricians were working, he was usually present when they were working on a major breakdown, and he would usually come by when they were working on a weekend. He also provided them with diagrams when necessary. Although Voss was a trained and experienced electrician, he did not normally perform manual work unless the electricians needed assistance.

At a higher lever, Plant Manager LaCombe and Industrial Relations Manager Rhein became involved in the supervisory process. The Company was dissatisfied with electrician Valentin's performance. In early 1981 Lowry Superintendent Fischer met with LaCombe, at Voss' request, concerning Valentin. LaCombe said his work was not good or fast enough, and he asked Fisher to get rid of him. LaCombe said he could not use him because he was not eligible to do outside construction work, but would fire him if LaCombe so requested. LaCombe said he would give Valentin another chance. In 1983 Voss told Assistant Business Manager Hankins that LaCombe

[7] The Company does not contend that electrician Warden was a Lowry supervisor by reason of his status as "Foreman" under the NECA contract. In any event, Warden was primarily engaged in performing electrical maintenance work, and his functions as foremen, to the exetent that they might be arguably regarded as supervisory, were routine in nature and did not involve the exercise of such discretion, in the interests of the employer, as would qualify him a a supervisor under the Act.

[8] Voss was not presented as a witness in this proceeding. The evidence concerning his duties substantially consists of the testimony of the General Counsel's employee witnesses, and documents which were presented in evidence.

was still dissatisfied with Valentin's performance, and asked when he was going to retire (Valentin eventually retired in June 1984). In 1982 LaCombe asked Fischer to come to the brewery to talk to electrician O'Dell, because his work was too slow. Fischer came a few days later, but LaCombe told him that the matter was settled. On another occasion Rhein told Fischer that an electrician who had initially been referred by Lowry was constantly talking and interfering with work, and that LaCombe wanted him off the Company's property. Fischer answered that he was a good electrician, but he agreed to transfer the employee. Fischer testified that he never disciplined the maintenance employees or even discussed their work (except to talk to Warden about mistakes on the timesheets), but would give them a "pep talk" if suggested by Voss Rhein. In sum, Lowry never took the initiative in monitoring emloyee performance, and the Company never asked Lowry to do so. Rather, the Company monitored individual performance, and decided what action should be taken if it believed that the employee's performance was substandard. Fischer would express his opinion, but would either carry out the Company's decision or let the Company resolve the matter. As indicated, the Company was aware that rejection of any of the initial crew of electricians was tantamount to discharge. Rhein also sought to become involved in the hiring process, although his efforts in this regard never reached fruition. In 1983 Rhein told Hankins that LaCombe wanted a particular electrician to work at the brewery. Hankins said he would try to get him, but the electrician was not hired or referred by Lowry. Also in 1983 Rhein proposed to Hankins that the Company could use college students as summer help for electrical maintenance work and suggested a wage rate of $5 per hour. Hankins agreed, subject to approval by the employees at the brewery, but Rhein subsequently decided not to hire summer help. Neither Rhein nor Hankins indicated that such summer help would have to be referred through Lowry.

The parties stipulated in this proceeding that Worker's Compensation claims were filed only against Lowry and were paid by Lowry's insurer. The evidence is inconclusive regarding formal grievance handling because no contractual grievances were filed after the Company subcontracted the electrical maintenance work. Jurisdictional disputes were always resolved by the stewards for the respective crafts or units. However, on at least one occasion the Company dealt directly with the Union in resolving an informal grievance. Hankins testified without contradiction that in early 1984 Hankins told Rhein that electrician Lorentzen wanted to work the day shift. Rhein said he wanted Lorentzen on nights, and they agreed that there should be no shift preference. The maintenance electricians continued to enjoy benefits which were available to company employees but not to nonemployees, and they enjoyed such benefits either because of a continuation of past practices or through negotiations with the Company in which Lowry was not involved. The Company had programs whereby it awarded prizes of beer or small amounts of cash to the employees at the plant as a reward for overall plant safety or productivity. These programs were known respectively as "safety bingo," "production beer," "No lost time accident beer" and "monthly beer." Prior to subcontracting, the maintenance electricians participated in and were eligible for prizes under these programs. After subcontracting began, Steward Valentin asked Rhein if they could remain in the programs. After consulting with LaCombe, Rhein informed the Union that they could do so. The parties stipulated that these programs covered "all persons performing services at the plant," including maintenance electricians. However, no evidence was introduced which would indicate that any persons not on the Company's payroll, other than the maintenance electricians, fell into this category. The maintenance electricians had the use of a company lunchroom facility, and those who worked regularly at the brewery had their own lockers, and stored their tools at or near their workbench. These regular electricians were always invited to the Company's Christmas party for its employees, but were not invited to Lowry's party. Electrician Poell, who had worked at the brewery since 1964, testified in sum that his working conditions remained substantially the same after the Company subcontracted the electrical maintenance work, except that he now received his paycheck from Lowry.

C. Developments Leading to the Subcontracting to Bienco, and the Company's Alleged Unlawful Conduct

As indicated, in August 1984 the Company and Lowry renewed their contract agreement only until 31 December 1984, although their preceding agreements had run for 2-year periods.[9] None of the company or Lowry officials who were presented as witnesses in this proceeding, testified directly concerning the reason for this short renewal term. However, the evidence indicates that the Company was concerned about what it regarded as escalating wage rates under the NECA contract, and was determined to avoid the impact of those rates. In December 1983 the Company and the Pipefitters Union were engaged in contract negotiations. The Pipefitters Union wanted wage parity with the electricians. Pipefitters' business agent, Nebgen, testified without contradiction that the Company's attorney told him that no one in the units would make more than the pipefitters, and that parity would be at the pipefitters' rate, not the electricians' rate. Hankins testified that in January, following a conversation with Nebgen, he called Rhein and said that he heard that the Company's attorney threatened to get the Union. Rhein answered that there was no problem, that this was just bargaining tactics, but that he would like to talk to Hankins after the Pipefitters negotiations were completed. However, he never contacted Hankins. Nebgen testified that he did not discuss the Pipefitters negotiations with the Union. Whether he did or did not, it is evident that Hankins somehow learned about what the Company said in those negotiations. Most significantly, the uncontroverted testimony of Nebgen and Hankins concerning the Company's statements demonstrates that (1) the Company was determined to significantly reduce the wage rates for its electricians even to the point of

[9] All dates in this section are for 1984 unless otherwise indicated.

making a commitment to the Pipefitters in this regard, and (2) the Company attempted to conceal its aim from the Union, and indeed, avoided dealing with the Union concerning the matter of wage rates. The Union did not learn until late August, when it asked Lowry to sign a 1-year renewal of the Addendum, that the Company and Lowry had extended their contract agreement only through December 1984, i.e., that unlike prior years, the agreement would come up for renewal during the term of the Addendum. Lowry President Oliver Hartman, who was presented as the General Counsel witness, testified that he so informed the Union, and that the Union told him that they would go along with that arrangement. I credit Hartman's testimony in this regard.[10] In the meantime, Hankins heard as early as July 1984 that the Company was shopping around among electrical contractors for a lower rate. Plant Manager LaCombe testified that in early November, before he contacted Lowry about a renewal of their agreement, he instructed Rhein to solicit bids for the electrical maintenance work.

In mid-November (probably the week of 12 November), at the Company's request, Hartman and Fischer of Lowry met with company officials LaCombe and Rhein at the brewery. All four testified concerning the meeting. However, their versions of the meeting, although differing in some aspects, conflict in only one significant respect. LaCombe told Hartman that their contract would expire soon, and that the Company needed a $5-per-hour reduction in the electricians' base wage rate. He asked Hartman to talk to the Union to see if they would accept the reduction. Hartman said he would get back to the company officials after he spoke to the Union. Hartman and Fischer testified that LaCombe said the reduction was "non-negotiable." LaCombe and Rhein testified that LaCombe did not make such a statement. I credit the Lowry officials. First, it was in their interest to present the Company's position to the Union in the most flexible light possible because if they failed to reach agreement Lowry would be out of a contract. Therefore it is unlikely that Hartman would have represented to the Union, as he did, that the Company's demand was nonnegotiable, unless the Company actually said so. Second, as has been and will be discussed, the Company's overall course of conduct indicates that it was taking a nonnegotiable stance because the Company was determined to substantially reduce the electricians' wage rate, with or without the Union, and preferably without.

The next development was a meeting at the union hall between Hankins and the two Lowry officials. Although there is considerable confusion in the testimony of these three witnesses as to when they met, the overall testimony concerning the course of developments indicates that Hartman was probably correct when he testified that they met some 3 to 7 days after the Lowry officials met with the Company.[11] I credit the testimony of Hartman and Fischer concerning their meeting. Hartman reported what LaCombe told him, i.e., that the Company wanted a $5-per-hour reduction in the base wage rate, which would be nonnegotiable. Hankins said that he did not think that the employees would accept such a cut, but that he would talk to Hartman. Shortly thereafter, in late November, LaCombe called Hartman and asked him whether there had been any "progress." Hartman answered that Hankins had to get with the employees.[12] The Union did not contact Hartman until after Christmas. On December 26, Hankins told him that a $5 base wage reduction was unacceptable, but the Union might put together a package of cuts totaling $2.40 per hour which would not include a reduction in the base wage rate. Hartman promptly informed LaCombe of the Union's position, but LaCombe did not respond to the proposal. On 27 December Hartman proposed to LaCombe that he meet directly with Hankins. LaCombe declined, asserting that his contract was with Lowry. LaCombe told Hartman that Lowry no longer had a contract, but could submit a bid for the maintenance work. On 28 December Hankins presented Hartman with a proposed document for signature by the Company, Lowry, and the Union, by which the Company acknowledged its status as a joint employer and obligation to bargain with the Union if it terminated its relationship with Lowry. That same day Hartman telephoned LaCombe and told him that the Union would agree to cuts in the range of $2.50 to $3 per hour if the Company signed the document. LaCombe answered that the Company could not sign such a document. Hartman delivered the document to LaCombe the next day. On 31 December Hankins told Hartman to inform the Company that the Union would agree to cuts totaling $2.50 per hour without the document. Hartman immediately informed Industrial Relations Manager Rhein of the Union's proposal. After consulting with LaCombe, Rhein called back and informed Hartman that the Union's proposal was "too little, too late."[13] On 1 January 1985 the Company exe-

[10] Hankins testified that Hartman did not inform him of the limited renewal until December 1984 and that until then he assumed that the Company and Lowry renewed their agreement for another 1-year period. However, Hankins admitted that in September 1984 Union President Faust told him that Hartman said the Company wanted a 6-month extension. If so, then it is probably that the Union would have checked to determine whether in fact Lowry signed a renewal agreement of such short duration.

[11] Hankins was obviously far off base when he testified that he met with the Lowry officials on 12 December. Indeed he subsequently admitted that he learned from Union President Faust in late November that the Company wanted a $5- or $6-per-hour wage cut. LaCombe testified that he called Hartman about 10 days after their meeting and learned that Hartman had already talked to Hankins. I find that the Lowry officials met with Hankins in the latter part of November, before Thanksgiving.

[12] I credit LaCombe's testimony concerning this conversation. I do not credit the testimony of Superintendent Fischer about a three-way conversation in early December among LaCombe, Hartman, and Fischer in which Hartman allegedly said that the Union made no offer because the Company said its proposal was nonnegotiable, and LaCombe said the Company might be willing to negotiate a wage reduction of $3 per hour. The testimony of the other witnesses (Hankins, Hartman, LaCombe, and Rhein) indicates that the Union did not state a position until late December, and the Company never indicated a willingness to accept anything less than a $5-per-hour wage reduction.

[13] The foregoing findings concerning developments during the last week of December are substantially based on the testimony of LaCombe and Rhein. Although I have credited Hartman's testimony in certain respects, LaCombe was the only witness to present a coherent and chronologically accurate account of those developments.

cuted a maintenance contract with Bienco, which does not have a contract with the Union, and Bienco commenced performing the electrical maintenance work with its own complement of employees. By letter dated 3 January 1985, Hankins demanded that the Company bargain directly with the Union concerning "the terms and conditions of employment of employees performing electrical work." By reply letter dated 4 January 1985, LaCombe denied that it was a joint employer of those employees, and asserted that the Union's dispute was solely with Bienco.

D. *Analysis and Concluding Findings*

The Company asserted in its answer, by way of affirmative defense, that the "Union has failed to exhaust its contractually established grievance and arbitration procedure." The Company has evidently abandoned this assertion, having presented neither evidence nor argument in support thereof. Because the Company's contention that it has no contractual or other bargaining obligation to the Union, it is evident that the subject matter of the present complaint cannot be resolved through any agreed-upon contractual grievance and arbitration procedure. Therefore I find this affirmative defense without merit, and I shall proceed to consider the merits of this case.

I agree with the General Counsel (Br. 13) that in addressing the merits, the first question to be decided is whether the Company and Lowry were joint employers of the maintenance electricians employed at the brewery during the period from August 1980 through 31 December 1984. If not, then the Company owed no contractual or other bargaining obligation to the Union, and therefore the complaint would have to be dismissed.

In *Laerco Transportation*, 269 NLRB 324, 325 (1984), the Board recently had occasion to define joint employer status in the following language:

> The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment. Whether an employer possesses sufficient indicia of control over petitioned-for employees employed by another employer is essentially a factual issue. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such a hiring, firing, discipline, supervision, and direction.

In sum, separate firms that "share, or co-determine, those matters governing essential terms and conditions of employment" of the employees involved are joint employers of those employees, regardless of whether the firms are commonly owned, operated, or controlled. *NLRB v. Greyhound Corp.*, 368 F.2d 778 (5th Cir. 1966), citing *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). Accord: *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966), cert. denied 385 U.S. 1008 (1967); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1121–1124 (3d Cir. 1982).[14]

Applying the foregoing principles to the present case, I find that the Company and Lowry shared and codetermined the matters governing essential terms and conditions of employment of the maintenance electricians employed at the brewery, and therefore were the joint employers of those employees. First and foremost, the Company and the Union in fact directly negotiated and agreed on the overall framework of terms and conditions of employment under which the maintenance electricians would work. They agreed that the employees would be covered by the NECA contract, except in certain particulars, including starting times and shift differentials. They agreed to retain the employees who had been on the Company's payroll, and that consequently the employees would retain their jobs in accordance with their company seniority notwithstanding that they would be on Lowry's payroll. The Addendum agreement, which governed terms and conditions of employment, although signed by Lowry actually reflected the negotiations and agreements between the Company and the Union. Similarly the memorandum of understanding on seniority, although signed by Lowry, reflected the verbal agreement on job retention that was negotiated between the Company and the Union. Thereafter the Company alone determined when additional employees were needed, how many were needed, and for how long, and what shifts they would work. Lowry selected additional or replacement employees to meet the Company's needs. However, throughout the period from August 1980 through December 1984, most of the work was performed by former company employees, i.e., those employees who retained their jobs by reason of agreement between the Company and the Union. The Company, the Union, and Lowry, through their interrelated agreements, further agreed that the Company as well as Lowry would have the right to supervise and even terminate the employees. In practice, only the Company exercised meaningful supervision over the day-to-day work of the employees. As discussed, the Company through its supervisory personnel, principally Electrical Superintendent Voss, supervised and directed the work of the employees to the extent that it determined that such supervision and direction were necessary. Indeed the nature of the work involved, i.e., maintenance work which was closely related and essential to the Company's normal production operations, effectively precluded Lowry from playing any meaningful role in day-to-day supervision and direction of work. The Company alone determined when employees would work

[14] The "joint employer" concept is distinct from that of "single employer." Unfortunately, as the court observed in *Browning-Ferris*, the terms have sometimes been used interchangeably, with some resulting confusion as to the definition and conditions present in each type of relationship. "A 'single employer' relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a 'single employer'"; i.e., where there is interrelation of operations together with centralized control of labor relations, common management, and common ownership of financial control. *Browning-Ferris*, supra at 1122; *NLRB v. M. P. Building Corp.*, 411 F.2d 567 (5th Cir. 1969). In the present case, the General Counsel does not contend that the Company and Lowry constitued a single employer.

overtime, and by informal understanding with the Union's steward, and without any notice to or consultation with Lowry, permitted the steward to designate those employees who would work weekend overtime. The Company initiated disciplinary action, determined what action was warranted, and Lowry, although it might make recommendations, invariably deferred to the Company's decision in this regard. As indicated, the Company was not a member of NECA, did not sign a letter of assent to be bound by the NECA contract, and unlikely Lowry, did not participate in contract negotiations between NECA and the Union. However, the Company did deal directly with the Union or the employees concerning terms and conditions of employment which were not specifically governed by the NECA contract or the Addendum. Thus the Company informally discussed and resolved grievances with the Union, and granted benefits to the maintenance electricians which were available to company employees, but not to other Lowry or noncompany employees. It is also significant that the Company did not, by subcontracting the electrical maintenance work, manifest a desire to relinquish control over that work, the employees performing that work, on their terms and conditions of employment. Rather as discussed, the Company subcontracted the work to avoid the appearance of granting a higher wage rate to the electricians than to other maintenance crafts, although the Company was well aware that by subcontracting to a union electrical contractor, the electricians would in fact be paid a higher rate than the other crafts. Therefore the evidence demonstrates that the Company and Lowry were joint employers of the maintenance electricians at the Belleville brewery. *Sun-Maid Growers v. NLRB*, 618 F.2d 56 (9th Cir. 1980), is precisely in point. *Sun-Maid*, like the present case, involved a producer (in that case, a raisin processor) who arranged to have its maintenance electricians placed on the payroll of an outside contractor. In affirming the Board's finding that Sun-Maid was the joint employer of the maintenance electricians, the court held as follows (618 F.2d at 59):

> A joint employer relationship exists when an employer exercises authority over employment conditions which are within the area of mandatory collective-bargaining. . . . Here, Sun-Maid controlled the electricians' work schedules, assigned the work and decided when additional electricians were needed. These actions amply support the Board's finding that Sun-Maid was the joint employer of the electricians.

In the present case, all the factors relied on by the court are present. Specifically, the Company controlled the electricians' work schedules (in accordance with its own agreement with the Union), assigned the work to the extent such assignment was necessary, and decided when, how many, and for how long additional electricians were needed. Moreover, as discussed above, the Company exercised authority over employment conditions in other respects, including discipline, granting of benefits, and informal adjustment of grievances.[15]

The next questions presented concern the appropriate bargaining unit and the Union's representative status. The complaint alleges, and the answer denies, that all maintenance electricians employed at the Company's Belleville facility, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act and all other employees constitute a unit appropriate for collective bargaining. The Company contends (Br. 43) that "a unit limited to Lowry electricians working at the brewery is inappropriate in view of the fact that they frequently worked elsewhere, and in view of the fact that Lowry frequently transferred its electricians from other facilities to work at the brewery." The complaint further alleges, and the answer denies, that since 6 August 1980 the Union has been the designated exclusive collective-bargaining representative of the asserted unit, and that the Union has been recognized as such representative by the Company. However, in its brief the Company makes clear that it does not dispute the Union's representative status vis-a-vis Lowry and NECA, albeit in a larger unit. Rather the Company's denial of representative status is based on its denial of joint employer status, and consequent position that it owes no bargaining obligation to the Union.

The General Counsel's unit position presents some problems. First, the General Counsel has presented no evidence that either the Company or Lowry ever recognized the Union as representative of a unit that was defined in the language of the complaint. None of the contracts or related documents that were presented in evidence contain such a unit description. Second, the cases principally relied on by the General Counsel as authority for the asserted unit (*Sun-Maid Growers*, 239 NLRB 346, 352–353 (1978), enfd. 618 F.2d 56, 59–60 (1980), and *U.S. Pipe & Foundry Co.*, 247 NLRB 139, 142 (1980)), stand for the proposition that a larger unit would be appropriate, although under the authority of those cases the Company would nevertheless be obligated to bargain with the Union concerning that portion of the unit for which the Company occupied joint employer status. However, on consideration of the evidence in this case, I find that the General Counsel's position is substantially correct, and that in fact the Company and the Union have historically bargained for the unit as described in the complaint, although they did not define that unit in the same language as the complaint. For some 35 years, the Company and its predecessors recognized, bargained with, and executed collective-bargaining agreements with

[15] *Furniture Distribution Center*, 234 NLRB 751 (1978), principally relied on by the Company (Br. 37–38) is distinguishable on its facts. In that case, Compton performed warehousing and delivery functions for FDC. The Board held that FDC was not the joint employer of Compton's warehousemen and drivers, finding that Compton alone handled all personnel actions including grievances, suspensions and new hiring, and instituted work rules and demonstrated the extent of its control over labor relations by closing the warehouse on one occasion against the wishes of FDC and without consulting FDC. In the present case, unlike *Furniture Distribution Center*, only the alleged joint employer (the Company) exercised day-to-day supervision and direction over the employees involved, including assignment of work and overtime and determining the number of employees needed and when they were needed.

the Union covering only the maintenance electricians at the Belleville facility. The 1975–1979 contract, which as modified was extended by the Company and the Union until August 1980, defined the unit by stating that: "The Employer recognizes the Union as the exclusive bargaining agent for all maintenance electricians at its Belleville, Illinois plant." That unit did not, either before or after 1980, include any of the categories which are excluded from the unit as described in the complaint. Although as requested by the Company, Lowry designated a "foreman" as required under the NECA contract, that foreman was not a supervisor within the meaning of Section 2(11) of the Act. To the extent that Gerald Warden performed functions that were arguably supervisory, those functions were routine or clerical in nature, did not involve the exercise of supervisory discretion, and comprised only a small portion of his work. Warden spent nearly all of his time performing electrical maintenance, i.e., unit work. Neither Voss nor any other company supervisor or engineer was ever included in the bargaining unit. The Company's other maintenance employees and its production employees were represented by other labor organizations in other bargaining units. It is possible to find, under the authority of *Sun-Maid* and *U.S. Pipe & Foundry*, that since August 1980 the maintenance electricians were included in a larger unit, i.e., either encompassing all Lowry's employees or all employees covered by the NECA contract. However, in light of the facts in this case, such a finding is not warranted. The maintenance electricians were at all times covered by a separate agreement, i.e., the Addendum, which was negotiated by the Company and the Union and executed by Lowry and the Union. They were covered by the NECA contract by virtue of the agreements among the Company, Lowry, and the Union, and as modified by those agreements. To a significant extent, their terms and conditions of employment, including seniority rights, nature of work performed, starting times, shift differentials, and privileges and benefits, differed from that of other Lowry employees. Contrary to the Company's argument, there was not frequent interchange among the maintenance electricians and other Lowry employees. Throughout the entire period from August 1980 through December 1984, most of the electrical maintenance work was performed by employees who had previously been on the Company's payroll, who worked exclusively at the brewery, and who could not work elsewhere for Lowry because they were not qualified to perform outside work for Lowry. After French died and Valentin retired, they were eventually replaced by employees who had also worked at the brewery on a regular basis. Interchange was substantially confined to those employees who as needed supplemented or replaced the seven maintenance electricians who worked regularly at the brewery. Moreover, in light of the language of the NECA contract, it is questionable whether the maintenance employees could be included in a unit encompassing all Lowry employees or all employees covered by that contract. The NECA contract does not contain an inclusive unit description. However, the contract does provide that: "The Employer shall be a person, firm or corporation whose principal business is electrical contracting." This language indicates that the Union and NECA contemplated that the employer signatories to the NECA contract would be electrical contractors. The Company is not engaged in the business of electrical contracting. The Company, Lowry, and the Union could agree, as they did, that the maintenance employees would be covered by provisions of the NECA contract. However, this agreement would not automatically operate to place the employees in a larger unit, particularly where the joint employer would not qualify as a signatory to the contract. Rather, the language of the NECA contract tends to support the General Counsel's position. Therefore, I find, in agreement with the General Counsel, that the maintenance electricians employed at the brewery, with the indicated exclusions, constitute an appropriate unit for collective bargaining.[16] I further find that at all times material the Union was the exclusive collective-bargaining representative of the unit employees, i.e., the maintenance electricians at the brewery. Those employees were continuously covered by collective-bargaining contracts which contained a union-security clause, and they were union members. Neither the Company nor Lowry disputed that the Union was their representative. Indeed in November 1984, the Company asked Lowry to deal with the Union in that capacity. Rather, the Company's denial of representative status was based on the erroneous premise that it was not an employer of the maintenance electricians.

As the Company was the joint employer of the maintenance electricians in an appropriate unit, and the Union was the exclusive collective-bargaining representative of that unit, it follows that the Company was obligated to recognize and bargain with the Union concerning the terms and conditions of their employment. Therefore the next question presented is whether the Company violated that obligation when it subcontracted the electrical maintenance work to Bienco.[17] The Company contends (Br. 38–40) that assuming arguendo, the Company had a duty to bargain with the Union, the Union failed to act with due diligence because it did not request the Company to bargain until 3 January 1985, after the Company subcontracted the maintenance work to Bienco. Therefore, the

[16] Assuming arguendo that a larger unit were appropriate, this would not relieve the Company of its obligation to bargain as joint employer of the maintenance electricians. See *Sun-Maid* and *U.S. Pipe & Foundry*, supra.

[17] The General Counsel contends (Br. 31–32) that the Company's decision to subcontract the maintenance work to Bienco rather than Lowry, even standing alone, was a mandatory subject of bargaining. I agree. The Company's decision involved "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment," *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1974). Therefore, *Fibreboard*, rather than *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), would govern. See also *Whitehead Bros. Co.*, 263 NLRB 895, 898–899 (1982). The General Counsel also correctly points out that the Company's decision turned on labor costs. See *Otis Elevator Co.*, 269 NLRB 891, 892 (1984). However, the Company's decision also involved other changes in terms and conditions of employment, including termination of employees with seniority rights, and substantial reductions or other changes in wages and fringe benefits, including reduction in the base wage rate amounting to much more than $5 per hour. All these changes involved mandatory subjects of bargaining. See *Sun-Maid*, 239 NLRB at 355.

Company argues that the Union waived any right to complain that the Company violated Section 8(a)(5) of the Act. I find this argument without merit. The Company's argument is based on an erroneous premise, because in late December the Union did, through Lowry, submit counterproposals to the Company's demand for a $5-per-hour reduction in the base wage rage. The demand was the only proposal ever submitted by the Company to the Union, either directly or indirectly. It is true that the Union waited for about a month before it responded to the Company's demand, and that the Union failed to offer an explanation for the delay. However, the Company's argument fails for more fundamental reasons. First, the Union was under no obligation to bargain or agree concerning any reduction in wage rates because the Company was bound by a collective-bargaining agreement effective through August 1985. The Addendum, although signed by the Union and Lowry, was negotiated by the Company and the Union and reflected the results of their 1980 negotiations. As a result of those negotiations, the Company and the Union understood and agreed that the maintenance electricians would be covered by wage rates under the NECA contract, except as modified by their agreements on shift differential. The Company reduced its commitment to writing when it agreed with Lowry that the unit employees would be covered by the Addendum, which specifically provided that the unit employees would be covered by the NECA contract except as modified by the Addendum. Thereafter the Addendum was renewed annually in accordance with the agreements between the Company and the Union. Therefore, and by reason of its status as joint employer, the Company was in fact a party to the Addendum, and the Union was not obligated to bargain over terms and conditions that differed from those provided in the Addendum until the Addendum came up for renewal. See *O. Voorhees Painting Co.*, 275 NLRB 779 (1985).[18] Second, even if the Company could lawfully compel the Union to negotiate concerning wage rates, the Company effectively prevented any meaningful bargaining by refusing to meet and deal directly with the Union. The Company and the Union originally negotiated the Addendum, which governed the terms and conditions of employment of the maintenance electricians. Under their agreement, the employees were paid hourly wage rates as provided in the NECA contract. The Company proposed to change that agreement when it demanded a $5-per-hour reduction in the base wage rate. As the Company had originally negotiated the terms of the Addendum, and only the Company was proposing to change those terms, it follows that the Company was an essential party to any negotiations. Instead, the Company presented an ultimatum to Lowry for submission to the Union without giving Lowry any authority to negotiate over the matter. However, LaCombe also made clear from the time he presented the Company's demand that the Company would not meet or deal directly with the Union concerning its demand.[19] In these circumstances, Lowry could function only as a messenger between the Company and the Union. Therefore, assuming that the Company's demand was a mandatory subject of bargaining, the Company violated Section 8(a)(5) of the Act by refusing to meet and deal directly with the Union concerning that demand. It is settled law that face-to-face negotiations between the "bargaining principals" (here the Company and the Union) is "an elementary and essential condition of bona fide bargaining." *Colony Furniture Co.*, 144 NLRB 1582, 1589 (1963); *Redway Carriers*, 274 NLRB 1359 (1985).[20]

Third, the Company effectively precluded any meaningful bargaining when it characterized its own demand as "non-negotiable." Because of this characterization, it is understandable that the Union would be at a loss to present any immediate responses. Fourth, even if the Company's demands were a mandatory subject of bargaining, and the parties bargained in good faith to an impasse, this would have permitted the Company only to unilaterally implement a $5-per-hour wage reduction. The Company could have done this by placing the maintenance electricians on its own payroll. Instead the Company not only terminated its subcontracting arrangement with Lowry, but also terminated employees with contractual seniority rights, and entered into a subcontract with another contractor which provided for wage reductions amounting to substantially more than $5 per hour, as well as loss of employees benefits. All this was done by the Company without giving the Union notice or an opportunity to bargain concerning such matters. In sum, I find that the Company failed and refused to recognize and bargain with the Union, and violated its contractual obligations to the Union by terminating employees with seniority rights, subcontracting the electrical maintenance work to Bienco, reducing wages, and otherwise changing terms and conditions of employment of maintenance electricians employed at the Company's Belleville facility. The Company thereby violated Section 8(a)(1) and (5) of the Act. For reasons which will be discussed, the Company's contention that the complaint should be dismissed for failure to join Lowry and Bienco as parties to this proceeding is more properly addressed to the matter of remedy, and therefore will be discussed in the remedy section of this decision.

[18] Although the Union learned that the Company and Lowry renewed their subcontracting agreement only until the end of 1984, the Union did not waive its rights under the Addendum by failing to protest this arrangement. The Union could properly assume that whatever the term of the subcontract agreement, the Company would continue to abide by the terms of the Addendum, in accordance with their longstanding agreements.

[19] Therefore the Company's argument that the Union did not make a timely request for bargaining with the Company is erroneous because the Company had already infomed the Union through Lowry that it would not engage in such bargaining.

[20] I do not agree with the Company's suggestion at the hearing that the most-favored-nation clause in the NECA contract precluded any meaningful bargaining over wages. The Union did not "adamantly" stand on the NECA contract. Rather as indicated the Union offered to make concessions in the area of wage costs. See *NLRB v. Superior Fireproof Door & Sash Co.*, 289 F.2d 713, 718 (2d Cir. 1961). Moreover the language of the NECA contract indicates that the clause would not be applicable to the Company. The clause (sec. 2.05 of the NECA contract) applies when the Union grants better terms and conditions to "any other Employer in the electrical contracting industry." However, the Company is not engaged in the electrical contracting business.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and at all times material has been a joint employer with Lowery of maintenance electricians employed at the Company's Belleville facility.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All maintenance electricians employed at the Company's Belleville, Illinois facility, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act any all other employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been and is the exclusive collective-bargaining representative of the employees in the unit described above.

5. By refusing to recognize and bargain with the Union as the representative of the unit employees, and violating its contractual obligations to the Union by terminating employees with seniority rights, subcontracting the electrical maintenance work to Bienco, reducing wages, and otherwise changing terms and conditions of employment of maintenance electricians employed at the Belleville facility, the Company has violated and is violating Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom, and from like or related conduct, and take certain affirmative action designed to effectuate the policies of the Act. I find for all purposes, including remedy, that Lowry and Bienco are not indispensable parties to this proceeding. The complaint charges only the Company with unfair labor practices, and the General Counsel requests remedial relief which is addressed to and requires action only by the Company. The relief sought by the General Counsel (Br. 36–37), insofar as pertinent to the operations of Lowry and Bienco, is substantially identical to the remedy which was granted by the Board and approved by the court of appeals in *Sun-Maid*, supra. See also *Hillside Manor Health Related Facility*, 257 NLRB 981, 986 (1981), enfd. mem. 697 F.2d 294 (2d Cir. 1982). Specifically, the General Counsel requests that the Company be ordered to *offer* to reestablish the subcontracting arrangement with Lowry, and that if Lowry is unable or unwilling to reemploy the maintenance electricians and resume its obligations under the subcontract, the Company be obligated to offer reinstatement directly to the maintenance electricians and employ them as part of its own work force. The proposed order would substantially provide for restoration of the status quo without requiring Lowry to resume its subcontracting arrangement. I find, on the authority of *Sun-Maid* and *Hillside*, that the proposed relief is appropriate in this case, and that such relief does not require that either Lowry or Bienco be joined as a party in interest. In *Hillside*, neither the former subcontractor (Environmental) nor the new subcontractor (Blaine) were named as parties in interest, nor was the former subcontractor (Control) in *Sun-Maid* (Sun-Maid terminated its contract with Control and performed the work in question with its own employees. Therefore there was no current subcontractor). Nevertheless the Board in both cases, and the court in *Sun-Maid* granted and approved the proposed remedy, and in the process distinguished *Mobil Oil Corp.*, 219 NLRB 511 (1975), enf. denied sub nom. *Alaska Roughnecks & Drillers Assn. v. NLRB*, 555 F.2d 732 (9th Cir. 1977), on which the Company principally relies (Br. 41–42). They did so for reasons which would also distinguish the present case from *Mobil*. Thus in *Sun-Maid* both the Board and the court pointed out that in *Mobil* the union's alleged representative status was based on a Board election proceeding in which the alleged joint employer was not named as an employer or given an opportunity to participate, contrary to the Board's rules. In *Hillside*, the Board pointed out, as it did in *Mobil* itself, that in *Mobil* "neither the contract termination nor the actual displacement of unit employees was alleged as a violation of the Act;" and therefore the proposed remedy would "require reinstitution of a legitimately terminated contract" with a firm (Santa Fe) which was not a party to the unfair labor practices proceeding and not represented in the proceeding. In the present case, the complaint alleged and I have found that the termination and displacement were unlawful. Moreover, in *Mobil* the recommended order would *require* reinstitution of the contract between Mobil and Santa Fe, i.e., would require action by Santa Fe, whereas in the present case, as in *Sun-Maid* and *Hillside*, the remedy would simply require the named Employer to offer to reestablish the contract. The Company's reliance on *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 233 (1938), is also misplaced. That case stands for the proposition that the Board cannot set aside a collective-bargaining contract on the grounds that the employer unlawfully dominated, interfered with, or assisted the signatory union, unless the union is named as a party in interest in the unfair labor practice proceeding. The Board's Rules and Regulations (Sec. 102.8) have since provided that such a labor organization is a party to the proceeding. However, the Supreme Court's rationale has not been extended to other forms of contractual arrangements, including subcontracting between employers. Thus in *Fibreboard Paper Products Corp. v. NLRB*, supra 379 U.S. at 215–217, the Supreme Court approved the Board's remedial order, which required Fibreboard to resume its former maintenance operation with its own unit employees, although the subcontractor (Fluor) was not named as a party in interest in the proceeding. See also *Syufy Enterprises*, 220 NLRB 738, 741 (1975).

I shall recommend that the Company be ordered to recognize and on request bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees, and to maintain and give full effect to collective-bargaining contracts covering those employees. I shall further recommend that the Company be ordered to offer Gerald Warden, Joseph Poell, Lawrence O'Dell, Elwood Harres, Albert Lorentzen, Tom

Chasteen, and Dave Pusa (the maintenance electricians who were working regularly at the brewery as of December 1984) immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions of employment without prejudice to their seniority or other rights and privileges previously enjoyed, dismissing if necessary anyone who may have been hired or assigned to perform the work that they had been performing prior to 1 January 1985. The Company shall be ordered to effect these offers of reinstatement by first offering to reestablish its subcontracting arrangement with Lowry. If Lowry is unable or unwilling to reemploy the maintenance electricians and resume its obligations under that arrangement, then the Company shall offer reinstatement to the maintenance electricians as part of its own work force. I shall further recommend that the Company be ordered to make whole all the above-named employees for any loss of earnings and benefits they may have suffered by reason of their terminations. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner and amount prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[21] The Company shall also be ordered to reimburse the various trust funds established under the NECA contract for any failure of contributions from Lowry by reason of the Company's unlawful termination of its subcontracting arrangement with Lowry and failure to employ maintenance electricians under the arrangement. In accordance with Board policy, the amount of interest if any due on such payments shall be determined at the compliance stage of this proceeding *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The Company shall also be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay due.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, G. Heilman Brewing Co., Inc., Belleville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to recognize and bargain collectively in good faith with Local Union 309, International Brotherhood of Electrical Workers, AFL–CIO as the exclusive collective-bargaining representative of the employees in the appropriate unit consisting of all maintenance electricians employed at its Belleville, Indiana plant, failing or refusing to honor collective-bargaining agreements applicable to those employees, or unilaterally changing the wages, hours, and other terms and conditions of employment of the unit employees without prior notice to the Union and without affording the Union an opportunity to meet and bargain concerning such matters as such representative.

(b) Terminating maintenance electricians at its Belleville plant in violation of their contractual seniority rights or without affording the Union prior notice and an opportunity to negotiate and bargain concerning any change in subcontracting arrangements and its effect on the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Gerald Warden, Joseph Poell, Lawrence O'Dell, Elwood Harres, Albert Lorentzen, Tom Chasteen, and Dave Pusa immediate and full reinstatement to their former positions of employment in the manner set forth in the remedy section of this decision, dismissing if necessary anyone who may have been hired or assigned to perform the work that they had been performing prior to 1 January 1985 or, if their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights, privileges, and benefits previously enjoyed, and make them whole for any loss of earnings and benefits they may have suffered by reason of their unlawful terminations, as set forth in the remedy section of this decision.

(b) Maintain and give full effect to collective-bargaining agreements covering the unit employees, including the maintenance work supplement to the prevailing inside agreement between the Union and Lowry Electric Company and the memorandum of understanding governing seniority rights, unless and until a new agreement or agreements are negotiated or the employees bargain in good faith to an impasse in accordance with the requirements of Section 8(d) of the Act.

(c) Reimburse the various trust funds established under the prevailing basic inside agreement between Southwestern Illinois Division, NECA, and the Union, for any failure of contributions from Lowry Electric Company by reason of Respondent's unlawful termination of its subcontracting arrangement with Lowry and failure to employ maintenance electricians under that arrangement.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Belleville, Illinois place of business, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained

[21] See generally *Isis Plumbing Co.*, 138 NLRB 716, 171–721 (1962).

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Howard University and Howard University Hospital *and* American Federation of State, County and Municipal Employees, Council 20, Local 2094, AFL–CIO. Case 5–CA–18268

August 26, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On a charge filed August 8, 1986, by American Federation of State, County and Municipal Employees, Council 20, Local 2094, AFL–CIO, the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint December 22, 1986, against Howard University (Respondent University) and Howard University Hospital (Respondent Hospital). The complaint alleges that the Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide certain information to the Union that it requested in relation to processing a grievance to arbitration.

On August 21, 1987, all parties entered into a stipulation of facts and filed a motion to transfer the proceeding to the National Labor Relations Board. The parties agreed to waive a hearing before or a decision by an administrative law judge and to submit the case directly to the Board for findings of fact, conclusions of law, and an order based on a stipulated record consisting of the complaint and answer, other formal Board documents, and stipulation of facts with attached exhibits.

The National Labor Relations Board has delegated its its authority in this proceeding to a three-member panel.

On September 28, 1987, the Board approved the stipulation and ordered the proceeding transferred. The General Counsel and the Charging Party filed briefs.

On the basis of the stipulation of facts, the briefs, and the entire record in this proceeding, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent University is chartered by the Federal Government and, as a part of its operation, operates the Respondent Hospital, engaged as a health care institution providing inpatient and outpatient medical and professional services to the community. During the 12 months ending October 31, 1986, the University derived gross revenues in excess of $1 million and purchased and received goods valued in excess of $50,000 directly from points outside the District of Columbia. Additionally, during the same period, the Hospital derived gross revenues in excess of $250,000 and purchased and received goods valued in excess of $50,000 directly from points outside the District of Columbia.

The parties stipulated, and we find, that the Respondents are employers engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act, and that the Hospital is a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that American Federation of State, County and Municipal Employees, Council 20, Local 2094, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Respondent[1] and the Union have been parties to a collective-bargaining agreement effective from October 1, 1985, to September 30, 1988. The agreement contains a grievance-arbitration procedure.

On October 15, 1985, Carolyn J. Beale, a medical technologist in the unit covered by the agreement, performed compatibility tests on five units of blood that were to be transfused to patient Frances Jackson. During the transfusion Jackson suffered a reaction and died.

The Respondent's investigation showed that two of the five units Beale reported as compatible were incompatible. Based on this investigation Beale was terminated on November 6, 1985.

The Union grieved the discharge and an arbitration hearing was scheduled for May 28, 1986, but eventually was postponed indefinitely.

On May 19, June 2, and July 30, 1986, the Union requested, in preparation for the hearing, inter alia, physicians' and nurses' progress notes and the autopsy protocol report.[2] The Respondent refused to provide the information without written permission, claiming that the information was confidential and privileged.

It is stipulated that in determining the nature and severity of discipline the Respondent considers: (1) the nature and severity of the error, (2) any mitigating factors, and (3) the skill and experience level

[1] Unless otherwise noted the Respondent to the Respondent Hospital.

[2] The physicians' and nurses' progress notes are a daily record of the case and treatment administered, the results of diagnostic tests, and general observations of the patient's status. The autopsy protocol report sets forth the condition of all the organs examined during the autopsy. It contains the nature of any infirmities that the patient may have had at the time of death and that may have caused or contributed to the death.

of the employee. The consequences of the error are also taken into account.

B. *Discussion*

The Union and the General Counsel contend that the information is necessary and relevant to the Union's duty to represent the grievant in arbitration. The Respondent's answer denies the information's relevance and also submits that it is not permitted to divulge the information because the documents are "privileged and confidential." The Respondent's belief is apparently[3] based on its two written policies and procedures for the preparation and maintenance of medical records. The policies are premised on the statutory physician-patient privilege found in D.C. Code § 14–307[4] and the District of Columbia Municipal Regulations, 22 D.C.M.R. *Public Health & Medicine*, § 2216.2.

The policies of the Respondent provide for release of the medical records or information from the records on written authorization of the patient, court order, subpoena, or statute.

The General Counsel correctly argues that D.C. Code § 14–307(a) applies only to in-court evidentiary disclosures. *Doe v. DiGenova*, 642 F.Supp. 624 (D.D.C. 1986). Further, autopsy reports do not fall into the category of records relating to diagnosis and treatment that may be privileged. *Eureka-Maryland Assurance Co. v. Gray*, 121 F.2d 104 (D.C. Cir. 1941). Additionally, the Respondent's own rules permit disclosure where required by "statute." The relevant statute here is the National Labor Relations Act, and it is well established that an employer has an obligation to provide a union with information relevant to its duty as a representative of the employees. *Washington Gas Light Co.*, 273 NLRB 116 (1984). This obligation extends to information required by the union to process a grievance. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Designcraft Jewel Industries*, 254 NLRB 791 (1981). The standard for the relevancy of the information sought by the Union is set forth in *W-L Moulding Co.*, 272 NLRB 1239 (1984), in which the Board citing *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969), stated, "The Board's only function in such situation is in 'acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'"

We find that the information contained in the doctors' and nurses' progress notes and autopsy protocol report are clearly relevant and that it "would be of use to the union" in determining whether Beale's error was the direct cause of the death of the patient. Relevancy, however, is not the sole factor in deciding whether the information must be produced by the Respondent. Although the requested information may be relevant, an employer may not be required to produce it if such production violates confidentiality and privilege. The Respondent's claim of confidentiality must be balanced against the Union's need for relevant information in pursuit of its role as a representative of the employees. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979).

In support of its claim of confidentiality, the Respondent refers to D.C. Code § 14–307. But, as shown, that section refers to "in court" disclosures and specifically excludes autopsy reports. The Respondent further relies on its own policies regarding disclosure. However, these policies, aside from being self-imposed, recognize that in some circumstances medical records and information are disclosable. One of the circumstances is whem it would be required by statute. The party asserting confidentiality has the burden of proof. *McDonnell Douglas Corp.*, 224 NLRB 881 (1976).

We find that the Respondent has failed to carry its burden of proof. The policies under which the Respondent claims confidentiality are not absolute but, rather, provide for disclosure in certain circumstances. The necessity of the Union to evaluate a grievance and adequately represent Beale in an arbitration hearing requires disclosure of the doctors' progress notes, nurses' progress notes, and autopsy protocol report.[5]

For the reasons set forth above, we conclude that the Respondent's failure to provide the Union with the doctors' progress notes, nurses' progress notes, and autopsy protocol report violated Section 8(a)(5) and (1) of the Act. We note that although confidentiality here is not absolute, the Respondent has an interest in ensuring that the information contained in the medical records sought is not divulged to individuals other than those necessary for the evaluation and preparation of Beale's grievance. Thus, in accord with the General Counsel's and the Union's suggestions, our remedy shall direct that the Union refrain from any disclosure of the information to unnecessary persons.

[3] The Respondent has not filed a brief.

[4] The D.C. Code § 114–307(a) provides:

> In the Federal courts in the District of Columbia and District of Columbia courts a physician or surgeon or mental health professional as defined by the District of Columbia Mental Health Information Act of 1978 . . . may not be permitted, without the consent of the person afflicted, or his legal representative, to disclose any information, confidential in its nature, that he has acquired in attending a client in a professional capacity and that was necessary to enable him to act in that capacity, whether the information was obtained from the client or from his family or from the person or persons in charge of him.

[5] *LaGuardia Hospital*, 260 NLRB 1455 (1982).

IV. THE EFFECT OF THE UNFAIR PRACTICES ON COMMERCE

The activities of Howard University and Howard University Hospital set forth in section III, above, occurring in connection with operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Howard University and Howard University Hospital are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. American Federation of State, County and Municipal Employees, Council 20, Local 2094, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act of certain employees in the following appropriate unit:

> Regular, probational staff, temporary and part time employees of Howard University Hospital excluding: security and nursing employees, covered by other contracts, personnel employees, trainees, requisition and student employees, supervisory, confidential office employees, administrative and managerial employees, physical and occupational therapists, and social services and pharmacy professional employees.

4. By failing and refusing to furnish to the Union doctors' progress notes, nurses' progress notes, and the autopsy protocol report as requested in relation to the grievance of Carolyn J. Beale, the Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist and take certain affirmative action that we find necessary to effectuate the policies of the Act.[6]

[6] We deny as unnecessary the General Counsel's request for a visitatorial provision. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

ORDER

The Respondent, Howard University and Howard University Hospital, Washington D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing or failing to bargain in good faith with the Union by failing to furnish to the Union information relevant to the processing of grievances or the administration of the collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish the Union the doctors' progress notes, nurses' progress notes, and autopsy protocol report on patient Frances Jackson; provided that on receipt of these medical records the Union, its officers, agents, members, and attorneys shall not divulge the information to any other persons who are not involved in or necessary to the resolution of the grievance in question.

(b) Post at its facility in Washington, D.C., copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with the American Federation of State, County and Municipal Employees Council 20, Local 2094, AFL–CIO by refusing to furnish information relevant to the processing of grievances or the administration of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request furnish the Union the doctors' progress notes, nurses' progress notes, and autopsy protocol report on patient Frances Jackson; provided however, that on receipt of these medical records the Union, its officers, agents, members, and attorneys, shall not divulge the information to any other persons who are not involved in or necessary to the resolution of the grievance in question.

HOWARD UNIVERSITY AND HOWARD UNIVERSITY HOSPITAL

Star Video Entertainment L. P. *and* Production, Merchandising and Distribution Employees Union, Local 210, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO, Petitioner. Case 22–RC–9934

August 31, 1988

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

The National Labor Relations Board has considered objections to an election held May 13, 1988, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 8 for and 15 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations, and finds that a certification of results of election should be issued for the following reasons.

As indicated above, an election was held by secret ballot on May 13, 1988.[1] The Petitioner filed timely objections to the election on May 18.[2] The Regional Director, by letter dated May 20, notified the Petitioner of the requirement that evidence in support of objections to an election be submitted in accordance with Section 102.69(a)[3] and that the deadline for submission of supporting evidence was May 26. The Petitioner failed, however, to submit evidence by that date. Although noting the Petitioner's submission of evidence on June 2, the Regional Director issued his report recommending dismissal of the Petitioner's objections for failure to proffer timely evidence in support of the objections.

The Petitioner's attorney contends,[4] inter alia, that on May 27, the day following the Regional Director's deadline, a Board agent granted the Petitioner an additional 48 hours to submit the names and addresses of witnesses and set aside June 3 as the date he would take statements from the Petitioner's witnesses. The Petitioner's attorney stated that he immediately contacted the Petitioner and advised it to present the names and addresses of witnesses within 48 hours. Despite this additional time, however, the Petitioner did not submit any evidence in support of its objections until June 2.[5]

As of September 29, 1986, the Board revised its Rules and Regulations regarding the time periods in which to file documents with the Board, including the submission of evidence in support of objections to an election. In pertinent part, Section 102.69(a) was revised to increase the time period allowed by the rule for the filling of objections to an election and the submission of evidence in support of objections from 5 to 7 days. These revisions, along with an explanatory statement, were published in the Federal Register on July 1, 1986.[6] In so doing, the Board put all parties on notice, with full explanation, that the new rule would be strictly applied. The Petitioner's argument that the Regional Director mechanically applied the rule is particularly unpersuasive in light of the additional time granted by the Board agent.[7]

For these reasons, the Board adopts the Regional Director's recommendations and issues a certification of the election results.

CERTIFICATION OF RESULTS OF ELECTION

It is certified that a majority of the valid ballots have not been cast for Production, Merchandising and Distribution Employees Union, Local 210, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, and that it is not the exclusive bargaining representative of the unit employees.

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[1] All dates are in 1988 unless otherwise specified.

[2] The Petitioner's objections were filed in accordance with Sec. 102.69(a) of the Board's Rules and Regulations which states, in pertinent part:

> Within 7 days after the tally of ballots has been prepared, any party may file with the Regional Director an original and five copies of objections to the conduct of an election or to conduct affecting the results of the election, which shall contain a short statement of the reasons therefor.

[3] Sec. 102.69(a) states, in pertinent part:

> Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections.

[4] The Petitioner's attorney submitted an affirmation of certain facts that are not challenged in the record.

[5] The Petitioner's attorney, in his affirmation, states, "[u]pon information and belief, the message was misunderstood by the Petitioner's business agent . . . ."

[6] 51 Fed. Reg. 23744 (1986).

[7] In response to the Petitioner's argument that affidavits were to be taken June 3, it is obvious that the submission of names and addresses within the 48 hours granted by the Board agent was a prerequisite to the taking of statements, both because the Petitioner had already missed the previous deadline and because the Board agent specifically requested the names and addresses of witnesses who were to give statements on June 3. In fact, as indicated above, the Petitioner's attorney acknowledges the terms of the Board agent's extension of time.

Ohio Masonic Home *and* District 1199, WV/KY/OH, National Union of Hospital and Health Care Employees, AFL–CIO. Case 9–CA–24009

August 31, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On August 14, 1987, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

Relying on *Tri-County Medical Center*,[2] the judge found, and we agree, for reasons explained below, that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing its no-access rule concerning off-duty employees.

The Respondent's rule prohibits off-duty employees "from entering [its] premises to engage in publicly hostile or adverse confrontations." Eight days after the rule was publicized, and shortly before contract negotiations were to begin, employees marched to the Respondent's administration building in an attempt to meet with management officials about resident care issues and employee working conditions.[3] The Respondent thereafter issued written reprimands for violating its rule to those off-duty employees who participated in the march.

In *Tri County*, the Board stated that a no-access rule concerning off-duty employees is valid only if it:

> (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

In the instant case, the judge found that the rule is prima facie invalid because it excludes off-duty employees from all areas of the Respondent's premises and is maintained and enforced for the purpose of preventing a repeat of employee marches on the administration building. The judge also found that the rule is ambiguous because it does not advise employees of what conduct is prohibited and the Respondent can easily ban any statutorily protected activity it decides is a publicly hositile or adverse confrontation.

Generally, the Board has applied the principles of *Tri-County* to those situations where off-duty employees engaged in organizational activities.[4] However, we agree that *Tri-County* should apply here, even in the absence of organizational activities, because the Respondent's rule is so overly broad and vague that it could be interpreted to prohibit any type of statutorily protected activity, including organizational activity. Furthermore, the ambiguity of the rule tends to chill protected concerted activities because employees cannot discern what type of activity will be prohibited and, therefore, may avoid engaging in organizational activities out of fear of being disciplined. Thus, the rule here effectively precludes employees from engaging in organizational activities.[5] Accordingly, we conclude that in circumstances where, such as here, an employer promulgates a no-access rule concerning off-duty employees, which, under a reasonable interpretation, could interfere with employees' organizational activities, the legality of that rule will be analyzed under the principles of *Tri-County*. In this case, inasmuch as the rule could interfere with employees' organizational activities, and because, as the judge found, and we agree, that it does not meet the first and third criteria of *Tri-County* and the Respondent's business reasons are insufficient to warrant its existence, we find that the Respondent's maintenance and enforcement of its rule violates Section 8(a)(1) of the Act.[6]

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] 222 NLRB 1089 (1976).

[3] Off-duty employees had engaged in similar marches on six other occasions. The judge found, and we agree, that the employees were engaged in protected concerted activities.

[4] See *Orange Memorial Hospital*, 285 NLRB 1099 (1987); *Woodview Rehabilitation Center*, 265 NLRB 838 (1982).

[5] The Respondent's argument that its no-access rule was not promulgated to restrict union solicitation and other traditional organizational activity, nor applied to any such activity, misses the point. The issue is whether the rule, as written, would encompass any such activity. It is the potentially far and overreaching nature of the rule inherent in its broad and ambiguous language that offends, not whether the particular conduct to which it here was addressed involved organizational activity.

[6] Member Johansen agrees with his colleagues that the Respondent's maintenance and enforcement of its vague and overly broad no-access rule violates Sec. 8(a)(1) because it neither limits access solely to interior or other working areas nor applies to all off-duty employees seeking access to such areas for any purpose. Further, he agrees that the Respondent has not demonstrated that the rule is supported by legitimate business justification. Member Johansen finds it unnecessary, however, to comment on what specific union acitivity is chilled by a rule where *all* protected activity is prohibited because any such distinction would be unfounded in precedent. See, e.g., *Independent Stations Co.*, 284 NLRB 394 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ohio Masonic Home, Springfield, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Raymond D. Neusch, Esq., for the General Counsel.
Dean E. Denlinger, Esq., for the Respondent.

DECISION

CLAUDE R. WOLFE, Administrative Law Judge. This case was tried before me at Springfield, Ohio, on 16 June 1987 pursuant to charges filed and served on 18 February 1987 and complaint issued on 31 March 1987. The complaint alleges that Ohio Masonic Home (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing the following rule since on or about 18 August 1986:

> Off duty employees may not enter the home's premises to engage in publicly hostile or adverse confrontations.

Respondent admits maintaining and enforcing such a rule, but denies such conduct violated the Act, and proffers the following affirmative defenses:

> The Employer maintains a nursing home consisting of both buildings and grounds, all of which are used by its residents.
>
> Both the residents and their families expect that the premises, including buildings and grounds, can be used quietly, peacefully and serenely. The average age of the residents is 83, with many residents in their 90s and over 100. Many of them are frail.
>
> The rule which the General Counsel claims is illegal only prohibits "publicly hostile or adverse confrontations" on the Home's premises. This restriction is essential to provide the residents peace, rest, and serenity that they expect and are entitled to.
>
> Peace, rest and serenity throughout the buildings and the grounds are precisely what the Home produces for its customers.
>
> The existence of the rule is subject to the grievance and arbitration procedure under the Collective Bargaining Agreement, Articles XVII and XVIII. The Board policy for deferral to arbitration applies in this case.

On the entire record, and after considering the posttrial briefs of the parties, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is an Ohio corporation engaged in the operation of a nursing home in Springfield, Ohio, providing medical and professional care services for the elderly. During the calendar year ending December 31, 1986, Respondent, in the course and conduct of these business operations, derived gross revenues in excess of $100,000. During the same period of time, Respondent, in the course and conduct of these business operations, purchased and received at its Springfield, Ohio facility products, goods, and materials valued in excess of $5000 directly from points outside the State of Ohio. Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent and the Union have been party to collective-bargaining agreements covering Respondent's service and maintenance employees since 1973.

On 29 July 1986,[1] Respondent amended its written administrative policy by adding the following to a list of "Offenses which require disciplinary action":

> Off-duty employees may not enter any buildings or work areas for any activity which is not closely related to or a part of an employee's job. Off-duty employees may not enter the Home's premises to engage in publicly hostile or adverse confrontations. These activities are threatening to the residents and are inconsistent with sympathetic care for the elderly.

It is the second sentence of this instruction that is alleged as an unlawful restriction on access to the premises. Thomas D. Scott, Respondent's administrator, explains the reason for this amendment was "[d]emonstrations and threats of demonstrations that bec[a]me so prominent that it was affecting very seriously the well being and attitude and security of the residents who live in the home. We felt obligated to curtail that sort of activity for everyone's benefit." Joyce McGonigal, the assistant administrator, agrees that this new restriction on access was caused by frequent demonstrations. She explains that these demonstrations consisted of large groups of employees walking to the administration building for the purpose of presenting their protest of actions taken by Respondent. This, she states, caused too much confusion for the administrative staff and especially for the elderly residents of the home.

Off-duty employees did, under the leadership of union delegates,[2] several times gather in the home's parking lot in groups ranging from 50 to 100 employees. From there they proceeded in a column of twos to the administration building and attempted to meet with management. These processions, which Respondent calls marches, from the

[1] All dates are 1986 unless otherwise stated.

[2] Delegates for the Union involved here perform the same functions as employees denominated stewards in other unions.

parking lot, past buildings lodging residents who, I find, could observe them if they chose to look out the window, and continuing to the administration building, took place six times, once in August, once in October, and twice in November 1985, and once in August and once in September 1986. There is some testimony by union delegates that these events were conducted with such decorum that one could hear a pin drop when the employees involved were in or at the administration building. I have considerable doubt that a group of 50 or more employees bent on seeking redress for their perceived grievances were that quiet. On the other hand, it does not appear that the conduct of the participants was unusually boisterous, offensive, or uncontrollable. Administrator Scott does testify to a couple of marches that had television coverage as instances where the employees involved were somewhat vociferous and given to chanting their demands. Scott further testifies that when the first march occurred on 27 August 1985, he was called from a meeting with Respondent's board to meet with the participating employees who had entered the building's lobby. According to Scott, there was considerable noise and hostility when he met with them for from 25 to 40 minutes and discussed the new rules prohibiting smoking in residents' rooms and eating in patients' rooms. He advised them Respondent wanted to meet with a union representative rather than an unruly mob. The group dispersed without unusual incident. After this first march, each succeeding march ended at the door of the administration building when Respondent's security officer advised the participants that neither the administrator nor the assistant administrator would meet with them. I have noted that it is unlikely the demonstrations were attended by absolute silence. On the other hand, Respondent's evidence that the congregation of employees was an "unruly mob," as Scott characterized it, consists only of general claims of considerable noise and hostility that do not warrant a finding the characterization was correct. On the whole, it seems to me that given the television coverage of a couple of the processions, which has been known to incite some of those pictured to perform for the camera, together with the strong feelings of the employees involved, it is most probable some of the employees did indeed voice their complaints in more than moderate terms, tone, and volume. It is impossible to discern from the evidence before me exactly how loud the employees were or exactly what they said, but I am persuaded their behavior fell somewhere between the pindrop quiet and unruly mob opinions expressed by witnesses for the opposing parties. I conclude, given the emotional content usually present in such confrontations, that there were some strong statements made by both employees and management at one point or another during the demonstrations but, as Scott concedes and I have previously noted, even in the presence of television coverage employee conduct was not overly boisterous or uncontrollable.

The new rule was announced to the Union by letter of 31 July 1986, 8 months after the last previous march. The reason for this timing, I am persuaded, was that the Union had requested negotiations on a new agreement, those negotiations were about to get underway, and Respondent feared a resumption of the marches. That expectation was met by a march on 7 August. Thereafter, Respondent issued written reprimands to the participants. The reprimands quoted the new rule and characterized the employees' conduct as publicly hostile, adversely confrontational, threatening to the residents, and inconsistent with Respondent's obligation of providing sympathetic care for the elderly. The reprimands were grieved under the collective-bargaining agreement. Respondent denied the grievance, and the Union did not pursue it to arbitration.[4]

Tri-County Medical Center,[3] on which the General Counsel relies, explains that a no-access rule concerning off-duty employees is valid only if it "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity," and that "except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid." Respondent's rule is ambiguous and does not meet criteria (1) and (3). Moreover, it is prima facie invalid because it bars entry to all areas of the facility's premises, and because it is maintained and enforced for the purpose of preventing a repeat of the employee marches on the administration building. The marches marshaled by union delegates were protected union and concerted activity for the purpose of pressing employee complaints about working conditions.

Respondent sets forth its view that it has compelling business reasons for the no-access rule as follows:

> There are three compelling business reasons that require the Home to prohibit public, hostile confrontations on its grounds by off-duty employees. First, the Home's product is a peaceful, secure home for the elderly, and it is obligated to provide that atmosphere for its residents. Second, the Home provides daily care to the frail, elderly residents, and it must protect the residents from activity that disturbs them or interferes with their care. Third, the Home is financially dependent on the support of Ohio Masons, both as financial contributors and as the only source of future residents. Hostile public activity on the grounds by the Home's employees threatens the Home's ability to continue receiving the Masons' financial support and to attract new residents. The rule is necessary for these business reasons and is a valid restriction on off-duty employee access to the property.[4]

Administrator Scott relates that of the 409 residents, 264 are ambulatory, the average age is 83, 82 residents

[3] 222 NLRB 1089 (1976).

[4] The deferral to grievance and arbitration defense raised by Respondent in its answer to the complaint was expressly withdrawn by Respondent in its posttrial brief "in the interest of finally establishing the validity of its rules." The General Counsel contends deferral is inappropriate. Inasmuch as no party requests deferral, its appropriateness in this proceeding need not be determined.

are between 90 and 100 years of age, 2 are over 100, 100 are between 85 and 89, 168 are 75 to 84, 44 are 65 to 74, and 13 are less than 64. To gain admission to the home, a resident must be a member of a Masonic Lodge or a member's spouse, must be sponsored by an Ohio Masonic Lodge, and must surrender 90-percent of his or her current and future assets to the home. In return, the resident receives total lifetime care as well as funeral and burial expenses.

Respondent's premises consist of between 400 and 450 acres. Of this, about 120 acres are the site of Respondent's buildings of which four are occupied by residents. This site also includes outdoor parking, large grassed and wooded areas with benches and picnic tables, and a cemetery for residents. There are benches in the cemetery. The open areas, with the probable exception of parking lots, are regularly frequented by ambulatory residents. Respondent argues that all the home's premises is one big patient care area. This view is also held by Dr. David Dienenfeld, who is an assistant professor of psychiatry and the director of the Division of Geriatric Psychiatry at the University of Cincinnati and whose curriculum vitae[5] clearly demonstrates that he is an expert witness on geriatric psychiatry as the parties stipulated. Dr. Dienenfeld visited the home on 22 May 1987, toured the facilities, and interviewed four of the residents presented by Respondent as individuals who might have suffered ill effects from the employee demonstrations and who were articulate enough to express their views to Dr. Dienenfeld. Dr. Dienenfeld concluded and testified that the resident care area of the home included the grassy and wooded areas as well as the buildings. In so concluding he noted there were many residents on the grassy area when he was there, and further explained that in his view residents are receiving the care of the facility even when no one is giving them direct service because the residents are provided with a reassuring psychological atmosphere of comfort, safety, and containment of the entire facility. Dr. Dienenfeld emphasizes that each of the residents he spoke to spontaneously referred to the home as "our home" and told him they considered the home to be the property of a community of Masons to which they elected to belong. He further states the fact the residents made the single payment for life care created a sense of ownership and community he had not seen in other systems where people pay monthly and can leave at will. He summarizes, "So, there's both the sense of commitment that results from the single payment system and a sense of ownership and community that results from the affiliation of the home with the Masons to whom these residents belong." Dr. Dienenfeld further testified it was his opinion any hostile or adversary conduct on Respondent's premises would have a deleterious impact on residents. As a reason for that opinion, he recites that, as a general rule, hostility or discord in the care system of a controlled community has an impact on the residents of the community who rely on the caretakers, and this impact is shown by anxiety, worry, or depression to some degree. He continues that the four residents he spoke to experienced worry, anxiety, and fear from either witnessing or hearing of the 1985–1986 employee processions. Many of their fears impressed him as beyond those a rational person outside the situation might have. One of the residents feared the Union would take over the home and make residents behave as it wanted them to. Two or three of the four interviewed were concerned there would be a strike, adversely affecting the care provided them. Dr. Dienenfeld stated that, as an expert, he thought that orderly processions of the sort previously conducted by the employees would, if witnessed by residents, be viewed by them as evidence of some tension within the caretaking administration.

In addition to the testimony of Dr. Dienenfeld, Administrator Scott's report that one elderly lady was so upset by one of the employee demonstrations that she could not eat, and some unspecific testimony that other residents were disturbed, Respondent, without objection by the General Counsel, placed a 29 November 1985 note from its medical director in evidence. It reads as follows:

> Re: Stress on the Elderly
>
> The elderly have less resistance to stress than their younger counter parts, it therefore takes less to upset the elderly because of loss of resilience. The residents here realize that they depend wholly on the employees for their care and daily living activities, food, clothing, etc., and when this care is threatened—real or otherwise—it causes severe emotional stress on an already compromise [sic] nervous and physical system.
>
> Rumors, strikes, picketing, marches and other activities of this nature along with the attitudes of the employees that take care of them have pronounced negative effect on the residents who are in the end our primary concern.

One cannot question Respondent's assertion that its product is a peaceful and secure home for the elderly. Nor can it be disputed that the avoidance of disruption of health care operations or the disturbance of patients in health care facilities are legitimate business objectives.[6] There is no evidence that the employee activities that caused Respondent to adopt its current no-access rule in any way disrupted or tended to disrupt health care operations at the home. I am persuaded, however, that the employee conduct giving rise to the rule did and would probably continue to cause some residents a degree of anxiety. This is unfortunate, but I do not believe this result warrants a rule so broad as that maintained by Respondent. It is clearly ambiguous, does not advise employees of exactly what conduct is or will be banned, and leaves to the unpredictable discretion of Respondent the ad hoc determination of exactly what is meant by "publicly hostile or adverse confrontations," and whether the purpose of an off-duty employee's entry onto Re-

[5] R. Exh. 10.

[6] *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978); *Mesa Vista Hospital*, 280 NLRB 298 (1986).

spondent's premises is to engage in such conduct.[7] Moreover, with all due respect to Dr. Dienenfeld's expertise, I do not believe that the interview of 4 of 409 residents and the observation of residents present in the grassy and wooded areas on a single day, together with the provision of benches and tables for their use, is sufficient predicate for his conclusion, and that of Respondent, that the entire 400 or even 120 acres of the premises are a health care area as such areas are contemplated in the various Board and court cases. There is no objective evidence, and I seriously doubt, that a visitation to parking lots by a resident puts him or her in a health care area, or that any resident receives any kind of hands-on medical care in the home's outside areas. Furthermore, while I have no doubt that a feeling of security and equanimity by residents is a desirable thing, I am not persuaded that important protected activities may be proscribed where there is no persuasive showing, as here, that this overall psychological atmosphere has been seriously eroded by the conduct sought to be prohibited.

With respect to Respondent's claim that the rule is necessary to preserve its financial structure, Greg Nelson, a witness with expertise in health care management, opined that hostile relations among the care providers, which I conclude means management versus employees, would have an impact on future business of the home in that it would discourage others from living there. This speculative testimony unsupported by any other evidence falls far short of establishing a reason for the rule on which Respondent can reasonably rely.

Conclusion

Respondent's rule is an overreaction to a perceived threat without giving due weight to employee rights. As the Supreme Court has noted, this is neither surprising nor unnatural.[8] The evidence clearly shows that the rule was enacted in response to protected union and concerted activity by employees, and it is so ambiguous that it could easily be construed as banning any statutorily protected activity that Respondent decided was a publicly hostile or adverse confrontation. Employees have no way of knowing from a reading of the rule exactly what is prohibited. The ambiguity of the rule, the precipitating reason therefor, the exclusion of off-duty employees from all areas of the home, and the failure of Respondent to convincingly show the rule is necessary to avoid disruption of health care operations or disturbance of its residents,[9] or is necessary to preserve Respondent's financial structure, require a conclusion the rule is invalid, and constitutes unlawful interference with and restraint and coercion of employees in the exercise of rights guaranteed them by the Act.

[7] Cf. *Presbyterian/St. Luke's Medical Center*, 258 NLRB 93, 99 (1981); *Solo Cup Co.*, 144 NLRB 1481, 1481–1482 (1963).

[8] *Beth Israel*, supra at 501.

[9] In passing, I note but do not rely on the circumstance that the Board has previously rejected Respondent's contention it was necessary to prohibit the wearing of union buttons in order to protect the health and welfare of it residents. *Ohio Masonic Home*, 205 NLRB 357 (1973).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and enforcing the following rule since 18 August 1986, Respondent has violated Section 8(a)(1) of the Act:

> Off duty employees may not enter the home's premises to engage in publicly hostile or adverse confrontations.

4. The unfair labor practice found above has an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Ohio Masonic Home, Springfield, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing the following rule:

> Off duty employees may not enter the home's premises to engage in publicly hostile or adverse confrontations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule quoted above, remove it from its administrative policy, and advise the employees in writing it is no longer being maintained or enforced.

(b) Post at its offices at or near Springfield copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.[12]

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[12] The circumstances of this case do not warrant the visitatorial clause requested by the General Counsel.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT maintain or enforce the rule set forth in our administrative policy and reading as follows:

> Off duty employees may not enter the home's premises to engage in publicly hostile or adverse confrontations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL rescind the above rule and remove it from our written administrative policy.

OHIO MASONIC HOME

Lenkei Bros. Cabinet Co. *and* United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Cases 8–CA–20157 and 8–RC–13593

August 31, 1988

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On May 23, 1988, Administrative Law Judge Marvin Roth issued the attached decision. The General Counsel filed exceptions[1] and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lenkei Bros. Cabinet Co., Mount Vernon, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election held in Case 8–RC–13593 is set aside, and that the case is remanded to the Regional Director for Region 8 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

[1] The General Counsel excepted only to the judge's findings concerning the no-distribution rules.

Charles Z. Adamson, Esq., for the General Counsel.
Roger L. Sabo, Esq., of Columbus, Ohio, for the Respondent Employer.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Mansfield, Ohio, on November 2 and 21, 1987.[1] The charge was filed on June 8 by United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union). The complaint, which issued on July 31, alleges that Lenkei Bros. Cabinet Co. (Respondent or the Company) violated Section 8(a)(1) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly engaged in unlawful interrogation, solicitation of grievances, promises and grants of benefits, threats of plant closure, and withholding of benefits, creating the impression of surveillance, and maintaining an unlawful no-distribution rule. The Company's answer denies the commission of the alleged unfair labor practices.

Pursuant to a petition filed on February 11 by the Union, and a Stipulated Election Agreement approved on March 2, an election was conducted on April 2 among the employees of the Company in the following appropriate unit:

> All employees, including all sanding employees, sub-assembly employees, hardware employees, finishers, laminating employees, mill machine operators, drivers, journeymen, leadmen and maintenance employees, but excluding all salesmen, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The tally of ballots showed that of approximately 73 eligible voters, 17 voted for and 55 against the Union. One challenged ballot was insufficient in number to affect the results of the election. The Union filed timely objections to the election, numbered 1 through 3, alleging respectively that the Company (1) granted substantial wage and benefit increases on March 1, and improperly influenced employees to change their views regarding union representation, (2) engaged in coercive interrogation on April 1, and (3) restored wage rates and benefits to certain employees prior to the election. On August 10 the Regional Director issued his order directing hearing on objections, order consolidating cases, and notice of hearing. The Regional Director found that the objections, which in part were coextensive with allegations of the complaint, raised substantial and material factual issues that warranted a hearing, and that his investigation disclosed other matters, covered by the complaint, which also warranted a hearing. The Regional Director ordered that the unfair labor practice and representation cases be consolidated for the purposes of hearing, ruling, and decision by an administrative law judge.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. On the entire record in this case,[2] and from my observation of the demeanor of the witnesses, and having considered the briefs submitted by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, an Ohio corporation with an office and place of business in Mount Vernon, Ohio, is engaged in the manufacture of cabinets. In the operation of its business the Company annually receives at its Mount Vernon facility goods and materials valued in excess of $50,000 directly from points outside Ohio. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] All dates are in 1987 unless otherwise indicated.

[2] Certain errors in the transcript have been noted and corrected.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES AND THE OBJECTIONS TO THE ELECTION

In January the Union commenced an organizational campaign among the Company's employees. Then maintenance employee Phillip McElroy testified in sum as follows: About January 30 Mill Machine Area Supervisor Michael Oswald approached him at work. Oswald asked him how he felt about the Union, whether he attended union meetings, whether he signed a union card, and what the union adherents wanted. To all questions, McElroy answered that he did not know. Oswald proceeded to demonstrate his knowledge by naming five employees who attended union meetings, and the dates, times, and locations of union meetings. He did not indicate the source of his information. Oswald testified that he did not talk to any of the employees about the Union prior to February 2, and he specifically denied having the alleged conversation with McElroy. According to Oswald, Company President Bela Lenkei called the supervisors together at work on February 1, and told them that a union was trying to organize the shop. Because February 1 was a Sunday, his testimony must be viewed with some skepticism. In fact, as indicated by the testimony of Production Manager Charles Sesser, the Company knew of the organizational campaign by Friday, January 30. As will be discussed, Oswald's testimony concerning a meeting conducted by Lenkei was demonstrably incredible and inconsistent with Lenkei's testimony. However, McElroy was not a wholly reliable witness. As will be discussed, his testimony was in error concerning the number of meetings for employees conducted by Lenkei, and the dates and locations of those meetings. On balance, as between McElroy and Oswald, I find McElroy to be the more credible witness, and I credit his testimony concerning his conversation with Oswald.

McElroy further testified in sum as follows: During February and March he had some three to five conversations with Production Manager Sesser concerning the Union. Sesser was not his supervisor, but McElroy frequently had to use his office to order parts. Sesser asked him the same questions as Oswald, and also asked who signed union cards. He indicated that he knew when and where union meetings were conducted. He discussed the disadvantages of unions. Sesser said that if the Union was voted in the Company would shut down because they would never stand for the Union. Sesser testified in sum as follows: McElroy came into his office nearby every day to talk, and freely expressed his opinions. McElroy volunteered information about the Union, and indicated that he was opposed to unionization. Sesser did not ask McElroy whether he signed a card or attended union meetings, and did not tell him who signed cards or attended meetings. Sesser testified that he did not know such information, but admitted that he picked up some "hearsay." Sesser testified that he did not talk with McElroy about the plant shutting down if a union came in. He testified that an employee told him that the Union said that Bela could not shut down the plant. The employees asked if this was true. Sesser responded by asking how the plant could function if all the employees went on strike. In contrast to Oswald, I have no reason to question Sesser's overall credibility. Neither version (McElroy's or Sesser's) is inherently improbable. I find that the General Counsel has failed to prove by a preponderance of the credible evidence that Sesser made statements and asked questions as testified to by McElroy. Therefore, I am recommending that paragraph 10 of the complaint be dismissed.

The complaint alleges that at employee meetings about February 13 and March 12, the exact dates being unknown, President Lenkei respectively (1) solicited employee grievances, promised to remedy grievances, and blamed the withholding of a wage increase on the Union's organizing campaign, and (2) told the employees that he wished to make beneficial changes in the shop, such as posting jobs for bid, but could not do so because of the Union. Mill machine operator Andy Lennington testified that about March 21 (the date being suggested by the General Counsel), he attended a meeting of night-shift employees at which Lenkei spoke. Supervisor Oswald was present. Lennington testified as follows: Lenkei answered employees' questions. Employees asked why some jobs were not posted. Lenkei answered that job posting (as provided in the Company's employee handbook) had been disregarded, but jobs would be posted from then on. (According to Lennington, Lenkei explained the matter of job posting at another meeting.) Lenkei did not always give full answers to the employees' questions. Oswald said that there were things that Lenkei wanted to say, but could not because of the union activity. Lenkei said that when he and his brother were partners, they disagreed on many things, and consequently Bela was unable to make changes that he wanted (Bela and Lazlo Lenkei were partners in the business until late January 1987, when Lazlo left the firm about the time the union campaign began. Until then, Lazlo was in charge of plant operations and, consequently, was responsible for personnel matters). On cross-examination by the Company, Lennington testified that he was not sure of the date of the ostensible March 21 meeting, but that it took place before the election.

Phillip McElroy testified as follows: During February and March he attended two meetings of employees in the plant lunchroom, at which Lenkei spoke. About 25 to 30 first-shift employees were present at each meeting. The first meeting took place about 3 weeks before the election, and the second about 1 week before the election. McElroy also attended a dinner meeting at Mazza's Restaurant on Sunday, March 29, at which Lenkei also spoke. Regarding the plant meetings, Lennington testified that Lenkei said basically the same things at both meetings. Lenkei asked the employees for their gripes, and why they did not come to him before going to the Union. Employees asked about new vending machines in the lunchroom. Lenkei said they were looking into the matter, and would be getting new ones. The Company installed new vending machines shortly after the elec-

tion. The employees asked about wages and fringe benefits. Lenkei said he could not do anything about pay increases or benefits because of the election petition. Oswald said that Lenkei could not take questions about benefits because he was not in a position to promise anything. McElroy did not testify about what was said at the dinner meeting. The General Counsel presented four employee witnesses. However, only Lennington and McElroy testified concerning meetings conducted by Lenkei.

President Lenkei testified that on February 5, shortly after his brother left the firm and Lenkei learned of the union compaign, he addressed the employees in groups at the plant. He conducted three meetings for day-shift employees and one for the night shift. He also invited the employees, but did not require them, to attend a dinner meeting at Mazza's on March 29, at which he spoke. Lenkei testified that these were the only meetings that he addressed in connection with the union campaign, although supervisors conducted informal coffee sessions with employees in late March. Supervisors Roger McDonald, Oswald, and Sesser corroborated his testimony in this regard. Lenkei testified in sum as follows concerning the February 5 meetings: After consulting with his attorney, he prepared and delivered a speech (the text was not offered in evidence). Lenkei explained that there was a new situation with his brother gone from the business, and he also discussed the Union. After delivering his speech he called for "questions." He did not refer to "problems" or "grievances." The employees asked whether the Company discontinued the practice of posting job openings for bidding when it started up a second shift in the fall of 1986. Lenkei answered that to his knowledge the practice was not discontinued. He then referred the question to Supervisor Oswald, who was present at the meeting. Oswald said that they had skipped posting several times because of the large number of hires at that time. Lenkei then told the employees that the practice was not discontinued and would be carried on as in the past. The employees also asked about new vending machines. The existing machines did not provide food service. This resulted in particular problems when the Company started up a second shift because lunchwagons did not serve the plant during evenings. In December a petition was circulated and presented to management, requesting improved vending facilities, and asserting that "the present service is not acceptable." The petition was signed by some 67 employees and supervisors. Lenkei testified that on February 5 he told the employees that "we are working on it." Lenkei told the employees, as part of his prepared speech, that the Company customarily gave general wage increases in February or March, and that having assumed his brother's duties, he would look at wages and do what he could. He did not know what he could or could not do, and would have to consult his attorney. Supervisor Oswald testified that Lenkei spoke to the employees in the plant lunchroom on February 5. Lenkei called for questions. One employee asked what if any changes would be made in view of Lazlo Lenkei's departure. According to Oswald, Lenkei, who was obviously upset, asserted that he could not really do anything for the employees, and repeated the same "do's and don'ts" that he had given his supervisors, i.e., that they could not threaten, promise, or interrogate. Oswald's version of the meeting was thus inconsistent with that of Lenkei, and patently incredible.

I credit Lenkei's testimony that he addressed the employees only on February 5 and at the restaurant meeting on March 29, and I also credit his version of the February 5 meeting. The employee witnesses were at best confused about when Lenkei spoke. The complaint had him speaking on or about February 13 and March 12. Andy Lennington, who was completely uncertain, adopted the General Counsel's suggestion that he spoke on or about March 21, but also referred to an earlier meeting when Lenkei discussed job posting. Phillip McElroy, who was also uncertain, had him speaking on or about March 12 and 26. If Lenkei spoke after the election campaign was underway, the Union probably would have monitored his activities in order to enable it to make an informed reply, and therefore would have known when he spoke. This circumstance tends to corroborate Lenkei's testimony that he spoke before the Union filed its election petition. It is also unlikely that, as testified by McElroy, Lenkei would say that he could not do anything about pay increases because of the election petition. It is undisputed that in early March Lenkei summoned the employees individually into his office and informed them of their respective wage increases. As indicated, the Union asserted that the Company interfered with the election by granting the wage increases. The complaint does not allege that the wage increases were unlawful. The Union did not appear at this hearing, and consequently presented no evidence in support of this objection. The Company presented uncontroverted evidence that for 8 or 9 years it has regularly followed a practice of granting employee wage increases in late February or early March. I find that the Union's objection insofar as it pertains to the wage increases is without merit. As indicated, I also find that the fact of the wage increases tends to corroborate Lenkei's version of the February 5 meeting.

Having so found, I further find, in light of the credited evidence, that the Company, by Lenkei, violated Section 8(a)(1) of the Act by soliciting and promising redress of employee grievances in order to discourage support for the Union. Lenkei wanted to know why the employees went to the Union. As found, Supervisor Oswald questioned Phillip McElroy about what the union adherents wanted. Lenkei addressed the employees on February 5 at least in part as a response to the union organizational campaign. Whether he called for "questions" or "gripes," the employees could reasonably infer that they were free to ask about what was in store for them in the future. They asked, and Lenkei did not discourage, such questions. In December 1986 the employees demonstrated their strong concern about food vending machines by petitioning the Company for better service. Nevertheless the Company did nothing about the matter, and said nothing about the matter, until the employees renewed their request at the February 5 meeting. Lenkei then told the employees that the Company was working on it. The Company presented evidence that new vending machines

were installed in May 1987. However, the Company did not present evidence about when the machines were ordered. The inference is warranted, and I so find, that the machines were ordered after the February 5 meeting. I find that by telling the employees that the Company was "working on it," Lenkei impliedly promised the employees that they would get improved vending machine service. Regarding job posting, Lenkei told the employees that the practice was not discontinued and would be carried on as in the past. In fact, as Supervisor Oswald admitted to the employees, and the employees already knew, the Company since the fall of 1986 had not consistently posted job openings. Therefore in fact, albeit not in form, Lenkei promised the employees that from then on the Company would post job openings for bidding.

In *Uarco, Inc.*, 216 NLRB 1 (1974), the Board held as follows:

> . . . the solicitation of grievances at preelection meetings carries with it an inference that an employer is implicitly promising to correct those inequities it discovers as a result of its inquiries. Thus, the Board has found unlawful interference with employee rights by an employer's solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action; the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary. However, it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation or polling about Union sympathies that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer.

See also *Ace Hardware Corp.*, 271 NLRB 1174 (1984). It is of course unlawful for an employer to expressly or impliedly promise or grant benefits to its employees in order to discourage support for a union, regardless of whether such conduct occurs in the context of a solicitation of benefits. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409–410 (1964). Applying the foregoing principles to the facts of the present case, I find for the reasons discussed that the Company promised its employees improved vending machine service and regular job posting and bidding in order to discourage support for the Union, and thereby violated Section 8(a)(1) of the Act. To this extent I find that the General Counsel has proven the allegations of paragraph 7(a) of the complaint. I am recommending that the balance of paragraph 7(a) (blame for withholding wage increase) and paragraph 7(f) of the complaint be dismissed.

Employee Michael Lang testified in sum as follows: About March 25 Supervisor Roger McDonald conducted a meeting of night-shift employees. Some 20 to 30 employees, including Lang, were present. McDonald asked the employees if the Union was their bargaining agent, and what the Union promised them. No one answered. He asked the employees to tell him their problems, and again they did not answer. McDonald said they should have gone to Bela with their problems instead of going to the Union. McDonald said that he did not know where the employees got the idea that Bela could not shut the doors if they tried to bring in the Union; that Bela could shut the doors whenever he wanted. McDonald testified that about March 23 and 24 he conducted "coffee sessions" with the employees. Preparatory to these sessions, the Company provided him with a written outline of what he should say. The outline, which was presented in evidence, stated at one point that: "The Company is not allowed to make promises, nor do we want to make promises." McDonald initially testified that he asked the employees if they had any "grievances." McDonald subsequently sought to back away from this admission, testifying that he only asked if they had any questions. McDonald testified that the employees asked about improved fringe benefits, including an additional week's vacation and an additional holiday. Notwithstanding the above quotation from his outline, McDonald testified that he did not say what could be done with respect to the election. Rather, McDonald testified that he told the employees that "Bela had to confirm all this stuff here and that this was the issues that I'd have to bring up with Bela and if Bela wanted to agree to this he would go from there." McDonald admitted telling the employees that he would relay their concerns to Lenkei. McDonald further testified that the employees asked whether Bela could shut down the plant if the Union came in, and he answered that the Union was not the concern, and that Bela could close the plant anytime he wanted.

McDonald testified that Lang was present at the meeting that he described. Therefore it appears that Lang and McDonald were both testifying about the same meeting. Notwithstanding the contradictions in McDonald's testimony, I am not persuaded that Lang accurately described the meeting. Lang's description of what McDonald said about plant closing suggests that the employees, rather than McDonald, raised the question of whether Lenkei could close the plant if the Union came in. In light of McDonald's detailed testimony concerning discussion of employee grievances, it seems unlikely that, as testified to by Lang, the employees remained silent throughout the meeting. I find that McDonald's admissions, rather than his contradictory self-serving assertions, most accurately reflect what was said at the meeting. The Company conducted these coffee sessions for the purpose of discouraging employee support for the Union. To that end McDonald solicited employee grievances. By promising to refer the employees' requests for improved fringe benefits to Lenkei, and suggesting that Lenkei might act favorably on those requests, McDonald impliedly promised benefits in order to discourage employee support for the Union and thereby violated Section 8(a)(1) of the Act. *Uarco, Inc.*, supra, *Ace Hardware*, supra. However, I find that McDonald did not threaten the employees with plant closure if they selected the Union as their representative. Rather, the employees sug-

gested this possibility, and McDonald correctly answered that Lenkei could go out of business as he wished. See *Jefferson Ready Mix*, 284 NLRB 977, 980 (1987).

Several allegations of the complaint concern alleged statements made by Lenkei in early March, when he individually informed employees of their respective pay raises. Michael Lang testified as follows: About March 5, he was summoned to Lenkei's office. Lenkei informed him of his pay increase. He said that he was aware of the union activity, and that some thought it would be illegal to give raises at that time, but that he saw no problem because the Company always gave raises at that time of year. Lenkei asked Lang if he had any problems. Lang said that he was promised another job opening, but that the job was given to a new employee. Lang also complained that he wanted to get off the night shift. Lang had previously spoken to Lenkei and Supervisor McDonald about this matter, and indicated that he might quit if he was not transferred. Lenkei answered that he did not like a night shift, but it was necessary because of the Company's increased volume of business. Regarding both matters, Lenkei said that he would check into the situation, and that if Lang did not hear anything in a couple of weeks, he should return to see him. Lenkei later told Lang that the job in question did not involve an increase in pay. Lang still wanted the job, but he did not get it. About April 1 Lang was permanently transferred to the day shift.

In the fall of 1986, the Company started up a second shift with about 20, mostly inexperienced, employees. The Company needed a few experienced employees to work with them. Supervisor McDonald asked employees Lang and Jeff Shandyfelt. Shandyfelt was reluctant because of family considerations. The two employees agreed to alternate on the second shift. However, Lang's wife complained to him about the arrangement. McDonald and Lenkei testified in sum that Lang asked both of them if he could return to the day shift. Lenkei referred the request to McDonald for decision. McDonald testified that when he transferred Lang and Shandyfelt on a rotating basis, he told them that the arrangement would continue until the new employees were trained. After the night-shift employees had 3 to 4 months training and experience, McDonald told Lenkei that he could now consider Lang's request. Lang again raised the matter with Lenkei when Lenkei informed him of his wage increase. Lenkei said he spoke to McDonald, who would make some kind of arrangement. About the second week in March McDonald told Lang that the second-shift employees were now sufficiently experienced, and that he and Shandyfelt would continue rotating on the night shift until the end of March, when they would both return to the day shift. Lenkei did not testify about the matter of the job transfer, and he did not dispute Lang's version of their March 5 conversation.

Andy Lennington also testified about conversations with management concerning his grievances. Lennington had been working for the Company for about 10 months. He worked in the mill machine area, but wanted more diversified experience. Lennington testified that about March 1 he met with Lenkei and Supervisor Oswald in the shop office. Lennington told them that he wanted more diversified experience. Lenkei answered that they would move him around eventually. Lennington did not testify that management initiated this meeting, or that Lenkei asked him for his grievances. Oswald testified in sum that from the time Lennington started with the Company he wanted more diversified experience, but that after the union campaign began he pressed his requests more vigorously. Lennington also complained that Phillip McElroy was not properly servicing his machines. At the time Lennington had an assistant who was learning the work. Lenkei testified that he told Lennington, in sum, that the Company wanted its machine operators to be able to operate most of the machines, and Lennington was not yet trained on all machines, but that job opportunities really depended on the kinds of orders that the Company received. Lennington remained at his job (which involved several machines) until August or September 1987, when he was transferred to other machinery.

The General Counsel alleges that the Company solicited grievances from Lang, impliedly promised him a promotion, and granted him the benefit of a shift transfer, and promised Lennington improved working conditions, all in order to discourage their union activity and sympathy. With respect to Lennington, I find that the testimony of Lennington, Lenkei, and Oswald together reflects the substance of what transpired. I do not find any violation of the Act. Lenkei did not solicit Lennington's grievances. Rather Lennington vigorously pressed his own grievance. Lennington did not get anything he did not already have, or would have gotten whether or not the Union was in the picture. In fact, he was not transferred until long after the election. Lenkei simply stated the Company's policy. In so doing he gave Lennington the same answer he would have given if there were no union in the picture. Therefore I am recommending that the pertinent allegation of the complaint (par. 7(b)) be dismissed. The allegations involving Lang present a closer question. As with Lennington, the testimony of Lang, his supervisor, McDonald, and Lenkei reflects the substance of what transpired. I find in the circumstances that Lenkei did not violate the Act. As found, the Company regularly granted pay increases about March 1 of each year. The amount of the raise varied from one employee to another. The evidence does not indicate whether Lazlo Lenkei personally informed the employees of their respective increases. In the absence of such evidence, I cannot assume that Lenkei's interview with Lang was an unusual procedure which was motivated by the union campaign. These interviews were in the nature of an annual review, in which it would be natural for Lenkei to ask the employees if they had any problems. In sum, the evidence indicates that Lenkei acted as he would if there had been no union in the picture. I further find that by transferring Lang and Shandyfelt back to the day shift, the Company did what it would have done even in the absence of a union. The Company knew that both were unhappy on the second shift, and anticipated that their stay would be temporary. Lang was strongly pressing the matter, and threatening to quit. In these circumstances it is not surprising that the Company acceded

to Lang's request when the time was appropriate. Lang never got the job transfer that he requested. Therefore, I am recommending that the pertinent allegations of the complaint (pars. 7(e) and (g)) be dismissed.

Employee Daniel Daley began working for the Company in 1979, during an economic strike by the Glassworkers Union, which then represented the Company's employees. The Company continued to operate during the strike, and the Glassworkers Union eventually abandoned or lost its representative status. Daley testified in sum as follows: About March 3, Bela Lenkei summoned Daley to his office and informed him of his pay increase. Lenkei mentioned that his brother had left or was leaving. He said that he knew Daley was involved with the Union, and could not understand why. Lenkei asked whether the Union was the way to go, and then proceeded to answer his own question. He said that he would not recognize or bargain with the Union, that "without bargaining you cannot form a union," and therefore, "the Union would probably ask you to go on strike." Lenkei said that he did not understand why the employees went to the Union instead of coming to him personally about their problems. On cross-examination, Daley admitted that Lenkei said he could not make any promises at that time. Lenkei testified that when he met with Daley and the other employees to inform them of their wage increases, he did not ask for their problems, but did invite questions. He testified that he talked about the Union, and discussed the 1979 strike with Daley. Lenkei testified that he did not discuss what would happen if the Union got in, or say that he would not bargain with the Union or shut down before he would bargain. The General Counsel did not cross-examine Lenkei about this or any other conversation or meeting with the employees. I credit Daley, except that I do not credit his testimony that Lenkei said he would not recognize or bargain with the Union. Daley knew that the Company bargained with the Glassworkers Union in 1979, and that the Glassworkers Union did not file unfair labor practice charges. Therefore it is unlikely that Lenkei would have told Daley that he would not recognize or bargain with the present Union. If he had taken this approach, it is probable that Daley would have questioned Lenkei about why 1987 differed from 1979. However, Daley did not do so. Lenkei's remarks were based on objective facts, namely, the events of 1979, when the Company bargained in good faith to impasse, the Glassworkers Union struck, and the strike was unsuccessful. Therefore by reminding Daley of these events, Lenkei did not unlawfully tell Daley that unionization was a futile act. I further find, on the basis of Daley's own credited testimony, that Lenkei did not unlawfully interrogate Daley or make him promises of benefit. In context, it is evident that Lenkei simply posed a rhetorical question, which he proceeded to answer by reminding Daley of the events of 1979. In light of Daley's testimony that Lenkei said he could not make any promises at that time, I find that Lenkei did not make express or implied promises of benefit. Therefore, I am recommending that the pertinent allegations of the complaint (pars. 7(c) and (d)) be dismissed.

At this point I shall return to the January 30 conversation between Supervisor Oswald and employee McElroy. I find that the Company, by Oswald, unlawfully conveyed the impression of surveillance of employee union activity, when Oswald confronted McElroy with specific information concerning union meetings, after McElroy professed that he did not know about such activity. The employees had not, at that time, gone public with their campaign. I further find that the Company, by Oswald, unlawfully interrogated McElroy about his union attitude and activities and that of his fellow employees. Oswald had no legitimate reason for his persistent questioning of McElroy. In light of subsequent developments, it is evident that the Company had an unlawful purpose. Oswald sought to find out what the union adherents wanted, in order that the Company might solicit and promise redress of grievances in order to discourage employee support for the Union. Oswald did not give McElroy any assurance against reprisal. Rather, Oswald followed up his interrogation by unlawfully conveying the impression of company surveillance of union activity. Oswald thereby demonstrated to McElroy that it would do him no good to avoid answering Oswald's questions. In this context the questioning was coercive and unlawful. Therefore, the Company violated Section 8(a)(1) of the Act by interrogation and conveying the impression of company surveillance of employee union activity.

At all times material the Company has maintained work rules, which are set forth in a handbook distributed to the employees. The handbook states in pertinent part as follows:

> I. Typical examples of misconduct by an employee which are considered inexcusable, and shall be cause for immediate discharge or temporary layoff:
>
> . . . .
>
> 6. Solicitation by employees on working time.
> 7. Distribution of literature on company property which in any way interferes with the work.
>
> . . . .
>
> NO SOLICITATION OR DISTRIBUTION
>
> No employee is permitted to solicit membership in any organization or solicit signatures on any petitions or to carry out any other type of solicitation during working time.
>
> No employee is permitted to engage in any distribution of any literature or other materials in working areas.

The evidence fails to indicate that the Company invoked the above rules during the union campaign, or that the Company commented on or explained the rules to its employees.

The General Counsel does not contend that the above restrictions on solicitation are unlawful. However, the General Counsel argues (Br. 11) that "These two no distribution rules when read together are ambiguous enough to give employees the impression that they are not allowed to distribute literature anywhere on Respondent's property at any time." In support of this argument, the

General Counsel relies on *Baddour, Inc.*, 281 NLRB 546, 547 (1986). I do not agree with the General Counsel's argument. In *Baddour*, the rule at issue stated as follows:

> To avoid interruption of work and complications and distractions in our operations, employees are not permitted to sell anything, distribute or post literature or other matter, make speeches or collections, or engage in any kind of solicitation during their working time, or in any way to interfere with the work of other employees.

The Board held that the language following "solicitation" could "reasonably be read as modifying only the proscription on solicitation," thereby indicating a blanket ban on distribution and all other enumerated activities. The present case presents no such ambiguity. The Company's rules deal separately with solicitation and distribution. There are two distinct restrictions on distribution. One prohibits distribution "in working areas." The other prohibits distribution "which in any way interferes with the work." The second prohibition is tantamount to a restriction on distribution of literature during working time. Indeed the prohibition is even narrower because distribution during working time does not always interfere with work. In *Baddour*, the Board indicated that such modifying language is permissible. The rule in *Baddour* was unlawful because the employer failed to make clear that the modifying language applied to activity other than solicitation. In the present case, the modifying language plainly and expressly applies to distribution. In sum, the present rules restrict distribution of literature only in working areas and on working time. Therefore the rules are presumptively lawful. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570–571 (1978).

The above findings cover all allegations of the complaint. No evidence was presented in support of Union Objections 2 and 3. Therefore I am recommending that these objections be overruled. For the reasons discussed, I find that the Company did not interfere with the election by granting wage increases about March 1. Therefore and to this extent Objection 1 is without merit. The remainder of Objection 1, namely, that the Company improperly influenced employees to change their views regarding union representation, depends on the merits of the complaint allegations.

As found, during the period between the filing of the petition and the election, the Company, by Supervisor McDonald, violated Section 8(a)(1) of the Act by impliedly promising the employees improved fringe benefits, in order to discourage employee support for the Union. I find that this conduct was sufficiently serious and substantial to warrant setting aside the election. McDonald spoke directly to some 20 to 30 employees, i.e., about one-third of the unit. He impliedly promised improved benefits, including more vacation and holiday time. These were matters of interest to the entire unit. Moreover, McDonald's unlawful conduct cannot be viewed in isolation. McDonald's conduct was part of a course of unlawful conduct that commenced prior to the election petition, including President Lenkei's captive-audience speeches to all the employees, in which he established the pattern of the Company's antiunion campaign by promising improved vending machine service and regular job posting and bidding. Lenkei's unlawful conduct "lends meaning and dimension" to McDonald's subsequent unlawful conduct. *Blue Bird Body Co.*, 251 NLRB 1481 fn. 2 (1980), enfd. mem. 677 F.2d 112 (5th Cir. 1982).

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By promising benefits to its employees in order to discourage support for the Union, the Company interfered with the Board election held on April 2, 1987.
5. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) of the Act, I shall recommend that it be required to cease and desist and to post appropriate notices. As the Company unlawfully interfered with the conduct of the election on April 2, 1987, I shall recommend that the election be set aside and that a new election be directed at such time as the Regional Director deems appropriate.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Lenkei Bros. Cabinet Co., Mount Vernon, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Expressly or impliedly promising employees benefits or redress of grievances in order to discourage support for United Brotherhood of Carpenters and Joiners of America, AFL–CIO or any other labor organization.

(b) Interrogating employees concerning their union attitude or activities or those of their fellow employees.

(c) Conveying the impression of surveillance of union activity by indicating that it knows the dates, times, and places of union meetings, the names of employees who attended, or other information concerning union activity.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its place of business in Mount Vernon, Ohio, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the election previously conducted on April 2, 1987, is set aside and a new election shall be directed at such time as the Regional Director for Region 8 deems appropriate.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT expressly or impliedly promise you benefits or redress of grievances in order to discourage support for United Brotherhood of Carpenters and Joiners of America, AFL–CIO, or any other labor organization.

WE WILL NOT interrogate you concerning your union attitude or activities or those of your fellow employees.

WE WILL NOT convey the impression of surveillance of union activity by indicating that we know the dates, times, and places of union meetings, the names of employees who attended, or other information concerning union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

LENKEI BROS. CABINET CO.

Stroh Brewery Company *and* Helen L. Cannady. Case 11–CA–12412

August 31, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 15, 1988, Administrative Law Judge William N. Cates issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief. The General Counsel and the Respondent also filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Stroh Brewery Company, Winston-Salem, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

George Carson, II, Esq., for the General Counsel.
Guy F. Driver Jr., Esq. and *C. Daniel Barrett (Womble, Carlyle, Sandridge & Rice)*, of Winston-Salem, North Carolina, for the Company.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This case was tried before me in Winston-Salem, North Carolina, on 17 December 1987[1] pursuant to the 6 August complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 11 of the Board. The complaint is based on a charge filed on 22 June by Helen L. Cannady, an individual (Cannady or Charging Party), against Stroh Brewery Company (Company or Stroh).

In the complaint the General Counsel alleges the Company violated Section 8(a)(1) of the Act on 12 March when Donald L. Steele, the manager of industrial relations at its Winston-Salem, North Carolina plant, instructed employees to cease cooperating with the investigation by Teamsters Local 391 (Union) of a grievance unless Steele was present. The General Counsel alleges the Company violated Section 8(a)(3) and (1) of the Act by discharging Helen L. Cannady and Tammy T. Ware on 1 April because Cannady assisted the Union and because the Company suspected Ware had also assisted the Union.

By its answer the Company admits certain factual matters but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company is an Arizona corporation with a brewery located in Winston-Salem, North Carolina, where it brews beer commercially. During the past 12 months the Company received at its Winston-Salem plant goods and raw materials valued in excess of $50,000 direct from points located outside North Carolina. The Company admits, and I find, it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

The Company admits, and I find, that Chauffeurs, Teamsters and Helpers Local Union No. 391, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act. On 1 November, the Teamsters International Union was readmitted to the AFL–CIO. *Keystone Bakery*, 287 NLRB 17 (1987).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Setting*

Teamsters Local 391 represents the production and maintenance employees at the Company's Winston-Salem brewery. For some 20 years Local 391 has been a party to collective-bargaining agreements (CBA) covering the bargaining unit. Initially the CBAs were with Schlitz Brewing Company, the Company's predecessor and, in the last several years, the CBAs have been with the Company herein.

Helen L. Cannady and Tammy T. Ware were regular part-time employees who worked for Stroh as tour guides at the Winston-Salem brewery. The duties of tour guides include conducting visitors on tours of Stroh's brewery, entertaining guests in the Company's hospitality room (the Strohaus), and working in the Company's gift shop. Tour guides work under the supervision of Hospitality Manager Kay J. Purcell. Purcell reports to Donald L. Steele, manager of industrial relations at Winston-Salem. The tour guides are not included in the bargaining unit represented by Teamsters 391, and they are not represented by any union. As of the hearing, the Company employed nine tour guides. That appears to be one

[1] All dates are in 1987 unless otherwise indicated.

more than the number named on the mid-March shift schedule for the tour guides (G.C. Exh. 7).

During the time relevant here, the Company contracted with Globe Security to provide security guards to control the ingress and egress at the brewery from a guardhouse at the plant entrance. Tourists or other visitors seeking a tour of the brewery are admitted to the facility through a gate controlled by the security guards. Before November 1986, the Company conducted tours beginning at 9 a.m. and concluding with the 4 p.m. tour. Starting in November 1986, and during the relevant time in 1987, hours for the tours, which were 30 minutes each, began at 11 a.m. and concluded with the tour departing at 4:30 p.m. At the conclusion of a tour, the tour guides escort the visitors to the Strohaus and serve them a maximum of three beers each. The tourists also may visit the gift shop at that time.

Stroh publicizes the tours and the tour hours. Its efforts in this respect range from a prominent display on a large billboard by major highways in the area, to tourist brochures, to a posting of the hours on the door of the Strohaus. The Company spends a substantial amount of money in this respect, with the cost of the billboards alone being some $1200 a month. The Company's purpose in having the tours, and in publicizing the hours of the tours, is to foster goodwill and promote its product.

B. *Contentions*

The General Counsel contends the Company fired Cannady because she was cooperating with the Union as a potential witness concerning a grievance over the discharge of Aubrey Martin, a member of the production and maintenance bargaining unit. Cannady was terminated, the General Counsel argues, because the Company "would not tolerate involvement by non-unit employees in its bargaining relationship." Ware was terminated because she was linked to Cannady in the facts the Company supposedly relied on, and for the additional reason that the Company, by Industrial Relations Manager Steele, observed Ware conversing with union representatives in a hallway at the plant. The union representatives, Business Agent Douglas D. Norris Jr. and chief steward Mike Jones, along with Aubrey Martin, were holding a caucus outside a conference room where the Company and the Union had been discussing the grievance regarding Martin's discharge. Steele emerged from the conference room on his way to another office and, according to Ware, observed her talking to the union group. As expressed in the complaint, the General Counsel alleges that the Company discharged Ware because it suspected Ware had assisted the Union. There is no direct evidence of such a suspicion, and Steele, who testified he does not recall seeing Ware in the hallway, denies giving any weight to her alleged presence in his recommendation that she be discharged. For its part, the Company contends it discharged Cannady and Ware because they, in an apparent effort to assure they would not have to work beyond 4:30 p.m., told security guards to cancel the 4:30 p.m. tour. Purcell gathered the facts and reported them to Steele who recommended to his superior at the corporate office in Detroit that the two be discharged. Steele's recommendation was approved, and on Monday, 30 March, Steele gave Cannady and Ware until Wednesday, 1 April, to resign or be terminated. When neither resigned, the Company discharged both.

C. *Material Facts*

1. The allegation of interference, restraint, and coercion

Complaint paragraph 8, in conjunction with the conclusionary paragraphs, alleges that the Company violated Section 8(a)(1) of the Act on 12 March when Industrial Relations Manager Steele "Instructed its employees to cease cooperating in the Union's investigation of a grievance unless a representative of the Company were present during said investigation." The General Counsel's supporting evidence is based on the testimony of Helen Cannady.

The Company's policy is to give eligible employees who desire it a free case of beer each week. Eligible employees obtain the free beer at the Strohaus. As part of their duties, the tour guides, after determining from the eligibility list that the employee is certified to receive the free beer, dispense the free beer to the eligible employees. On 12 March Aubrey Martin entered the Strohaus, told Cannady his clock number, and asked whether he was eligible to receive his free case of beer. Cannady checked the eligibility list, saw that Martin was listed as eligible, and tendered a free case of beer to him.

The Company apparently had recently terminated Martin. Not long after Martin left the Strohaus with the free case of beer Cannady had given to him, Supervisor Don Johnson entered and spoke with Cannady about Martin not being eligible to receive a free case of beer. Cannady advised Johnson she already had given Martin the beer because his name had not been deleted from the eligibility list. Johnson left. The Company terminated Martin a second time over the beer incident and a grievance was filed over this termination. (Presumably a grievance also had been filed over the first termination.)

A grievance meeting (the initial one, apparently) was held about 19 March concerning Martin's free beer discharge.[2] Martin described Cannady's procedure in giving him the free beer. Following the meeting, Business Agent Norris called Cannady and asked whether she was willing to give a statement concerning her dispensing the free beer to Martin. Cannady said yes. Moments later, Manager of Industrial Relations Steele telephoned Cannady and instructed her not to speak with anyone concerning Martin's case unless Steele was present. Cannady explained she already had spoken to someone about the case. Steele said that was fine but in the future not to do so unless he was present. Cannady said okay.

A week later, on 26 March, Norris and Chief Steward Mike Jones came and spoke to Cannady while she was dispensing free beer to employees. Cannady told Norris and Jones of Steele's instructions. Norris said he would

[2] It was on this occasion that the union group stepped into the hallway for a caucus. As Ware was walking by, one of those in the group stopped her for a conversation. While Ware was standing with the union group, Steele emerged from the conference room and walked to the main office. I credit Ware that as Steele emerged he saw her and smiled.

arrange this with Steele. Norris then contacted Steele who offered to stipulate to Cannady's testimony at Aubrey Martin's grievance meeting. Norris testified that at the grievance meeting Steele did so stipulate. Moreover, Steele conceded at the meeting that Cannady had done nothing improper in dispensing the free beer to Martin.

Cannady agreed to assist the Union regarding its processing of the free beer discharge of Aubrey Martin. Assistance offered by nonunit employees to unit employees on a grievance matter is protected activity. *Heritage Manor Center*, 269 NLRB 408 fn. 2, 414 (1984). Steele's unrestricted instruction to Cannady necessarily imposed a limitation on her statutory right to confer with and assist Martin and the Union independent of the presence of a management representative. By Steele's instruction to Cannady, the Company violated Section 8(a)(1) of the Act, as alleged. *Heritage Manor Center*, supra.

2. The discharge of Cannady and Ware

a. *Contentions and background evidence*

Stroh contends Cannady and Ware began telling the security guards to turn away tourists arriving after 4 p.m. The record is not clear on the point, but the evidence suggests the practice began possibly as early as February before Michael E. McSwain, in early March, left his security guard position with Globe Security and joined the Winston-Salem Police Department. Although there is no direct evidence establishing the purpose behind the purported conduct of Cannady and Ware, the Company argues they initiated the practice so they could leave work at 4:30 p.m. rather than having to work until 5 p.m. or later.

Generally there were about three tour guides on duty in the afternoons, with more present if there were special group tours or parties. Cannady testified that when there was no tour at 4:30 p.m. the tour guides left at 4:30 p.m. When she escorted a 4:30 p.m. tour she generally would sign out between 5 p.m. and 5:15 p.m. The Company's records reflect that as late as 16 March Cannady escorted a 4:30 p.m. tour (G.C. Exh. 4). The guides rotated their tours. Because tours would not be taken at the normal times if no tourist was there to escort, the tour guides would not know until around 4 p.m. who would take any 4:30 p.m. tour. When the tour guides worked to 5 p.m. or later, they were paid for whatever time they worked.

So far as the record reflects, the Company's first knowledge that security guards were turning away tourists after 4 p.m., and that Cannady and Ware were responsible for the practice, came on 20 March based on a conversation with security guard Shari L. Taylor. Stroh investigated and terminated Cannady and Ware. Stroh contends that Cannady's proper performance of her job in dispensing the free case of beer to Aubrey Martin on 12 March, and Ware's purported presence with the union representatives in the hallway on 19 March, had nothing to do with their subsequent termination.

As mentioned earlier, the General Counsel contends Stroh seized on security guard Taylor's report as a pretext to demonstrate to its nonunion employees they were not to cooperate with the Union or become involved in the bargaining relationship between Stroh and the Union.

Chronologically, the first background event is described by Margaret W. Wiggins, one of the tour guides. Wiggins could not specify the date, but testified it was after January 1987, and during cold weather. Because the incident occurred while Ware was employed, it apparently took place in either February or March. Wiggins testified that on this occasion she and Ware were in the Strohaus gift shop. Ware answered a telephone call and Wiggins heard her tell the caller "Eleven to four." When Ware hung up, Wiggins told her, "Tammy, it's 4:30. You know better than that." In a kidding fashion, Wiggins added, "Are you trying to get into trouble or something?" Ware's response, if any, is not reported. Ware testified she does not recall the incident, but she does not affirmatively deny it. There is no evidence Wiggins reported the incident to Stroh's management or, specifically, to her immediate superior, Hospitality Manager Purcell.

Wiggins also testified she began to suspect the security guards were canceling some 4:30 p.m. tours when "earlier this year" (again, apparently in either February or March) some tourists informed her that the week before a security guard had informed them, at 4 p.m., that there would be no more tours that day. Again, there is no evidence Wiggins reported this information to Purcell or to anyone else in management.

One guard testified he did turn away tours during this timeframe. Security Sergeant Danny R. Holt testified he turned away tourists between 4 p.m. and 4:30 p.m. on more than three occasions. According to Holt, he began turning away all such tourists after he returned to work following a 1-day illness and security guard Michael E. McSwain told him they were to stop the tours at 4 p.m.[3] Holt worked Monday through Friday from 3 p.m. to 11 p.m. Holt generally testified he treated McSwain's instruction as a standing order which he thereafter followed. Nevertheless, Holt could not recall when McSwain told him this, he admits that as a sergeant he outranked McSwain, a guard, and he could not explain how the Company's tour records reflected the 4:30 p.m. tour was conducted on 16 and 17 March and earlier on 19 and 26 February. Asked whether he took McSwain's instruction as applying only to a single day, Holt initially testified he did not remember, but additionally testified he carried out the instruction more than three times and until Steele came to the guardhouse (presumably after the discharge of Cannady and Ware) and told the security guards the 4:30 p.m. tour remained in effect as advertised. Holt also testified that on an unspecified number of occasions, after McSwain told him, in essence, there were to be no more 4:30 p.m. tours, female voices he could not identify called him and told him to turn away tours after 4 p.m.

Called by the General Counsel as a rebuttal witness, McSwain (who had resigned from the police department

[3] Notwithstanding Holt's reference to "at" 4 p.m., the balance of the evidence indicates that the question here revolves around tourists arriving too late to take the 4 p.m. tour but in time for the last tour at 4:30 p.m. Holt was called as a witness by Stroh.

at some point before the hearing) testified he could not recall telling Holt anything about a tour being discontinued, or discontinued even for 1 day. McSwain's hours were 4 p.m. to midnight.

b. *The material events*

Tour guide Wiggins testified that on Friday, 20 March, she received a call from a male security guard at 3:56 p.m. asking whether Stroh would have a 4 p.m. tour. Wiggins replied not only a 4 o'clock tour but also a 4:30 tour. She additionally informed him, "We always have them Monday through Friday from 11 o'clock and the last one is 4:30." "Okay," the guard said, and hung up. In the Strohaus after the tour, Wiggins reported the matter to Hospitality Manager Purcell. Wiggins also reported that tourists were being turned away from tours. Purcell asked Wiggins to call the guardhouse and ascertain whether there was a new security guard on duty. Purcell's version, essentially the same, is that she overheard a tourist complaining to Wiggins that tourists behind them were turned away by the guard and told there was no 4:30 p.m. tour. Wiggins then came and repeated the remarks to Purcell. Assuming there must be a new security guard, Purcell instructed Wiggins to call the guardhouse and make sure the guards were aware that the tour hours were 11 a.m. to 4:30 p.m.

Wiggins called and spoke with guard Shari Taylor who said there was no new security guard. Wiggins explained that tourists were complaining of being turned away, and asked if Taylor knew anything about the matter. Taylor said someone had told the security guards not to admit any tourists after 4 p.m. Wiggins asked who, and Taylor replied she had rather not say because she did not want to get anyone into trouble. Wiggins said, "Shari, you are in trouble. I am in trouble. We all will be if you don't tell me who it is." "Helen and Tammy," answered Taylor. Wiggins immediately reported this information to Purcell.

By this time of the day the office was closed, so it was early Monday morning, 23 March, before Purcell was able to inform Industrial Relations Manager Steele. He directed Purcell to question Cannady and Ware about the matter. Purcell did so the following day, 24 March, and each denied the charge. Purcell reported the denials to Steele.

On Thursday, 26 March, Steele interviewed security guards Taylor and Holt who confirmed that Cannady and Ware had told them to turn away tourists after 4 p.m. Although Holt could not identify the tour guides by name, Taylor could do so, Steele testified, and Taylor told him she recognized their voices. Steele asked the guards to write statements in their own hand, and each did. The statements are in evidence. Taylor's reads:

> On 2 to 3 occasions I was told to cut tours off at 4:00 p.m. by Helen Kennedy [Cannady] or Tammy. (I don't know her last name.) This message I feel was only given to me because another guard, Michael McSwain, had not arrived at work yet otherwise the[y] would [have] told him to cut off the tours. Each time they called they would always ask for him. Michael has since quit this job. I did not know that we were not supposed to cut the tours at 4:00 p.m. I assumed as did everyone else this came from Kay Purcell although I was never actually told by Kay.

The statement Holt submitted to Steele reads:

> I was out one day, and when I came back to work I was told that visiting tours would stop at 4 o'clock p.m. I ask[ed] Mike about it and he said it took 30 mins to make a tour. And that if they took a tour at 4:30 it would be after 5 o'clock before the employees could leave the Brown Bottle Room [Strohaus]. Mike told me that the women in the Brown Bottle Room told him. Then around 2 or 3 times they called at guard house and said not to seen [send] any more tours up after 4 o'clock p.m. I have also called up there to fine [find] out and they said no more after 4 o'clock.

Steele testified that during his interview of Taylor and Holt it was mentioned that tourists had been turned away, although no estimate of the number of such tourists was given. According to Steele, Holt said he had continued to turn away tourists after he was first told. Steele concedes he specifically asked about Friday, 20 March.[4] Holt testified he did not think Steele asked if he had turned anyone away. And, according to Holt, he did not tell Steele he had turned away tourists on more than three occasions. As mentioned, Steele testified Holt said he kept turning away tourists after 4 p.m. In contrast, Steele understood that Taylor did not view the calls as a standing order to cut all tours after 4 p.m., and Taylor confirms in her testimony that such was her understanding.

Taylor testified she told Steele essentially what is in her statement before she wrote it. At the hearing, Taylor testified she recognized the voices of Cannady and Ware from previous business conversations with them, although she only knew Ware by her given name, and that Cannady called once and Ware once telling her to send no more tours after 4 p.m. When Cannady called, Taylor testified, she identified herself as "Helen," but Ware did not identify herself. The tour guide roster for the week of 16 March reveals only one Helen and one Tammy among the eight names (first names only) listed. Taylor testified she never turned a tourist away. On receiving the two calls from Cannady and Ware, and perhaps others relayed to her by Holt, Taylor would report the instruction to the guard who relieved her. Taylor normally worked until 4 p.m. and generally was relieved by McSwain who worked the 4 p.m. to midnight shift. McSwain (who left in early March) testified he could not recall any such instruction from Taylor or anyone else. Nevertheless, McSwain admits Taylor once informed him either Cannady or Ware had called for him but left no message. McSwain also concedes he knew Cannady and Ware socially, that he "grew up" with Cannady, and

[4] As Respondent's records reflect for the week of 16 March, Ware did not work at all on 20 March and Cannady left ill at 10:45 a.m.

that he had dated one of them. The record does not reflect whether it was Cannady or Ware whom he dated.

As I described earlier, on Thursday, 26 March, Cannady was dispensing beer to employees in the Strohaus when Union Representative Norris and Chief Steward Jones came by. That is when Cannady informed Norris she could not discuss the Aubrey Martin grievance with the Union unless Steele was present. Norris said that would be no problem and that he would contact Steele. The following day, 27 March, Steele came to the Strohaus and asked Cannady, "Who did you talk with yesterday?" Thinking Steele meant had she talked with someone about the facts relating to the Aubrey Martin grievance, Cannady answered, "No one." "You didn't talk with anyone yesterday?" Steele asked. "No," replied Cannady. "Okay," Steele said, "have a very good weekend," and he left. Steele had no further conversation with Cannady until Monday, 30 March.

At some point following his interview of the two security guards, Steele contacted his superior at Respondent's Detroit headquarters, reported the details of the investigation, and recommended discharge. Steele's recommendation was approved, apparently by Joseph Franzem, vice president, corporate services.

On 30 March Cannady and Ware were summoned to Steele's office. Present were Steele, Purcell, Cannady, and Ware. Steele said he had information the two had turned tourists away, and he specifically mentioned Friday, 20 March. Cannady and Ware not only denied the allegation, but Ware observed she had not worked at all on 20 March and Cannady pointed out that she had left before noon that Friday. Steele admits their protest was his first awareness that Cannady and Ware were not at work at the relevant time the afternoon of Friday, 20 March. When Cannady and Ware called their absence to his attention, Steele, Cannady testified, said, "That's beside the point. You still called the guards and you told them to cut off the tours from coming in." At the hearing, Steele reinforced this position by describing the absence of Cannady and Ware on 20 March as "immaterial" because, in his view, they, by the practice they had set in motion, were responsible for the action of the security guard in turning away visitors the afternoon of Friday, 20 March.

At the interview on 30 March, as Steele testified, Cannady and Ware denied they had ever called the guardhouse to turn away tourists. At the hearing, Cannady and Ware each testified she had never directed the guards to turn away tourists from taking the 4:30 p.m. tour.

Continuing at the 30 March meeting, Steele told Cannady and Ware he had no reason to disbelieve the security guards because they had nothing to gain. In contrast, Cannady and Ware did have something to gain in that they would be leaving work earlier. Based on these facts, Steele said, and to avoid any stigma of discharge, Cannady and Ware could have to 1 April to resign or be discharged. About an hour after the meeting, Cannady called Purcell and said she would take neither option. Ware reported for work on 1 April, but Purcell told her she had been terminated. Ware was given a written termination notice and escorted off the premises. A termination notice was mailed to Cannady. The notices state that each was "Terminated for cause" on 1 April 1987.

Steele testified Cannady and Ware were discharged solely "for instructing the guards to turn tours away and the guards honored those instructions," and that he fired them for this based on the statements of the two security guards plus the earlier report Purcell had made to him. Steele concedes that Wiggins and other tour guides were not interviewed until after the discharge of Cannady and Ware. In short, as he testified, Steele chose to believe the security guards, Taylor and Holt, over Cannady and Ware.

c. *Discussion*

As I have summarized, Industrial Relations Manager Steele testified the relationship of Cannady and Ware to the Aubrey Martin grievance had nothing to do with their discharge, and that the sole reason Cannady and Ware were discharged was "for instructing the guards to turn tours away and the guards honored those instructions." Steele testified with an unfavorable demeanor and I do not credit him. I find that Steele learned Cannady had spoken to Union Representative Norris and Chief Steward Jones on 26 March. Concerned that Cannady discussed the facts of the Aubrey Martin grievance with them, Steele confronted Cannady the following day with a question almost accusatory in nature. When Cannady replied she had talked with no one, Steele, I find, concluded she was lying and that her lying was for the purpose of avoiding having to disclose that she had discussed the facts of the Aubrey Martin grievance with Norris and Jones. At that point, I find, Steele made the decision to recommend Cannady be discharged. As argued by the General Counsel, moreover, I find Steele was determined to prevent the nonunion employees from becoming involved in the bargaining relationship with unit employees, especially if the involvement appeared to be as supporters for the Union's position.

I find that a motivating reason for Cannady's discharge was her protected activities. I further find that Steele discharged Ware because he suspected, from observing her conferring in the hallway with the union representatives and Aubrey Martin, that she also was supporting the Union. I further find that a motivating reason for Ware's discharge was Steele's suspicion that Ware was engaging in protected conduct. Thus, the General Counsel has established prima facie that the discharge of Cannady and Ware was unlawful.

Once the General Counsel has established a prima facie violation of the Act in motivation cases, the burden shifts to the Respondent to demonstrate it would have imposed the discipline even absent the disciplined employee's protected conduct. Did Stroh carry that burden here? The Company points to the information furnished by the security guards and the importance of the promotional and goodwill purpose of the tours. The General Counsel's counterargument is rather ambiguous.

The General Counsel argues that security guard Taylor placed responsibility on Cannady and Ware in "an attempt to divert responsibility from herself and other guards." Thus, the argument runs, Taylor accused

Cannady and Ware because, as Wiggins told her, someone was going to be "in trouble." The General Counsel contends there is a discrepancy between the versions of Wiggins and Purcell concerning whether someone was in fact turned away on 20 March, and counsel for the General Counsel points to the ambiguous nature of Taylor's written statement of receiving two to three calls from Cannady "or" Ware as opposed to her version at the hearing that each called her once. The General Counsel also argues that as Taylor disclaimed any standing order to turn away tourists after 4 p.m., her credibility suffers in light of the fact neither Cannady nor Ware was at work the afternoon of 20 March to give a current instruction. However, it was a male security guard (Holt, possibly) who spoke with Wiggins shortly before 4 p.m. on 20 March.

Steele locked on the important point early. There is no evidence the security guards had any motive to turn away tourists. The hours of the guards would be unaffected by a tour from 4:30 to 5 p.m. Whatever additional work would be involved in granting access to the tourists is not shown to be anything more than negligible. The General Counsel stops short of arguing that the guards, on their own, initiated the practice of turning away tourists after 4 p.m. There just is no plausible reason in the record to explain why the guards would be interested in doing that.

By contrast, and as Steele noted, Cannady and Ware did have a possible incentive—leaving work at 4:30 p.m. rather than 5 p.m. or later. The tour guides were paid for any time they worked after 4:30 p.m., and there is no clearcut evidence Cannady and Ware preferred to leave at 4:30 p.m. even though they would lose an extra 30 minutes or so of pay. On the other hand, Cannady and Ware did not testify they needed the extra money and preferred to work until 5 p.m. or later if possible. On the state of the record, it must be said that, considering the possible incentives of the tour guides as compared to that of the security guards, Steele's choice of accepting the guard's version is a reasonable one. It seems clear that someone told the guards to stop at least some of the 4:30 p.m. tours, and the evidence Steele had pointed to Cannady and Ware. As they initiated the practice, it is immaterial that they made no call on Friday, 20 March. Indeed, whether any tourists were in fact turned away on 20 March is immaterial. The important point to consider is the Company learned about the practice on 20 March.

As I find, Steele reasonably believed the guards. Even so, would the Company still have fired Cannady and Ware absent their protected conduct? There is no evidence of past examples of discipline of nonunit employees on this conduct or any other misconduct. The evidence establishes the Company spends a sizable amount of money advertising the tours as part of its effort to create goodwill and promote the sales of its product. And conducting visitor tours is the reason Stroh hires tour guides. These facts support a finding that Stroh would have fired Cannady and Ware over their unauthorized instructions to the guards regardless of their protected conduct.

On the other hand, Ware testified without contradiction that Steele told them had they admitted their misconduct the discipline would have been less severe than discharge. Does that statement of Steele indicate he would not have fired them had they not engaged in protected activities? No. If anything, the statement detracts from an unlawful motivation finding. Under all these circumstances, I find the Company carried its burden of demonstrating it would have fired Cannady and Ware even absent their protected conduct. I therefore shall dismiss the complaint as to Helen L. Cannady and Tammy T. Ware.

CONCLUSIONS OF LAW

1. Stroh Brewery Company is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 391 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company violated Section 8(a)(1) of the Act on 12 March 1987 when Industrial Relations Manager Donald L. Steele directed tour guide Helen L. Cannady, an unrepresented employee, not to cooperate in the Union's investigation of a grievance of bargaining unit employee Aubrey Martin unless Steele was present.

4. The Company did not violate Section 8(a)(1) and (3) of the Act by discharging Helen L. Cannady and Tammy T. Ware effective 1 April 1987.

5. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Stroh Brewery Company, Winston-Salem, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing its unrepresented employees not to cooperate in the Union's investigation of a grievance of bargaining unit personnel unless a representative of management is present.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

---

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Post at its Winston-Salem, North Carolina brewery copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Company has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT instruct our unrepresented employees not to cooperate with Teamsters Local Union No. 391 by discussing the Union's investigation of a grievance of a bargaining unit employee unless a representative of management is present during the discussion between the Union and the unrepresented employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

STROH BREWERY COMPANY

Kasper Disposal Service *and* Teamsters Local 945, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO. Case 22–CA–14371

August 31, 1988

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On September 30, 1987, the National Labor Relations Board issued a Decision and Order in the above-captioned case,[1] in which the Board ordered the Respondent, inter alia, to make whole Sandra LePoidevin for her losses resulting from the Respondent's unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. A controversy having arisen over the amount of backpay due under the terms of the Board's Order, the Regional Director for Region 22 issued and duly served on the Respondent a backpay specification and notice of hearing alleging the amount of backpay due.

On April 13, 1988, the General Counsel filed with the Board in Washington, D.C., a Motion for Summary Judgment and Memorandum in Support, with exhibits attached. The General Counsel submits that although granted an extension of time within which to file an answer, the Respondent has failed to file an answer to the backpay specification as required by Section 102.54(a) of the Board's Rules and Regulations. The General Counsel, therefore, requests that the Board find the allegations of the backpay specification deemed to be admitted true without the taking of evidence in support of the allegations and enter summary judgment in favor of the backpay specification.

On April 22, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On May 5, 1988, the Respondent, by its attorney, filed a response to the Notice to Show Cause, asserting that on February 3, 1988, it executed and sent to the Regional Director a stipulation in the underlying unfair labor practice case, agreeing not to contest the Board's decision in court but reserving its right to a hearing on the backpay owed the discriminatee. The Respondent's attorney admits that the backpay specification and notice of hearing was received on March 1, 1988, but contends that the "documents' title did not indicate a Demand for an Answer to the specification was requested." Thus, the attorney, unfamiliar with Board proceedings, simply "calendared" the matter. The Respondent's attorney further admits receiving the General Counsel's letter extending the filing time to April 11, 1988, but asserts it was impossible to comply with that deadline because the letter was not received until April 12, 1988. The Respondent was not successful in its attempts to contact the Board agent handling the case until just after the Motion for Summary Judgment was filed, and the Board agent's supervisor denied the Respondent's request to withdraw the motion and allow the Respondent to file an answer.

The Board having duly considered the matter,

IT IS ORDERED that the Respondent be given 14 days from the date of this Order to file a proper answer to the backpay specification in conformance with the requirements of Section 102.54(b) of the Board's Rules and Regulations.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is denied without prejudice to its renewal should the Respondent fail to file a timely, proper answer.

IT IS FURTHER ORDERED that the above-entitled proceeding be remanded to the Regional Director for Region 22 for further appropriate action.[2]

MEMBER JOHANSEN, dissenting.

Contrary to my colleagues, I would not give the Respondent an additional 14 days to file a proper answer, but rather I would grant the General Counsel's Motion for Summary Judgment on the backpay specification. There is no reason in this case to make an exception to our standard policy of granting summary judgment when a respondent has failed to file an answer within the reasonable time limits prescribed by the Board's Rules.

The backpay specification and notice of hearing was served on the Respondent by certified mail on February 29, 1988. As is customary, the specification advised the Respondent that it was required to file an answer within 21 days. No answer was filed by the March 21 due date, even though the Respondent concedes that it received the specification on March 1. By letter dated April 5, the General Counsel extended the filing deadline to April 11, and informed the Respondent that if no answer were received by that date, the General Counsel would move for summary judgment. Having received no answer or response from the Respondent by April 13, the General Counsel filed the instant motion.

[1] 286 NLRB 14.

[2] We believe this is the appropriate resolution under all the circumstances here, including the fact that the Respondent had previously agreed to waive its right to contest the underlying unfair labor practice findings in the court of appeals on the understanding that it would be able to contest the amount of backpay owing the discriminatee.

The Respondent advances no valid justification for its failure to file an answer to the backpay specification. It claims that because of its attorney's unfamiliarity with Board law and because the title of the specification and notice of hearing "did not indicate" that an answer was requested, it simply noted the hearing date and filed the document. The Respondent's attorney, however, was obligated to read more than just the specification's title and the hearing date. As mentioned above, the specification expressly states that an answer is to be filed within 21 days, pursuant to Section 102.54 of the Board's Rules and Regulations. Those rules provide that failure to file an answer may result in the Board finding, without the taking of evidence, all allegations of the backpay specification to be true.

In addition, the Respondent asserts that it did not receive the General Counsel's April 5 letter extending the filing time and warning of a Motion for Summay Judgment until April 12, at which time it was too late to comply with the April 11 deadline. Accepting this assertion as fact, the failure to receive this letter in a timely manner does not excuse the Respondent's failure to file an answer nor warrant denial of the General Counsel's motion. The Board's Rules and Regulations do not require the General Counsel to send such a letter, and the fact that the General Counsel routinely may extend the filing deadline when an answer has not been filed within the 21-day period does not relieve a respondent of its obligation to file an answer within the prescribed time.

Further, even faced with the instant motion, the Respondent has failed to file an answer or advise that it will do so. Instead, the Respondent has stated that it "look[s] forward to our day in court in which to challenge the Board Agent's calculations." In these circumstances, I see no purpose to be served by granting an additional extension of time, and I would grant the General Counsel's Motion for Summary Judgment.

Frontier Building Services *and* Service Employees International Union, Local 105. Cases 27–CA–9840, 27–CA–9840–2, 27–CA–9840–4, 27–CA–9840–6, and 27–CA–9840–7

August 31, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On July 13, 1987, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1] in which it ordered, inter alia, the Respondent to make whole certain of its employees for any loss of pay and other benefits resulting from the Respondent's unlawful discharge of these employees. On December 22, 1987, the United States Court of Appeals for the Tenth Circuit entered its judgment enforcing the Board's Order. A controversy having arisen over the amount of backpay due under the Board's Order, as enforced by the court, the Regional Director for Region 27, on April 29, 1988, issued a backpay specification and notice of hearing alleging the amount of backpay due the discriminatees and notifying the Respondent that it should file a timely answer complying with the Board's Rules and Regulations. The Respondent has failed to file such an answer.

Thereafter, on July 18, 1988, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 20, 1988, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent failed to file a response to the Notice to Show Cause.

On the entire record in this proceeding, the Board makes the following

Ruling on Motion for Summary Judgment

Section 102.54 of the Board's Rules and Regulations provides in pertinent part:

> (a) . . . The respondent shall, within 21 days from the service of the specification, if any, file an answer thereto . . . .
>
> (c) . . . If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate.

The backpay specification issued and served by certified mail on the Respondent and its representative about April 29, 1988, specifically states that the Respondent shall, within 14 days[2] from the date of the specification, file an answer with the Regional Director for Region 27, and that if the answer fails to deny the allegations of the specification in the manner required under the Board's Rules and Regulations and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondent shall be precluded from introducing any evidence controverting them. According to the allegations of the General Counsel's motion, on May 18, 1988, the Compliance Officer for Region 27 discussed, by telephone, with Peter Shelley, attorney for the Respondent, the need for filing an answer to the backpay specification.

The Respondent has not filed an answer to the backpay specification. As the Respondent has not filed an answer to the specification and has not offered any explanation for its failure to do so, in accordance with the rules set forth above, the allegations of the specification are deemed to be admitted as true and are so found by the Board without the taking of evidence in support of the allegations.

Accordingly, the Board grants the General Counsel's Motion for Summary Judgment and concludes that the net backpay due the discriminatees, Mary Merritt, Ken Merritt, Roland Perkins, Yvette Marquez, Danny Marquez, Mary Montoya, and Muhammed Safi, is as stated in the computations of the specification, and orders the payment of these amounts by the Respondent to the discriminatees.

ORDER

The National Labor Relations Board orders that the Respondent, Frontier Building Services, Longmont, Colorado, its officers, agents, successors, and assigns, shall make whole the discriminatees named below by paying to them the amount following their names, plus interest as computed in *New Horizons for the Retarded*,[3] less tax withholdings required by Federal and state laws:

[1] 284 NLRB No. 100 (July 13, 1987) (unpublished).

[2] The backpay specification erroneously states that the Respondent shall file an answer within 14 days, although it correctly cites Sec. 102.54 which, as amended on September 29, 1986, provides that the respondent shall answer within 21 days from service. As the Respondent has failed to respond in any manner to the backpay specification, we find that it was not prejudiced by this inadvertent error.

[3] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Mary Merritt	$2,160
Ken Merritt	1,230
Roland Perkins	900
Yvette Marquez	900
Danny Marquez	900
Mary Montoya	900
Muhammed Safi	900

Ohmite Manufacturing Company, a Division of North American Philips Company *and* United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO. Cases 1-CA-21196(1-2) and 1-RC-17896

August 31, 1988

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On June 12, 1984, Administrative Law Judge Phil W. Saunders issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified[2] and to adopt the recommended Order.

1. The judge dismissed paragraphs 8(f), (j), (p), and (q) of the complaint, finding that the unfair labor practices alleged were not attributable to the Respondent. We disagree. Each paragraph alleges misconduct by one or the other of the Respondent's two group leaders, Peter Walden and Sis Paradise. For the reasons stated by the judge, we agree that Walden and Paradise were not statutory supervisors. Contrary to the judge, however, we find that they acted as the Respondent's agents in its antiunion campaign. Both played an integral role in that campaign. They regularly attended management meetings at which campaign strategy was discussed. Further, they were authorized to answer employees' questions about various campaign issues on behalf of the Respondent, and were instructed by the Respondent concerning the legal restrictions upon what they could say. Finally, they served as "couriers" for the Respondent, distributing the Respondent's antiunion literature to the employees. Under these circumstances, we find that the Respondent placed Walden and Paradise in a position so that the employees would reasonably understand that they spoke for management in connection with its antiunion campaign. The Respondent was therefore responsible for their actions within the area of such apparent authority.[3]

Nevertheless, we agree with the judge that paragraphs 8(f), (j), (p), and (q) of the complaint should be dismissed. As set forth below, we find that the General Counsel presented insufficient evidence to carry the burden of proving these allegations.

Paragraph 8(f) of the complaint alleges that sometime in May and June 1983 Walden threatened employees with a plant shutdown and layoffs if the Union won the election. The General Counsel presented no evidence whatsoever to support this allegation. The General Counsel now contends that the failure to do so was the judge's fault, i.e., that the judge erroneously refused on request to enforce Walden's subpoena or, alternatively, to accept Walden's affidavit into evidence.

Both contentions are without merit. The issuance of a subpoena carries with it prima facie authority to enforce it in the appropriate Federal court; no prior approval is necessary in normal circumstances.[4] The judge, in fact, so advised counsel for the General Counsel at the hearing. The fault therefore, lies solely with counsel for the General Counsel.[5] As for Walden's affidavit, inasmuch as Walden was not available for cross-examination by the Respondent and, as the judge found, the affidavit was given under circumstances casting doubt on

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the result reached by the judge in finding that Schneider's conversation with union activist Headley did not amount to interrogation in violation of Sec. 8(a)(1) of the Act. However, in affirming the judge's finding in this regard we do not rely on the judge's discussion of Headley's testimony that Headley was not threatened or intimidated by Schneider's question. Such evidence of an employee's subjective reaction to an employer's questions regarding employees' union activities is irrelevant in an analysis of "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177 (1984).

In adopting the judge's finding that the Respondent's temporary transfer and ultimate discharge of Supervisor Rickard did not violate the Act, we note that his citation to *Bennington Iron Works*, 267 NLRB 1285 (1983), is inapposite because it dealt with an agency question not relevant here. Also, in adopting this dismissal we find it unnecessary to rely on the judge's discussion of *Parker-Robb Chevrolet*, 262 NLRB 402 (1982). Even assuming that the discharge of a supervisor in order to remedy employees' preelection grievances could fall within those limited "circumstances" in which "the discharge of a supervisor may violate Section 8(a)(1)" (id. at 402), we agree with the judge that the General Counsel did not prove by a preponderance of the evidence that the Respondent's treatment of Rickard constituted the remedying of an employee preelection grievance; and thus the discharge would not be a violation even under that theory.

[2] The Respondent filed a motion to strike certain alleged misstatements of fact in the General Counsel's brief. We deny the Respondent's motion. The General Counsel's statements are arguably supported by the record and, in any event, we have independently examined the evidence.

[3] See, e.g., *EMR Photoelectric*, 251 NLRB 1597, 1601 (1980), citing *Hanover Concrete Co.*, 241 NLRB 936, 939 (1979).

[4] See Sec. 11 of the Act and Sec. 102.31 of the Board's Rules and Regulations. The General Counsel identifies no authority supporting the argument that the judge's approval was required before seeking enforcement of the subpoena.

[5] As the General Counsel concedes, the judge never expressly ruled against enforcement of the Walden subpoena. The judge ruled only that he would not discontinue the hearing pending court enforcement.

its trustworthiness, we find it was properly excluded.[6]

Paragraph 8(j) of the complaint alleges that on May 16 Paradise threatened employees with the possible loss of their jobs if the Union won the election. In support of this allegation the General Counsel offered the testimony of employees Headley and Bezio. Both testified that during a lunchtime conversation in which employees were discussing whether they would lose their benefits if the Union won the election, Paradise stated that they should not worry about it because "we probably won't have a job anyway."

The General Counsel contends that Paradise's statement was clearly an unlawful threat. The testimony of employee Brown, however, casts considerable doubt on the General Counsel's contention. Brown testified that earlier in the conversation the employees had discussed the possibility that there might be a layoff due to a business slowdown. As the judge found, there had been such a layoff just 6 months earlier. Contrary to the General Counsel, therefore, we are unable to conclude that Paradise's statement about losing their jobs referred to the consequences of a successful union campaign. Rather, we conclude that at its worst it was vague and ambiguous.

Paragraph 8(p) of the complaint alleges that on June 17 Paradise threatened employees with a plant shutdown and layoffs if the Union won the election. Here again, the General Counsel failed to present any credible evidence of such threats. The only evidence the General Counsel offered was Bezio's testimony that employee Parker had told her that Paradise had told her that President Saunders had told her that he would close the plant if the Union got in. We find that the judge in his discretion properly rejected this uncorroborated testimony as unreliable hearsay.[7]

Paragraph 8(q) of the complaint alleges that on June 20 Paradise again threatened employees with a plant shutdown and layoffs if the Union won the election. Here, the General Counsel's evidence consisted of Headley's testimony that Brown stated to her and Bezio that a machine was recently removed from the plant "because they were going to start to move the work out," and that Paradise was also present and did not deny Brown's statement. Thus, the General Counsel contends, Paradise ratified Brown's statement by her silence.

According to Brown, however, Paradise responded that she was not aware that the machine had been moved out. Moreover, Brown testified that thereafter Moriarty, the Respondent's purchasing agent, told her that the machine was merely being sent out for repairs, and that she immediately relayed this to Headley and Bezio. Accordingly, even accepting Headley's testimony that Paradise remained silent, we find that any alleged adverse impact that silence may have had was subsequently cured.

2. The judge also dismissed the allegation that the Respondent through Plant Manager Rickard violated Section 8(a)(1) of the Act by threatening employee Massey with an unexcused absence if she left work to attend the May 23 Board representation hearing. The judge found that receiving an unexcused absence was "relatively unimportant" insofar as it would take at least three unexcused absences in a month before an employee would receive even a written warning. Accordingly, the judge concluded that Massey "was not threatened with any meaningful disciplinary action if she chose to attend, but would merely be accorded an unexcused absence based on the Respondent's normal procedures."

We agree with the judge that this allegation should be dismissed, but do so for the following reasons. At the outset, contrary to the judge we do not deem it significant that it would take three unexcused absences before a written warning would be given, and many more before discharge. The fact is that an unexcused absence could lead to discipline. An unexcused absence was therefore "meaningful."[8]

The issue, then, is not whether Rickard effectively threatened Massey with meaningful disciplinary action. We conclude that he did. The issue is whether the threat violated the Act. As discussed below, we conclude that it did not.

Since *Standard Packaging Corp.*,[9] the law has been clear that employees have no absolute right under Section 8(a)(1) and (4) of the Act to leave work to attend a Board hearing. What has not remained clear, however, are the circumstances in which an employer may lawfully refuse to permit

[6] See *NLRB v. McClure Associates*, 556 F.2d 725 (4th Cir. 1977), enfg. 223 NLRB 580 (1976); *Head Ski Division, AMF Inc.*, 222 NLRB 161, 162 fn. 3 (1976). Although the judge inadvertently states in fn. 8 of his decision that he is granting the Respondent's motion to quash the "subpoena," it is clear that he meant "affidavit" since it was Walden's affidavit and not the subpoena that the Respondent formally asked to have excluded from the record—a request the judge referred to as a "motion to quash."

[7] We note that the General Counsel apparently made no effort to call Parker, whose credibility determines the probative value of Bezio's testimony, to testify about Paradise's alleged statement.

[8] Moreover, we note that discipline was not in fact all that unlikely to result from the Respondent's refusal to allow Massey an excused absence. The Union's letter to the Respondent requested Massey's attendance not only on May 23 but "if necessary, on consecutive days thereafter, until completed." Thus, Massey might have accumulated several unexcused absences if she had attended the hearing as planned.

[9] 140 NLRB 628 (1963).

employees to do so. In *Standard Packaging* the Board held that where the General Counsel failed to prove that the employer's refusal was improperly motivated, or that the employees' attendance at the hearing was necessary (i.e., that they were subpoenaed or that they otherwise had real need to attend), the employer's refusal did not violate the Act. This, however, was not the last word on the subject.

Some 15 years later in *Earringhouse Imports,*[10] the Board all but eviscerated *Standard Packaging*. The Board in *Earringhouse* held that an employer violated Section 8(a)(1) and (4) by discharging 13 employees who defied its denial of their request for leave to attend the representation hearing. The Board so held notwithstanding that the judge had found no evidence that the employer had an unlawful motive or that the 13 employees had a need to attend the hearing.[11] The Board held that the burden was on the employer to establish that the employees' absence from work would have caused a significant economic loss, and that the employer failed to do so. In effect, therefore, the Board established a *presumption* of illegality, shifting the burden of proof from the General Counsel to the employer.

The Board's holding in *Earringhouse* was thus plainly contrary to *Standard Packaging*. However, as noted by the D.C. Circuit in denying enforcement in *Earringhouse,*[12] the Board did not even mention that case much less distinguish or expressly overrule it. Nor did the Board cite any other Board precedent for its presumption under Section 8(a)(1) and (4) of the Act.[13]

In view of the foregoing, and after carefully considering the merits of each, we agree with the D.C. Circuit in *Earringhouse* that the better approach is that originally followed in *Standard Packaging*. As the D.C. Circuit noted in denying enforcement in *Earringhouse*, "working time is for work."[14] There is nothing inherently improper, therefore, in an employer's wanting to keep its employees at work.[15] A presumption that such a decision is unlawful is thus clearly unwarranted.

Accordingly, we overrule *Earringhouse* and hold that the burden of proof lies where it customarily is in an unfair labor practice proceeding: with the General Counsel. Consistent with the Board's decision in *Standard Packaging*, that burden will be to prove that the employer's refusal was improperly motivated or that the employees demonstrated to the employer at the time of their request that they had a real need to attend the hearing. Only when the General Counsel has presented prima facie evidence of either or both of the above will the burden shift to the employer to either discredit the General Counsel's evidence or, as to the latter, show an overriding business reason for its refusal to allow the employees to leave work.

Applying our holding to the facts of this case, we find that the General Counsel failed to meet this burden. First, there is no evidence that the Respondent's refusal to grant Massey an excused absence was improperly motivated. Although Massey testified that employees had been granted excused absences for personal business in the past, it was never explained what the nature of that personal business was or whether such leave had been granted liberally. Further, the judge credited Rickard's testimony that his decision was based solely on his understanding of the Company's attendance policy.[16]

Second, there is no evidence that there was any real need for Massey to attend the hearing. Like the employees in *Standard Packaging*, Massey was not subpoenaed to appear and was not called to testify. Although the Union requested her presence as its "observer," neither the Union nor Massey offered the Respondent any explanation whatsoever at the time of the request why an "observer" was needed.[17] As one of the most active union support-

[10] 227 NLRB 1107 (1977) (Members Penello and Walther dissenting), enf. denied sub nom. *Service Employees Local 250 v. NLRB*, 600 F.2d 930 (D.C. Cir. 1979).

[11] As in *Standard Packaging*, none of the employees were subpoenaed to appear at the representation hearing, and none testified.

[12] 600 F.2d at 936.

[13] The only authority cited by the Board in *Earringhouse* allegedly supporting its presumption was *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). However, as the D.C. Circuit noted in denying enforcement in *Earringhouse*, the Supreme Court's discussion in *Great Dane* was in the context of Sec. 8(a)(3) and involved employer actions that appeared discriminatory on their face. 600 F.2d at 939 and fn. 22. The D.C. Circuit further noted that in *NLRB v. Brown*, 380 U.S. 278 (1965), a case cited in *Great Dane*, the Court stated, "When the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served, the employer's conduct is *prima facie* lawful." The D.C. Circuit concluded that under the circumstances (no improper motive or necessity for attendance) denying the employees leave to attend the representation hearing had no more than a de minimis impact on employee rights, and thus that the employer's conduct was prima facie lawful. Id.

[14] See 600 F.2d at 932 and cases cited therein at fn. 1.

[15] As the Board in *Earringhouse* conceded, an employer has a "legitimate interest in operating [its] business without disruption." 227 NLRB at 1108.

[16] Moreover, the record reveals that the Respondent subsequently granted Massey paid time off to be the Union's observer during the July 1 election. Significantly, this was before the filing of the unfair labor practice charges on July 15.

[17] Unlike our dissenting colleague, we are unwilling to speculate, post hoc, as to the advisory functions Massey might have served at the hearing as the Union's "observer." Nor would we require the Employer to have done so at the time of the leave request. Rather, in the absence of any contrary evidence, we assume that the term "observer" meant, and was understood to mean, precisely what it normally means: one who simply watches or observes.

ers Massey undoubtedly had a genuine personal interest in the hearing. Such an interest, however, does not rise to the level of a "real need."

Accordingly, we affirm the judge's finding that the Respondent did not violate Section 8(a)(1) when it refused to grant Massey an excused absence to attend the representation hearing.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Furthermore, it is certified that a majority of the valid ballots have not been cast for United Rubber, Cork, Linoleum and Plastic Workers of America, AFL–CIO and that it is not the exclusive representative of the bargaining unit employees.

CHAIRMAN STEPHENS, dissenting in part.

I join my colleagues in the majority in all but their conclusion that the Respondent did not violate Section 8(a)(1) of the Act when its plant manager, William Rickard, responded to employee Doris Massey's request for an unpaid absence to attend the May 23 representation hearing by stating that such an absence would be marked as "unexcused." I agree with them that we should overrule *Earringhouse Imports*, 227 NLRB 1107 (1977), enf. denied sub nom. *Service Employees Local 250 v. NLRB*, 600 F.2d 930 (D.C. Cir. 1979), to the extent that it recognizes an absolute right for employees to take unpaid leave to attend Board proceedings in the absence of a showing of business necessity for denying them permission. Like the majority, I would return to the rule of *Standard Packaging Corp.*, 140 NLRB 628 (1963), but in my view, finding a violation of Section 8(a)(1) on the facts here is entirely consistent with *Standard Packaging*.

In *Standard Packaging*, the employer's plant manager was presented with an employee request that at least four, and possibly seven, employees be released from work to attend a hearing on a decertification petition, although apparently none was scheduled to give testimony. The manager did not reject the request out of hand but stated that he wished to check production schedules to see if this would be possible. After checking, he informed the requesting employee (who was a chief sponsor of the decertification petition) that he could only allow that employee to attend. Upon further pleas by the employee, the manager agreed that one other employee could also go and that any others who turned out to be needed at the hearing could be released on telephone notification of the need for their presence. Two employees, Storms and Murray, who were not among those allowed to attend, went to the hearing notwithstanding their lack of permission to leave work and were subsequently discharged for insubordination. In dismissing the complaint allegation that the discharges violated Section 8(a)(1), (3), and (4) of the Act, the Board explained (id. at 630):

> In the circumstances, we cannot find that Respondent's refusal to release Storms and Murray was motivated by any desire to interfere with the Board's processes or with such rights as the complainants may have had to attend the Board proceeding as prospective witnesses. Nor can we say that the position taken by Respondent would, had Storms and Murray accepted it, have occasioned an interference with the proceeding or precluded the complainants from attending the hearing upon a reasonable showing that their attendance was necessary. It is our belief that this record adequately supports the Respondent's asserted reliance upon its work schedule as the reason for its unwillingness, in advance of the hearing, to release more than two employees to attend the hearing.

I agree with the majority that the Board in *Standard Packaging*, implicitly applied a dual test. An employer that penalizes or threatens to penalize an employee for taking unpaid leave to attend a Board proceeding thereby commits a violation of Section 8(a)(1), (3), and (4) of the Act only if either (1) it does so with unlawful intent, i.e., out of hostility toward union or other protected activity, or (2) the employee's showing of need to attend the Board proceeding outweighs the employer's production-related ground for denying in whole or in part the employee request.[1] I also agree that, in the absence of any indication of an employee's need to attend the Board proceeding, the employer is under no obligation to show any business reason for denying the employee permission to do so by taking unpaid leave from work.

[1] This appears to be the test that the Sixth Circuit applied in *Vokas Provision Co. v. NLRB*, 796 F.2d 864, 876 & fn. 15 (1986), denying enf. 271 NLRB 1010 (1984). In *Vokas*, 6 employees out of a work force of 12 had demanded to attend a Board hearing en masse, on the representation that as-yet-unserved subpoenas awaited them there. The demand was made to the employer the day before the hearing. The judge credited the employer's evidence that its reason for allowing only one, rather than all six, to go was that the simultaneous departure of half of its work force would cause "serious business disruption." The court of appeals agreed with the judge both that there was no showing of unlawful motive and that the employer's business reasons for preventing all six from attending the hearing outweighed the employees' interest in attending. 796 F.2d at 878–879.

The court recognized, as established law, that there was probably an absolute right to obtain an unpaid leave of absence in order to testify under subpoena. In the absence of a subpoena, the balancing test was to be applied. 796 F.2d at 896.

I would not, however, hold that the demonstration of the employee's need to attend the hearing must be exceptionally strong before the employer has at least some burden of explanation. If the circumstances indicate that the employee may serve a useful function at the proceeding, I would impose on the employer, at the least, a burden of inquiry into the interest to be served by the employee's presence and consideration whether that interest can be accommodated without disruption to production. Indeed, the employers in *Standard Packaging, Earringhouse,* and *Vokas* all made at least some attempt to determine the need for employees' presence at the Board proceedings and then gave permission for at least one employee to attend.[2]

In the present case, one employee, Doris Massey, requested leave to attend a Board representation proceeding as the Union's observer. Massey was known to the Respondent as the principal union organizer among the employees. It was clearly possible for Plant Manager Rickard to ascertain whether the Respondent had received any other requests from the Union for employee attendance at the hearing or whether—as seems to be the case—Massey was the only employee whose presence the Union sought. Moreover, if Rickard had any questions about what function Massey might serve as an "observer," he could have called the Union's field representative who signed the letter requesting Massey's attendance in that capacity, since the Union's telephone number was included in the letterhead. It is not difficult to discern why a union might need the presence of at least one employee at a representation proceeding. Issues are often not well defined prior to a scheduled hearing in a representation case, and unforeseen questions about the workplace and eligibility for inclusion in the bargaining unit often arise during the prehearing conference, when the parties attempt to reach an election agreement, and during the hearing itself, if one is held.[3] A unit employee, such as Massey, is often a valuable source of information on such issues. The usefulness of such advice is no less great if the union asks the employee to attend as an observer but does not subpoena the employee's attendance. Thus, while the issuance of a subpoena may strengthen the showing of need, it should not be treated as an indispensable requirement.

Balanced against the circumstances indicating that Massey had an interest going beyond mere curiosity in attending the representation proceeding was Rickard's bare assertion of his understanding that it was appropriate under plant practice to mark her absence as unexcused. He made no claim at all that her absence on unpaid leave would cause aay disruption of production. Indeed, he testified that the Respondent was concerned with employee absenteeism only if it were excessive.[4] Since the letter requested Massey's attendance at a Board hearing "on May 23, 1983, and consecutive days thereafter, until completed," Rickard might understandably have been troubled by the prospect of her possibly being absent for a number of days; but he could have allayed such fears by calling the field representative who wrote the letter to reach some agreement on limits to her absence. Compare *Vokas Provision Co. v. NLRB,* supra, 796 F.2d at 875 (when employees are subpoenaed, an employer may call the Board to schedule appearances "in an orderly fashion" to "minimize disruption" to business).

In sum, where employee attendance at Board proceedings is concerned, I think our test should encourage all parties to act reasonably and in a manner that will serve the interests of employees, employers, unions, and the public. An indication that an employee's presence at a hearing might be useful should trigger at least a burden of inquiry on the part of the employer to see if some reasonable accommodation may be made. As to whether and to what extent a request for unpaid leave must be granted, each case should turn on its own facts. The stronger the showing of need, the greater the showing the employer must make to overcome it. Where, as here, the circumstances suggest a legitimate reason for the employee's attendance and the employer simplyrejects the request without explanation, I would find that the balance weighs against the employer and that a violation of Section 8(a)(1) is established.[5]

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[2] In *Earringhouse,* supra, the employer had been advised by its attorney that the attendance of all its warehouse employees at a representation hearing was unnecessary, and it offered to allow the employees to select one employee to attend as their representative. The employees had sought to attend en masse on the ground that the proceeding "concerned them." 227 NLRB at 1107–1108.

[3] No hearing was actually held on the scheduled date for the hearing on the underlying representation petition in this case. Instead, the parties, on that date, entered into an election agreement that included a "side agreement" that, inter alia, permitted one named individual to vote subject to challenge as a "confidential employee/supervisor."

[4] To the extent that the Respondent contended that there was no disciplinary significance to the classification of an absence as unexcused, however, I agree with my colleagues, for the reasons stated in the majority opinion, that telling Massey that the absence would be unexcused threatened her with a "meaningful" sanction.

[5] In the absence of a showing of unlawful motive, I would find this to be an independent violation of Sec. 8(a)(1)—coercing, restraining, and interfering with the protected activity of participating in a proceeding related to a union representation petition—but I would not find violations of Sec. 8(a)(3) or (4). See *NLRB v. Burnup & Sims,* 379 U.S. 21, 23 (1964) (independent violation of sec. 8(a)(1) may be found without proof of discriminatory motive); *Textile Workers v. Darlington Mfg. Co.,* 380 U.S. 263, 269 (1965) (same).

Michael T. Fitzsimmons, Esq., for the General Counsel.
Edward E. Shumaker, Esq. and *Mark T. Broth, Esq.*, for the Respondent.
Nello Morbidelli, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PHIL W. SAUNDERS, Administrative Judge. Based on charges filed on July 15, 1983, and amended charges filed on August 15, 1983,[1] by United Rubber, Cork, Linoleum and Plastic Workers of America, AFL–CIO (the Union or the Charging Party) a consolidated complaint was issued August 23 and an amended complaint on October 13, against Ohmite Manufacturing Company (the Company or Respondent) alleging a violation of Section 8(a)(1), (3), and (5) of the Act. Respondent filed an answer to the complaints denying it had engaged in the alleged matter. Subsequent to the hearing, both the General Counsel and Respondent filed briefs in this matter. Respondent also filed a reply brief, but I have only considered those briefs initially filed.

On the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is a division of North American Philips Company, a Delaware corporation, and at all times mentioned, has maintained an office and place of business in Hudson, New Hampshire, and is now and continuously has been engaged at this location in the manufacture, sale, and distribution of power-type resistance products, electromechanical components, and related products.

Respondent, in the course and conduct of its business, causes and continuously has caused at all times mentioned large quantities of materials used by it in the manufacture of components, resistance products, and other products, to be purchased and transported in interstate commerce from and through various States of the United States other than the State of New Hampshire and causes, and continuously has caused at all times mentioned, substantial quantities of finished products to be sold and transported from the plant in interstate commerce to the States of the United States other than the State of New Hampshire.

Annually, Respondent sells and ships goods valued in excess of $50,000 from its Hudson, New Hampshire plant directly to points located outside of the State of New Hampshire.

Respondent is and has been engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are 1983 unless stated otherwise.

III. THE UNFAIR LABOR PRACTICES

Respondent is a manufacturer of resistors and related materials used in the electronics industry, as aforestated, and in addition to its New Hampshire plant, the Company also has production facilities located in Princeton and Skokie, Illinois, its principal office. The Hudson, New Hampshire operation involved in the case, has been owned by Ohmite for over 10 years, and it employs approximately 89 persons.

During April, the Union initiated an effort to organize the employees at the Hudson plant. Union supporters within the plant used time available before and after work, breaks and lunch, and in some cases actual working time in the production area, to solicit employee authorization cards.

On or about April 28, Respondent received a demand for recognition, which stated that the Union had achieved a card majority. By letter dated May 16, the Union notified and disclosed to the Company the names of nine employees who made up a partial list composing the members of the union organizing committee. See Respondent Exhibit 3.

The Union and Respondent executed an election agreement on May 23, and pursuant to this agreement an election was conducted on July 1. The Union lost the election by a vote of 43 to 37 with 3 challenged ballots. The Union subsequently filed objections to the election, but later several of the objections were withdrawn. However, the remaining objections were consolidated with the instant unfair labor practice matter for hearing.[2]

The main issues in this proceeding are as follows:

Are Walden and Paradise supervisors or agents of the Respondent?

Did Respondent unlawfully enforce its rules regarding solicitation and personal phone calls?

Did Respondent threaten to discipline an employee if she attended an NLRB hearing.

Did the Respondent threaten to close its Hudson facility in retaliation for its employees' union activity?

Did Respondent threaten its employees with loss of benefits because of their union activity?

Did Respondent threaten to deny a wage increase to its employees because of their union activity?

Was Respondent's withholding of a pay increase prior to the election and granting of same subsequent to the election unlawful?

[2] Respondent contends that par. 8 of the amended complaint should not be allowed as it violated its right to due process; that the amendment contains many allegations that were previously dismissed or withdrawn by the Union in lieu of dismissal by the Regional Director. However, it is clear, as pointed out, under Sec. 102.17 of the Board's Rules and Regulations, that a complaint may be amended by the Regional Director prior to hearing, and I am in agreement that the amended complaint meets the requirements of Sec. 102.15 and, accordingly, it is sufficient to form the basis for litigation. It is further noted that all the pending allegations come within the scope of the amended charges and that none of them were either specifically withdrawn or dismissed. I am also aware and note that several additional unfair labor practice charges were not included as a part of the amended complaint even though they were brought against the Company during or subsequent to the election campaign, but after investigation by the Board all of these charges were withdrawn in lieu of dismissal. Moreover, at the instant hearing before me the General Counsel withdrew pars. 9, 10, and 11 of the consolidated complaint.

Did Respondent unlawfully interrogate and solicit grievances from its employees?

Did Respondent remove Plant Manager Rickard from the plant prior to the election and discharge him subsequent to the election in order to dissuade employees from supporting the Union?

Does Respondent's unlawful conduct warrant the setting aside of the election?

Did the union represent a majority of the unit as of April 28?

Are the unfair labor practices committed by the Respondent sufficient to warrant a bargaining order remedy.

Before addressing and discussing the specific allegations and issues, it should be noted at the outset that the election campaign here in question, and which lasted through May and June, was obviously quite open and "freewheeling" to all employees. In fact, this record shows that the plant's lunchroom and hallways were covered with both pro and antiunion propaganda and, as indicated, vocal employees on both sides of the issue aggressively asserted themselves and solicited support.[3] From time to time the Company's role also included clarifying misstatements of fact and law contained in the prounion materials, and policing *both* employee groups to help minimize the campaign's interference with plant operations and production. There were also numerous occasions when both pro and antiunion forces passed out and distributed leaflets, notices, and other literature.[4]

It is equally clear by this record, and most of the witnesses on both sides readily admitted, that the Company had a recognized "open door" policy in place both before and during the campaign period. Witnesses testified that they had numerous conversations and discussions with members of the corporate and plant management team in the months and years prior to the July 1 election, and in which employee grievances were openly discussed, investigated, and in some cases remedied. Moreover, it is also clear that a companywide grievance procedure, grievance committees, "birthday meetings," and other less formal channels of communication were continuously available to and used by the employees, and that the Company made efforts not to disrupt this system. A threshold question in this case is the supervisory status of Peter Walden and Sis Paradise.[5]

The General Counsel produced testimony through union committee members Jean Headley and Dot Bezio to the effect that Sis Paradise gave them instructions as to their work; that if they forgot to punch in for work, Paradise had the authority to sign for them; that on occasions Headley had received oral complaints about her work from Paradise; that if they were going to be absent from work or wished to leave early, they would contact Paradise; that there were approximately 10 to 15 employees in the finishing department supervised by Paradise; that at times Paradise authorized employees to work overtime; and that Paradise functioned as a conduit for messages from Plant Manager Rickard.

The General Counsel points out that in the election agreement, the Respondent consented that group leaders (including Walden and Paradise) were supervisors as defined in the Act; that it held them out to the employees as supervisors both by posting the Board election notice and distributing its own literature specifically stating their supervisory status.[6]

As above, the Company denies that group leaders Sis Paradise and Peter Walden are supervisors within the meaning of the Act, and while the Company did agree with the Union to exclude the group leaders from the bargaining unit, it did not stipulate to their supervisory status, and even so such a stipulation would not constitute a final determination of their supervisory status.

Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well-recognized Board law that the status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. It is also well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act. To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer supervisory status, and while these enumerated functions in Section 2(11) of the Act are to be read in the disjunctive, that section also "states the re-

[3] All charges and objections regarding the contents of the company *letters* and *memos* to employees were withdrawn or dismissed.

[4] See R. Exhs. 13–39 separate pro and antiunion samples of campaign material posted during the campaign in the off-work areas of the plant.

[5] During the time here in question, William Rickard was the plant manager; William Hogan was the plant foreman; Paul Moriarty was the manager of manufacturing services; and Hilda DeGrenier, Paul Walden, and Sis Paradise were classified as group leaders. Rickard was in charge of the entire plant; Moriarty reported to Rickard and was in charge of five quality control inspectors; Hogan reported to Rickard and through DeGrenier, Walden, and Paradise was in charge of the production employees. Max Sanders is the president of Respondent; Charles Dillon is the director of industrial relations; William Schneider is manager of manufacturing; and James Berg is the materials manager at the Skokie plant and served as acting plant manager for 2 weeks at Hudson. All the above individuals are admitted supervisors, except Walden and Paradise.

[6] The Stipulation for Consent Election, G.C. Exh. 3, and the Notice of Election, R. Exh. 22, excluded group leaders and other supervisors from the unit, but otherwise there are no admissions in these exhibits that Paradise or Walden was a supervisor or, for that matter, even the group leader. Moreover, under the Act, the status of an employee, and whether he or she is or is not a supervisor, is always determined by the individual's duties, and not by his title or job classification. It is also true that a finding or agreement to supervisory status in a representation case is not binding in an unfair labor practice case, *Serv-u-Stores*, 234 NLRB 1143 (1978).

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quirement of independence of judgment in the conjunctive with what goes before." Thus, the individual must consistently display true independent judgment in performing one of the functions in Section 2(11) of the Act. The exercise of some supervisory tasks in a merely "routine," "clerical," "perfunctory," or "sporadic" manner does not elevate an employee into the supervisory ranks. Further, the existence of independent judgment alone will not suffice; "the decisive question is whether [the individual involved has] been found to possess authority to use [his or her] independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act." In short "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former."

This record clearly establishes that Paradise had none of the responsibilities and work-related duties associated with supervisory status. Unlike senior group leader Hilda DeGrenier who reported directly to the plant manager, Paradise was under the direct supervision of Plant Foreman Bill Hogan, and Hogan credibly testified that he had full responsibility for the hiring, firing, discipline, training, and instruction of the 50–60 employees under his supervision, and that all other employees were supervised by either Materials Manager Paul Moriarity or Hilda DeGrenier. Unlike Hogan and DeGrenier, it is clear that Paradise had no authority to interview or hire new employees; that only Hogan had the authority to issue warnings, discipline, or terminate employees under his supervision. Hogan further testified that Paradise, who had no office and who was not on salary, could not schedule work hours, assign overtime, or evaluate other employees' work. Moreover, Paradise did not have the authority to determine if an employee's absence would be excused or unexcused, could not grant an employee time off from work, and could not make adjustments on employee timecards.

This record also shows, contrary to the testimony of the General Counsel's witnesses, that it was not necessary for employees to seek permission from Paradise to be late or absent from work or to leave the plant early. Bill Hogan and others testified that employees were instructed to call the plant before their shift if they would be absent or delayed and that prior to 7:30 a.m. the office phone would ring only on the plant floor and in so doing it might be answered by any nearby employee. In fact, employees Doris Massey and Dot Bezio admitted that they regularly answered calls during the early morning hours and then communicated the call-in messages accordingly. In fact, on cross-examination the testimony of Jean Headley and Dot Bezio confirms in several respects the Company's position that Paradise served only as a work expediter and a conduit of information to and from the employees. Both Headley and Bezio agreed that Paradise had no authority to hire, fire or discipline employees, and that the written warnings came directly from Bill Hogan. They further admitted that Paradise reported directly to Hogan, and that they actually had no idea how decisions regarding overtime work were made. Finally, Headley agreed that Paradise functioned as a team leader, and only occasionally would act or give instructions unless told to do so by Hogan.

I do not attach any special significance to the argument by the General Counsel that the Company used Paradise at times to distribute their literature, and/or authorized her to answer employee questions concerning their upcoming election. As noted, the organizing campaign here in question was openly and vigorously conducted by both sides and continuously sprinkled with numerous questions and answers on related subjects, distributions of notices, posters, buttons, T-shirts, rumors, and various literature constantly displayed or circulated by all parties, and all coupled with frequent discussions among everyone concerned. Therefore, it is highly unlikely that any one person would or could be singled out with any special significance as to these endeavors, and certainly there are no such indications in this record.

I now turn to the question of whether Peter Walden was an agent and supervisor within the meaning of Section 2(11) of the Act, as alleged. The General Counsel introduced testimony through Toni McNamara to the effect that Walden gave her instructions regarding her work; that if she called in sick or had to go home early she would speak to Walden or Hogan; and that "most of the time" Walden would authorize overtime.

Doris Massey testified that Walden was in charge of the coding area of about 15 to 20 employees; that he directed her work; that she contacted Walden when she was unable to come into work or wanted to leave early; that if she forgot to punch in Walden would sign in for her; and that on occasions Walden would relay instructions or directions from management people. However, on cross-examination, both Massey and McNamara admitted that Walden did not have the authority to interview or hire employees, nor did he have authority to issue written warnings, discipline, or terminate employees.

It was also established by the credited testimony of Foreman William Hogan that Walden was paid hourly, could not independently assign overtime, but would only communicate Hogan's request that particular machines work extra hours and Walden would then convey such instructions to the machine operators. It is also clear that Walden was not responsible for evaluating other employees' work, could not excuse an employee's absence, and could not even make final adjustments of errors on employee timecards without the approval of Hogan. In the final analysis, both the union and company witnesses generally agreed that Walden was a "work expediter" whose main function was to make sure that the work was processed quickly and in an orderly fashion, but under the direction of the foreman and plant manager.[7]

In light of the fact that Walden and Paradise exhibited none of the characteristics traditionally recognized by the Board as indicative of supervisory status, I have found that there is lacking an adequate basis in this record to find that either one was an agent of Respond-

[7] Like the circumstances involving Paradise, I also do not place any special significance on the fact that from time to time Walden may have passed out literature for the Company or answered questions—he was only one of many for both sides so engaged, as previously detailed.

ent and a supervisor within the meaning of Section 2(11) of the Act and, therefore, Respondent is not chargeable with their statements or conduct, as alleged. In accordance with the above, I dismiss the allegations contained in paragraphs 8(f), (j), (p), and (q) of the amended complaint.[8]

Paragraphs 8(a), (b), and (c) of the amended complaint alleges that:

> (a) Since on or about January 18, 1983, by issuing an employee rule book, Respondent promulgated, and since that date has maintained, the following rule:
>
> SOLICITING AND DISTRIBUTION OF LITERATURE
>
> Vending, soliciting or collection of any type for any reason during working time in any plant area is prohibited. However, any employee may engage in solicitation during non-working time in any plant area. Employees may not distribute pamphlets, notices of meetings, political material or any other type of literature at any time in work areas. Employees may distribute literature during non-working time only in non-working areas.
>
> (b) Since on or about May 1, 1983, Respondent maintained the rule described above in subparagraph (a) in order to discourage its employees from joining, supporting or assisting the union.
>
> (c) On or about May 1, 1983, Respondent acting through Walden and Hogan maintained and enforced the rule described above in subparagraph (a) selectively and disparately by applying it only against employees who joined, supported or assisted the Union.

Respondent's solicitation and distribution rule is presumptively valid. *Our Way, Inc.*, 268 NLRB 394 (1983), in which the Board held that "rules barring solicitation during working time state with sufficient clarity that employees may solicit on their own time." As a result of the *Our Way* holding, the burden is on the General Counsel to establish that some violation of Section 7 rights occurred through enforcement of an otherwise valid rule.

The General Counsel produced testimony through Doris Massey, a leading union adherent, to the effect that prior to May 1 she was allowed to walk around the plant and talk to employees while she was at work, but testified that after May 1 she was reprimanded by Walden and Hogan for talking to employees while she was at work. Massey further testified that during the campaign she observed other workers talking to employees while they were at work, but these employees wore buttons that said "Vote No."[9]

In making my conclusions and findings concerning this allegation, it is first noted, and as duly acknowledged by Massey, that the Company also has a well-recognized rule stating that employees are supposed to be at their machine or in their work areas, unless they are on breaks or have been sent some place by someone in management. Moreover, the General Counsel's witnesses testified that they understood the distinction between break and worktime, and members of the union organizing committee—including Bezio, McNamara, Massey, Headley, and Ayers—admitted that they were not restricted from distributing prounion literature during nonworktime, including periods before and after their shift, during breaks, and lunch, and several of these same individuals testified that they were not even prevented from soliciting authorization cards during worktime in the plant production area.

As indicated, this record establishes that the Company took a uniform approach to the enforcement of its solicitation policy. Witnesses testified that the walls of the lunchroom and adjoining hallway were covered with both prounion and antiunion literature throughout the election campaign, but steps were taken to prevent the spread of campaign literature to the work area and members of both the prounion and antiunion groups were told to restrict their activities to areas other than the plant floor. In fact, both Massey and Bezio testified that they met with Plant Manager Rickard on or about May 13 to discuss alleged violations of the solicitation policy by the antiunion group. It appears that on this occasion Rickard repeated the Company's position that solicitation was restricted to the periods before and after work, and during breaks and lunch. Moreover, as Rickard testified, he then also took the precaution of warning *both* groups that solicitation was prohibited on the plant floor, and on cross-examination Massey conceded that Rickard informed the *antiunion* group to stay at their machines and that they were not to be posting and handing out items during working time.

Massey acknowledged that as a leader of the organizing committee it was her practice to initiate conversations with other employees to gather support for the Union, but at the same time, recognized it was part of Hogan's responsibility to maintain productivity by enforcing rules that required employees to remain in their work area except during breaks. On cross-examination, Massey testified:

> Q. So the rule that we're talking about is a rule that except during breaks you're supposed to be at

[8] The General Counsel subpoenaed Peter Walden to testify, but Walden did not respond to the subpoena, and at the hearing the General Counsel initially offered the affidavit of Walden as an aid in the decision of whether to enforce the subpoena. However, after due considerations of all the factors involved, the General Counsel then decided to make an offer of proof consisting of Walden's affidavit. However, from the credited testimony of Foreman Hogan it appears that Walden was terminated by the Company for poor attendance and performance and, therefore, a consideration of this affidavit by me would deny to the Company the required opportunity for the cross-examination of a discharged former employee, and under such circumstances the strong possibility of a biased statement against Respondent. I have rejected the offer of proof, and due to the circumstances and events noted above, Respondent's motion to quash the subpoena is granted.

[9] She also testified that on one occasion Peter Walden told her not to leave her work area—to stay near her machine because she was being watched. However, because Walden is not a supervisor, as stated above, this statement cannot be chargeable to the Respondent.

your machine or in your work area, unless you've been sent somplace else by management?

A. Right.

Q. And that's so that we can produce resistors, which is what the company's business is? Correct?

A. Right.

Q. And if everybody is wandering around the plant it's not very good for production, is it?

A. No.

Q. And you say that you were told after May 1st to stay in your work area and not to be passing out literature or posting things when you were supposed to be at your machine?

A. Right.

Q. Now the company never tried to stop you from posting things in the lunch room or the ladies room before and after work or during breaks, did they?

A. No.

Q. You were allowed to do that?

A. Yes.

Q. And nobody ever said you couldn't?

A. Right.

In the final analysis, the reprimand Massey received from Hogan, above, was clearly only a part of the Company's lawful general practice of confining the election campaign to nonwork areas of the plant and maintaining productivity and was not improper discipline or interference. As testified to by Massey, this policy was applied evenly to both the prounion and antiunion groups. In accordance with the above, this allegation of the amended complaint is dismissed.

It is alleged that since on or about May 1, 1983, Respondent imposed more onerous terms and conditions of employment on its employees by more rigorous enforcement of its rule against receiving personal phone calls at work and selectively and disparately applying it only against employees who joined or assisted the Union.

Union committee member Jean Headley testified that on one occasion during the election campaign she had difficulty receiving a personal call from her husband concerning her sick child, but that after "arguing for a few minutes," she was then allowed to leave her work area to answer the call. Headley testified that antiunion employees, those wearing "Vote No" buttons during the campaign, were permitted calls and such were announced over the loudspeaker.

Union committee member Doris Massey testified that prior to May 1 she was allowed to receive personal phone calls at work, but that this policy changed and after this date employees with "Vote No" insignia on them were allowed to receive personal phone calls. Massey also testified that during the campaign she received an oral reprimand from Foreman Hogan for spending excessive time on the telephone.

The General Counsel argues that at the onset of the union organizing drive, Respondent, for the first time in over a year, began to enforce its rule relative to its employees receiving personal phone calls, and that the timing of this event, together with the lack of justification for it, other than vague and conclusionary testimony to the effect that a large number of calls were being made, is sufficient to establish a violation of the Act. Moreover, the example of Headley's call not being forwarded the day after she appeared with the Union at the National Labor Relations Board RC hearing on May 23, contrasted with Massey's testimony regarding a trivial phone call being put through to another employee, also establishes the disparate enforcement of the policy.

This record shows that throughout the years at their Hudson operations, management has periodically reminded employees of the handbook rule concerning personal telephone calls. As stated in the employee handbook—the Company's policy is to screen incoming messages and then call employees from their work areas only in emergency situations[10] and, as pointed out, both employees and supervisors agree that such periodic reminders are necessary to avoid unnecessary disruptions in the plant. In fact, Jean Headley even admitted policy reminders on phone calls were given in the year preceding the election campaign. Moreover, this record reveals that the Company had posted a reminder notice on the employee bulletin board approximately 1 year prior to the union campaign here in question,[11] and Doris Massey's testimony, after reviewing Respondent's Exhibit 6, even confirms that the Company had a regular practice of enforcing its personal phone policy:

> Q. And this was long before the Rubber Workers were ever organizing at Ohmite? Correct?
>
> A. Right.
>
> Q. So periodically it's fair to say that the Company has had to crack down on the number of personal phone calls because they were interfering with work.
>
> A. Right.
>
> Q. And the same thing happened in the Spring of 1983? Correct?
>
> A. Yes.

As set forth more fully by Respondent—the testimony in this case makes clear that despite the Company's acknowledged effort to enforce a reasonable work rule on phone calls, employee access to calls and phone messages was relatively unimpeded during the campaign, and aside from the short delay in the processing of Headley's call, stated above, no other witnesses testified that they were denied incoming telephone calls. Further, several witnesses for the General Counsel admitted that calls were received by union committee members including Gauthier, Ayer, Bezio, G. Hagen, Marks, McNamara, Arsenault, and Headley. In fact, on cross-examination Ayer admitted that employees were receiving personal phone calls whether or not they were on the union organizing committee.

In regard to Massey's reprimand from Foreman Hogan, as previously noted Hogan admitted that he did speak to her on one occasion regarding her constant use of the telephone. Hogan testified that he responded to

[10] See G.C. Exh. 2 at 7.

[11] R. Exh. 6.

Massey's request to leave her work station to make a personal call by stating:

> A. I said, okay, there's no problem, but you know, you have been using the phone an awful lot lately and you know, I want to keep it to a minimum.
>
> Q. Now why did you say that?
>
> A. Because she had been the using the phone an awful lot.
>
> Q. During working hours?
>
> A. Yes.

In her testimony, Massey agreed that Hogan's comment to her was a product of the Company's general enforcement of their phone policy. It is also noted that Massey, who was recalled in rebuttal as a witness after Hogan's testimony, did not dispute his claim that she was frequently seen out of her work area making and receiving personal calls. Moreover, as further indicated, at no time did Massey receive a written warning or other discipline on these grounds, nor were her telephone privileges discontinued.

I am in agreement that the General Counsel has introduced insufficient evidence to meet his burden that the isolated incidents described by Headley and Massey were discriminatory in nature or related to the organizing campaign and, accordingly, this allegation is also dismissed.

It is alleged that on several occasions in May, Respondent, by William Schneider, interrogated employees concerning their support for the Union, solicited grievances from them, and remedied the grievances.

Before turning specifically to the allegation, I think it best to set forth some of the background evidence in this record relating to the overall situation and circumstances pertaining to the Company's recognized policy of maintaining an "open door" for employees with complaints and grievances, as briefly indicated previously.

Charles Dillon, the Company's director of industrial relations, testified that he has maintained an open door policy since he joined the Company in 1966, and stated that this policy:

> . . . is one where employees have a right and privilege to come in to management and discuss their problems . . . employees have a right to use the complaint procedure or come directly to a manager or into personnel with their problems.

Thus, as further indicated, employees are regularly encouraged to discuss problems with supervisors and with the corporate headquarters people from the Skokie home office during their frequent visits to the Hudson plant. Dillon stated that he averaged fine to seven annual visits to Hudson, while William Schneider, in his capacity as manager of manufacturing, visited the plant on a monthly basis, and it is clear in this record that during such visits Dillon, Schneider, and a few other corporate staff members. regularly made it a practice to meet with employees at the work stations and to discuss their problems.[12] In fact, Jean Headley, and several other employees who testified, agreed that it was quite common for Dillon, Schneider, and others to regularly visit the Hudson plant and to discuss employee problems during these visits. Moreover, Doris Massey, a leader of the prounion group, confirmed that the Company encouraged employee-management communication:

> Q. And the Company maintained an open-door policy?
>
> A. Yes, they did.
>
> Q. When Mr. Dillon came out from Skokie did you see him walking around on the plant floor?
>
> A. Yes.
>
> Q. Did he ask you if you had any complaints, any problems?
>
> A. Yes, I suppose he did.
>
> Q. And this all, of course, took place long before the election campaign ever stated?
>
> A. Yes.

The General Counsel produced testimony through Jean Headley to the effect that sometime around mid-May, Manager Schneider approached her at work, said he noticed she was wearing a union button, and then asked her why she felt the employees needed a union. She explained to him what she felt was the overall problem, i.e., people not being treated fairly, and he then inquired if she had any specific problems. Headley told him that she had not received her efficiency ratings (on which her bonus was based) for a considerable period of time. Schneider then left, but returned shortly, and gave Headley her ratings. Headley further stated that while she had seen both Schneider and Dillon at the Hudson plant prior to the time period here involved—that in May and June they were at the plant more than ever before. She also testified that Schneider was not the person who normally gave out efficiencies and that he had not spoken to her since he had originally set up her machine in February 1982.

On cross-examination, Headley admitted that her talk in May was not her first or only conversation with Schneider regarding production problems, and further conceded that Schneider, who had set the piece rate on her machine in 1982, regularly attempted to solve employee problems. Headley also stated that the change in the method of efficiency rating reporting was again explained to her after the discussion with Schneider—that she was then informed that in order to see efficiency ratings, she would have to go to the plant office and ask for them.

Schneider testified that he talks to the employees on the production floor every time he comes to the Hudson plant, and that it is common for the employees to contact him regarding their efficiencies or piece rates, or problems with their machines. Schneider stated that he first

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[12] In *Brookfield Dairy*, 266 NLRB 698 (1983), the Board held that an 8(a)(1) violation occurred when, because of union activities, an employer discontinued its open door policy under which employees were free to discuss all job-related matters with their employer. Similarly, in *Gould, Inc.*, 260 NLRB 54 (1982), the Board held that even the threat of eliminating an open door is unlawful.

ərned from Headley that the past company practice of roviding written efficiency rating slips had been hanged by management in the Hudson plant—that he hen investigated the matter and learned that under the ew system the efficiency ratings were available to em-loyees in the plant office, and were also given to em-loyees on their payroll checkstub, and as a result Head-ey was then given her rating by him and told how she ould obtain this information in the future under the new rocedure.

Headley's testimony confirms that the Company had, n fact, maintained an open-door policy, and for many ears had encouraged employees to discuss problems vith management, and Schneider's conversation with Headley demonstrated a consistent application of such ractice.

Turning now to Headley's testimony which she stated hat on this occasion Schneider also asked her why the mployees needed a union. In *Rossmore House*, 269 NLRB 1176 (1984), the Board held that it would no onger apply the *PPG* standard[13] to the effect that ques-ions of interrogations concerning union sympathies were nherently or per se coercive, but rather the standard for valuating whether interrogation of employees violates he National Labor Relations Act, is: "whether under all f the circumstances the interrogation reasonably tends o restrain, coerce, or interfere with rights guaranteed by he Act."

The Company does not deny that Schneider may have sked Headley why she felt the employees needed a nion at the Hudson plant, but there is no evidence that his conversation was accompanied by any coercive con-luct or had any adverse effect on Headley or on the out-ome of the election. Headley, along with the other nembers of the organizing committee, was known to the Company to be a supporter because of the Union's letters o the Company, but, nevertheless, Headley did not hesi-ate in responding to the question and listing her several rievances as to why they needed the Union. As indicat-d, she further testified that she was not threatened or in-midated in any way by Schneider's question, and also tated that it had no effect on her vote. Moreover, her estimony on cross-examination clearly establishes that nion activities were a small part of a larger dialogue, iscussed above, concerning the distribution of employee iecework efficiency ratings.

As stated above, this was one of many conversations etween Headley and Schneider, but the particular con-ersation here in question was obviously innocuous and pparently without effect in that no other employees ere present, and there is no evidence of it having any ffect on the election outcome or on Headley's active articipation in the union campaign. Examined in con-xt, and in consideration of all the circumstances, chneider's question was neither intended nor had the ffect of denying employee Section 7 rights.

Organizing committee member Kathy Gauthier testi-ed that on May 19, and with employee Abby Williams resent, she was approached by William Schneider and ked: "What I thought about the union, and I told him I would rather not talk about it, that I'd rather talk about the weather."

Schneider testified that what occurred on May 19 was just one of numerous conversations he has had with Gauthier and other employees during his regular visits to the Hudson plant. He stated that he made a point of talking to Gauthier every time he came to the Hudson plant as he has known her for a long time. He described Gauthier as a talkative person who often asked for and received advice from him on personal problems.

Schneider testified that the May 19 conversation was another of his normal discussions with Gauthier as he could not recall her raising any specific grievance or complaint, and denies introducing the topic of the Union and recalled: " . . maybe she said something like, you know, I asked how are things, and she said, well, everybody is talking about the union, but I'd rather talk about the weather." Schneider testified that employee Williams was not present during this discussion, and further indicated that if he spoke to Williams, it was after talking to Gauthier, as her work area was nearby.

I have credited the testimony of Schneider in which he denies introducing any union conversation, but even, assuming arguendo, accepting *Gauthier's* testimony and version of this incident, there is still no violation of the Act as no other unlawful conduct occurred with respect to either employee, and the nature of this inquiry, in the total context of all the circumstances, as stated above, is not sufficient to establish the kind of interference, restraint, or coercion that would constitute "a violation of Section 8(a)(1)." *Rossmore House*, supra. Similarly, in *Stumpf Motor Co.*, 208 NLRB 431 (1941), the Board held that management asking "a self-proclaimed and known union adherent" what he thought of the union, did not violate Section 8(a)(1), but was merely a conversation opener.

In accordance with the above, this allegation relating to Schneider is dismissed.

It is alleged that on or about June 22, and on two occasions on or about June 23, Materials Manager James Berg, from the Respondent's Skokie plant and headquarters, interrogated an employee concerning the employees' union sentiments and solicited grievances and impliedly promised to remedy the grievances.

Kathleen Gauthier testified that on June 22 James Berg spoke to her at her work station and asked why she wanted a union, and that she replied "for more benefits and more respect." She also testified that Berg then asked her if the discharge of William Rickard, the plant manager, "would stop the thing with the union," and she replied that she didn't think—"We've gone too far."

Manager Berg testified that because of his unfamiliarity with the Hudson plant, he made a point of touring the plant floor and meeting the employees immediately after his arrival:

> Well, basically since I did not know the operation that well, I wanted to go out on the floor and just see how the floor flowed through and how we followed up on our orders in case I did get a call from Skokie on a preorder I would know where to go or who to see.

[13] 251 NLRB 1146 (1980).

Berg also confirmed that he did initiate a conversation with Gauthier during his tour of the plant, he stated:

> I did walk out to the floor. I had a purpose of going to that work area. She was assembling what we call a DA assembly, it's an assembly for winders. And we've been having problems with parts situations and I was walking out to that area at the plant to find out just what type of DA's the ladies were making. As I walked in that area she was the very first girl I happened to see walking through there and I happened to say Good morning, how are you? What DA's are your working on? And she told me and I said how are you working, are the machines running properly. And she began to say that her machine had not been running as well as it could have, or as it had in the past, that she had been having minor problems with mechanical problems and that she wasn't satisfied where she wasn't getting service. When she did have problems no one responded to her problems and she wasn't making as many parts as she thought she should have.

Berg also testified that he was interested in Gauthier's complaint because it related to his work in the Skokie plant as both plants made several assemblies for each other.

Berg testified that through her minor complaints about not getting respect, not being advanced fast enough, and having some mechanical problems with her machine, he then began to realize that Gauthier was a union sympathizer, and he replied:

> I kind of said that I really don't understand why you need outside help. These problems seem minor and they should be able to be taken care of right here within the plant and that's all I said.

Berg further testified that he then told Gauthier he would look into her problems:

> Q. And that was your, that was company policy, isn't it?
>
> A. Yes.
>
> Q. If an employee has a problem the manager looks into it.
>
> A. Yes.
>
> Q. And that had been the case long before this organizing drive ever started.
>
> A. Definitely.

Dot Bezio testified that during the third week of June she had two discussions with Berg, and that both of these conversations occurred at her workplace. She stated that in the first conversation Berg asked her why she felt that she needed "outside help" to negotiate, and if some changes were made would it make a difference. Bezio said that the second conversation occurred the following day when Berg again asked her why she needed outside help, and after she complained that the internal grievance process was not working and in particular complained about the way she had been treated by Rickard—Berg then told her "that doesn't sound good—I'll look into it."

Berg testified that on the occasions in question he and Bezio had talked for quite a while about different things—that Bezio was a gregarious person—and the more they talked the more she began to tell him about her problems. Berg stated that he was "shocked" at some of her complaints "because some of the problems were so minor. Some of the things were very solvable right there, immediate."

> Q. Was this problems with the machines or what?
>
> A. Machines, personalities, small grievances not being attended to. More or less the same type of thing the other girl was saying the previous day.

Berg confirmed that he told Bezio that he did not believe she needed outside help with these type of grievances, but that he would look into a few of her complaints:

> But I couldn't promise her I could fix it. I was only going to be there for two weeks.
>
> Q. Was it your understanding, was that company policy when an employee said they had a problem you would also look into it?
>
> A. Yes.

The General Counsel argues that Gauthier's testimony should be credited over that of Berg—that Berg's testimony was inconsistent regarding what Gauthier said to him and incredible in his claims that he did not know Gauthier was a union adherent when others in management were obviously aware of her activities. Moreover, that any determination of Berg's credibility must include a determination of why Berg was at the Hudson plant at the time in question because Berg admitted that his position at Skokie is not comparable with that of a plant manager, and that none of the functions of his position are performed by a plant manager, and that other than an earlier 2-day visit he had never even been at the Hudson plant, but despite these factors he was put in charge while Rickard was absent during the last 2 weeks in June. The General Counsel further points out and argues that in the past Berg had been sent to the Respondent's plant in Princeton when a union campaign was taking place, and it is the contention of the General Counsel that the real reason for Berg's assignment to Hudson was to be the "nice guy," and find out exactly what it would take to dissuade the employees from supporting the activities there, and that his total lack of credentials to serve as the Hudson plant manager, together with his admitted assignment to another plant during a union organizing campaign, cannot be dismissed as a mere coincidence.

Turning to the testimony of Bezio—the General Counsel maintains that there is not a great deal of difference between Bezio's and Berg's version of their conversations, and to the extent they differ it is the General Counsel's contention, for the reasons set forth above regarding Berg's credibility, that Bezio's version be credited. If credited, this testimony clearly establishes that Bezio was unlawfully interrogated and solicited, and neither the fact that she was wearing a union button or the

Company's preexisting open door policy is a defense to Berg's action.

First of all, in making my determinations concerning the testimony here in question, I am unable to attach any significant weight to the argument by the General Counsel that Materials Manager Berg lacked credentials to serve as the temporary manager at the Hudson plant in the absence of Rickard.

The credited evidence in this record reveals that Plant Manager William Rickard was away from the Hudson plant for the last 2 weeks in June, while attending a computer training course and consulting with company engineers regarding machine modifications (more on this later), and that the Company assigned James Berg, Skokie plant materials manager, to cover for Rickard during his 2 weeks' absence. Moreover, whatever other functions the General Counsel assigns to Berg while at the Hudson or Princeton plant, must be deemed as pure speculation, and his inferences therefrom are completely lacking in any evidentiary status so far as this record is concerned. Berg struck me as a highly capable executive with considerable experience, and as a straightforward and a very candid witness in all respects.[14]

As indicated, it is also noted that both Gauthier and Bezio admitted that their conversations with members of management were a result of the Company's ongoing open-door policy and, as previously pointed out, the Board has held that it can be a violation of 8(a)(1) to discontinue an existing open-door policy during an organizing campaign—*Brookfield Dairy*, supra. The testimony in this record clearly establishes that the Company has consistently applied and maintained its longstanding practice of soliciting and remedying employee grievances. In fact, Dot Bezio, in this regard, testified on cross-examination as follows:

> Q. Mr. Dillon has been coming out for years, hasn't he?
>
> A. Yes.
>
> Q. And when he came out he went around and talked to employees about what problems they had?
>
> A. We talked about panel meetings.
>
> Q. Birthday meetings or grievance panel meetings?
>
> A. Grievance panel meetings.
>
> Q. And all that was before the union?
>
> A. That's right.
>
> Q. So this conversation with Mr. Berg wasn't really much different from those earlier conversations, was it?
>
> Mr. Fitzsimmons: Objection.
>
> Judge Saunders: Well, if you know.
>
> A. That conversations with Mr. Berg were different? Yes.
>
> Q. But he was asking what the problems were, wasn't he?
>
> A. Right.
>
> Q. And earlier Mr. Dillon and other people from Skokie had asked similar questions, hadn't they?
>
> A. More or less.

Regarding the interrogation of these two employees by Berg, it is equally clear that no violation of the Act occurred. Berg's comments, which he freely admitted to, and under all the circumstances noted above, were neither coercive in intent or intimidating in result. *Rossmore House*, supra.[15]

In the final analysis, the General Counsel has not sustained his burden of establishing that Bezio and Gauthier were in any way inhibited from exercising their Section 7 rights. Berg's casual inquiries must be deemed as only a pattern or part of a larger dialogue in which corporate management officials have used for many years in their contacts and visits with employees while in Hudson, and in so doing seeking out their individual problems and then in some instances followed with their endeavors to help correct such difficulties.

The allegations as to James Berg are dismissed.

It is alleged that on or about June 23, 1983, Respondent, by Charles Dillon, solicited an employee's grievances and impliedly promised a remedy to the grievances.

Kathleen Gauthier testified that she had a conversation at her work station with the Respondent's director or industrial relations, Charles Dillon, on June 23, and Dillon asked what did she want out of a union, and she replied, "respect." No evidence was introduced of any promise by Dillon to remedy this request.

As to this incident here in question, Dillon testified as follows:

> Q. Did you, in fact, have a conversation with her?
>
> A. Yes, I did.
>
> Q. And by that time you received Mr. Morbidello's letter informing you that she was on the organizing committee, had you?
>
> A. That's right.
>
> Q. So, you knew where Cathy stood, didn't you?
>
> A. Oh, yes.

[14] Berg denied any talk with any employee about the possibility of firing Rickard. Berg stated that he was in no position to obtain Rickard's termination—that Rickard did not report to him, that, in fact, both of them were managers but in different chains of command.

[15] In *Graham Architectural Products v. NLRB*, 697 F.2d 534, 541, (3d Cir. 1983), the Third Circuit has also made the same approach:

> In deciding whether questioning in individual cases amounts to the type of coercive interrogation that section 8(a)(1) proscribes, one must remember two general points. Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace. Moreover, as the United States Supreme Court recognized in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), the First Amendment permits employees to communicate with their employees concerning an ongoing union organizing campaign "so long as the communications do not contain a threat of reprisal or force or promise of benefit." Id. at 618, 89 S.Ct. at 1942. This right is recognized in section 8(c) of the Act. Section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution. What the Act proscribes is only those instances of true "interrogation" which tend to interfere with the employee's right to organize.

Q. And was Cathy's version of that conversation entirely accurate.

A. No.

Q. Would you tell the Judge in your own words based on your own memory how that conversation went.

A. I was walking over to where Cathy was working in the capping area and she had one of these big union buttons on. That was the first time I had seen her wear one, although she may have worn it before that, but it was the first time for myself. And I, in a way kiddingly, said I'm surprised to see you wearing one of those buttons and she responded that she felt that maybe we need some changes around here and that was the reason she was for the union.

She also indicated that there were some problems with the equipment and the people could not communicate to their plant manager. And she said also that if a union could not do anything for them they could always, she used the term, fire them, after a year.

Q. What, if anything did you say?

A. My response to her was the fact that, that it may be much more difficult to get rid of them than you think.

Q. She said that you said it was a long process. Do you think you may have said that?

A. I said it was a long process.

Q. Did you in any way say that it was impossible to get rid of the union?

A. No.

Q. In fact, you know that it isn't.

A. That's right.

Q. Did you say that you would—Did you say anything threatening to her about her wearing the button?

A. No, sir.

Q. Did you say anything bad was going to happen to her because she was wearing the button?

A. No, I did not.

Q. Did you promise her that anything good would/happen if she took it off?

A. No.

Q. How long do employees have to wait after an election before they can ask for a decertification of election? Do you know, Chuck?

A. It's a year.

Q. Is that what you were referring to was a long time?

A. That's right.

In making my conclusions as to this allegation, it is first noted the admitted testimony of Gauthier to the effect that the conversation here in question was just one of many she had with Dillon during his frequent visits to the Hudson plant, and that she "always got along" with Dillon, and agreed that it had been his regular practice for quite some time to discuss plant related and personal matters with her.

Since both the testimony of Gauthier and Dillon establishes that this conversation was not coercive or intimidating and was not communicated to other employees, and based on decisions previously noted *Rossmore*, supra, no violation of the Act should be found, and I have so concluded.

It is alleged that on May 19 and 20 Dillon conditioned a wage increase on the defeat of the Union; that on or before July 1, 1983, Respondent failed to give a pay increase to its employees because they joined, supported, or assisted the Union and in order to discourage them from engaging in such activities; and that on or about July 14, 1983, Respondent gave its employees a pay increase retroactive to July 4, 1983, in order to discourage its employees from joining, supporting, or assisting the Union.

The General Counsel produced testimony through Jean Headley to the effect that at a "birthday meeting" in May,[16] in which about 14 employees were in attendance, and one of them asked Industrial Relations Director Dillon about the pay raise they had been getting each year, and that Dillon replied:

> . . . that as we knew the raise was usually *effective on July 1st*, and that this year the fly in the ointment was the union activities. And that the election was coming up on July 1st, and that if you voted no for the union the raises would go through as per usual. And if we voted yes, that we would have to wait and see, that they couldn't give us a raise right away because the union could use it against them as an unfair labor charge.

It appears that Lillian Ayer was also at the "birthday party" in May, and she testified that on this occasion someone inquired about the pay raise, and Dillon replied:

> Dillon said something about a worm in the ointment—a fly in the ointment. And then I turned and spoke to the person next to me, and I didn't hear the rest of the statement.[17]

Jeanine Gagne testified that in late June, she asked Dillon if employees were going to get a raise, and he answered: "It all depends on the union. If it comes in we wouldn't, and if it didn't we would get the raise." Gagne stated that each year the Company had given a wage increase and usually during the first week in July.

Counsel for the General Counsel argues that the testimony by his witnesses establishes that Respondent placed the onus for its failure to continue its prior pay raise policy on the Union, and thereby violated the Act. Moreover, maintains counsel for the General Counsel,

[16] It appears that "birthday meetings" were started by Rickard some time ago, and each employee whose birthday falls within that particular month was invited to the conference room for a general meeting with management and a discussion on production and other related matters. Headley agreed that Dillon had been attending such meeting for several years during his visits to the Hudson plant.

[17] Ayer agreed that even prior to the advent of organizational activities Dillon would visit the Hudson plant from time to time and would walk around the production floor talking to the employees and trying to find out if they had any complaints or problems, and then tell them he would endeavor to do something about it. Ayer also agreed that "for years" this had been Dillon's practice.

even if his witnesses are not credited, Respondent's statements and propaganda establish a violation—that an employer who wishes to lawfully withhold a pay raise during a campaign may do so only if it postpones the increase for the duration of the campaign and informs its employees of such, and then states that its reason for doing so is to avoid the appearance of interfering with the election—that in *Uarco Inc.*, 169 NLRB 1153 (1968), the employer made it clear in its campaign statements that whether or not its employees were represented by a union, it planned to continue its established practice of adjusting wage rates, but Respondent, in the instant case, has made no such announcement, and never assured its employees that they would get their annual raise even if they selected the Union, and this lack of a positive statement by Respondent was particularly harmful in the instant case as the plant was full of rumors that the pay raise would not be granted if the Union was selected. The General Counsel maintains that these rumors were the most talked about subject in the campaign, and not a surprising fact in light of the propaganda being turned out by the antiunion employees. Moreover, contends the General Counsel, because Respondent was aware of this propaganda, by means of it being posted, it had almost a mandatory obligation to make a positive statement that the employees would get the pay raise even if the Union won the election. The General Counsel further maintains that none of Respondent's propaganda specifically ensures the pay raise if the employees selected the Union—rather, it informed them that the wage increase would be granted if the Union lost but would be subject to negotiation if the Union won, and that this is shown by the text of President Max Sanders' June 29, 1983 speech to the employees (G.C. Exh. 5) in which Sanders (above) informs the employees that if they select the Union to represent them there is no guarantee that they will receive any wage increase at all, and that even if they do, it will be subject to what could prove to be many months of bargaining, and then proceeds to contrast that with the treatment the employees would receive if they reject the Union, specifically making reference to the annual wage increase and the fact that Dillon has completed the annual wage survey for the increase.

This record clearly establishes that it was Dillon's responsibility, as director of industrial relations for all three plants, to recommend the amount of the annual wage increase, and that his recommendation in this respect is reviewed by the company president and division directors who often make adjustments before approving the proposed increase. To prepare his recommendation, Dillon conducts an annual area wage survey for each plant, and in the Hudson area this involves collecting information from local employers and the Southern New Hampshire Industrial Association, and determining a competitive wage rate based on this data.

Dillon credibly testified that unlike prior years, he was unable to complete the 1983 wage survey until the mid-June, and cited a variety of factors as responsible for this delay, including his other obligations as director of industrial relations and the time consumed by several NLRB proceedings involving the Hudson plant.[18]

As further indicated, on May 23, Dillon and counsel for Respondent attended the *unit* hearing at the Regional offices, and at this time the Company and the Union agreed that the election should be held on a payday (Friday) after both sides had an opportunity to share their views. Dillon testified that he then discussed several dates with his counsel, and in so doing learned that his counsel would be unavailable on two Fridays, June 17 and 24, because of other commitments. However, the parties then agreed to Friday, July 1, as the date for the election. Dillon also testified that soon after the unit hearing, he then informed his counsel of the potential problem with the election date and the annual increase:

> I discussed with our attorney the fact that there was this [election] on July 1st, and we normally gave out our wage increases at that time and felt that this could be a difficult situation for us because by granting an increase before the election might influence the employees and thereby invoke an unfair labor practice charge against us.

Dillon testified that after discussing the above matters with members of management it was then decided to withhold judgment and simply go ahead with the survey, and it appears that the Hudson plant wage survey was completed in mid-June, and then sent to the directors, but final approval of the wage increase was not received until the second week of July:

> Q. And why was it delayed?
> A. Well, [we] couldn't get all the division directors together at one time, some were out of town, the president also, our attorney was unavailable.

Dillon also testified that the wage increase for Hudson was then announced on July 12, and that the decision to make the raise retroactive was made by the company president who agreed that the employees should not be penalized because of Respondent's own delay.

In making my determinations regarding these allegations, it is initially noted that the Board has held in numerous wage increase cases that there is no violation of the Act if the employer acts consistently with his own past practice even if that practice is not entirely regular.[19] As indicated, in *Sugardale Foods*, 221 NLRB 1228

[18] It appears that as a result of former employee Pat Tabor's unfair labor practice charge filed May 2, Dillon was also obligated to spend considerable time preparing the Company's response. Tabor's charge was subsequently withdrawn. Moreover, the receipt of the Union's recognition letter on April 28, 1983, placed additional demands on his time, and required him to meet with the Company's directors, plant supervisors, and counsel on numerous occasions.

[19] It should also be noted that an employer is under no absolute prohibition in the matter of granting benefits to employees, even during the course of a union organizing campaign, but it is true that benefits announced and granted during such a sensitive period will be closely scrutinized. Indeed, the Board has held, in the matter of granting wage increases, that there arises a strong presumption of illegality in the granting thereof during a union campaign. However, an employer is free to grant benefits as if the union were not in the picture, i.e., as it would in its normal business operations, absent any union organizing effort. *Winiex Knitting Mills*, 216 NLRB 1058 (1975).

(1975), the Board held that no violation occurs where the employer's reason for delaying the wage increase was to avoid election interference. The Board noted that when there is no evidence that the employer sought to undermine the Union by delaying the increase, and the employees understood the reason for the delay, no violation can be found, and the Board further found that, as in the instant case, there is no violation if the pay raise is subsequently applied retroactively.

In the instant case, Dillon had explained to several employees that the timing of the wage increase could result in an unfair labor practice charge, and numerous employee witnesses testified that they understood management's concern that a pay raise on or before election day could be viewed as a "bribe," or an unfair labor practice.[20] Therefore, even if the Company had completed the wage survey in time for July 1, a delay until after the election could have been appropriate.

In the final analysis, the Company acted consistently with its past practices (granted annual wage increases sometime during the first part of July); avoided their apprehensions of possible election interferences by delaying the increase until after the election; and explained to employees on several occasions why the delay in their opinion was necessary.[21]

Under the facts and circumstances of this case, I am unable to conclude or find that Respondent's deferral of the pay raise was coercive in nature or created an atmosphere that interfered with the employees' exercise of a free choice in the election. On the contrary, I find no evidence that the Company sought to undermine the position of the Union or to influence the votes of employees in the impending election by deferring the increases, or that the employees believed such to have been the case. Indeed, as the Company made it clear to the employees that the sole purpose of deferring the expected pay increases was to avoid the appearance of interference with the election, and therefore within the guidelines of *Uarco Inc.*, 169 NLRB 1153 supra.

It is alleged that on or about May 20, 1983, Manager Rickard told an employee that attending an NLRB hearing would be an unexcused absence.

Doris Massey testified that on the date indicated below she gave a letter addressed to William Rickard from Union Agent Morbidello, which requested that she act as a observer for the Union at the RC hearing on May 23 and, if necessary, on consecutive days thereafter.[22] Massey stated that later in the day she asked the plant manager if she could be excused to attend the hearing as indicated in the letter, but that Rickard then replied that if she took the day off it would be an unexcused absence and would go against her record. Massey testified that prior to the date in question she had been allowed absences for personal business and she was also aware of other employees who were permitted excused absences for personal business. Massey said that as a result of her conversation with Rickard she did not attend the hearing even though Rickard did not tell her that she could not go.

The General Counsel points out and argues that Rickard threatened Massey by stating that her attendance at the RC hearing would result in an unexcused absence because it is clear that such an absence, while not a per se basis for discipline, can together with other absences, result in discipline up to and including discharge, and that the best evidence of the reality of the threat is that Massey did not go to the hearing. Moreover, Massey's testimony that both she and others have received excused absences for personal business was not refuted. The General Counsel also points out that although Respondent made much at hearing that Massey's requested attendance was only as an observer, it is clear that by the date of her request Respondent was aware of Massey's status as the foremost union adherent, and that her request was not one made out of mere curiosity and, accordingly, Rickard's statement to her violated Section 8(a)(1).

The Company does not dispute that union adherent Doris Massey was told that her absence from work to observe the May 23 unit hearing would be considered "unexcused," but the Company maintains that this action was proper and consistent with past practice and does not constitute a violation of the Act.

Plant Manager Bill Rickard testified that whether an absence is considered excused or unexcused is relatively unimportant unless an employee has a noticeable attendance problem, and that it would take at least three unexcused absences in a month before an employee would receive even a written warning.

Plant Foreman Bill Hogan testified that excessive absenteeism was rarely regarded as a termination offense except under extreme circumstances or where it became "habitual—for example group leader Peter Walden was

[20] Dillon credibly refuted the statements attributed to him by Jean Headley. Dillon testified that at this May meeting, when a question was asked if a pay increase would be given, he replied by stating that at this time it was very difficult to answer this question and pointed out that by announcing the wage increase the Company could have an unfair labor practice charge filed against them. Employee Kim Adams testified that no one from management ever told them that they were not going to get a pay raise, but there were *rumors* to the effect that if the Union came in there would/be no pay raise or that he raise might be delayed—that Dillon had stated that he did not want the union people to think that the Company was "bribing" them. Employee Mary Brown testified that she had two conversations with Dillon regarding the pay raise, and on the first occasion in March he told her that they were "pretty sure" the raise would be given, and on the second occasion in June, Dillon told her that the raise may have to be held off because the Union could say the employees were being bribed. Employee Terry Cote also gave similar testimony. It should also be noted that not one of the participants, other than Headley, testified that they came away believing that the wage increase was conditioned on the election results, and employees Terri Cote, Diane Arseneault, Kim Adams, and committee member Lillian Ayer each testified that they had no doubt that they would receive a raise in 1983. Moreover, Dillon's May 10 letter to employees spoke of "continued wage increases" (R. Exh. 24), and his June 24 preelection letter referred to wage increases "every year" for our "past ten years" (G.C. Exh. 6). Finally, on the eve of the election, Respondent's President Max Sanders spoke to all employees and in so doing mentioned that Dillon had "just recently completed his annual wage survey," and also mentioned that employees were aware of the company policy in which wage adjustments were made each year.

[21] In posted notices to employees relative to the election, there are no references to any wage increase delays or nonpayment that I am aware of. In fact, in R. Exh. 26, dated May 23, 1983, Dillon states that the Company expects to continue its policy of wage increases.

[22] See G.C. Exh. 30.

terminated after he missed 18 out of 26 workdays with unexcused absences.

In her testimony, Massey admitted that she was not under a subpoena to attend the RC hearing,[23] and further admitted she was not told that she could not attend the hearing, and was not threatened with any form of discipline. It appears that Rickard simply informed her that her absence would be considered unexcused, based on his understanding of the Company's attendance procedures, and Massey was not given a written warning on this or any other occasion during the campaign.

As further indicated, the decision not to attend the unit hearing was made by Massey, and not by the Company, and whether an absence was unexcused or excused has no effect on an employee's earnings or wages. Further, Massey had no grounds for concern unless she made a habit of her absenteeism, and there is no evidence of this. I am in agreement that the Company treated Massey's request no differently than it would an employee's request to visit a lawyer, a doctor, or attend any other need of a personal interest. In the final analysis, Massey was not prevented from attending the hearing, and was not threatened with any meaningful disciplinary action if she chose to attend, but would merely be accorded an unexcused absence based on the Respondent's normal procedures. In accordance with the above, this allegation is dismissed.

It is alleged that on or about June 1983, Respondent, by Hilda DeGrenier, threatened employees that they would not receive their annual pay increase, that they would lose all their benefits, that the Company would shut down the plant, and they would be laid off if they selected the Union to represent them.

Kathleen Gauthier testified that in the third week in June she and two other employees, Carol Marks and Carol Maginguy,[24] had a conversation with supervisor and senior group leader Hilda DeGrenier, and in which DeGrenier told them:

> She didn't have much to say too much about a union because she was in one and she didn't think they did much for the people. And then if we did we'd lose our benefits if we did go for a yes vote. We'd lose our vacation and a lot of other things. It could get down to 10 to 15 people, if there were to be like a layoff.

Gauthier also remembered DeGrenier telling them that "they could get to close the shop, and the union people could be out of a job."

DeGrenier testified credibly and at quite some length regarding her several conversations with Gauthier and other employees during the campaign. DeGrenier, who has worked for Ohmite and its predecessor for many years, testified that she had numerous friends in both the pro and antiunion group, and for this reason took no active part in the campaign, but prior to her employment at the Company she had worked in several factories where she became an active union member and at one time even served as a steward. DeGrenier testified that through this background, and her husband's current membership in a union, she had a good understanding of negotiations and contract ratification process, and that some of the employees were aware of her knowledge in these matters, and as a result asked her questions about the Union's campaign promises. DeGrenier testified that during such conversations she expressed her own opinion on a variety of employee questions and on matters regarding the contents of the posted pro and antiunion campaign literature in the plant.

DeGrenier testified that during this conversation Gauthier and the two other employees approached her with questions regarding a particular prounion wall poster that promised increased wages, benefits, and job security if the Union was elected. DeGrenier testified that when asked if the Union could make such guarantees by Gauthier and Marks, she stated:

> And so I had explained to her that it wasn't necessarily so. That company nor union could guarantee you a job because if things got slack, we would have a layoff and that the least senior person would get laid off first (the layoff procedures at Hudson).[25]

DeGrenier stated to employees that whether layoff occurred at the plant depended on the economy, and not on whether there was a union in the plant. DeGrenier testified that she told the employees that the Union could not guarantee increased wages, that this was not necessarily so, but denied saying anything about losing wages or benefits:

> Q. Did you say that they would lose their vacations if they voted for the union?
>
> A. No, sir.
>
> Q. Did you think that was the case?
>
> A. No, sir. I knew better.
>
> Q. How did you know better?
>
> A. Because that is not—even with the other unions I belonged to, it was never worked that way.
>
> Q. You never lost your vacation.
>
> A. No, sir.
>
> Q. Did you tell them they would lose their insurance and their benefits if they voted for the union?
>
> A. No, sir.
>
> Q. Did you tell them the plant was going to close down if they voted for the union?
>
> A. No, sir.
>
> Q. Did you tell them that they had killed the wage increase for this year?
>
> A. No, sir.

[23] See R. Exh. 31—a company notice to employees stating that any employee *subpoenaed* to testify at the *instant* hearing, would be paid their normal wages minus witness fee received.

[24] Marks and Maginguy were not subpoenaed or called as witnesses by the General Counsel.

[25] There had been a general layoff at the Hudson plant in December 1982, over 6 months before the election. This record also shows that an unfair labor practice charge filed by the Union alleging that the Company had unlawfully tampered with Gauthier's seniority because of her union involvement was later withdrawn or dropped by the Union.

Q. Did you think there would be a wage increase this year?

A. Yes, sir.

Supervisor DeGrenier further testified that Gauthier was concerned about her seniority, stated above, and the possibility of another layoff and raised the issue during subsequent conversations, but she repeatedly told Gauthier that she had no knowledge of any plant shutdown. However, as also indicated, DeGrenier did state that a union could not guarantee job security and that the negotiation process carried no guarantees of improved wages or benefits—that the parties would get together and would then "dicker" over insurance, vacation, and holidays.

I am in agreement that the General Counsel has introduced no credible evidence that DeGrenier threatened employees during her conversations with them; but on the contrary, the evidence adduced clearly establishes that DeGrenier presented an accurate, fair, and balanced approach in employee-initiated discussions of union matters and bargaining realities. See, e.g., *White Stag Mfg. Co.*, 219 NLRB 1246 (1975).[26] Moreover, several employees testified that their conversations with DeGrenier left them with no impression whether unions were good or bad, and even Gauthier admitted that DeGrenier told employees to vote their conscience: "I told them that it was very important that they all vote. It was their right to vote irregardless of whichever way they voted. But please vote."

In the final analysis, the union statements or replies admitted by DeGrenier did not constitute threats that the Company would not bargain in good faith; that employees would not receive the annual pay increases or would lose all benefits; or that the plant would be shut down; or that employees would be laid off if they selected the Union. Further, there is no evidence that any of the employees involved in the alleged incident, all of whom were committee members, were inhibited, restricted, or dissuaded in their support for the Union. DeGrenier's comments were merely the expression of personal opinion of a low-level supervisor and, under the circumstances here, no violative conduct can be attributed to her as she merely informed interested employees in some of the basic realities in the collective-bargaining process.

This allegation is dismissed in accordance with the above.

It is alleged that on or about June 17, 1983, Respondent removed William Rickard from the plant as a benefit to employees to induce them not to select the union to represent them, and that on or about July 7, 1983, Respondent discharged Rickard in order to discourage its employees from joining, suppporting, or assisting the Union.

It appears that some 9 or 10 months ago from the date of the hearing, the Hudson plant installed a data processing computer system of Texas Instruments in order to process invoices and to improve the transmission of payroll data, and Dillon testified that during early 1983, when this related matter came up for discussion, Rickard expressed interest in attending a training school on the use of this equipment so as to be familiar with it, and then, in turn, he would be in a position to train employees at the Hudson plant. Dillon stated that about the same time period, it was also necessary for Rickard to work with and acquire experience in processing new coating methods on certain machines, and during the latter part of June, Rickard was sent to Skokie for this purpose and then went to the Anchor Brush headquarters in Tennessee for training on the data processing equipment. Dillon testified that Anchor Brush set the time for the training and Rickard's trip during the last 2 weeks in June had nothing to do with the Union.

Bill Rickard testified regarding his whereabouts 2 weeks prior to the election and corroborates the testimony of Dillon:

Q. Just a couple other questions, Bill. Where were you during the two weeks prior to the election?

A. I was in Skokie and in Tennessee.

Q. Would you briefly tell the Judge what you were doing in Skokie.

A. In Skokie we were working on a problem we had with the 44 processing, that was type of resistor that we made, and I was working with the engineers on that out in Skokie. We also were working on another process which is called a 22 coating machine, which Skokie was putting together and because of Hudson being the only location that had that process, I was helping them develop the equipment. And I also went down to Tennessee to deveop a program, computer program, that we had been working on for months, the T.I. system.

Q. For a Texas Instruments system?

A. Right.

Q. And when did the Hudson plant acquire that Texas Instruments system?

A. On, at least eight to ten months prior to me going out there.

Q. Prior to late June.

A. Right.

Q. And what were you learning in Tennessee about the Texas Instruments system, just briefly?

A. Well, what we were doing was, we had several manual reports that were being done in the office and because of the expense of the Texas Instruments system, we were trying to convert those over to a computer entry.

Q. And somebody from Hudson had to go to this seminar?

A. Yes.

Q. And how did you come to be the one?

A. Well, I actually volunteered because of my background in computer programming.

Q. You like working with computers?

A. Yes, I do.

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[26] Sec. 8(c) of the Act provides:

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat or reprisal or force or promise of benefit.

Rickard testified that he was informed a week or two prior to June 17 that he was going to Skokie and Tennessee by Dave Kluxdahl, the Respondent's general manager and director of operations.

This record reveals that in March, prior to any union activity, Rickard received an unfavorable performance evaluation as plant manager, and Dillon testified that he was then aware that Rickard's continued employment was in jeopardy and later learned that management intended to terminate him. Rickard testified that, in late June, he was informed by Respondent's president, Max Sanders, that he was going to be discharged for poor performance, and thereafter received 2 weeks' severance pay.

It is undisputed that Rickard was absent from the plant the last 2 weeks prior to the election, and that his discharge was announced to the employees after the election.[37] As aforestated, Respondent claims that this was merely the result of good-faith business decisions. However, it is the General Counsel's position that these acts were done to undermine the employees' support for the Union.

The General Counsel points out and argues that supposedly Rickard was sent to Tennessee to learn how to operate a computer despite the fact that the Company had the equipment for 10 months prior to this, and that he was sent to Skokie to assist in the conversion of a piece of machinery despite the fact that the manufacturing manager, Paul Moriarty, was in charge of this machine. Moreover, maintains the General Counsel, these trips were ordered on 2 weeks' notice irrespective of the fact that Respondent was seriously considering Rickard's discharge, and that the man who replaced Rickard was totally without credentials, and that these facts, together with what Respondent had to view as Rickard's responsibility for the union campaign, lead to the inevitable conclusion that his removal from the plant was a deliberate attempt to undermine support for the Union.

Turning to Rickard's discharge—the General Counsel contends that a review of his final evaluation (R. Exh. 30) shows that Rickard was a "union organizing drive waiting to happen," and in particular it should be noted on his evaluation that he was rated as aggressive, not aware of the feelings of others, and someone who disregards personnel policies to accomplish short-term goals. It is also pointed out Rickard's testimony to the effect that he was not told about his discharge when he received his evaluation in March although Dillon described Rickard's position as then being in jeopardy, but it is clear that Respondent did not intend to discharge him at that time, and, argues the General Counsel, Respondent did not adduce a single event that occurred between March and July to support its discharge of Rickard. Therefore, in light of this, and the events discussed below, there can be no other conclusion but that Rickard was discharged in order to remove a prime incentive for the employees supporting the Union. Moreover, in late June, Respondent began an intense effort by means of unlawful solicitation of grievances to determine what was necessary for it to prevail against the Union, and it had already recognized Rickard as a major reason behind the employees' desire to have a union and had temporarily removed him from the facility, and now, through Berg and Dillon's unlawful solicitation, it discovered that the depth of feelings against Rickard ran even deeper. Further, on June 22, Berg solicited Gauthier whether Rickard's discharge would induce the employees not to support the Union, and on the following day Dillon solicited from Gauthier that one of the major reasons the employees wanted the Union was because they could not communicate with Rickard. Additionally, contends the General Counsel, during the same week Dillon also found out from Jeannine Gagne that Rickard's actions and attitudes were "why we needed something," and James Berg also solicited from Dot Bezio that her major complaint was that Plant Manager Rickard was unfair.

In concluding his argument, counsel for the General Counsel maintains that by this time Respondent had now ascertained from three members of the union organizing committee that Rickard was the major source of employee dissatisfaction, and his demise shortly followed. Moreover, the fact that the benefit (Rickard's discharge) was not conveyed until after the election, does not minimize its unlawful effect.

In making my conclusions regarding these allegations, it is first pointed out that in my evaluations there is insufficient evidence in this record to show that Rickard's absence from the plant was related to the organizing campaign and the election. As indicated previously, Rickard left the Hudson plant approximately 2 weeks before the election, and spent this time consulting with company engineers at the headquarters in Skokie and attending a computer training course in Tennessee. It appears that both trips had been planned in advance but were delayed somewhat because of difficulty in finding a computer training facility that used the Company's new computer system. It was also established that while in Skokie, Rickard assisted company engineers in converting the Hudson plant's "44 Process" coating machine.

The General Counsel states that this allegation is supported by the testimony of Kathy Gauthier regarding her conversation of June 22, with Respondent's materials manager, James Berg. However, as previously indicated, Berg credibly testified that he is not Rickard's supervisor, had no involvement in his absence form the plant, and specifically denied any talk with any employee about the possible discharge of Rickard. In this regard, Berg testified as follows:

> Q. Did anytime during that conversation, did you ask her if it would help if Rickard was fired?
>
> A. No, never, sir.
>
> Q. Did you ever talk with any employee about firing Rickard?
>
> A. No, Sir.
>
> Q. Would it be your position to obtain Mr. Rickard's termination?
>
> A. No.
>
> Q. Organizationally, were you two more or less on the same level?
>
> A. We're all managers.
>
> Q. Did he report to you or you report to him?

[37] See R. Exh. 5.

A. He did not report to me. He reported to Bill Schneider.

Q. And who do you report to?

A. I report to Dave Kluxdahl.

Q. So you're in different chains of command.

A. Yes, sir.

Q. Did you mention anything about Mr. Rickard's continued employment during that conversation?

A. Never mentioned his name once.

In the final analysis, the theory advanced by the General Counsel is that Rickard was terminated so as to remove an unpopular condition of employment (Rickard), and which complaints about him had been voiced by the employees to management.[28]

In the first instance, the record in the instant case clearly shows that the Company had adequate business justifications to send Rickard to Skokie and Tennessee, and there is no testimony in this record otherwise. There is some confusion in this record concerning the exact date when the actual *decision* was made by President Max Sanders to discharge Rickard and, therefore, it is somewhat difficult for the General Counsel to successfully maintain that Rickard made the above trips when the Company was about to discharge him. The final evaluation sheet, also relied on by the General Counsel, merely shows that the Company had adequate reasons and justifications to fire Rickard whenever they decided to do so, but any other deductions or inferences therefrom must be deemed as pure speculation. There is also the argument that in June management made unlawful solicitations of grievances to find out what was necessary for the Company to prevail over the Union. However, in earlier sections of this decision, I have fully considered and detailed such allegations and have recommended dismissal of the same. Finally, the argument is made that management had now ascertained from three members of the organizing committee (Gauthier, Bezio, and Gagne) that Rickard was the major source of employee dissatisfaction. In this regard Berg testified that Gauthier complained to him about minor mechanical problems and that she "wasn't getting service." Under the totality of circumstances in this case, this statement by Gauthier can hardly be deemed a serious complaint about the plant manager. Dot Bezio testified that prior to the election she told Berg that Rickard "was unfair" because she had "bid off a job" but nevertheless Rickard had told her to take it. However, Berg only recalls several minor complaints mentioned by Bezio, as previously detailed herein, but there were no specific complaints about the plant manager. The General Counsel apparently maintains that the complaint Jeannine Gagne had as to Richard was registered in a conversation she had with Dillon:

Q. You remember the election day on July 1st.

A. Yes.

Q. Prior to that election did you ever have any conversation with Mr. Dillon about the union?

A. Yes.

Q. When did that conversation take place?

A. The 25th of June. Around there.

Q. Where did it take place?

A. At my work area.

Q. Was anyone else present?

A. Not at my table, but surrounding me. Yes.

Q. Could you tell me what was said in that conversation? Tell me what Mr. Dillon said to you and what you said to Mr. Dillon.

A. Well, he was going by and I glanced at him, and I said: "I suppose you're not coming to see me," and he said: "Good morning." I said: "It's too bad about the mess we're in. It didn't have to happen. That's why we need something." For instance, Mr. Rickard, our plant manager, I asked him about my machines. They were down, and they had been down seven weeks. I had loads of work, a lot of red tags, and some of the other supervisors were coming to look for their work and I couldn't do a thing.

Again, it appears to me that while Rickard may have been unable on certain occasions to meet all the demands and needs of his employees, nevertheless, there is no substantial showing that his presence and performance as plant manager was in any way injurious to the extent or

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[28] In *Parker-Robb Chevrolet*, 262 NLRB 402 404 (1982), the Board noted, inter alia, as follows:

> . . . a supervisor's discharge is found to be unlawful if it is motivated by a desire to thwart organizational activity among employees. However,the justification for finding a violation and reinstating a supervisor who would otherwise be excluded from coverage under the Act is grounded upon the view that the discharge itself severely impinged on the employees' Section 7 rights. As noted above, the Board has found that, when a supervisor is discharged for testifying at a Board hearing or a contractual grievance proceeding, for refusing to commit unfair labor practices, or for failing to prevent unionization, the impact of the discharge itself on employees' Section 7 rights, coupled with the need to ensure that even statutorily excluded individuals may not be coerced into violating the law or discouraged from participating in Board processes or grievance procedures, compels that they be protected despite the general statutory exclusion. In contrast, although we recognize that the discharge of a supervisor for engaging in union or concerted activity almost invariably has a secondary or incidental effect on employees, we believe that, when a supervisor is discharged either because he or she engaged in union or concerted activity or because the discharge is contemporaneous with the unlawful discharge of statutory employees, or both, this incidental or secondary effect on the employees is insufficient to warrant an exception to the general statutory provision excluding supervisors from the protection of the Act. Thus, it is irrelevant that an employer may have hoped or even expected, that its decision to terminate a supervisor for his union or concerted activity would cause employees to reconsider, and perhaps abandon, their own concerted or union activity. No matter what the employer's subjective hope or expectation, that circumstance cannot change the character of its otherwise lawful conduct.
>
> In the final analysis, the instant case, and indeed all supervisory discharge cases, may be resolved by this analysis: The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Sec. 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is not unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act.

When this test is applied in the instant case, I am unable to conclude that the discharge of Plant Manager Rickard interfered with the right of employees to exercise their Section 7 rights or that his reinstatement is necessary to convey to employees the extent to which the Act protects these rights.

scope as contemplated and suggested by the General Counsel. Moreover, it is again noted that the Board has generally refused to hold an employer responsible for the antiunion conduct of such a supervisor absent evidence that the employer encouraged, authorized, or ratified the supervisor's activities or acted in such a manner as to lead the employees to reasonably believe that the supervisor was acting on behalf of management. *Bennington Iron Works*, 267 NLRB 1285 (1983). By this record, I am not persuaded that Respondent encouraged, authorized, or ratified Rickard's activities or led the employees to believe he was acting on behalf of management even if there was a link to union activity.

The General Counsel has introduced no evidence in support of these allegations that were not fully rebutted by Respondent. In fact, Doris Massey, head of the organizing committee, agreed that Rickard was "all right." Rickard was absent from the plant on legitimate business trips (there are only *inferences* to the contrary), and was terminated on or about July 5 because of concerns about his job performance dating back to his last formal evaluation in February, and the employees were not even aware of his discharge until *after the election*, and under such circumstances, it is highly unlikely that employees were thereby induced not to select the Union. In accordance with the above, I also dismiss these allegations.

It is alleged that on or about May 12, 1983, Respondent, by Rickard, implied to an employee that the Union had killed a raise, and told the employee that if the Union gets in all benefits are up for grabs, and that on or about May 13, 1983, Rickard told employees that if the Union got in all benefits were up for grabs.

The General Counsel introduced testimony through Dot Bezio to the effect that on May 12, she showed Rickard a small sheet of paper that was being distributed by antiunion employees, and which stated, inter alia, that the Union had killed the annual pay increase,[29] and asked him if something had happened that she was not aware of. According to Bezio, Rickard then replied by telling her that "everything is up for grabs" and that everything has to be "renegotiated." The next day Bezio had a another conversation with Rickard in which she attributed the same statements to him. Massey was present for this conversation and also testified to Rickard's statement—she stated that Rickard told them that all benefits "were up for grabs," and if the Union got in "everything we did would have to be renegotiated," that employees would not get any more benefits than what they did have, and that the Company would have the last say.

Rickard testified that in the conversation here in question, the subject matter of the Union was brought up and what would happen if the Union got in, and his response was "that all the benefits would have to be negotiated." Rickard then testified that this question was asked quite often during the campaign and he probably could have said either negotiate or renegotiate. Rickard denied saying anything about the Union killing the wage increase, nor did he say employees would lose their vacations or benefits, or that they would have to renegotiate to get what they had already.

The General Counsel argues to the extent the testimony between the parties differ, Bezio's and Massey's testimony should be credited as Rickard's testimony was evasive throughout his cross-examination, and that this is particularly shown by his testimony regarding Respondent's policy on absences. The General Counsel also notes that as both Bezio and Massey are still employed by the Respondent they would have much to lose by testifying falsely.[30]

In closely examining the testimony pertaining to this allegation, it appears to me that on cross-examination Bezio was less certain of the substance of the conversation here in question. In contrast to her earlier testimony, Bezio stated that she did not remember Rickard saying anything about whether employees would get a pay raise in 1983, but could only recall the phrase "up for grabs" and that employee benefits would have to be "renegotiated" if the Union won the election. As indicated, Rickard confirmed that he was never asked to read or comment on the leaflet here in question. He credibly stated that Bezio initiated the conversations to "talk about the fact that nonunion people were distributing the leaflet on Company time," and *not* to discuss the contents of the leaflet. Moreover, that he did not even see the leaflet mentioned by Bezio, that he was not asked to read it, nor did he affirm or disclaim any of the contents.

Rickard also credibly denied ever using the phrase "up for grabs" in regard to employee benefits, but does recall telling Bezio that solicitation by both pro and antiunion groups was limited to periods before and after work, during breaks, and lunch, and it appears that both groups were subsequently monitored to assure that the distribution of literature was confined to the lunchroom and hallways, as previously indicated.

On May 13, union organizing committee members Bezio and Massey initiated a second conversation with Rickard to again discuss solicitation matters, and in which both claimed that Rickard repeated that if the Union got in, "everything we did have would have to be renegotiated" and all the benefits "were up for grabs," but Rickard's recollection of this conversation differs significantly from that of Bezio and Massey. Rickard stated that after discussing solicitation and other issues:

> Well, to the best of my recollection, I believe we got to the point of saying, well, what would happen if the union got in. And my response to that was that all the benefits would have to be negotiated.
>
> Q. Can you remember, there was a lot of discussion yesterday about negotiate or renegotiate, can you remember if you said negotiate or renegotiate?
>
> A. Probably, it came up in several conversations, I probably could have said both.

[29] G.C. Exh. 47.

[30] The General Counsel stipulated that the antiunion group of employees were *not* agents of the Company. No charges have been pressed against the Company regarding the content of any campaign materials, and Rickard is no longer employed, having been terminated in earlier July 1983, as stated above, so any possible repercussions against Massey and Bezio because of their testimony has been considerably reduced or eliminated altogether.

I am in agreement that whether Rickard said "negotiate" or "renegotiate" in either conversation is quite unimportant and immaterial within the context of this organizing campaign. The record and exhibits in this case show that employees initiated countless number of conversations and other communications about the Union prior to the election. Rickard testified:

> It was very hectic, in fact, from a productivity standpoint, it was atrocious. It seemed like nothing was getting accomplished other than union and nonunion activity. It was very hard to stay productive during that period.

The admitted remark by Rickard that if the Union got in all benefits would have to be negotiated or renegotiated appears to be quite innocuous considering the extensive and overall activities during the campaign. Moreover, there were only two employees involved in this instance, both of whom were leaders of the union organizing committee who presumably, and by reasonable inference, were strong supporters of the Union and not easily persuaded otherwise, and there is no evidence on the record that they repeated Rickard's comments to any other employees. Further, it is clear from the testimony that neither Massey, Bezio nor Rickard understood any real distinction between negotiate and renegotiate in the collective-bargaining context. When asked to articulate the distinction between the two, Massey stated:

> When you negotiate for something you originally ask for it. All right? I think. When you negotiate you talk about it. Okay? And it's either given to you or not. When you renegotiate for something you bring it back in and rediscuss it.

Rickard offered a similar definition:

> Q. What does the word negotiate mean to you?
> A. Negotiate to me would mean to sit down and collectively agree on something.
> Q. What does the word "renegotiate" mean?
> A. Just about the same thing except that you're reagreeing on something that was already agreed on.

Based on the above-credited testimony of Rickard, it is clear that he did nothing more than convey to Bezio and Masey the basic requirements of Sections 8(d) and 8(a)(5) of the Act. In the final analysis, there is no evidence that the admitted comments by Rickard were improper or had any coercive effect under the prevailing circumstances here.[31] It is also recommended that the allegations be dismissed.

It should be specifically pointed out and noted that all facts found are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been derived from a review of the entire testimonial record and exhibits with due regard for the logic and probability, the *demeanor* of the witneses, the weight of the evidence, admitted facts, reasonable inferences, and the teaching of *NLRB v. Walton Mfg Co.*, 369 U.S. 404 (1962). As to those testifying in contradiction of the findings their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses or because it was in and of itself incredible and unworthy of belief. *All testimony has been reviewed and weighed in the light of the entire record.* As I have indicated Respondent's supervisors, managers, and other witnesses impressed me as candid, frank, straightforward, and believable witnesses who recalled with considerable clarity, consistency, and specificity what they said and heard during the discussions and events here in question, and in my evaluations made no attempt to fabricate their descriptions of what occurred as indicated in several instances by their open and frank admissions.

On the other hand, I have found several of the witnesses for the General Counsel to be hesitant, evasive, and unconvincing witnesses, and in answers given on cross-examination this becomes quite obvious, as I have already indicated in various instances. Therefore, on the basis of the above, on my observations of the demenaor of the witnesses, the inherent probability of the testimony and events in all the relevant circumstances, and on the basis of the record as a whole, I have credited the testimony of the witnesses for the Company where it is in conflict with that of the witnesses for the General Counsel.

In view of my findings that there was *no* violative conduct by Respondent within the allegations of the complaints, I will not consider the 8(a)(5) majority card issue as there is no basis whatsoever for setting aside the election and/or for a *Gissel* bargaining Order, as requested by the General Counsel in his proposed remedy.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has failed to sustain its burden of proof for any allegation in the complaints.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The complaint is dismissed in its entirety.

[31] There is no allegation or testimony that Rickard told Bezio and Massey that negotiations would "start from scratch," and the General Counsel was unsuccessful in his attempt to attribute such remark to Rickard, and it is quite obvious that Bezio and Massey drew no such inference.

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Baptist Home for Senior Citizens, Inc. *and* United Steelworkers of America, AFL–CIO–CLC, Petitioner. Case 10–RC–13499

August 31, 1988

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

The National Labor Relations Board has considered objections to an election held July 23, 1987, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 33 for and 46 against the Petitioner, with 4 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings and recommendations only to the extent consistent herewith,[1] and finds that a certification of results of election should be issued.

The hearing officer recommended that the Petitioner's first objection be sustained and the election set aside because the Employer circulated an altered ballot that tended to mislead employees into believing that the Board wanted them to vote "No" in the election. We disagree.

In support of its objections, the Petitioner presented a two-page document that the Employer admittedly distributed to the great majority—perhaps all—of the employees within 2 days before the election.[2] The first page of the document is a memorandum on the Employer's stationery and signed by Jerry Moss, administrator of the Employer's facility. The memorandum, in question and answer format, explains certain mechanics of the election, and concludes by stating "I urge you to exercise your right to vote and to protect your own best interest and What [sic] you now have by *Voting No!!* on Thursday." The second page, stapled to the memorandum, appears to be a photocopy of the Board's sample ballot for the election. There is an "X" in the "No" box on the ballot.

The hearing officer credited the testimony of James Turnipseed, vice president of Northport Health Services, the firm that has the management contract on the Employer's facility, that copies of the two-page document were distributed to employees at group meetings held 2 days before the election, and that he explained to those in attendance that he had marked the sample ballot "No," and that he encouraged them to do the same. Jerry Moss testified that, at group meetings that he held with employees on the night shift, he also explained that "we" had marked the sample ballot "no," in the hope that the employees would support the Employer in the election. Four employees who attended such meetings testified that the Employer's representatives explained the source of the marked ballots. Because not all employees attended the group meetings, management personnel attempted to contact individually the employees who had not attended the meetings, and to explain to them the information contained in the Employer's memorandum as well as the source of the marked sampled ballots. However, the hearing officer credited the testimony of two employees, Pauline Rice and Solonia Jordan, that they had received copies of the two-page document without any explanation that management personnel had marked the sample ballot "No."

Moreover, employees Rice and Renner Hill testified that they had seen copies of the marked sample ballot, not attached to the covering memorandum, lying on the table in one of the employees' breakrooms shortly before the election. The record does not establish who placed the unattached ballots on the breakroom table.[3] Rice also testified that she saw a stack of the marked ballots, not attached to the memorandum, lying on Administrator Moss' desk in his office the day before the election.

In *SDC Investment*, 274 NLRB 556 (1985), the Board adopted a two-part analysis to determine if an altered ballot is objectionable. First, the Board will examine the ballot in order to determine if the source of the altered document is clearly identified on its face. If the source can be clearly identified on examination of the document itself, then the Board will find that the document is not misleading, because employees will understand that it emanated from a party rather than from the Board. If, however, the source cannot be clearly identified,

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that the Petitioner's objection relating to the Employer's alleged solicitation of employees to demand the return of their union authorization cards be overruled.

The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] The record does not establish conclusively whether every employee received a copy of the document.

[3] There is some indication that the marked sample ballots had been detached from the covering memorandum by persons unknown. Thus, Hill testified that "most of them was attached, you know, both of these sheets. And some of them were tore [sic] apart." Rice testified "that there might have been two of these [apparently referring to the memoranda] on the table over against the wall, but these [apparently referring to the marked sample ballots] were lying on the table by theirselves [sic]."

In any event, both Turnipseed and Jerry Moss testified that they had not left "stacks" of campaign literature lying around for employees to pick up.

the Board will examine the nature and contents of the material in order to determine whether the document has a tendency to mislead employees into believing that the Board favors one party over the other. Id. at 557.

The hearing officer applied the test set forth in *SDC*, and found that neither the altered ballot nor the attached memorandum identifies which party marked the ballot. He also found that the Employer's supervisors had not explained to every employee that the sample ballot had been marked by the Employer, and that some of the unattached ballots were seen in the breakroom. Applying the second part of the *SDC* analysis, he found that the "X" in the "No" box on the sample ballot was clearly not discernible as an addition made by the Employer, and was not sufficiently distinct from the ballot to preclude the suggestion that the Board was endorsing a "No" vote. Even if all employees who had seen the marked ballot had seen it with the covering memorandum attached, the hearing officer went on, he would still have found it objectionable because, in his view, the ballot appeared to be a specific endorsement by the Board of the Employer's point of view, expressed in the memorandum, that the employees should vote "No." Accordingly, the hearing officer concluded that the employees who were exposed to the altered ballot may have perceived that the Board wanted them to vote "No," and recommended that the Petitioner's objection be sustained.

We agree with the hearing officer that the altered ballot does not identify the Employer as its source, but we reject his conclusion that exposure to the ballot would suggest to the employees that the Board favored a "No" vote in the election. Although the "X" in the "No" box on the ballot suggests that employees should vote against the Petitioner, we find that the context in which the ballot was distributed negates any inference that it set forth the views of the Board.[4] The ballot, as distributed by the Employer to employees, was stapled to a memorandum on the Employer's letterhead. The memorandum was signed by the administrator of the facility, and urged the employees to vote "No." Because the memorandum thus unmistakably emanated from the Employer, we conclude that the altered ballot stapled to the memorandum would have appeared to employees to be part of the Employer's partisan election campaign material and not an official communication from the Board.[5]

The fact that two employees testified that they saw copies of the marked sample ballot lying unattached on the table in the employees' breakroom does not render the Employer's conduct objectionable. There is no evidence that any employee who saw the unattached ballots did not also receive, or at least see, a copy of the ballot stapled to the Employer's memorandum. Indeed, most employees received, along with the two-page document, an explanation from the Employer's supervisors that it was the Employer who had altered the ballot. Moreover, as we have noted, the record does not reflect who was responsible for placing the unattached ballots in the breakroom. Employee Hill's testimony that the document had been "tore [sic] apart" indicates that the ballots originally may have been brought to the breakroom stapled to the memorandum (i.e., in the condition in which the Employer distributed them), and later may have become separated. The record, in short, does not indicate that the Employer ever distributed or made available to employees any copy of the altered sample ballot that was not stapled to the Employer's partisan memorandum. Because we find that the Employer's distribution of the two-page document was not objectionable, we find no sufficient basis for setting aside the election solely on the evidence that some unknown person or persons (quite possibly the employees themselves) later may have detached the marked ballot from the memorandum.[6]

Accordingly, we shall overrule the Petitioner's objection and certify the results of the election.

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[4] See *BIW Employees Federal Credit Union*, 287 NLRB 423 (1987); *Worths Stores Corp.*, 281 NLRB 1191 (1986); and *C. J. Krehbiel Co.*, 279 NLRB 855 (1986), indicating the appropriateness of considering extrinsic evidence in examining the nature and contents of a document to determine if it is misleading.

[5] In this respect this case is strikingly similar to the Board's recent decision in *BIW Employees Federal Credit Union*, supra, in which the employer distributed a two-page document to all employees the day before the election. The first page of the document was a memorandum on the employer's stationery, from its manager, urging employees to vote "No" and referring to an attached sample ballot as demonstrating a "No" vote. The second page, stapled to the first, appeared to be a copy of an official Board sample ballot with additions giving the time and place of the balloting and the counting of ballots. An "X" appeared in the "No" box; a handdrawn arrow directed attention to the "No" box, and a statement appeared explaining that a mark in the "No" box meant that employees did not desire union representation. The phrase "Distributed for Information" was adjacent to the explanatory statement. The Board overruled the petitioner's objection, holding that, in context, the altered sample ballot would not give employees the misleading impression that the Board favored a vote against the union.

[6] Nor do we find significant Rice's testimony that she saw a stack of marked ballots, not attached to the memorandum, on the desk in Administrator Moss' office. The record indicates that Moss' office was not readily accessible to employees, and there is no indication that the Employer left the unattached ballots in that office intending that employees should observe them in that condition.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for United Steelworkers of America, AFL–CIO–CLC and that it is not the exclusive representative of these bargaining unit employees.

MEMBER JOHANSON, dissenting.

I agree with the hearing officer that the election should be set aside. The sample ballot neither indicates on its face, nor is it obvious, that it was altered, what the alterations were, and who made them. This could mislead the employees into believing that the ballot was prepared by the Board. See my dissent in *Professional Care Centers*, 279 NLRB 814 (1986).

Wykle Research, Inc. *and* United Food and Commercial Workers Union, Local 711, affiliated with United Food and Commercial Workers International Union, AFL–CIO and CLC. Case 32–CA–8924

August 31, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 2, 1988, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wykle Research, Inc., Carson City, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has also excepted to the judge's decision asserting that it evidences bias and prejudice. On our full consideration of the entire record in these proceedings, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in his analysis and discussion of the evidence.

[2] Although the judge did not discuss the testimony of several of the Respondent's witnesses, who characterized discriminatee Tammy Holt as a disruptive and uncooperative employee, we have considered such evidence and each the same result as did the judge. We conclude that the General Counsel has made out a prima facie case of unlawful discharge by showing that the Respondent had knowledge of Holt's union activity and, having gained such knowledge, called her into the office of General Manager Tolson who immediately unlawfully interrogated her about her union activities and threatened her with discharge if she did not end such activities. Before the meeting ended, Holt was discharged. The judge discredited the testimony of Tolson and Marketing Director Echols, who also was present, about the reasons for her discharge. We, therefore, like the judge, find that the Respondent has failed to meet its burden of showing that it would have discharged Holt even in the absence of any union activity. See *Wright Line*, 251 NLRB 1083 (1980). We find it unnecessary to rely on the judge's speculation in fn. 32 of the decision in reaching this result.

Ariel L. Sotolongo, Esq., for the General Counsel.
Thomas J. Ray, Esq. (Allison, MacKenzie, Hartman, Soumbeniotis & Russell, Ltd.), of Carson City, Nevada, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This matter was tried in Carson City, Nevada, on 4 and 5 November 1987.[1] The complaint, based on a charge filed by United Food and Commercial Workers Union, Local 711, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC (Union) alleges that Wykle Research, Inc. (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act) on 8 May 1987 by "discharg[ing] its employee Tammy Holt . . . because [she] joined or assisted the Union or engaged in other protected concerted activities."[2]

The complaint alleges that Respondent, by its general manager, Carl Tolson, further violated Section 8(a)(1) on 8 May by "interrogat[ing] an employee about his/her union membership, activities, and desires and [those] of other employees," and by "threaten[ing] an employee with discharge if he/she joined or assisted the union or engaged in other protected concerted activities."

II. JURISDICTION AND LABOR ORGANIZATION

Respondent, a Nevada corporation located in Carson City, sells certain dental products nationwide on a nonretail basis. The pleadings establish that its annual sales to customers outside Nevada exceed $50,000, and that it thus is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

The pleadings establish, as well, that the Union is a labor organization within Section 2(5) of the Act.

III. THE ALLEGED MISCONDUCT

A. *Evidence*

About 90 percent of Respondent's sales are by telephone from Carson City. The telephone salespeople are called telemarketing service representatives—telemarketers for short. Most of the remaining sales are realized at dental meetings around the country. Telemarketers sometimes represent Respondent at those meetings.

Tammy Holt was a telemarketer. She began on 5 January 1987 and, as the complaint alleges, was fired on 8 May. She was one of about six telemarketers when discharged.

The telemarketers did not have union representation at relevant times. Holt began promoting representation to her coworkers on 6 May, distributing a prounion flier to two of them, discussing the flier with another by telephone, and inviting several to her home for a postwork organizational meeting on May 7. The flier, prepared by

[1] This manner of setting forth dates comports with the wishes of the Board.

[2] Sec. 8(a)(3) forbids an employer from "discriminat[ing] in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." Sec. 8(a)(1) prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in Section 7" of the Act. Sec. 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Holt's husband after conferring with the Union's business agent, Bob Whitney, stated variously that the Union "is willing to represent telemarketers and other clerical positions"; that representation "would of course mean better benefits, wages, and working conditions for all"; and that "a majority of employees [would have] to attend a meeting to discuss this" with Whitney "to get the show on the road."

The next day, 7 May, Holt continued to pass word of that evening's meeting. The meeting materialized as planned, but only three employees—Holt and two others—attended. Whitney presided, and supplied Holt with union authorization cards. Among those invited but not present was Thelma Banker, whose duties included serving as secretary for Respondent's general manager, Carl Tolson.

At work the first thing the following morning, 8 May, Holt and Banker had a conversation in which the issue of Banker's signing a union card came up.[3] Holt was on her way to the restroom at the time. She and Banker commonly conversed on such occasions, Banker's desk being "directly across from" the restroom. Soon after, at her telephone cubicle, Holt complied with a coworker's request for a card.

Assertedly feeling duty-bound to do so, Banker presently told Tolson about her encounter with Holt. This, according to Tolson, was his first knowledge of Holt's union activities.[4] About the same time, apparently, two of Holt's coworkers informed Respondent's marketing director, Darrell Echols, of the previous evening's meeting—his first awareness, so he testified, of Holt's activities.

Prompted by Banker's disclosure, Tolson forthwith summoned Holt, Echols, and Banker to his office to "get the matter straightened out." Banker's purpose in being there, Tolson testified, "was to corroborate the statement . . . regarding Tammy's bothering her, and also to take minutes of the meeting." Tolson and Echols both testified that they had not previously discussed the situation with each other.

Holt testified that Tolson began the meeting by saying he understood that she had "had a union meeting last night" and that she "had been soliciting union cards." She ignored the reference to the meeting, as she recalled, but admitted complying with a coworker's request for a card. Tolson came back, per Holt, that she "should quit" if she was "that unhappy with the company." Tolson further stated, according to Holt, that "unions in Nevada are illegal," and that she would "be fired" if she "did not cease and desist [from] union activities" and "sign a paper" so pledging. Holt assertedly responded that she would not "sign anything" until conferring "with somebody else," and the focus shifted to other matters.[5]

Tolson testified that he opened the meeting by saying he had heard that Holt was "soliciting" for the Union. He also testified, twice, that he questioned Holt whether she had asked Banker "to sign a union card." He later denied putting that question to her, averring that he instead remarked, "I understand—Thelma tells me that you—you've been bothering her regarding a union card."

Tolson's account continued that he told Holt, following these "introductory or preparatory" comments, that any soliciting was to be "on her own time, during breaks, lunch hour, or off the premises"; that he did not "care what she did during those periods," but that she was "not to do it on company time." Holt responded, according to Tolson, that she would do "whatever she wished . . . anytime she wanted," prompting him to state that her "job function was to be on the phone and stay on the phone," and that she "could do whatever she wished . . . during the break times . . . or after hours or before hours . . . providing it wasn't disruptive to other employees."

Tolson admittedly told Holt "at least once" in the context of her union activities "that, if she was unhappy with the company, she should quit." She replied, so he testified, either that she would "when she [got] another job," or that she would "get another job when she [felt] like it." Tolson denied referring to the meeting at Holt's house, contending that he "did not even know there was a meeting."

Tolson also denied giving Holt a cease-and-desist ultimatum. According to an affidivit he gave during the precomplaint investigation of this matter, however, he "advised" Holt that she was "disrupting the flow of work of the company," that he "had been informed that her constant complaining and attitude was disruptive to her fellow employees," and that he "would be forced to terminate her . . . if she didn't stop disrupting the work flow."[6] Tolson, in his live testimony, did not address the remark Holt attributed to him that unions are illegal in Nevada. He stated in his affidavit: "I did inform her Nevada was a right-to-work State. I did not tell her unions were illegal."[7]

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[3] The details of this conversation are in conflict. Banker testified that Holt started it by asking her to sign a card; that she replied in the negative, "[A]bsolutely not. I spoke with my husband last night. He feels I'm not even eligible to be covered by this. I'm not interested. You're interrupting my work. Get away from me"; and that Holt promptly withdrew. Holt testified, on the other hand, that Banker began the exchange, asking "how the meeting had gone" and if Holt had asked Whitney about Banker's eligibility for union representation; and that she said Whitney did not know, but that Banker could sign a card if she wished and they "could go from there."

[4] Banker reported, by Tolson's initial version, that Holt had asked her to sign a card, persisting even after Banker had said to "stop bothering" her; and that Holt also had been "bothering everybody else." Tolson later testified that Banker did not say others had been "pestered," only that she had been "pestered" and that "some of the employees . . . are unhappy."

[5] In evidence without objection is a fragmentary note in Holt's handwriting purporting to summarize Tolson's cease-and-desist ultimatum. Holt testified that she scribbled it "at the same time he was saying it," and that its essence is that Tolson ordered her "to cease and desist with union activities and, if [she] didn't then [she] will be dismissed."

[6] In addition to its cease-and-desist reference, Holt's aforementioned note (fn. 5) states, "Do out side." Holt denied that this supports Tolson's version that he merely told her to solicit "off the premises." She testified that it instead reflects her telling Tolson that she had approached employees only outside.

[7] Asked if Tolson said that "unions in Nevada are illegal . . . or that Nevada is a right-to-work state," Holt repeated that "he said unions in Nevada are illegal." She added, in answer to a followup question, that she "understand[s] what the difference is."

Echols testified that the portion of the meeting devoted to Holt's union activities was "very brief," and that, while he could not remember "exactly what we started off with," it "may have" come at the meeting's outset. He recounted Tolson's saying he had "had some complaints that people had been solicited at work," specifically mentioning that Banker had been "approached about signing some type of union card"; and that Tolson proclaimed:

> I'm not going to have it . . . on my time, on my payroll time. If you want to do it out in the parking lot on your time, be my guest. But you're not to do it on my time.

Echols also testified that Tolson said, with reference to Holt's union activities, "If you're that unhappy, why don't you just leave?" Echols mirrored Tolson's denial of a cease-and-desist ultimatum, further denying that Tolson otherwise threatened Holt with discharge.

Banker testified that Tolson forbade "solicitation of anything on company time or company premises," and that this "opening sentence was the only time it [Holt's union activity] was even brought up." Banker continued that she did not "believe [Holt] responded to that," and the subject was dropped. Banker stated that she could not recall Tolson's uttering a cease-and-desist ultimatum.

Neither Echols nor Banker was examined whether Tolson said unions are illegal in Nevada.

The discussion eventually turned to Holt's pay and job performance, evolving as Echols recalled into "a shouting match."[8] Holt complained that her performance and personal circumstances demanded better pay, and that Tolson had acted illegally by overriding a presumed earlier commitment from Echols and Sharon Williams, her immediate supervisor, to raise her monthly base salary from $500 to $700.[9] Tolson came back that he had not approved the raise, that her performance "didn't warrant" a raise, and that she should "sell more" if she "want[ed] more money." Tolson about then echoed his earlier remark, "if you're unhappy with the company, why don't you quit?"

Echols assumed a more active role as the exchange progressed. Alluding to Holt's "screaming and yelling"—his depiction, disputed by her—he commented: "Tammy, I don't consider this professional behavior. . . . [D]o you consider yourself a professional?" She answered, by her account, "[C]ontacting the Union was the most professional thing I could ever have done."

At length, Holt testified, she "told them that [she] was not unhappy with the company" but only with Tolson, and that, "if he would have left the telemarketing group alone, the motivation would be up and [they] would be selling much better." At that point, Holt continued, Echols

> stood up and turned around and looked at [her] and said: "I cannot tolerate that attitude towards the general manager. You're fired!"

Echols recalled Holt's and his concluding remarks somewhat differently. He testified that, after saying she "liked" the company and "liked" him and Williams, Holt said she had "a problem with" Tolson, expanding, "I think he's an ass and he makes me sick." With that, Echols went on, he announced: "Tammy, that's it. You're fired!" Similarly, Tolson testified that, first having said she would "work for Williams and . . . Echols, but [not] for him," Holt called him "an ass." Echols thereupon "jumped up," according to Tolson, and declared: "That's disruptive and it's misconduct and . . . I won't tolerate that attitude towards the general manager, and so you're terminated—you're fired!"

Asked later if Holt called him an ass, Tolson evinced less conviction, testifying, "I believe so." Holt denied using that term or any other that might be considered profane.

Banker recounted Holt's saying, "just before she was terminated," that

> she could do her job if the general manager left her alone, but that she did not like him and she couldn't do a job if he continued to be part of their department or come into their department.

Echol's response, as related by Banker, was: "[B]ecause of your attitude and your failure to work on improving your attitude, you're hereby discharged." Banker averred that "there may have been some names called," but she could not be sure without checking her shorthand notes, which were not produced.[10]

By all live accounts, Tolson said nothing following Echols' pronouncement. As Echols put it, Tolson "kind of looked bewildered . . . [and] . . . just left the room." In his affidavit, however, Tolson stated:

> I told her her termination wasn't based on any outside activities, it was based on misconduct, her being disruptive to her coworkers and for entering unauthorized areas. I had received a report from Sharon Williams that around 5/5 Williams had caught Holt in Williams' office going through files, I don't know what files.

The meeting lasted about an hour. In its immediate aftermath, Echols prepared and Banker typed a so-called statement of understanding, extracted from Banker's shorthand notes. It stated:

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[8] Holt, asked if she raised her voice during the meeting, testified, "No, there was no need to." I find this improbable in the circumstances.

[9] On 9 April, Echols and Williams met with the telemarketers to discuss their pay, among other things. Holt and others had been complaining that they were underpaid, and Echols himself "felt the base salary was a little low." In Echols' words, they "put together a plan" to raise the base salary to $700 a month. Tolson withheld approval pending further research, however; and, when Holt learned this, she told Tolson that she wanted her raise "immediately." Tolson responded that he would "get approval" just for her, retroactive to 1 April, but that did not materialize.

[10] Banker later revealed that even her notes would not be conclusive, explaining, "[I]f there were some profanity . . . I may or may not have written it in my shorthand notes." The record does not disclose if the notes still exist. Banker testified that she gave them to Tolson after she was done with them.

> This is to document a meeting held in Carl Tolson's office at 10:00 a.m. on Friday, May 8, 1987. Attending were Carl, Darrell Echols, Tammy Holt and notes were taken by Thelma Banker.
>
> Carl told Tammy that if she was unhappy with Wykle Research, she should find another job.
>
> Tammy stated that she had made contact to have a union card signed only after an employee had *asked her* for the card. Carl then specifically cited Thelma as having been contacted on company time.
>
> Tammy's base salary and commission structure were outlined by both Carl and Darrell. Tammy feels she has been mistreated, and has not received all compensation agreed to when she was brought on board. Carl stressed that she is presently ahead of her schedule on her income earning, as suggested upon her initial employment.
>
> Carl stated that Wykle Research is not responsible to fulfill all Tammy's family income needs.
>
> Tammy stated her unhappiness with Carl—not with Wykle Research. Darrell informed Tammy that he (Darrell) is her immediate Department Manager, and cannot tolerate that attitude. Therefore, Tammy is being released from employment effective 12 noon today, May 8, 1987.

On Echols' request, Holt waited until the document was prepared, the idea being that she joined him and Tolson in signing it. After reading it, however, she refused to sign. She testified:

> I refused to sign it for the fact that it did not have a couple of the main words. . . . I told [Echols] that at the meeting Mr. Tolson told me I had to cease and desist with union activities or I was fired, and it was not in this document.

Holt testified that, faced with her refusal, Echols telephoned Tolson, after which he told her that Tolson "did not say that"; that she had "misunderstood" him. Holt, insisting as she recalled that she had not misunderstood Tolson, persisted in her refusal to sign. Echols did not speak of this incident in his testimony.

"[T]hat day or the next day," Banker testified, she transcribed her shorthand notes more literally. She termed the resulting minutes a "verbatim transcription."[11] They make no reference to a cease-and-desist ultimatum, depicting Tolson's comments regarding Holt's union activities this way:

> Carl stated he had heard some "rumblings" about solicitation of union cards to be signed, disrupting the work of fellow employees, and these fellow employees were annoyed at the constant interruptions. He further stated that these interruptions must cease. Further disruptive activities of any sort will be cause for dismissal. Any solicitation must be on off hours, or on employee's personal time, and outside the building—not on company time. Carl further stated that the signed (by Tammy) company policy declares solicitation activities on company premises to be strictly prohibited. Carl told Tammy, "If you are dissatisfied with your job, you should look for another one."

Nor do Banker's minutes indicate that Holt called Tolson an "ass." They deal with the concluding portion of the meeting, when that supposedly occurred, as follows:

> Tammy said that, "I like the company—it's just you (Carl Tolson) that I don't like. If you (Carl Tolson) would just stay away from me, I could probably do a good job here." At the moment, Darrell intervened and said to her: "I am your immediate Department Manager, and I cannot tolerate that kind of disrespect for our company's General Manager. Therefore, you are dismissed because of your attitude at 12 noon today."

Banker's minutes elsewhere reveal that

> Tolson told Holt early in the meeting that she had "a choice as to whether [she was] going to be here or gone," and that he "want[ed] the choice made by the end of today";
>
> Echols told Holt she had "excellent closing rates" and "works very hard on the phone"; that her "biggest problem has been herself—the constant 'bitching' and complaining"; and that she should "get out of the department . . . if she was unhappy."
>
> Tolson said he was "not satisfied with Tammy's performance" at a recent dental meeting in Detroit, and that she "outlined reasons the show was not profitable (including [booth] location, etc.)."
>
> Echols "stated that Tammy could earn all she wanted, because of her talents"; and that Tolson said:
>
> You've been here for six months. The first few months, your sales were poor, but now you're starting to really roll. You get your money on performance—not on your wishes.
>
> Echols declared, just before the concluding exchange, "that if [Holt] is so extremely unhappy with the company, she should resign and find herself another job."

Lori Richards, a telemarketer at the time, testified that she had a conversation with Echols after Holt's discharge in which he said he took the action because Holt had "got[ten] a little mouthy . . . toward her boss." Echols enlarged, according to Richards, "All we wanted to talk to her [about was] that you can't solicit union at work." Echols said nothing about this conversation in his testimony.

Respondent would have it that it also discharged Holt on 10 April. That was a payday. When her check did not reflect an expected $200 increase in her monthly base salary,[12] Holt confronted Echols and Williams, and a

[11] As earlier noted, Banker conceded the possible incompleteness of the underlying notes, at least as concerns profanity.

[12] Fn. 9, supra, provides context for this expectation.

several-hour encounter ensued. She protested not only the pay situation, but a proposed revision of the telemarketers' work schedules, projected to go into effect in June,[13] contending that it would create insuperable child-care problems. She beseeched at one point, "[W]hy don't you just fire me, so I can collect my unemployment."

Echols and Williams advanced several possible solutions—volunteering Williams' children as babysitters; offering Holt split shifts; permitting her to leave to deliver the children, then return to work, without being docked. Holt was not receptive, however, and Echols finally "excused" himself to confer with Tolson, who directed that he "let her go" if she was "that adamant" about the unworkability of the proposed changes. Echols thereupon gave Holt her final check, urging as he did so that she "try and work this out." He admitted: "I didn't want her to leave. I didn't want her to quit."

Holt called Echols later that day, reporting that she had discussed the matter with her husband and that they could "work out the hours." Echols responded, as he recalled:

> Fine, Tammy, under these conditions: . . . That you come back with a good attitude, get back on the phone and do your job, and I don't want to hear any more about it.

She responded with the sought-after assurances, and returned to work apparently without suffering any actual break in employment.

Echols testified that the discharge in question "was strictly [his] decision and [he] took full responsibility for it." Tolson likewise testified that "Echols discharged her," adding that he "had the authority to overrule" Echols, but instead tacitly "concurred." Both testified that they did not foresee, when the fateful meeting began, that it would end as it did. Echols asserted, however, that Tolson "had been on [his] case to get rid of her for quite awhile"; that he, too, was "fed up with" and "thinking of terminating her" by 5 May; and that he "intended to terminate her," but "not particularly on" the 8th. The reasons for Tolson's disenchantment, according to Echols, were that Holt's sales "weren't there, she wasn't performing what we needed to justify her"; and her "bitching and moaning was something we didn't want."

Echols first testified that he fired Holt

> because I was tired of her performance. . . . I was tired of her constant outbursts, her disruptive behavior, that was affecting this department and . . . that I had spent too much time on . . . . I don't know of any company that you could go to . . . that an employee could do that and get away with it.

Echols later testified that Holt's last statement in the meeting upset him, and "that's why [he] fired her . . . spontaneous[ly]" and without premeditation, "right on the spot, right when the comment was made." Asked again why he took the action, Echols answered, "Because I didn't want this disruptive behavior and this person in my department anymore. She was not performing." He elsewhere testified variously that "the sole factor was her performance"; that her "sales performance . . . was part of it"; that the "primary reason" was her "disruptive behavior"; and that he "terminated her because of her disruptive behavior" in the 8 May meeting, as well.

Asked his meaning of "disruptive behavior," Echols testified:

> Her constant disruption to the other employees, which affected their performance; her constant disruptions about her salary, the policies, the procedures, everything about the company.

He later answered the same question this way:

> Her constant complaining and moaning, her disruptive behavior to the other employees, the fact that she wasn't doing her job, she spent more time complaining than being on the telephone, which is her job, to be on the telephone.

Echols denied—"absolutely not"—that Holt's union activities figured in his action.

Tolson's live testimony to the contrary, he stated in his affidavit:

> *I decided* to discharge Holt for (1) misconduct, her going into unauthorized files in Williams' office, (2) disruptiveness, constant complaining about the company, her husband, her home life, to her fellow workers, and (3) insubordination, her refusal not [sic] to stop bothering her fellow employees. [Emphasis added.][14]

His affidavit aside, Tolson testified, "There's a multiplicity of reasons why Ms. Holt was terminated." Purporting to relate them, he adverted to the 8 May meeting, testifying:

> She became quite vocal and used some language that was unconducive for a woman or a lady in my office . . . and used some very vile terms regarding myself and Darrell Echols.

Tolson concededly could not remember, and the record does not otherwise intimate, that Holt called him anything other than an "ass." Nor does the record contain any evidence that she directed that or any other such epithet to Echols.

Again seemingly contradicting his affidavit, Tolson denied that Holt was discharged because she "would not

[13] The proposal consisted of increasing the telemarketing complement to 12 and adding a second shift—one working four 10-hour days per week, the other three 10-hour days and 4 hours on Saturday, and both being paid the same base salary.

[14] Tolson testified that this extract from his affidavit refers to Holt's 10 April discharge, not that in question. A reading of the extract, in context, unequivocally indicates the contrary, however, and the same affidavit states that the incident in Williams' office occurred "around 5/5."

stop bothering other employees."[15] He denied, as well, that poor sales were the "ultimate reason."[16] He also denied that Holt's union activities were a factor, insisting that he was "not at all" concerned about the employees' "forming a union." His "only concern as it relates to [union] activity," he testified, "was that it [not be] on company time."

Although Tolson's affidavit cites Holt's "going into unauthorized files in Williams' office" as one of the reasons for her discharge, he did not speak to that in his live recital. Echols and Holt both recounted, however, that Echols once chastised her for using the telephone in Williams' office. Echols testified that she told him she was calling in search of other employment, and that he remonstrated: "[T]his is an off-limits area and you're on my time." Holt countered, according to Echols, that the premises had no phone for personal calls, and he offered the use of his office phone when she was on break.

Tolson's affidavit states that this incident occurred "around 5/5." Echols first testified that it happened sometime between 13 April and 8 May, but that he could not remember "what date it is." He later testified that it was 5 May, and that he had documented the incident in writing. Holt testified, on the other hand, that it was "at the beginning of April," and Williams recalled that it was "about a month before [Holt] was terminated." Perhaps unwittingly revealing that it happened as recalled by Holt and Williams (and/or that the incident was not that important in the overall scheme of things), Echols testified that the reasons for the 8 May discharge were much the same as those underlying Holt's 10 April so-called discharge, "the only thing new . . . [being] . . . her behavior at the Michigan dental meeting."

Holt and another telemarketer, Dottie Voight, represented Respondent at a meeting in Detroit from 25 to 27 April. Tolson testified that Holt's standing with him suffered from word of her antics there. Echols had reported, according to Tolson, that Holt's conduct had been "unbecoming a professional"; that she had "gone out in the aisle and tried to trip dentists, and grabbed them." Echols added, per Tolson, that Voight was "extremely embarrassed with Tammy's behavior at the show," resigning as a result.

Tolson continued that he "wanted to fire" Holt when he heard this, but that he deferred to Echols, who said he wanted "to observe her for a couple of more days and then make a decision." Echols further remarked, as Tolson recalled, that Respondent was "shorthanded and a body was better than none."

Echols testified that he learned about the Detroit meeting, from Williams, on his 5 May return from a trip. Williams reported, so he testified, that Holt had been "tripping doctors in the aisle, and that her brazenness so "upset" Voight that she had quit. Williams recounted in turn Voight's telling her that Holt "had went so far as to go out and stand in the aisle and basically trip doctors"; and that she, Williams, passed the information on to Echols.

Echols testified that Holt acknowledged to him literally tripping dentists, explaining that extreme aggressiveness was needed to offset a poor booth location. He responded, he testified, that this was "not the professional behavior [he] was expecting," and would be "reflected in [her] performance review." Holt testified that she neither tripped anyone, nor told Echols that she had. She did admit, though, that she "did everything [she] could to get" dentists to Respondent's booth, because "sales was down," and Voight "was not aggressive enough," and the booth was "in a spot where hardly any doctors went by."[17] Voight, testifying as Respondent's witness, said nothing about the tripping, instead likening Holt's approach to that of a carnival barker "yelling at you to come into their booth." Voight did not go into the reasons she left the payroll.

Tolson testified that Holt had "a positive attitude" and that her performance was "maybe a little bit above average" in February and March, his only reservations being her "extremely bad" English and lack of "professionalism" when dealing with dentists. But, after 10 April, he asserted, her attitude "changed considerably" and her "disruptiveness" increased—she "was never on the phone,"[18] she "was constantly interruptng other people,"[19] her "sales were down,"[20] and she was complaining about her pay and "the general aspect of the company."[21]

Echols, who became marketing director in early March, testified that he "was not satisfied with [Holt's] performance" from that time to 10 April citing both her "disruptive behavior," which he called his "main concern," and her sales record. She "was a disruptive influence to other employees" throughout that time, he amplified, because of her complaints "every single payday" that "the company had ripped her off." Others consequently "started complaining and questioning their paychecks, too," he continued, compelling him to go over the underlying calculations with a few of them each payday as a routine occurrence. This, Echols noted, was "very irritating."

Echols admittedly did not feel in those early weeks, however, that Holt "couldn't be worked with." He testified that he once resisted Tolson's urging that he "get rid

[15] Tolson's affidavit states in relevant part: "(3) insubordination, her refusal *not* to stop bothering her fellow employees." The italicized "not" plainly subverts the intended meaning of the passage, and should be disregarded.

[16] Respondent's counsel stated on the record that "sales are not really an issue in this case."

[17] Echols characterized Detroit sales as "atrocious," failing even to cover expenses.

[18] Tolson testified, "[A]s soon as I walked in, she turned around and got on the phone." Asked if he spoke to her about this, he testified: "It's not my position to do that. That's her supervisor's position."

[19] Tolson indicated that he did not personally see this, testifying, "I was hearing complaints from other telemarketers regarding her disruptiveness."

[20] Holt's sales figures were $1873 for January, $7247 for February, $9972 for March, $4408 for April, and $4173 for May up to her discharge. Tolson acknowledged that her May sales were "rather high," but averred that this is misleading because of "false orders." Echols testified that Respondent knew nothing about any false orders "till after she left . . . so that wasn't even a factor in her dismissal. The record is anything but conclusive that Holt in fact placed false orders.

[21] Tolson testified that Holt's complaints "primarily" concerned her pay—"it was never correct as far she was concerned." He added, "[T]he entire company shuddered when payday came up, because we knew we were going to have a problem with Holt on the pay."

of her," replying: "[N]o, I don't want to get rid of her, because . . . she's got a lot of room for improvement and . . . she's got some potential and I'd like to work with her."

Echols assertedly watched Holt "more closely" following her abortive severance of 10 April. He explained: "I'd already terminated her. I'd already been told by Mr. Tolson to fire her several times. My neck was on the line here by bringing her back."

"For the first few days," Echols testified, "she seemed to be fine," but then, come payday, she resumed her litany about having been "ripped off." Nor was that the only source of irritation, according to Echols. He added that he "noticed her more and more frequently talking to the other people in the other cubicles" about matters unrelated to work, and that four others had complained to him that she was "bothering [them] again." He further testified that this "was affecting" the others' performance; that their calls "had dropped off."

Asked what he did when he saw Holt engaging others in inappropriate talk, and how often it happened, Echols replied that he told her to "go back to work," but that he could not recall "how frequent it was"—that he "was so disgusted with the whole matter [that he] didn't mark it off." Concerning the incidence of coworker complaints, Echols testified, "[S]o frequent that, if I kept writing down every date and every occurrence, I wouldn't have gotten any of my work done."

As earlier mentioned, Echols testified that he memorialized Holt's being in Williams' office. In evidence is a two-page document, ostensibly prepared by Echols on 5 May relying on a synthesis of memory and jottings on "little note pads," which purports to summarize that and other of Holt's misdeeds and failings. The first page states:

> Tammy
>
> 5/5 Unauthorized entry into supervisor's office to search for new job. I heard her & told her not to be doing this from this building, during work hours. Verbal Warning given.
>
> 5/5 Tammy was observed out of her work station, having general chitchat and disrupting her coworkers. She has been spoken to several times about this & given a Verbal Warning.
>
> 4/25-4/27 Michigan Dental Meeting—Sales Quota was 5000—actual 998-2 people-Tammy Holt-Dotie Voight attended. When Dottie a new employee returned she told us Tammy would actually trip Doctors to stop them. Tammy was told that I was upset with her performance & she would not be attending another meeting. I was in Indianapolis when I heard an Exhibitor rave about how good the Michigan meeting was. We have always done well at this meeting and 5000 is an acceptable and attainable goal for this market.

Asked why he made a record of these matters at this time, Echols testified:

> I was still having problems with Tammy so I was still keeping documentation on occurrences that I felt warranted it. . . . [W]e had already talked to Tammy about her disruptive behavior, she'd been terminated before. She made a commitment to me that she would not do this, that she'd have a good attitude and do her job and this showed me that she was not doing what she said she would.

The second page of the document states:

> Every Pay Day of Commission Day
>
> Tammy would complain her husband would kill her & she couldn't show him her paycheck. Several options were given to Tammy—none of which she liked.
>
> She was hired at 500 base [plus] 400 commission.
>
> The guaranteed commission of 500 was extended 90 days on March 9 by Carl Tolson. He felt the company had not given her all the tools she needed to succeed.
>
> Several Training Sessions, Sales Seminars, PTSS Courses & 2 Trade Shows have been given to help Tammy reach her goals.[22]
>
> Everytime we sent Tammy on a trip she wanted to receive comp time for going. Wykle Research does not give comp time to salaried employees when they travel as they receive 5% commission on everything they write at the show plus all expenses paid.

Echol's reason for recording these matters, he testified, was

> because these were occurrences that I had not documented before, as they occurred, and I thought it should be documented somewhere because I thought maybe I'd better let this person go.

He denied then knowing about Holt's union activities.

Holt testified that "everything was fine" and that she had "a very positive attitude" until 10 April, but that she "became unhappy" as an outgrowth of that day's meeting with Echols and Williams and consequently began looking for another job. She continued that "the morale of everybody . . . was going down" coincident with the erosion of her own; and that, while she "liked" Echols and Williams, she "didn't like" Tolson and "the way he conducted business."

Holt further testified that "all of" the telemarketers, as a "common occurrence," talked among themselves about nonwork matters; and that Williams often prodded them, "sometimes twice a day," to "go to work" or "get back on the telephones." Williams conceded as much, testifying that she had "to remind quite a number . . . of the telemarketers . . . on a regular basis . . . to stop the chitchat."

Holt denied, however, that she ever was singled out for being "disruptive" or "chitchatting." She also denied ever being told that her sales were "poor or unacceptable." Holt denied, as well, that she complained about her pay "every payday." She asserted that she "twice" questioned the "accuracy" of her commissions, and that

[22] PTSS is short for "Professional Telephone Sales Skills."

"quite a few" of her coworkers "quite often" did the same.

On or about 1 April, Holt and a coworker each received a $200 bonus. Echols testified that the announcement accompanying the presentation to Holt gave as the reason "her spending time and energy training . . . other telemarketers on the computer and because of the initiative she showed in doing that." Similarly, Tolson's affidavit states that the bonus was given Holt "for showing some initiative and doing extra work in showing other employees how to use the computer." Tolson and Echols nevertheless testified that that was not the real reason. The real reason, according to Tolson, was "for her to buy some clothes, because she was going to [a] dental meeting and her attire wasn't suitable."

Holt denied being told to use the money for clothes.

B. *Conclusions and Reasons*

1. The allegedly unlawful interrogation and discharge threat

Reviewing the evidence, Holt testified that Tolson began the 8 May meeting by saying he understood that she had "had a union meeting last night" and that she "had been soliciting union cards." Tolson later said, according to Holt, that she "should quit" if she was "that unhappy with the company"; and that she would "be fired" if she "did not cease and desist [from] union activities" and "sign a paper" so pledging. Holt further testified that she memorialized the cease-and-desist ultimatum in the form of a contemporaneous note, which is in evidence; and that she refused in the meeting's aftermath to sign the so-called "statement of understanding" because it contained no reference to that ultimatum.

Tolson admittedly opened the meeting by saying he had heard that Holt was "soliciting" for the Union, and concededly told her, "at least once" in the context of her union activities, "that, if she was unhappy with the company, she should quit." He acknowledged, as well, that he questioned Holt about asking Banker "to sign a union card," later averring that he instead said, "I understand—Thelma tells me that you—you've been bothering her regarding a union card."

Tolson denied mentioning the previous night's organizational meeting, or that he gave Holt a cease-and-desist ultimatum, asserting that he merely directed to solicit "on her own time." Tolson's affidavit states, however, that he "advised" Holt that she was "disrupting the flow of work of the company," that he "had been informed that her constant complaining and attitude was disruptive to her fellow employees," and that he "would be forced to terminate her . . . if she didn't stop disrupting the work flow."

Echols also denied that Tolson made a cease-and-desist pronouncement, adding that he did not otherwise threaten Holt with discharge. Banker testified that she did not recall a cease-and-desist ultimatum.

Neither the "statement of understanding" nor Banker's more complete minutes refer to a cease-and-desist ultimatum. The minutes reflect Tolson's telling Holt, however, that "further disruptive activities of any sort will be cause of dismissal"; and that she had "a choice as to whether [she was] going to be here or gone," and he "want[ed] the choice made by the end of today."

Crediting Holt, I find that Tolson delivered a cease-and-desist pronouncement substantially as she described. Her demeanor in the telling was altogether covincing, and the content of her testimony on the point, including that about the memorializing note and her refusal to sign the "statment of understanding," not only stood up under the rigors of cross-examination, but came across as eminently plausible. Her account gains added documentary enhancement, moreover, from the remarks linked to Tolson by Banker's presumably sanitized minutes that "further disruptive activities of any sort will be cause for dismissal," and that Holt had "a choice . . . to be here or gone" and he "want[ed] the choice made" by day's end.

I conclude that, by thus conditioning Holt's continued employment on her abstention from union activities, Tolson threatened her with discharge in a manner violating Section 8(a)(1).

Regarding the allegedly unlawful interrogation, Tolson admittedly brought up Holt's card-solicitation activities—either in question form or as a declarative statement. I find, crediting Holt, that he also mentioned the "union meeting last night."[23] I conclude that these remarks were interrogative in purport if not in form, and that, juxtaposed with Tolson's cease-and-desist ultimatum and the surrounding circumstances generally, they constituted additional violations of Section 8(a)(1).[24]

2. The allegedly unlawful discharge

In *Wright Line*, the Board stated:

> [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[25]

I conclude that the General Counsel has made the requisite prima facie showing that Holt's protected conduct was a motivating factor in Respondent's decision to discharge her. Thus:

(a) Holt was the foremost, possibly the only, union proponent among Respodent's telemarketers.

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[23] Again, Holt's demeanor was most persuasive. Tolson's denial was weakened by his accompanying assertion that he "did not even know there was a meeting." Given that Holt had invited Banker to the meeting, and that Banker felt duty-bound to report Holt's card-solicitation activities to Tolson, I deem it most unlikely that she did not also tell him about the meeting.

[24] *Rossmore House*, 269 NLRB 1176 (1984). See also *Churchill's Supermarkets*, 285 NLRB 138 (1987); *Structural Finishing*, 284 NLRB 981 (1987); *Establishment Industries*, 284 NLRB 121 (1987).

[25] 251 NLRB 1083, 1089 (1980). This formulation received Supreme Court approval in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

(b) Tolson and Echols first heard about Holt's union proponency the very morning of the discharge.

(c) Respondent was profoundly disturbed by word of Holt's union activities, as witness Tolson's immediately calling her to his office to "get the matter straightened out," and his conduct during the ensuing meeting—most notably, his cease-and-desist ultimatum.

I further conclude that Respondent has failed to overcome the General Counsel's prima facie showing. My reasoning is this:

(a) Had Holt called Tolson "an ass" during the 8 May meeting, as he and Tolson testified; or directed "some very vile terms" at Tolson and Echols, as Tolson would have it; and had Echols thereupon discharged her "spontaneous[ly]" and without "premeditation," as he testified at one point, the discharge probably would not have violated the Act.[26]

(b) The record contains no evidence, however, that Holt said anything remotely vile;[27] and, while the meeting doubtless grew loud and heated, I credit Holt that she did not call Tolson "an ass." [28] The supposition necessarily follows that Tolson and Echols made this up to lend colorable legitimacy to an improper action.

(c) Tolson and Echols, moreover, did not leave it at that. After testifying that he discharged Holt as an on-the-spot reaction to her supposed outburst in the meeting, Echols testified, variously, that "the sole factor was her performance," that her "sales performance . . . was part of it," and that the "primary reason" was her "disruptive behavior"—by which he professed to mean her "constant disruption" of other employees and her "constant disruptions about her salary, the policies, the procedures, everything about the company."

Echols to the contrary, Tolson testified and Respondent's counsel represented that Holt's sales were not an issue; and Tolson, compounding the confusion, stated in his affidavit that the decision was *his*, based on Holt's "going into unauthorized files in Williams' office," her "constant complaining . . . to her fellow workers," and her "refusal . . . to stop bothering her fellow employees." Tolson then fouled the stew still more by testifying that this last was not part of the mix.

These /several assertions in the aggregate, far from serving Respondent's intended purpose, significantly buttress the General Counsel's prima facie showing. They perforce belie any contention that the discharge was spontaneous and unpremeditated; and their egregious inconsistency suggests a truth-be-damned flinging of mudballs against a wall in the hope that some might stick. Further, to the extent that Echols' and Tolson's "reasons" do correspond—their recurrent references to Holt's disruptive and bothersome behavior—the inference is inescapable that they were alluding at least in substantial part to her union activities.[29]

(d) Most of the irritants cited by Tolson and Echols in would-be justification of the discharge had been endured for weeks before the 8 May revelation of Holt's union activities. That she was discharged that same day because of those irritants, one or all, to the exclusion of her union activities, therefore begs belief.[30]

(e) Aside from the just-noted infirmities in Respondent's defense, it suffers from Tolson's and Echols' shared penchant for reckless exaggeration and other obvious dissimulation.

Some salient examples: (1) Tolson's testimony, contrary to both his affidavit and the remarks during presentation, that Holt was given the bonus "to buy some clothes" rather than "for showing more initiative and doing extra work"; (2) Echols' testimony, unsupported by Voight, denied by Holt, and inherently unbelievable, that Holt literally had been "tripping doctors in the aisle" at the Detroit meeting; (3) Echols' added testimony, uncorroborated by Voight or Williams and intrinsically suspect, that Voight quit because of Holt's Detroit conduct; (4) Echols' evasion, when asked how often he saw Holt engaged in inappropriate talk, that he "was so disgusted with the whole matter [that he] didn't mark it off"; and (5) Echols' related ploy, when asked the incidence of coworker complaints about Holt, that they were "so frequent that, if [he] kept writing down every date and every occurence, [he] wouldn't have gotten any of [his] work done."

Yet other instances of Tolson's and Echols' manifest and discrediting lack of candor are (6) Tolson's testimony that Holt "was *never* on the phone" (emphasis added) after 10 April, whereas Banker's minutes reveal that Echols acknowledged during the 8 May meeting that Holt "work[ed] very hard on the phone"; (7) Holt's being singled out by both Tolson and Echols as the cause of recurrent interruptions, even though the record contains no substantial evidence that she was ever singled out for warning or rebuke on that account and Williams testified that she "had to remind quite a number . . . of the telemarketers . . . on a regular basis . . . to stop the chitchat"; and (8) Tolson's testimony—absurdly inflated and seemingly at odds with Echols' admission that "a few of" the employees questioned their pay as a "routine occurrence"—that "the entire company shuddered when payday came up, because we knew we were going to have a problem with Holt on the pay."

Tolson's and Echols' want of veracity is additionally revealed by (9) the total absence of corroboration, even from Tolson, for the statement in his affidavit that Holt got "into unauthorized files" in Williams' office; and (10) the unconvincing character of Echols' testimony about the timing of Holt's being in Williams' office. First testifying only that it was sometime between 13 April and 8

[26] *Meyers Industries*, 268 NLRB 493, 497 (1984).

[27] Among the dictionary definitions of vile are these: "1. morally base or evil; wicked; depraved; sinful 2. offensive to the senses or sensibilities; repulsive; disgusting 3. cheap; worthless 4. degrading; low; mean 5. highly disagreeable or most inferior; very bad . . . ." Webster's, New World Dictionary (2d College Edition 1972).

[28] Holt, as earlier indicated, generally was a convincing witness. Tolson and Echols, given to easy hyperbole in their zeal to disparage Holt, were not. In addition, Holt's calling Tolson "an ass" is not corroborated by the postmeeting "statement of understanding," by Banker, or by Banker's more detailed minutes; and Tolson's later testimony only that he "believe[d] so," when asked if Holt had called him that, was singularly weak.

[29] E.g., *Virginia Metalcrafters*, 158 NLRB 958, 962 (1966); *Winn-Dixie Greenville*, 157 NLRB 657, 662 (1966).

[30] E.g., *Scott's Inc.*, 159 NLRB 1795, 1801 (1966); *Swift & Co.*, 139 NLRB 1233, 1240 (1966); *Virginia Metalcrafters*, supra at 962 fn. 3.

May, he later asserted that it was on 5 May, even producing a memorandum he supposedly had prepared that same day and ostensibly documenting this and other of Holt's transgressions. Holt and Williams persuasively testified, however, that the incident was weeks earlier; and, as earlier noted, Echols himself implied as much (and/or that the incident was of no great moment), testifying that "the only thing new" surrounding the discharge in question, as opposed to Holt's 10 April "discharge," was her "behavior at the Michigan meeting."[31]

One could go on; the foregoing is illustrative rather than exhaustive of the chinks apparent in the accounts of Respondent's two chief witnesses. When deceit is at the core of a defense, deceit unavoidably radiates far and wide. "O what a tangled web we weave . . . ."

(f) Finally regarding Respondent's burden, just as the content of Tolson's and Echols' testimony was fraught with conspicuous artifice, their demeanor in the rendering was correspondingly unconvincing.[32]

Conclusions of Law

Respondent violated Section 8(a)(3) of the Act on 8 May 1987 by discharging Tammy Holt; and further violated Section 8(a)(1) on 8 May by interrogating Holt about her union activities, and by telling her she would be fired if she did not cease and desist from engaging in union activities.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

ORDER

The Respondent, Wykle Research, Inc., Carson City, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Threatening employees with discharge unless they refrain from activities on behalf of United Food and Commercial Workers Union, Local 711, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC or any other labor organization.

(c) Discharging employees for engaging in union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Tammy Holt immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position; without prejudice to her seniority and other rights and privileges; and make her whole, with interest, for any losses of wages or benefits she suffered as a consequence of the unlawful termination of her employment on 8 May 1987.[34]

(b) Remove from its files any reference to the unlawful termination of Tammy Holt and notify the employee in writing that this has been done and that the termination will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Carson City, Nevada, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[31] Thus rejecting Echols' testimony that the incident in Williams' office happened on or about 5 May, I also reject his testimony that he prepared the memorandum that day and that it constitutes a reliable recordation of events. I deduce that he instead prepared it sometime after the discharge, self-servingly shaping its contents to support a theory that Holt's misconduct had exceeded the limits of tolerance by 5 May just before the onset of her union activities, yet proximate to the discharge.

[32] The argument might yet be made, despite all the deficiencies in Respondent's presentation, that the circumstances immediate to the discharge bespeak an impulsive reaction by Echols to an unprotected provocation. A more tenable interpretation, in light of those deficiencies, is that Tolson and Echols scripted the fateful meeting with the idea of goading Holt into some kind of discharge-justifying excess.

[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[34] Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Under *New Horizons*, interest is computed at the "short-term Federal rate" for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

Notice To Employees
Posted By Order of The
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees concerning their union activities.

WE WILL NOT threaten employees with discharge unless they refrain from activities on behalf of United Food and Commercial Workers Union, Local 711, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC or any other labor organization.

WE WILL NOT discharge employees for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Tammy Holt immediate and full reinstatement to former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL remove from the employment records of Tammy Holt any reference to her termination; and WE WILL notify her in writing that this has been done and that the termination will not in any way serve as a basis for future personnel or disciplinary action affecting her.

WYKLE RESEARCH, INC.

Sprinkler Fitters Local No. 704, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO *and* McRae Fire Protection, Inc. Cases 7–CA–1411 and 7–CC–1421

August 31, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On May 27, 1988, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

The complaint alleges that the Respondent, Sprinkler Fitters Local 704, violated Section 8(b)(4)(i) and (ii)(B) of the Act by engaging in secondary picketing with the object of forcing or requiring other individuals to cease doing business with the Charging Party. The Respondent filed an answer denying that it had violated the Act, but at the hearing it withdrew its answer and, along with the other parties, stipulated and moved that the judge enter a decision and recommended order in conformity with the allegations and prayer for relief contained in the complaint. The parties further stipulated and moved that the judge issue a notice to members and employees consistent with the recommended remedy.

The prayer for relief contained, inter alia, the following language:

> 1. Cease and desist from:
>
> (a) Picketing at or in the vicinity of the premises of the Bellbrook Nursing Home jobsite, Rochester Hills, Michigan, during hours when the Charging Party is not working on the site.
>
> (b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Liberty Construction Corp., or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service or in any manner or by any means, threatening, coercing, or restraining Liberty or any other person engaged in commerce or in an industry affecting commerce where in either case [an] object thereof is to force or require Liberty Construction Corp., or any other person, to cease doing business with the Charging Party.

In his recommended Order, however, the judge substituted the following for the quoted material:

> 1. Cease and desist from:
>
> (a) Picketing at the Bellbrook Nursing Home jobsite, Rochester Hills, Michigan, where an object thereof is to force or require Liberty Construction Corp., or any other person, to cease doing business with McRae Fire Protection, Inc.
>
> (b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

The judge's notice contained similarly worded provisions.

The General Counsel has excepted to the judge's failure to provide relief consistent with the stipulation of the parties and to issue a notice consistent with that stipulation. Specifically, the General Counsel contends that the provisions of paragraph 1(b) of the judge's recommended Order, and the corresponding provisions of his notice, are not equivalent to the provisions of paragraph 1(b) of the prayer for relief. The General Counsel requests that the recommended Order and notice be modified to conform to the stipulation of the parties. We find merit in the exceptions.

As the General Counsel points out, paragraph 1(b) of the recommended Order is a standard cease-and-desist order for violations of Section 8(b)(1)(A); it does not require the Respondent to cease and desist from violating Section 8(b)(4)(i) and (ii)(B). Paragraph 1(b) of the prayer for relief, by contrast, closely tracks the language of Section 8(b)(4)(i) and (ii)(B) and orders the Respondent to cease and desist from violating that portion of the Act. Similar provisions have been included in other cases in which 8(b)(4)(i) and (ii)(B) violations have been found.[1] Consequently, we shall modify the recommended Order and notice to conform to the parties' stipulation by substituting the provisions of paragraph 1(b) of the prayer for relief for those of

[1] See, e.g., *Plumbers Local 274 (Stokely-Van Camp)*, 267 NLRB 1111, 1116 (1983); *Carpenters Local 316 (Thornhill Construction)*, 283 NLRB 81 (1987).

both paragraphs 1(a) and 1(b) of the recommended Order and the corresponding portions of the notice.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sprinkler Fitters Local No. 704, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Livonia, Michigan, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Liberty Construction Corp., or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Liberty or any other person engaged in commerce or in an industry affecting commerce where in either case an object thereof is to force or require Liberty Construction Corp., or any other person, to cease doing business with McRae Fire Protection, Inc."

2. Delete paragraph 1(b).

3. Substitute the attached notice for that of the administrative law judge.

[2] Because our modifications will render redundant the provisions of par. 1(a) of the judge's recommended Order and the corresponding provisions of the notice, we shall further modify the recommended Order and notice to delete those provisions, which are, we note, somewhat inconsistent with the provisions of par. 1(a) of the prayer for relief. The General Counsel does not specifically except to the judge's failure to provide the relief requested in that paragraph. In any event, the provisions of that paragraph are themselves redundant, because par. 1(b) directs the Respondent to cease and desist from violating Sec. 8(b)(4)(i) and (ii)(B) "in any manner or by any means." Accordingly, we shall not include the provisions of par. 1(a) of the prayer for relief in the Order or the notice.

The General Counsel also notes that the judge failed to address his notice to employees as well as members, as provided for in the complaint. We shall substitute a new notice to conform to the prayer for relief, as stipulated by the parties.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT in any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engage in, or induce or encourage any individual employed by Liberty Construction Corp., or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or in a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service, or in any manner or by any means, threaten, coerce, or restrain Liberty or any other person engaged in commerce or in an industry affecting commerce where in either case an object thereof is to force or require Liberty Construction Corp., or any other person, to cease doing business with McRae Fire Protection, Inc.

SPRINKLER FITTERS LOCAL NO. 704, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO

Richard Whiteman, Esq., for the General Counsel.
J. Douglas Korney, Esq., of Southfield, Michigan, for the Respondent.
Norman D. Hawkins, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On charges filed on August 11, 1987, and January 22, 1988, by McRae Fire Protection, Inc., against Sprinkler Fitters Local No. 704, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint dated February 4, 1988, alleging violations by Respondent of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the National Labor Relations

Act (the Act). Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Detroit, Michigan, on March 23, 1988, at which the General Counsel, the Charging Party, and the Respondent were represented by counsel. At trial, Respondent withdrew its answer and the parties agreed to have me issue a decision in conformity with the complaint allegations.

On the entire record in this case, I make the following

FINDINGS OF FACT

I. JURISDICTION

Liberty Construction Corp., a general contractor in the construction industry with offices in Southfield, Michigan, has been engaged, at all times material, in the construction of the Bellbrook Nursing Home in Rochester Hills, Michigan. The value of this construction project exceeds $1 million and involves the use of goods and materials, valued in excess of $70,000, which are delivered to the Bellbrook jobsite directly from points located outside the State of Michigan.

McRae Fire Protection, Inc., the Charging Party, is a subcontractor at the Bellbrook jobsite, engaged in the installation of a sprinkler fire protection system. In performing this work, it uses goods and materials valued in excess of $50,000, which are shipped to its Michigan facilities directly from points located outside Michigan. Other subcontractors working at the jobsite include Jerrett Construction, Elite Stucco & Drywall, Shawnee Shores Construction, S & M Heating, R. J. F. Mechanical, Resnick Electric, and Marco Cement.

Each of Liberty Construction Corp., McRae Fire Protection, Inc. and the above-referenced subcontractors are employers and/or persons engaged in commerce, or in an industry affecting commerce, within the meaning of Section 2(2), (6), and (7) and Section 8(b)(4) of the Act.

II. LABOR ORGANIZATION

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

As alleged in the complaint, I find and conclude:

A. At all times material herein, Respondent has had a labor dispute with the Charging Party. It has not had a labor dispute with Liberty Construction Corp., or any subcontractor other than the Charging Party, at the Bellbrook jobsite.

B. In furtherance of its dispute with the Charging Party, Respondent has engaged in the following conduct at the Bellbrook jobsite:

1. From on or about August 3, 4, and 10, through August 19, 1987, Respondent picketed the jobsite at an entrance that was posted for the exclusive use of neutral persons, their employees, visitors, and suppliers, despite the fact that there was an alternative entrance available that had been posted for the exclusive use of the Charging Party, its employees, visitors, and suppliers.

2. From on or about August 10 through August 19, 1987, Respondent regularly picketed the Bellbrook jobsite from 5:30 a.m. to 3:30 p.m., during jobsite workdays, despite the notice it had received that the Charging Party did not work during those hours.

3. From on or about January 21 through 29, 1988, Respondent picketed the jobsite from 6:30 a.m. to 2 p.m., during jobsite workdays, despite the notice it had received that the Charging Party did not work during those hours.

C. As a result of Respondent's conduct, set forth above, individuals employed by various of the neutral subcontractors refused to work at the Bellbrook jobsite.

D. Respondent engaged in the conduct set forth above with an object of forcing or requiring Liberty Construction Corp., and other persons to cease doing business with the Charging Party.

E. By the acts and conduct described above, Respondent has engaged in violations of Section 8(b)(4)(i) and (ii)(B) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Liberty Construction Corp. and McRae Fire Protection, Inc. described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Liberty Construction Corp., McRae Fire Protection, Inc., Jerrett Construction, Elite Stucco & Drywall, Shawnee Shores Construction, S & M Heating, R. J. F. Mechanical, Resnick Electric, and Marco Cement are employers and/or persons engaged in commerce, or in an industry affecting commerce, within the meaning of Section 2(2), (6), and (7) and Section 8(b)(4) of the Act.

2. Respondent Sprinkler Fitters Local No. 704, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By its picketing at the Bellbrook jobsite in August 1987 and January 1988, Respondent engaged in unfair labor practice conduct within the meaning of Section 8(b)(4) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Sprinkler Fitters Local No. 704, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Livonia, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Picketing at the Bellbrook Nursing Home jobsite, Rochester Hills, Michigan, where an object thereof is to force or require Liberty Construction Corp., or any other person, to cease doing business with McRae Fire Protection, Inc.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Livonia, Michigan office, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Furnish the Regional Director for Region 7 with signed copies of the notice for posting by Liberty Construction Corp. and the subcontractors at the Bellbrook Nursing Home jobsite, if willing, in places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Lincoln Lutheran of Racine, Wisconsin, Inc. *and* **Katherine Arena.** Case 30–CA–9464

August 31, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On April 29, 1988, Administrative Law Judge George F. McInerny issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

George Strick, Esq., for the General Counsel.
John M. Loomis, Esq. and *Katherine Williams, Esq. (Beck, Chaet & Loomis, S.C.)*, of Milwaukee, Wisconsin, for the Respondent.
Duane Arena, Esq., of Racine, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE F. MCINERNY, Administrative Law Judge. Based on a charge filed on February 4, 1987, by Duane Arena, Esq., on behalf of Katherine Arena[1] (the Charging Party), the Regional Director for Region 30 of the National Labor Relations Board (Board) issued a complaint on March 27, 1987, alleging that Lincoln Lutheran of Racine, Wisconsin, Inc. (Respondent, Lincoln Lutheran, or the Center), had violated Section 8(a)(1) of the National Labor Relations Act, 2 U.S.C. § 151 et seq. (the Act), by discharging and failing to reinstate the Charging Party because she had engaged in protected, concerted activities under the Act. The Respondent filed an answer in which it denied the commission of any unfair labor practices.

[1] Duane Arena is the husband of Katherine Arena, as well as her attorney in this matter.

Thereafter, on June 23 and August 3 and 4, 1987, a hearing was held before me at Milwaukee, Wisconsin, at which all parties were represented by counsel, and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, to present oral and written motions, and to argue orally. After the close of the hearing, the Respondent and the General Counsel submitted briefs, which have been carefully considered.[2]

On the entire record, including my observations of the witnesses, and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Wisconsin corporation with its office and place of business in Racine, Wisconsin, where, among other things, it is engaged in the operation of a nursing home known as the Becker-Shoop Center. During the calendar year ending December 31, 1986, the Respondent derived gross revenues of over $100,000 from its nursing home and purchased and received goods and materials valued at over $10,000 directly from points outside the State of Wisconsin.

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Lincoln Lutheran is a nonprofit corporation owned and operated by 24 sponsoring churches. The majority of the sponsors are Lutheran churches, but the list also includes one Episcopal, one Methodist, and one Catholic church. Lincoln Lutheran offers elderly care, principally in Racine, consisting of three nursing homes, one of which is the Becker-Shoop Center which we are concerned with here, three independent living facilities, four supervised living facilities, and such other programs as meals-on-wheels, wellness programs, telephone programs (involving daily calls to elderly persons), adult day care centers, support groups, and neighborhood senior centers. The Company also maintains facilities in Kenosha and Oak Creek, also in Wisconsin.

The Becker-Shoop Center, the facility involved in this case, is a 110-bed skilled care nursing facility established in 1982, by the merger of two previously existing facilities. As the description implies, it is a place where seriously handicapped individuals are cared for and treated. Approximately 40 patients have what has been diagnosed as Alzheimer's disease, 20 others are not so diagnosed but exhibit the symptoms of Alzheimer's disease. All the

[2] After the close of the hearing, the Respondent submitted a motion to correct transcript in a number of places. There being no opposition to this motion, and since the proposed corrections comport, except in two instances, with my memory of the testimony at the hearing, I grant the motion except for the proposed corrections on p. 87, L. 15, which should read "employment at will," and p. 238, L. 9, where the proposed correction does not relate to the record at that place.

patients are confused, crippled, or wandering, and require the highest level of medical care.

The administrator of the Becker-Shoop Center almost since its establishment in 1982 has been Daniel Langenwalter. The nursing department, which is where the events composing this case took place, has been headed since April 1983 by Director of Nursing (DON) Elaine Dyer. She has been assisted since 1984 by Assistant Director of Nursing (ADON) Judy Suter, and PM Coordinator Sue Barney, who was appointed in 1985.[3]

Daniel Langenwalter testified that during 1985 and 1986, the times in question here, the Becker-Shoop facility employed three classes of people in the nursing department; registered nurses (RNs), licensed practical nurses (LPNs), and aides, also known as group living therapists (GLTs).[4] There are three shifts daily, providing 24-hour nursing services. The first shift runs from 6:45 a.m. to 3:15 p.m., the second from 3 to 11 p.m., and the third from 11 to 7 a.m. The normal complement of nursing department employees on these shifts was described by Langenwalter as:

First shift: 16 aides; 1 LPN; 3 RNs
Second shift: 14–16 aides; 1 LPN; 3 RNs
Third shift: 5 aides; 0–1 LPN; 1–2 RNs

Carol Jarosz, the Respondent's corporate administrator of human resources, testified that RNs at the Center were employed in three categories, based on the number of hours they work. There are permanent full-time people, who work at least 80 hours during the Center's 2-week payroll payroll period; permanent part-time people, who work between 40 and 80 hours in the 2-week period; and limited part-time people, who work between zero and 20 hours in the 2-week payroll period. Some of the last category come in to work on regular schedules, others are on call and are referred to as "floats." At times material here there were eight or nine in the permanent full-time category, seven or eight in the permanent part-time category, and six to seven in the limited part-time category.

B. *The Discharge*

Katherine Arena was hired at the Center as a limited part-time RN in April 1983. She worked from 4 to 8 p.m. for a time, then from 3 to 8:15 p.m., and finally from 3 to 9 p.m., generally on weekends.[5] She was described as a competent nurse and there is no contention here that her work was unsatisfactory or in any way connected with her discharge.

So far as I can determine from the record here, Arena's problems with Lincoln Lutheran began in the late summer of 1985, when she became concerned with the Center's policies, particularly staffing, scheduling, absentee and tardiness, shift exchanges, the level of care provided to patients, morale problems, and other matters. She expressed her opinions on these matters frequently and openly. In September 1985 Arena contacted all of the RNs at the facility and invited them to a meeting on September 23, at the office of her husband, Attorney Duane Arena. Seven or eight nurses attended the meeting, which lasted about 3 hours, and at which the above topics were discussed along with a suggestion that they form a "council" or group of three nurses, who could represent the group and deal with the DON about the group's concerns.

The management of the Center heard of this, apparently from some of the attendees, and reacted by sending Arena a warning letter dated September 30, 1985, over Langenwalter's signature. The warning set out the facts that Arena had complaints about "the Nursing Service Department at Becker-Shoop Center"; and that she had discussed these complaints "at work and on work time" with other nurses. The letter went on to say that Langenwalter had no problem with the fact that Arena had complaints, but pointed out that there was a complaint procedure set out in the Lincoln Lutheran employee handbook. Because she had failed to follow the prescribed procedure, she was being warned and directed henceforth to follow the applicable procedures under pain of further disciplinary action, "up to and including termination."

The warning also contained a statement of the Respondent's view of the status of RNs at the Center: "as a staff R.N. you are considered a professional and part of the management team. Discussion of Management related concerns you may have relative to the operation of Becker-Shoop Center or Lincoln Lutheran of Racine, Wisconsin, Inc., with Subordinates is not appropriate." Langenwalter concluded by suggesting that Arena put any questions about this matter in writing and send them to Elaine Dyer, the director of nursing, or himself.

The letter was presented to Arena at a meeting with Langenwalter and Dyer. Arena remonstrated, asking to be told who her "accusers" were, and whether the letter was prompted by the September 23 meeting. Langenwalter refused to respond.

Arena then turned the September 30 letter over to her husband and attorney, Duane Arena. He immediately sent a letter, addressed to Joy Moy,[6] c/o Lincoln of Racine, with copies to Langenwalter, Jarosz, and Dyer, demanding that the September 30 letter be withdrawn, and threatening action under the laws of Wisconsin, or an unspecified lawsuit.[7]

[3] Other corporate officials who were mentioned in this hearing were Joy Moy, executive director of Lincoln Lutheran and in charge of all its facilities, and Carol Jarosz, corporate administrator of human resources.

[4] The LPNs and aides have been, since 1976, part of an overall collective-bargaining unit certified by the Board and represented by Local 150, Service and Hosptial Workers, AFL–CIO. The RNs were specifically excluded from this unit.

[5] The difference in Arena's hours from the Center's established shifts is explained by the fact that RNs and LPNs worked sometimes on a "short shift," from 3 to 9 p.m. on the second shift, for example; and sometimes as "long shift" covering the whole 3 to 11 p.m. schedule for the shift. Sometimes part-timers would work a long shift, but there is no indication that full-timers worked short shifts, with the exception of Sue Barney, the second-shift coordinator.

[6] As noted above, Joy Moy is and was the executive director of Lincoln Lutheran and, as such, ranking above Langenwalter.

[7] Apparently there was a civil suit filed in state court that was dismissed by the Racine County Circuit Court and was, at the time of this hearing, on appeal.

After this letter was sent, Duane Arena had lunch with another local lawyer named Robert Riegelman, who was also a member of Respondent's board of directors. The two lawyers agreed that it might be well if the parties to the dispute, Lincoln Lutheran and Mrs. Arena, could talk about the problems raised by Arena's activities and Lincoln Lutheran's response. Accordingly, she arranged a series of meetings with Executive Director Joy Moy in the late fall and early winter of 1985. They discussed a number of topics, and at the conclusion of the meetings, Moy arranged to remove the September 30 letter after a 6-month period.[8]

Arena had been rated by DON Dyer in February 1985, and again on September 5, 1985, prior to the September 30 warning or the September 23 meeting. In each of these written evaluations, she had been rated "average" on almost all of the 60 or more printed categories on the rating form.[9] Then, on January 20, 1986, Arena was rated, this time on a revised form that took more of a narrative form than the forms used in the 1985 ratings. Arena protested this evaluation and had a series of meetings with Dyer and ADON Judy Suter on this protest. By the time they had their fourth meeting it was evident from Arena's testimony[10] that there was a lot of tension, and even dislike, between she and Dyer. As it turned out, a new evaluation was prepared with revisions (which seemed to me mainly cosmetic) that satisfied Arena, and this incident blew over.

Arena encountered no further problems during the remainder of the winter of 1985 and up until July 1986. On July 9 the Center held a meeting described by Director of Human Resources Carol Jarosz as being for all RNs, "and other department supervisors." Jarosz attended as did a Lincoln Lutheran lawyer, Arthur Beck. The purpose of the meeting was to discuss the recently negotiated collective-bargaining agreement between Lincoln Lutheran and Local 150. Beck, who had represented Lincoln Lutheran at the negotiations that led up to the agreement, and Jarosz who was chairman of the Center's bargaining team in these negotiations, reviewed the agreement, pointing out duties, rights, and responsibilities for supervisory staff contained in the document.

As Beck explained the terms of the contract, Arena proceeded to ask questions concerning matters such as what would the RNs do in case of a strike; whether the bargaining unit employees had been offered a pay cut; and comments to the effect that the unit employees worked hard, they contributed greatly to the fine reputation Lincoln Lutheran enjoyed, and concerning layoff of aides. Arena's questions and comments were described by Jarosz as a "challenge" to Beck's explanations, and as "heckling" by Reverend Jane Lantis, a Lutheran minister and the chaplain at Lincoln Lutheran, who was present and sitting next to Arena at this meeting.[11]

Jarosz held another meeting on September 24 with RNs at the Center. This time the topic was "positive ways to discipline." This may seem anomalous, but Jarosz explained that she was trying to explain to the nurses ways to coach people, counsel them, and to develop and follow progressive disciplinary methods as a team. According to Jarosz, Arena asked a number of questions dealing with questions of phasing out limited part-time nurses, rotation of hours, assignment of hours by seniority, and other matters. Jarosz testified that Arena continued to press her questions even though Jarosz gave answers that she felt should have settled the issues. They spent so much time on these questions that the time alloted for the meeting ran out before Jarosz was able to complete her agenda.

On October 14, Elaine Dyer held a meeting of RNs and LPNs to discuss changes in paperwork and in summary care of patients. Some time into the meeting, Arena asked if there would be an opportunity at that time to bring up concerns of nurses. Dyer responded that they would if they had time. After another 26 or 30 minutes, Arena again asked if they could discuss "concerns, because we had several." Finally, about 5 minutes before the meeting was scheduled to adjourn, Dyer asked if there were any questions. Arena said that it was "obvious to me that we had no more time, certainly to open up nursing concern issues" and asked if they could set up another meeting to discuss these issues. A conversation ensued in which Arena kept pressing to have a meeting and Dyer was driven to respond first that she did not think it was possible; to remarking that Langenwalter was out of town; to an excuse that they did not have room available and that they had no money to pay nurses for attending such a meeting. Arena and "a couple of the other nurses" said that they did not need to be paid, that they would come on their own time. Dyer finally agreed that they could find a place to meet. He asked Arena what she wanted on the agenda. Arena replied that she did not think they needed an agenda. Dyer pressed her on that point and Arena cited an example of exchange (of shifts) policy. The meeting then adjourned.

After this meeting broke up Arena and Dyer continued their discussion in the corridor, outside the meeting room. The conversation centered on Arena's concerns for the policy of hours available for limited part-time RNs. They apparently disagreed on this as well as other issues, and I am led to believe that the discussion became rather acrimonious.[12]

Both before and after the October 14 meeting, Arena had contacted and continued to contact other RNs and

[8] Langenwalter testified that this was done.

[9] The copies of these forms in the record are almost illegible, particularly in respect to the numerical ratings. While I was able to get the overall sense of the exhibits, it would have been helpful if the copies were checked more closely before being submitted as a part of the record.

[10] Dyer did not testify in this proceeding.

[11] Katherine Arena's description of this meeting shows that it was not her intention to challenge nor to heckle. In her view, Beck encouraged interruptions for questions at any time, and her questions were merely requests for clarification of some of the issues in the contract. However, see my comments on Arena's testimony, below.

[12] I have based these findings on the several meetings in July, September, and October 1986, from Arena's testimony, which I found generally credible, although marked with emotions, impressions, and extraneous matters.

LPNs to survey the problems and attitudes of others and to work up subjects to bring up at various meetings.

Arena worked over the weekend of October 18 and 19. She looked for a notice for the promised nurses meeting but did not see any. In talking with other nurses she found not only that there had been no notice of such a meeting, but that Dyer had been calling nurses in individually for meetings.

On Monday, October 20, Arena called Dyer and asked if she had changed her mind about the nurses' meeting. Dyer replied that she had not changed her mind, but had decided to meet with the nurses "to talk about their concerns on a one to one level rather than in a group setting." Arena began to argue, accusing Dyer of going back on her word and suggesting that Joy Moy had said they were to have monthly meetings to discuss nurses' concerns. The conversation continued for a while, and finally Dyer asked Arena to come in for the meeting on October 22.

On October 22, Arena arrived, met with Dyer, and was told that Langenwalter wanted to see her. Langenwalter then handed her a letter of discharge. He refused to discuss this letter with Arena, telling her that it was self-explanatory and, after some argument, she left the premises.

C. *Concerted Activity*

The record seems abundantly clear that Arena, while she may have had personal and individual reasons for some of her concerns over working conditions at the Center, recognized that hours for limited part times, exchange policies, and the possible phasing out of the limited part-time category had broader application. She must have had some conversation on matters of mutual concern to get six or seven other nurses down to her husband's office in September 1985.

Arena testified, credibly, that she had talked to other nurses both before and after the October 14 meetings about the very things she raised at that meeting, and undertook to force Dyer into further group discussion of these issues at another meeting. After having observed Arena closely while she testified at this proceeding, I find it inconceivable that she had never discussed her concerns with her fellow workers. Accordingly, I find that Arena was engaged in concerted activity with her coworkers in September and October 1986, on matters of common interest, and she was not expressing only her own individual concerns at that time. See *Meyers Industries*, 268 NLRB 493 (1983).

D. *Reasons for the Discharge*

During the course of the hearing, I made the comments that management may have viewed Arena as a "Pest." In his brief the General Counsel described her as a "gadfly" to management. Daniel Langenwalter talked about a series of events that he said led to Arena's discharge. He included what he termed her fundamental disagreement with the direction of Elaine Dyer, the director of nursing; her inability to accept general direction; her public arguments about orders and policies, scheduling, absentee-tardiness policy, administration of the Local 150 contract, and exchanging or swapping shifts. He complained that she would not stop talking and arguing at meetings; she would not accept answers to her questions provided by management; and management reached a point, after the October 20 telephone conversation between Arena and Elaine Dyer, in which the former accused the DON of going back on her word, of that this was the last straw. Dyer talked to Langenwalter. He, in turn, talked to Carol Jarosz and Joy Moy. They all concurred that Arena should be discharged and she was.

As I have indicated, I took the opportunity presented by her lengthy stay on the witness stand to observe Arena, and her demeanor, carefully. She is obviously well-educated, well-spoken, articulate, confident, and persuasive. I did get the impression of zealotry beneath a composed and calm exterior. But this was manifested primarily in Arena's efforts in her testimony to be complete, to include in her description of events not only what was said, but what background influenced the participants, and what they thought and felt, as well as what they said. It was necessary, on a number of occasions during her testimony for the General Counsel, and also myself, to caution her about going beyond the boundaries of the matters she was eloquently describing. I did not discern in her demeanor the confrontational aspect or the "heckling" ascribed to her by some witnesses, but I can see that her attitude could, under certain circumstances, be tenacious and annoying if not abrasive.

I saw also, in Arena, a person who is vitally concerned with fairness and justice not only for her peers, but also for those with less education and training. This is not to say that Langenwalter or Dyer was an advocate for unfairness or injustice. But they had their own framework within which fairness and justice would be administered through themselves and their supervisory staff. Because Arena was considered by them to be a part of that supervisory staff, she was required to conform to the procedures and policies of Lincoln Lutheran. If she was a supervisor, then Respondent had every right to her loyalty and adherence to supervisory procedures set down by management.

For her part, Arena seemed to regard herself not so much as a supervisor, but an advocate for her fellow RNs, for LPNs, aides, and patients. It is undisputed that Arena sought to bring up her concerns at meetings. It is clear, also, that she consulted with others. She was criticized for discussing what went on at a management meeting with an aide, and she was noted for allowing an aide to voice her discontent in a public area. She testified that she discussed her concerns with other nurses before and after the October 14 meeting.

It seems to me significant, however, that with all the matters that Langenwalter enumerated as leading up to Arena's discharge, it was not until she pressed Elaine Dyer for a group meeting, or discussion of mutual concerns, that the decision was made to discharge her.[13] I

[13] In this regard I noted that the first warning given Arena occurred shortly after her meeting in Arena's office with a group of her colleagues.

do not need to make a finding based on these facts, but if Arena was not a supervisor, there is substantial evidence to warrant a finding that her discharge was prompted, at least in part, by her efforts to persuade management to sit down with the RNs as a group, albeit an unorganized group, to discuss conditions of employment at the Center.

The case thus comes down to a question of whether Arena was a supervisor under Section 2(11) of the Act, or was an employee entitled to the protections of Section 7 of the Act. If she was a supervisor, her discharge, even though it was prompted by her concerted activities, would not constitute a violation of the Act;[14] if she was not, then the discharge would be a violation.

E. *The Supervisory Question*

1. Company policy and procedure

In considering the question of whether Arena and her fellow registered nurses are supervisors as defined in the Act, I have broken the evidence down into two types of categories. The first, which is discussed in this section, deals with the official position of Lincoln Lutheran as set out in its policies and procedures, and in its official treatment of its registered nurse employees; and the second looks at the actual duties, functions, and responsibilities of the RNs.

First, I note the representation case filed by Local 150 on October 20, 1975, requested certification in a unit composed of "all regular full-time and regular part-time employees working 16 or more hours per week." Specifically excluded from this petition were "supervisors, confidential employees, office clerical employees, registered nurses and guards . . . . "In his Decision and Direction of Election, the former Regional Director for Region 30 did not mention the registered nurses, and they were duly excluded from the unit certified on February 9, 1976. When the Becker and Shoop facilities were merged in 1982, Lincoln Lutheran applied the existing certification to the merged employee group. There is no indication in the record that there was ever any attempt to amend the certification to include the registered nurses, nor is there any evidence that a petition was ever filed for a separate unit of registered nurses.

The job description signed by Arena at the time of her appointment in April 1983 provides that, as a staff nurse, she will assist with supervision and management of the unit (to which she is assigned) including personnel assignments. Further, in the absence of the director of nursing and assistant director of nursing, the RN with the "highest seniority" is to be the "supervising nurse."[15] Duties for this position include supervising the assignments of all nursing personnel.

The employee handbooks that were received in evidence at this hearing are not much help. On one hand, the handbook was used by Langenwalter to warn Arena for not using the complaint procedures contained in the handbook. On the other hand, provisions for the wearing of uniforms cover only aides, and not LPNs or RNs.[16]

All of these institutional positions are somewhat equivocal and not entirely clear regarding the status of the registered nurses. However, the evidence becomes clearer regarding statements by management officials to the RNs and to other employees. There is no question but that RNs were designated as supervisors.[17] They were required to attend management meetings together with department heads. They were consulted on their views regarding upcoming negotiations with Local 150. They were called to meetings to discuss the results of those negotiations. They attended meetings to discuss supervisory techniques, administration of progressive discipline, and other matters that in any context, are supervisory in nature. Officially, registered nurses were authorized to evaluate other employees,[18] to transfer or reassign, and to recommend disciplinary action.

2. Company practice

In practice the indicia of authority with which management has attempted to clothe the registered nurses is less clear. There is no doubt from the testimony of registered nurses, Merle Donahue, Wanda Childers, Sandrie Baugrud, Kathryn Anderson, and Arena herself, that the RNs had authority to direct the work of aides working on their shift, and to report these aides to Dyer or her assistant, Judy Suter, if they did not perform their duties in a manner, as described by Arena, "up to Lincoln Lutheran Standards of expectation." Donahue testified about a written warning that she issued to an aide several years before, and Childers testified that she recommended that an aide named Janette Hopkins be dismissed, and Hopkins was dismissed. Childers also stated that she made a recommendation for transfer of an aide named Tom Sura, but that recommendation was not followed.

Marjorie Smith, a former aide at the Center, testified that she was chief steward for Local 150 in 1986 and 1987. She stated that she worked on the second shift and that it was the practice for aides to go first to Sue Barney, the PM coordinator, with problems. If Barney was unavailable, then to a full-time RN, then to a part-time RN. On complaints presented by employees to

[14] There is no evidence here that the rule outlined in *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), would apply. See also *Pontiac Osteopathic Hospital*, 284 NLRB 442 (1987).

[15] The record shows that the DON and ADON ordinarily work the first shift approximately 7 a.m. to 3 p.m. This would, of course, have left the other two shifts with only RNs present up to the fall of 1985, when Sue Barney was appointed as "PM Coordinator," working from about 3 to about 9 p.m.

[16] It is also noted that RNs are hourly rated employees, not exempt from overtime requirements of the Fair Labor Standards Act. They keep time records on an hour system, unlike other employees who punch time-clocks.

[17] All the registered nurses who testified about the issue agreed that they were told they were supervisors.

[18] While the General Counsel alleges that evaluations have not been shown to have any "effect on wages or employment status" of aides, he overlooks provisions of the Local 150 contract for transfer, reassignment, and promotion, where it is clear that Lincoln Lutheran could use the results of evaluations to affect probationary status or to deny requested actions; subject, of course, to the grievance and arbitration procedures of the contract.

Smith as a steward, Smith said she had been told to bring these up with Barney or one of the full-time RNs.

Cynthia David, another former aide, testified that it was the practice if an aide had a personal problem and wanted to be excused, to see the long-shift nurse, even though that person might be an LPN. David was not aware of any aide being sent home or suspended by a shift nurse. She did, however, state that she viewed all registered nurses as part of the management team, and noted that aides did receive guidance on what to do and how to do it from the RNs.

Arena testified that she did not think she had authority to allow employees to leave early, pointing out an occasion when she was told that not to allow aides to leave their posts to go out to the parking lot to warm up their cars. She also pointed out an instance where she felt obliged to consult Judy Suter, ADON, by telephone when confronted with a request by an aide to leave early. Arena also pointed out that with the appointment of Sue Barney as PM coordinator, Sue would handle difficult problems, and the full-time RNs would take care of the matters. The part-time nurse, like Arena, would then have little if any authority over problems. However, Arena also said that she had authority over the work of three or four aides, had authority to direct the work of these aides, and had equal authority with the charge nurse[19] to allow people to go home early and to handle medical problems of patients.

On evaluations of aides, Arena and other part-timers had done this, at least up to the early part of 1985. At that time, Elaine Dyer had told the staff that, henceforth, full-timers were invited to participate in the process and provide impact. Wanda Childers, a part-time RN on the third shift, testified that as late as July 1986, she had evaluated an aide on her shift. As Childers pointed out when questioned about calling in employees that "somebody had to do it."

Conclusions

All of this testimony shows that there may be differences in the perception of individuals about their levels of authority and responsibility depending on whether a registered nurse is full-time or part-time; working a long or short shift; or working first, second, or third shifts. However, I am convinced that the evidence shows that all registered nurses, whether full-time or part-time, long shift or short shift, from whatever shift, are described as supervisors; are considered by aides to be part of the management team; and have authority to assign and direct the work of the aides on their shift, using independent administrative as well as professional judgment. They have authority to call people in, to allow people to leave early, and to send people home. They have authority to recommend disciplinary action and, whether their recommendations are followed, there is testimony, by Arena and Wanda Childers, that higher management accepts the underlying facts on which those recommendations are based. They have authority to evaluate employees, even though the part-timers may voluntarily participate in the evaluation process. There is no indication in the record that evaluations so made have any less impact upon the final result of the evaluation process.

Accordingly, I find that Katherine Arena, along with the other registered nurses at the Becker-Shoop Center, is a supervisor within the meaning of Section 2(11) of the Act, and that her discharge on October 22, 1986, did not violate the Act. *California Beverage Co.*, 283 NLRB 328 (1987); *St. Alphonsus Hospital*, 261 NLRB 620 (1982); *Sutter Community Hospitals of Sacramento*, 227 NLRB 181 (1976); *Greenbrier Valley Hospital*, 265 NLRB 1056 (1982); and cases cited therein.

Conclusions of Law

1. The Company, Lincoln Lutheran of Racine, Wisconsin, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Company has not committed any unfair labor practices under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The complaint is dismissed.

[19] Lincoln Lutheran does not have a category of charge nurses, the usual term for a nurse in charge of a shift or an area, but on each shift, one nurse's name is marked with an atserisk. That designates the nurse in charge of the shift.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Paul Mayfield d/b/a Mayfield Produce Co. *and* Teamsters and Chauffeurs Local 525, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] **Case 14–CA–18024**

September 13, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On April 30, 1986, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.[4]

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We agree with the judge that a bargaining order to remedy the Respondent's misconduct is warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Respondent's unfair labor practice conduct included telling employees that others would be discharged for union activities, creating the impression of surveillance, coercive interrogations, the promise and grant of benefits, and multiple threats of discharge, loss of jobs, loss of overtime, change of operations, and plant closure. The severity of these instances of misconduct is underscored by the Respondent's unlawful discharge of eight union supporters. The seriousness of the misconduct is further underscored by the fact that the misconduct was in large part committed by the owner and his sons in a family-run business and that the misconduct was personally directed at over 25 percent of the unit. In addition, the Respondent's misconduct occurred for the most part within days of the employees' commencing active solicitation for Teamsters and Chauffeurs Local 525.

The Respondent's misconduct was swift, pervasive, and severe. We are convinced that the misconduct is the type that has lingering effects and that is not readily dispelled by traditional remedies or time. Accordingly, we agree with the judge that an election would not reliably reflect genuine uncoerced employee sentiment. *Kona 60 Minute Photo*, 277 NLRB 867 (1985); *Quality Aluminum Products*, 278 NLRB 338 (1986); *Reno Hilton*, 282 NLRB 819 (1987).

[4] The judge ordered the Respondent to cease and desist from granting certain benefits to induce employees to reject union representation. Nothing in that Order or in our Decision and Order should be construed as requiring the Respondent to vary or abandon those benefits.

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Paul Mayfield d/b/a Mayfield Produce Co., Staunton, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Mary J. Tobey, Esq., for the General Counsel.
John J. Murphy Jr., Esq. and *Henry W. Sledz Jr., Esq. (Kovar, Nelson & Brittain)*, of Chicago, Illinois, for the Respondent.
Nancy M. Watkins, Esq. (Wiley, Craig, Armbruster & Wilburn), of St. Louis, Missouri, for the Charging Party.

DECISION

ROBERT T. WALLACE, Administrative Law Judge. On a charge and an amended charge filed by the above-named Union on 27 June and 2 August 1985, respectively, a complaint was issued on 2 August 1985, as amended, in which it is alleged that Respondent Paul Mayfield d/b/a Mayfield Produce Co. violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging eight employees[1] for supporting the Union in an organizing drive. It is also alleged that Respondent committed numerous independent violations of Section 8(a)(1) through coercive interrogations, unlawful surveillances, threats, and promises of benefits;[2] and a bargaining order is sought.

The case was tried before me on 16 through 20 September 1985 at St. Louis, Missouri. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact and Determinations of Alleged Violations of Section 8(a)(1)

Respondent is engaged in the nonretail sale and distribution of fresh produce from two facilities located in Illinois near Staunton. During a representative 12-month period ending 31 July 1985,[3] it purchased and received at those facilities products valued in excess of $50,000 directly from points outside the State of Illinois. It admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent Company is owned by Paul Mayfield and, admittedly, he and his sons (Dave, Tim, Larry, and Dennis) are supervisors within the meaning of Section 2(11) of the Act. In that role they were aided by "leadmen" Dave Ellis, Roger Leetham, and Ray Haynes who, according to the Mayfields, regularly relayed their in-

[1] Robert Holland, Michael Johnson, Thomas Butler, Thomas Barnes, Kenneth (Gene) Hay, Lester Hall, Richard Simberger, and Matthew Potocki Jr.

[2] The General Counsel requests permission to withdraw three of these allegations (5m, n, and o), stating that no evidence was presented in support thereof. This unopposed request is granted.

[3] All dates are in 1985 unless otherwise shown.

structions regarding company policies and work assignments to other employees, evaluated the performance of other employees, and were authorized to issue verbal reprimands to other employees.

At all pertinent times Respondent had 51 employees not including office clericals and Mayfield family members. The 51 work as drivers, warehousemen, produce sorters, and salad room employees. Their assignments, however, are informal as they are frequently transferred from one job to another. For example, loaders and palletmen often become drivers and/or assist drivers on their routes, sorters regularly help load trucks, and all employees from time to time are called on to assist the sorters.

In mid-April leadman and loader Jeffrey Knezik reported for work about 7 a.m. While they were awaiting job assignments, Dave Mayfield came over to where they were standing. He told them that "we" (i.e., the Mayfields) were going to talk to the foremen[4] because "the union representative might be coming by"; and he went on to say that "before we go union . . . [the Mayfields] were going to pay union wages." I find the latter statement to be an unlawful promise of benefits to forestall unionization.

On 19 May three drivers (Holland, Johnson, and William Rothe) met with Union Representative Charles Bryson and discussed how to conduct an organizing drive. At the end of the meeting Bryson urged them to pursue the matter with an agent (Dale Stewart) of Local 525.[5] Accompanied by a fourth driver (James Tiepelman) they met with Stewart on 23 June. After hearing their complaints about low wages and lack of medical insurance and job security, he gave them further instructions on the mechanics of organizing; and he also passed out a quantity of blank authorization cards. An active solicitation effort ensued, and by 26 June the Union had in its possession 31 signed cards.

James Missey was hired as a driver by Respondent on 21 June. On the following morning he was on the loading dock awaiting arrival of the driver he was to ride with that day. He was standing next to Tim Mayfield and leadman Ellis and heard the former tell the latter that there would be a union at the Company only over "their [the Mayfields] dead bodies," and he went on to say that if necessary they would prevent unionization by running the company with family members only. Those statements constitute an unlawful threat to discharge or lay off employees if they chose to be represented by a union. They also are coercive in that they convey an impression that Respondent would do anything, legal or otherwise, to keep a union out. *Sterling Sugars*, 261 NLRB 472, 475 (1982).

On finishing his shift 24 June, Barnes was called into the office, where Dave Mayfield asked if he had heard anything about the Union. Receiving no response, Mayfield told him that he had heard "through the grapevine" that Barnes had participated in a discussion about the Union at his stepfather's (Butler's) house. Again Barnes said nothing, whereupon Mayfield stated, "We heard your dad is the main cause of this and its usually the new truck drivers[6] that try to start something . . . . All us Mayfields have to do [to defeat the Union] is drop the produce trucks, and the warehouse and everything, and just sell . . . [tomatoes to] McDonalds. So tell . . . [Butler] if he values his job, just to drop it." The interview ended with Mayfield pointing out that another produce company had gone out of business because of unionization. I find the interview unlawful for several reasons. Barnes was not an open union supporter and the questioning was patently intimidating. *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In addition, Mayfield's "grapevine" comment created an impression that employees' union activities were under surveillance. Further, his remarks entail proscribed threats to change operations and to fire Butler to defeat unionization.

On the next day, just as Butler got out of his truck after finishing his route, leadman Ellis took him aside and warned him that earlier in the day Dave Mayfield said he was going to fire Butler for holding secret union meetings at home. The statement is patently coercive in that it conveys a threat to discharge an employee for engaging in protected concerted action. It also creates an impression of surveillance of activities on behalf of the Union. In this connection I find that Ellis, although not shown to be a supervisor within the meaning of Section 2(11) of the Act, nevertheless was an agent of Respondent because he was regularly used as a conduit for relaying instructions and policies of management and reasonably could be viewed by employees as speaking on Respondent's behalf. *Roskin Bros.*, 274 NLRB 413 (1985); *B-P Custom Building Products*, 251 NLRB 1337, 1338 (1980). And that result is not affected by the circumstance that Ellis may have acted on his own initiative and out of friendship for Butler.

Potocki was one of 12 employees who regularly worked in the "tomato room" grading and crating tomatoes by color (ripeness). By 26 June he had signed an authorization card and had persuaded seven coworkers in the tomato room to do so; and he had returned all the cards to Johnson. That morning he was approached on the job by Leadman Haynes who told him, "truck drivers were being fired and . . . the company would fold up before they allowed a union in." Later in the day Haynes came back and told him that one of the drivers who had been fired was "your buddy Mike [Johnson]," and he suggested that Potocki should "ask Mike what the Union had got him now." To Potocki's inquiry about why they were being fired, Haynes replied, "I don't know what reasons were given, but it was for union activities . . . for trying to get a union in." For reasons expressed above concerning Leadman Ellis, I find that Haynes acted as an agent of Respondent in communicating unlawful threats of discharge and plant closure.

[4] As used by the Mayfield's the term "foremen" includes leadmen.

[5] About a week later driver Butler invited to his home a group of dockmen and sorters (Barnes, Hay, Hall, Simburger, and John Wells) and told them about the contact made by the drivers with the Union. There followed a general discussion of the pros and cons of unionizations.

[6] At this time Butler had been employed by Respondent for about 2-1/2 months.

By the end of the workday on 26 June, Respondent had discharged all the alleged discriminatees (except Potocki) for asserted disparate reasons. Dennis Mayfield told Johnson that the insurance company "had lowered the boom on us last night so you can't drive anymore." Tim Mayfield informed Holland "they" were going to have to let him go on advice of their insurer because of a traffic ticket he received in January, and also because he was "unaccessible" when needed for driving a night (mushroom) route. Butler too was terminated by Tim Mayfield because of an incident occurring about a month before when he had damaged a fender by backing into a pole. Barnes and Hall both worked on "parts," i.e., they filled orders for less than full cases of produce. They were dismissed by Dave Mayfield who told them they had failed to properly rotate produce. He also mentioned that Dennis Mayfield's 12-year-old son, Mark, had been hired to replace Barnes. Hay and Simberger worked on the dock loading and unloading trucks. Dave Mayfield approached them separately but conveyed the same message to each: their services were no longer required because he was replacing them with relatives. He added: "You know this is a family run business."

Driver Tiepelman returned to the plant late in the afternoon on 26 June. Larry and Dennis Mayfield were standing nearby. As Tiepelman passed by, Larry invited him to say something about the Union, adding he heard Tiepelman was a "ring leader." When Tiepelman denied having had anything to do with the Union, Larry stated, "You're supposed to have that barbeque in Livingston for a Union meeting." Tiepelman replied that his barbeque had a purely social purpose. Larry then said that if there were "anymore things brought up about . . . [Tiepelman's involvement with] the Union's," they were going to let him go. I find the interrogation to involve coercion, communication of a threat, and creating an impression of surveillance—all in violation of Section 8(a)(1) of the Act.

On reporting to work at 8 a.m. on 27 June, Potocki was called into the office, where Larry Mayfield told him he was being laid off. Asked why, Larry explained that three cases bearing Potocki's initials and containing an unusually high ratio of bad tomatoes (15 to 20 out of 80 per case) had been discovered at a customer's facility and that a contract had been lost because of it.[7]

Driver Rothe arrived at work that morning about 2 hours before Potocki. As he entered the office to punch in, Larry asked him if he had heard anything about a union, adding "I know you are an old union man so I figure you might know something." Rothe replied yes he did know something and volunteered, "Tiepelman came to my house last night and is pretty freaked out . . . because he said you guys threatened to fire him . . . as an instigator of the Union." Larry responded, "Yeah, we have to get this thing straightened out because . . . we can't have a union in here telling us what to do . . . if it persists we will end up dropping off a bunch of routes and . . . the family will just run the place from then on . . . [and] we might be better off that way . . . [and] make more money." Larry also inquired whether Rothe (who had signed an authorization card and solicited other employees to do so) had been approached by anyone. Rothe responded, "No." About 4 p.m., having completed his route, Rothe again went to the office. Dennis and Tim Mayfield were there. Rothe replied that he would just repeat what he had told Larry that morning: that Tiepelman said he had been threatened with discharge for acting as an instigator of the Union. Tim responded: "Yeah, Jim Tiepelman is a troublemaker." Rothe replied: "I don't know Jim all that well so I couldn't really tell you one way or another." Dennis then opined that he could not understand "these guys," why they wanted to picket the place, especially because one of them (Holland) recently had been allowed to work overtime so that he could pay for a motorcycle. I find the a.m. and p.m. inquiries both involve coercive interrogation as to protected union activities. In addition, I find Larry Mayfield's observation that routes would be eliminated to be an implied threat to lay off or discharge employees for engaging in protected concerted activities.

On the morning of Friday, 28 June, Respondent received a copy of a petition in which the Union asked the Board to order a representation election at the plant. At 6 p.m. that day, Respondent called a special meeting of drivers. Nearly all of a total of 19 drivers were present. Each was given a two-page typewritten "Drivers Guide" which, in addition to a restatement of applicable standards of conduct and appearance, contained two new announcements: (1) that in the future the company would provide uniforms and caps at no cost to the drivers,[8] and (2) that a bonus program had been established for them. Dennis Mayfield commented on both items, and with respect to the latter he stated that under the bonus program each driver could earn as much as $35 per week. Respondent's insurance broker David Alender (a son-in-law of Paul Mayfield) also talked to the drivers. He said that if they were interested he would have an expert come and speak to them about a group medical/life insurance plan during the regular monthly drivers' meeting on the following Monday, 1 July. The drivers agreed; and at the Monday meeting all opted to sign up for the plan. I find that the conferring of these new benefits, timed just after Respondent received formal notification that an election was in the offing and hard on the heels of a series of unlawful interrogations and threats as well as the discharge of eight known union supporters, was an unlawful offer of benefits intended to induce employees to reject the Union. Compare *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), in which the Court stated, "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits not conferred is also the source from which future benefits must follow and which may dry up if it is not obliged." Here, the circumstance that at least

[7] At the trial Larry testified (Tr. 659) that it was not until 5 July that the customer told him the contract was to be terminated.

[8] Although Respondent had not deducted a $5 weekly uniform rental fee from driver paychecks since payroll period ending 6 June, it was in the process of changing suppliers and drivers had received no assurance that fees would not be resumed on 1 July, the effective date of a contract with a new supplier.

two of the benefits had been under consideration (Alender had obtained bids from several insurers during a 3-month period beginning in December 1984; and the Mayfields previously had "talked about" extending to the drivers a bonus plan similar to one effectuated for loaders in March or April) lacks significance because Respondent failed to provide any indication concerning why it chose this particular time to confer benefits. See *Litton Dental Products*, 221 NLRB 700, 701 (1975).

On the evening of 30 June, Simberger and Barnes approached leadman Leetham in the driveway of his home. Leetham said he did not want to talk, adding that he would probably get fired if he was seen with them. On being pressed by Simburger about why "we" were fired, Leetham was silent for a couple of seconds and then said: "If you go messing with the Union that is it." As in the case of Leadmen Ellis and Haynes, Leetham is shown to have been vested with an appearance of speaking authoritatively on behalf of management and, as alleged, I find his statement that employees were discharged in retaliation for union activities to be binding on Respondent and unlawful.

Paul Mayfield addressed the drivers at the meeting on 1 July. In his words:

> I started out saying I hear or see that you . . . want a union. To me it is legal and it is your choice . . . I said now boys you know that when you . . . came to get your jobs we told you just how much we would give you and you agreed with that . . . I also told them now you know that this business is very competitive . . . . If we will charge $.25 more we won't have . . . [customers] and any added expense could cause us to lose business, lose customers. We wouldn't be able to sell things. If we can't sell them, we can't put it on the truck, can't deliver it, that would affect the . . . routes and also . . . [I mentioned] that we had some routes that were marginal. We were trying to hang on to them and economically it wouldn't help us if we had more expense.

Three employees (Rothe, Crainick, and Tiepelman) each testified that Paul Mayfield was more explicit. They claim, and I credit their accounts, that he told them that overtime and routes probably would have to be cut if a union came in. I find that comment unlawful. Although an employer can make predictions about precise effects resulting from unionization, he must go further and provide an adequate factual basis why such consequences are probable and beyond his control. *Engineered Control Systems*, 274 NLRB 1308 (1985); *Bacchus Wine Cooperative*, 251 NLRB 1552, 1559 (1980). Here, there is no indication that employees were given anything more than the rambling discourse quoted above; and, in that circumstance, I find Paul Mayfield's prediction is simply a veiled threat to cut off overtime and to lay off employees if they chose the Union. *Fred Lewis Carpets*, 260 NLRB 843, 849 (1982); *Virginia Apparel Corp.*, 264 NLRB 207, 210 (1982). The coercive nature of Mayfield's speech is intensified when viewed in the context of Respondent's threats of plant closure and discharge as well as the actual discharges. *Grove Valve & Regulator Co.*, 262 NLRB 285 (1982).

Within a short time after 27 June, Respondent hired 16 new employees, not including the hire of 12-year old Mark Mayfield. All 16 were on a part-time (2 or 3 days a week) basis pursuant to a newly established policy. When David Mayfield was asked at the trial why the policy had been changed at that particular time, the following exchange occurred:

> A. It works better.
> Q. Why is that?
> A. Experience proves it that it has.
> Q. Why?
> A. I don't know. They [part-time employees] come in for shorter amounts of time. They are more alert. They are more on time. They don't come in drunk.

That response, however, stands in sharp contrast to his earlier testimony that newly hired part-time loaders "come and go so fast I don't remember [their hire dates] . . . . They are part-time. They find other work." Also, he explained that a part-time loader had worked only a short time and was fired because "he came in drunk three nights." Based on the record as a whole, I conclude that a more likely reason for the policy change was Respondent's perception that part-time workers are less apt to take a proprietary view of their jobs and join unions.

Credibility Determinations

The violations of Section 8(a)(1) cited above are based on testimony of employees that I find internally and mutually consistent; and to have been rendered candidly and without animosity. I also note that two of the employees (Rothe and Crainick) have continued in Respondent's employ and the credibility of their adverse testimony is enhanced by the fact that it was given at considerable risk. *Bohemia, Inc.*, 266 NLRB 761, 764 fn. 13 (1983); *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977). Also at risk was another witness (Missy) who had been laid off on 30 July and had hopes of being recalled. Two others (Knezik and Tiepelman) had voluntarily terminated their employment with Respondent and so stand to gain nothing financially from their testimony in this proceeding. As to the alleged discriminatees, their testimony regarding 8(a)(1) violations (with one exception)[9] relates solely to uncontroverted statements of Leadmen Ellis, Haynes, and Leetham. Respondent offered no explanation why those individuals failed to testify, and that circumstance warrants an inference that, if called, their testimony would be corroborative. The same conclusion applies to statements of Tim and David Mayfield alleged to have been uttered in the presence of Leetham and Ellis. *Antenna Department West*, 266 NLRB

[9] I have accepted as true Barnes' testimony regarding his conversation with David Mayfield on 24 June based on a favorable impression of his credibility vis-a-vis that of David, coupled with the fact that the account is consistent with a pattern of conduct on Respondent's part depicted in the testimony of other witnesses.

909, 912 (1983); *Castle Instant Maintenance/Maid*, 256 NLRB 130, 135 (1981); *American Chain Link Fence Co.*, 255 NLRB 692, 693 fn. 4 (1981).

The Discharges

The testimony of the eight dischargees regarding the reasons given them for their respective terminations is substantially undisputed.[10] Indeed, the Mayfields claim that the decision to effect the discharges for those reasons was a collective one and was arrived at wholly apart from consideration of any protected activities engaged in by those selected for separation. In my view, however, the evidence amply demonstrates that they were fired precisely and solely because each had supported the Union. In effect I find that the Mayfields' claim is wholly pretextual. Accordingly a detailed *Wright Line*[11] analysis is unnecessary.

In reaching this conclusion I have in mind: the close proximity of the discharges to the onset of protected union activities and the lack of any adequate exculpatory explanation for the timing; credited testimony that Respondent claimed "grapevine" knowledge of employee activities in support of the Union; overt animus toward union supporters manifested by repeated threats to fire those employees who sided with the Union; and the spurious nature of the reasons offered for the discharges. Concerning the latter, I note (1) that although Johnson, Holland, and Butler were discharged allegedly for faulty driving, Johnson's poor driving record had been compiled prior to his being hired and he had been assured by Dennis Mayfield in mid-March that he could continue driving provided he received no tickets for moving violations, a condition he had fulfilled. Holland's alleged dereliction involved a speeding ticket received 1 month before he was rehired in February, and he had informed Dennis Mayfield of the citation during his rehire interview.[12] Butler's accident was promptly reported by him on the day it happened (6 June) and, on viewing the damaged vehicle, Tim Mayfield told him not to worry because the damage was too slight (under $500) to report to the insurance company and he cautioned him not to let it happen again;[13] (2) that in light of Dave Mayfield's testimony that he walked through the parts department two or three times a night to see how things were going and conducted an after-hours inspection of that area once a week, that he often complimented Hall and Barnes for running "a very neat area," and that he put into effect a $20-a-week bonus for them about 1 week prior to 26 June—I find it more probable than not that any rotten vegetables "discovered" in the parts department on the night of 25 June and for which he fired them on the following day were those the two employees had culled from incoming produce and set aside for return to suppliers pursuant to established procedures; (3) that on the day (27 June) following the discharge of loaders Hay and Simburger, assertedly to replace them with Mayfield relatives, Dave Mayfield hired three nonfamily members—two as part-time loaders and the third as a member of the pallet crew, a job interchangeable with that of loader; and (4) that according to credited testimony of Potocki, Larry Mayfield, on being pressed tacitly, admitted that the real reason for his "layoff" was not bad tomatoes but his dad's orders.

Bargaining Unit/Majority Status

As previously noted, Respondent's work force is composed of 51 employees, including leadmen Ellis, Haynes, and Leetham. The 51 are full-time and regular part-time drivers and warehousemen; and included within the latter category are a number of informal classifications such as produce packers and sorters, salad makers, order fillers, pallet crew, and workers who load and unload trucks. Employees are frequently transferred from one job to another; and their wage rates range from $3.35 to $5 an hour. Regular part-time employees include high school students and they share the same working conditions and terms of employment as full-time employees. Although Respondent has two warehouses they are located within 2 miles of each other. Employees all clock in and out at the same warehouse and they often work at both facilities over the course of a day or week. Labor relations policy is centrally established by the Mayfields and working conditions are virtually the same at both facilities. In these circumstances, I conclude that the drivers and warehousemen, exclusive of Mayfield family members, constitute an appropriate unit for purposes of collective bargaining.[14]

The evidence also shows that 29 employees in that unit had signed authorization cards as of 26 June;[15] and I find all of these cards valid for the purpose of establishing majority status of the Union on that date. In reaching that conclusion I have concluded that Respondent's specific challenges to seven of these cards lack merit for reasons indicated below.

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[10] Although certain Mayfields testified to "other" reasons for terminating some of the employees, those reasons were not expressed at the time of the discharges and I am not persuaded that they are anything other than afterthoughts.

[11] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982).

[12] Another reason given to Holland for his discharge was his inaccessibility when needed on short notice for a "mushroom" run into St. Louis during early morning hours. He had operated that run about four times a week during the month of May pursuant to his request for an extra (i.e., overtime) assignment. I credit his testimony that the run had been awarded another driver in early June, so I find that his asserted inaccessibility had become a moot question at least 3 weeks prior to his discharge.

[13] Tim Mayfield states that he merely told Butler to fill out an accident report; and he claims he made the decision to fire Butler on the spur of the moment after reading a letter (undated) which Dennis Mayfield placed on his desk on 26 June. In the letter, lessor Ryder states that "if . . . [Butler] is involved in another occurrence resulting in property damage, personal injury or is guilty of other reckless or abusive handling of a motor vehicle, we may request he not be permitted to operate a Ryder vehicle." I accept as more plausible, and therefore credit, Butler's testimony about Tim's comments on 6 June as well as his claim that on 26 June Tim said he had no other choice but to let him go because Ryder said he could no longer drive their trucks.

[14] It was stipulated that office clerical employees are appropriately excluded from the unit.

[15] The evidence also shows that two additional cards (neither of which were offered in evidence by the General Counsel) were not signed by the employees (Kenneth Hopper and Gary Mills) whose purported signatures appeared there. Johnson admitted signing Hopper's name but claimed lack of knowledge regarding the false signature of Mills.

The cards of employees Donald (Leroy) and Becky Cook were credibly authenticated by Holland. Respondent does not contend that the signatures thereon are not theirs, nor did it offer any evidence disputing Holland's account. Instead it asserts, without any case citation, "that any card whose authenticity depends even in part upon the testimony of a proven forger and perjurer remains unauthenticated." The statement has reference to the fact that Johnson testified that he had been present when the Cooks signed cards. The short answer here is that in accepting those cards I have relied only on the testimony of Holland and have not had to decide whether Johnson told the truth in this instance.

Employee John Schwartz testified that he signed a card on 23 June and that on the following day he told Johnson to tear it up. Assuming Schwartz did attempt to revoke, that action was ineffective because it was taken after commencement of Respondent's unfair labor practices, and there is a presumption that the requested revocation was a result of the unlawful conduct. *Warehouse Groceries Management*, 254 NLRB 252 (1981); *Air Products & Chemicals*, 263 NLRB 341, 352–353 (1982). Indeed, any effort objectively to assess the degree to which Schwartz or any other employee might have been affected by those practices would be speculative at best and, at worst, could result in rewarding wrongdoing.

Several employees (including Ron Phillips, Douglas Missey, Raymond Plenske, and Phillip Lutes) claim they signed cards in order to obtain an election. But subjective intent is not relevant where, as here, the language on the cards[16] is free of ambiguity. Signers plainly designate the Union as their collective-bargaining representative, and they authorize it to use the cards either for purposes of recognition or for an election. Mere use of the disjunctive does not create any ambiguity. Neither does the highlighted caption stating that the card is not an application for membership in the Union. On the contrary, the caption makes clear to signers that they do not have to join the Union in order to obtain collective-bargaining representation or an election. *Pedro's Restaurant*, 246 NLRB 567, 579 (1979); *WCAR, Inc.*, 203 NLRB 1235, 1246–1247 (1973).[17] In that regard, there is no basis for an assumption that Respondent's employees were too unsophisticated to understand and be bound by what they sign. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Further, no signer claims to have been told to disregard the language of the card or that the card would be used solely to obtain an election; and the record is devoid of my implication to that effect. *Photo Drive Up*, 267 NLRB 329, 363–364 (1983); *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1963).[18]

Bargaining Order

The unfair labor practices found to have been committed by Respondent, including the mass discharge of eight union supporters shortly after commencement of an organizational drive—an action accompanied by prior and subsequent threats of loss of jobs, unlawful interrogations, statements creating impressions of surveillance, and promises (indeed implementations) of increased benefits—are so serious and pervasive that the possibility of erasing their coercive effect and of conducting a fair election by use of traditional remedies is virtually nonexistent. I am aware of no significant mitigating circumstances. On the contrary, the effects of Respondent's acts are magnified because they took place in a relatively small family run business and were perpetrated by the owner and his sons. *Thriftway Supermarket*, 276 NLRB 1450 (1985); *J. Coty Messenger Service*, 272 NLRB 268 (1984). Accordingly, I conclude that entry of a bargaining order is appropriate and necessary in this case.

Conclusions of Law

I find that Respondent violated Section 8(a)(3) and (1) of the Act in the particulars and for the reasons stated above, and that it is not shown to have violated that Act in any other respect. *I further find* that those unfair labor practices and each of them have affected, are affecting, and unless permanently enjoined will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act. *And I further find* that the following employees of Respondent (the unit) constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers and warehousemen including produce packers and sorters, order fillers, loaders, laborers, receiving and storage and salad room workers, employed by Respondent at its facilities in or near Staunton, Illinois, excluding office clerical and professional employees, guards, and supervisors as defined in the Act.

That on or about 26 June 1985, a majority of employees in the unit designated and selected the Union as their representative for purposes of collective bargaining; that since that time the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the unit for purposes of collective bargaining regarding wages, hours, and other terms and conditions of employment; that the unfair labor practices found to have been committed here are so serious and substantial in character that the possibility of erasing their effects and of con-

[16] The cards contain the following language immediately above the signature blank:

> I, the undersigned employee of . . . authorize . . . [the Union] to represent me in collective bargaining.

Then comes spaces for identification of signers followed by a prominent (bold-face) notation:

> THIS IS NOT AN APPLICATION FOR MEMBERSHIP
>
> This card is for use in support of the demand of Teamsters Local Union 525 for recognition or for an N.L.R.B. election.

[17] Although Respondent cites *NLRB v. Peterson Bros.*, 342 F.2d 221, 224 (5th Cir. 1965), for the proposition that language identical to that on the cards involved is ambiguous, the Board in *Pedro's Restaurant* and *WCAR, Inc.*, supra, appears to take a contrary view; and other circuit courts expressly disagree with the pertinent portion of the *Peterson* case. See *NLRB v. C. J. Glasagow Co.*, 356 F.2d 476, 478 (7th Cir. 1966), and *Auto Workers v. NLRB*, 363 F.2d 702 (D.C. Cir. 1966).

[18] Although Respondent does not mention the matter in its brief, Barnes' statement that he did not read the card before signing does not invalidate it as evidence of support for the Union. *Sertafilm*, 267 NLRB 682, 692 (1983).

ducting a fair election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards, would, on balance, be protected better by issuance of a bargaining order than by recourse to traditional remedies.

REMEDY

In addition to the customary cease-and-desist order and requirement for notice posting, my Order will require Respondent (1) to offer unconditional reinstatement to Robert Holland, Michael Johnson, Thomas Butler, Thomas Barnes, Kenneth (Gene) Hay, Lester Hall, Richard Simburger, and Matthew Potocki Jr.; (2) to make them whole for all wages and benefits lost as a result of their unlawful discharge, in accordance with the principles set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962); and (3) to recognize and, on request, bargain with the Union as the exclusive representative of the employees in the unit in regard to terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

I conclude that the scope and severity of Respondent's unfair labor practices evince a general disregard for the employees' fundamental statutory rights and warrant a broad cease-and-desist order. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Paul Mayfield d/b/a Mayfield Produce Co., Staunton, Virginia, its agents, officers, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in the Union, or any other labor organization, by discharging employees or otherwise discriminating in any manner with respect to their tenure of employment or any term or condition of employment.

(b) Threatening employees with discharge, loss of jobs and overtime, and change of operations or plant closure if they select a union as their collective-bargaining representative.

(c) Coercively interrogating employees concerning their or other employees' union activities or sympathies.

(d) Engaging in surveillance of union meetings and activities or creating an impression that it is doing so.

(e) Telling employees that other employees were or would be discharged or otherwise discriminated against because of their union activities.

(f) Promising to give employees health and life insurance coverage, bonuses, free uniforms, and other benefits if they opt to be represented by a union.

(g) Granting employees health and life insurance coverage, bonuses, free uniforms, and other benefits to induce them to opt not to be represented by a union.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of all employees in the unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a written, signed agreement:

> All full-time and regular part-time drivers and warehousemen including produce packers and sorters, order fillers, loaders, laborers, receiving and storage and salad room workers, employed by it at its facilities in or near Staunton, Illinois, excluding clerical and professional employees, guards, and supervisors as defined in the Act.

(b) Offer Robert Holland, Michael Johnson, Thomas Butler, Thomas Barnes, Kenneth (Gene) Hay, Lester Hall, Richard Simburger, and Matthew Potocki Jr. immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Remove from its files any reference to the unlawful discharges of and failure to reemploy Robert Holland, Michael Johnson, Thomas Butler, Thomas Barnes, Kenneth (Gene) Hay, Lester Hall, Richard Simburger, and Matthew Potocki Jr., and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities in or near Staunton, Illinois, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

The National Labor Relations Act gives all employees the following rights.

To engage in self-organization
To form, join, or help unions
To bargain collectively through representatives of their own choosing
To act together for collective-bargaining or other mutual aid or protection
To refrain from any or all of these things.

WE WILL NOT discourage membership in Teamsters and Chauffeurs Local 525, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discharging any of you or in any manner discriminating against you in regard to your tenure of employment or any term or condition of employment.

WE WILL NOT threaten you with discharge, loss of jobs and overtime, and change of operations or plant closure if you select a union as your collective-bargaining representative.

WE WILL NOT coercively interrogate you concerning your or other employees' union activities or sympathies.

WE WILL NOT engage in, or in any way create an impression we are engaging in, spying on union meetings or employee union activities.

WE WILL NOT tell you that other employees have been or will be discharged or otherwise discriminated against because of their union activities.

WE WILL NOT promise or give you benefits if you decide not to be represented by a union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with Teamsters and Chauffeurs Local 525, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all employees in the unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody that understanding in a written signed agreement:

The bargaining unit is:

> All full-time and regular part-time drivers and warehousemen including produce packers and sorters, order fillers, loaders, laborers, receiving and storage and salad room workers, employed at our facilities in or near Staunton, Illinois, excluding office clerical and professional employees, guards, and supervisors as defined in the Act.

WE WILL offer Robert Holland, Michael Johnson, Thomas Butler, Thomas Barnes, Kenneth (Gene) Hay, Lester Hall, Richard Simburger, and Matthew Potocki Jr. immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our records any references to those discharges, and WE WILL notify those employees in writing that this has been done and that the discharges will not be used against them in any way.

All of you are free to join Teamsters and Chauffeurs Local 525, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

PAUL MAYFIELD D/B/A MAYFIELD PRODUCE CO.

Chinatown Planning Council, Inc. *and* Young Shi Lee. Case 2-CA-22244

September 13, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On April 7, 1988, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, to modify the remedy,[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Chinatown Planning Council, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] The judge inadvertently failed to cite *F. W. Woolworth Co.*, 90 NLRB 289 (1950), for the computation of backpay. The recommended remedy is modified accordingly.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge our employees because they make complaints to us on behalf of their coworkers and themselves regarding working conditions of our employees, or because they circulate petitions among our employees which complain about our employees' wages, hours, and working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Young Shi Lee immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL remove from our files any reference to the unlawful discharge of Young Shi Lee and notify him in writing that this has been done and that the discharge will not be used against him in any way.

CHINATOWN PLANNING COUNCIL, INC.

Leonard Grumbach, Esq., for the General Counsel.
Henry C. Woicik, Esq., of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge filed on 13 May 1987[1] by Young Shi Lee (Lee), a complaint was issued by Region 2 of the National Labor Relations Board on 26 June against Chinatown Planning Council, Inc. (Respondent).

The complaint alleges that Respondent unlawfully discharged Lee because he (a) made complaints to Respondent on behalf of his coworkers and himself regarding working conditions of Respondent's employees and (b) circulated a petition among Respondent's employees that complained about Respondent's wages, hours, and working conditions.

Respondent's answer denied the material allegations of the complaint and raised certain affirmative defenses, and on 30 September and 1 October a hearing was held before me in Brooklyn, New York.

On the entire case, including my observation of the demeanor of the witnesses and after consideration of the letter filed by the General Counsel and brief filed by Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a not-for-profit corporation, having an office and place of business at 456 Broadway, New York City, is a contractor under a contract with the New York City Department of Housing Preservation and Development (HPD). Pursuant to such contract, Respondent provides personnel to rehabilitate, renovate, and repair city-owned real estate. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates hereafter are in 1987 unless otherwise stated.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent is a "multi-social service, educational and planning agency," serving the Chinatown community with numerous programs, including adult education, day care, youth, and senior citizens' activities and manpower training programs in sewing, clerical careers, jewerly, hotel service, and patternmaking.

The Intercity Remodeling and Apartment Repair (IRAR) is another of Respondent's programs, and the one involved herein. Its purpose is to train the new Chinese immigrant in repair and renovation of buildings owned by the City of New York. The trainee learns the skills necessary to rehabilitate the properties and utilizes those skills to find jobs when he leaves IRAR. The work performed by the trainees includes painting, plastering, installation of walls and ceilings, general maintenance and renovation work, and removal of garbage and debris.

HPD pays Respondent $90 per day per trainee and Respondent pays the trainee an hourly sum, from which taxes and social security payments are deducted. Respondent also provides workers compensation and disability insurance for the participants. The trainees, who work 35 hours per week, work in crews of six people, comprising a crew of five and one site supervisor, who assigns work and teaches them how to do the job.

The contract with HPD, which began in September 1986, provides for training of certain "on-site" skills such as proper use of tools, materials, and equipment; appropriate work attire; work techniques; fellow worker and supervisor relations; meeting job (productivity) standards; and identifying site health and safety measures and general job skills (punctual attendance).

The contract also requires Respondent to conduct certain "off-site" training, including "life skills" classes, the purpose of which is to improve the trainee's self-awareness, self-reliance, and job readiness. Specifically, the classes are to teach the participants how to dress, behave, and respond in job interviews; how to budget and allocate their salaries; and general skills necessary to function in society.

Notwithstanding the "off-site" contract clauses, Lee received no classroom training during his tenure with Respondent. Deputy Executive Director John Wang testified that no such training was given because IRAR was a new and large program and the emphasis in the beginning of the program was to organize the work crews and get the renovation work done.

Lee was hired in October 1986 at the beginning of the IRAR-HPD program. His first assignment consisted of repair and renovation work and removing garbage. About 2 or 3 weeks after he began work, Lee began to speak openly with his fellow employees concerning improving their working conditions.

On 24 November 1986 he received at $2 raise to $7 per hour.

In December 1986 he was assigned as a driver to pick up and deliver material and transport workers.[2] Early that month he continued to discuss working conditions with coemployees, who he met while making deliveries. They spoke about such issues as low wages, unfairness of supervisors, poor lighting, and lack of gloves and dust masks.

On 1 January 1987 Lee received a raise to $8 per hour.

That month, on at least three occasions, Lee told Jones Chow, the director of the IRAR program, of employee complaints concerning lack of masks and gloves and poor lighting in the buildings. Jones responded that Respondent had just purchased expensive masks and gloves, and no more would be bought. Lee told him that a worker was hurt due to insufficient lighting, and Chow replied that the injury was caused by the trainee's carelessness.

Also in January a site supervisor was discharged. A meeting of about six people, including Lee, was held at the supervisor's home. Also in attendance was another site supervisor. The participants spoke about the lack of dust masks and other equipment, insufficient lights, and poor treatment of the workers.

Two weeks later, another meeting was held, and the same matters were discussed. Those present, including Lee, considered contacting the Board or the media with their grievance, but decided to give Respondent an opportunity to respond to their charges. Lee wrote a petition and, during his travels to various worksites in late January, he secured signatures on the petition. Twenty signatures, including three site supervisors, were obtained by early February.[3] The petition is as follows:[4]

> Petition to the manager, Mr. Chow
>
> We have been working for the CPC's IRAR for more than three months. During this period, we have given our best in fulfilling our responsibilities. However, the fact that the IRAR being just established, most things are just getting started from the very beginning. Especially, about the assignment and reassignments of personnel, it has been crucial. And it has not been particularly ideal on getting us benefits and the supply of tools and materials to the job sites, which had led to a severe waste of time and effort. In light of the IRAR's future, and to increase the quality and efficiency of the work, we respectfully request that you will invite the CPC's Board of Directors to call an all-employees discussion meeting and to send an observer to it; so that the administrative staff and the job site co-workers can frankly and mutually discuss (the matters), unifying our aims and efforts to create better results. In pursuance of getting CPC's IRAR to be one of the

[2] On 18 December Lee requested and received from IRAR Director Jones Chow a letter, for visa purposes, which stated that Lee "is employed in [IRAR] on an hourly rate basis as a construction worker."

[3] Lee obtained the last signature by traveling to another worksite during his lunchbreak.

[4] The letter is as it appears in the original. "CPC" is reference to Respondent, Chinatown Planning Council.

local contenders, and not letting down the good intention of the government in delegating the opportunity to serve our fellow Chinese; therefore, we pray that such a meeting be called immediately for the benefit of all.

Sincerely,
Job Site Workers

On 9 February, the following letter was distributed to the staff and trainees by Manager Jones Chow:[5]

The IRAR has been established for four months. It is time to make a summation:

1. Our IRAR's situation

The CPC itself is a not-for-profit organization. It is not like other enterprises or social organizations which have set capitals and foundations. As some of the workers and trainees have already known, at the formation of our unit, the only assets was a contract with the HPD; other than that, there was nothing else. Not to mention were the tools, processing-site, cars, warehouses and offices which were necessities in the founding of a construction company. Even the paper for business purposes was borrowed and printed by the Brooklyn Branch [of CPC]. The office was also on loan temporarily. I like to use here to thank the tremendous support of the Brooklyn Branch.

Through the combined efforts of all; one may say that the ones with money provided the funds, the ones who could work provided the labor, the ones with tools provided the tools, the ones with cars provided the transportation . . . there was a tremendous support in various ways. Today, we can say that we are on track, and completing the HPD's contract according to specifications. The HPD is ever increasing its confident on our work. At HPD, our reputation is ever on the rise. The CPC's Headquarters has expressed extreme satisfaction and the importance of our works. Our unit have also provided other CPC units with much inexpensive refurbishings. Therefore, the results are firm, and these results are due to the combined efforts of all. Here, I like to thank especially the staff, team leaders and trainees who totally supported my work during this period.

2. Our IRAR Goals

Due to being newly established and lacking in experience, [we have] signed a contract this year, within which there are things which are disavantageous to us and have affected directly on our welfare. For example:

a. Particularly low hourly wages. The workers, who are satisfied in working with the unit can't maintain the lowest living standards.

b. Trainees are without paid holidays, no medical insurance, and having a lost sense of security and belonging.

c. The assigned construction items have not been enough to completely train a trainee in skills for independent work.

I know of all these and understand your feelings. But these are facts which I can only express my regrets. I hope that, when signing the second contract this September I will get them for us all. Also hope that all of us can be more patient, work arduously, in creating for us the advantageous conditions for the signing of the second contract with HPD. I also think that, at that time, my unit will have over 12 teams of workers. It no longer will be just involved in the removing of garbage, painting, types of simple tasks. It will be the renovation of the whole building, including electrical, plumbing, and even heating systems. I like to see that the team leaders then would come from today's trainees. Whichever, the future is very bright and prosperous, but it awaits our combined efforts.

3. The difficulties and problems we are now having.

Although our unit is on track, it's still far from a enterpreneurial constructing firm. For example:

a. Not having a good warehouse, and the warehouse capacity is inadequate. Our materials can't be well protected; and a good warehouse managing system can't be established.

b. Not enough cars lead to the discontinuities in transporting the materials and created working delays. Tools which coundln't be removed and have been stolen are common occurrence.

c. Pays not being on time. Over-times was not paid. The increases of pay, being approved by me, were not paid accordingly. . . . These need me to activity and continuously to reflect to the Headquarters and requesting the headquarter's help to solve them expeditiously. However, as a unit, from nothing to its existence, from small to big, it can't be done in one step. There must be a through period, where [we are] not just waiting, nor should we over hurried it. And such is the proper attitude to take.

I know we all have many correct views and suggestions. I welcome you to bring them out. We will listen if these ideas will be beneficial toward the unit's unity. We will accept the reasonable suggestions about work. Things can be solved immediately will be solved immediately. For instance: the workers whose approved pay increases, I will positively get them back for you. The reasonable [ideas] which can't be solved immediately will be solved later. However, what I don't want to see is that when you have some opinions and reflect them on [your] working attitudes. Moreover, that due to the differences in views, I don't want to see your ways of disobedience to the work assignments.

4. Conclusion

We should value this good opportunity in the establishment of such a construction unit, providing our immigrants with the opportunity for employment and the learning of skills.

[5] The letter is as it appears in the original.

> I hope that the top and bottom of the unit will be united in heart and purpose, exerting the most of body and soul, to bring our work into a higher level; to gain for the Chinese greater benefits.

By the time the 9 February letter from Chow was distributed, Lee had not sent his petition to Respondent or shown it to anyone from management.[6] Lee asked the trainees if he should submit the petition and some said he should not, so he did not send it to Respondent.

On 17 February Lee did not work due to a toothache. That was his only absence during his tenure with Respondent. He stated that he called his site supervisor twice that day, but the supervisor did not answer his beeper and, consequently, did not speak to him that day.

The following day, 18 February, Lee reported to work and was told by his supervisor to call IRAR Director Chow. Lee worked that day, and called Chow and was told to see him the next day.

At their meeting, Chow asked Lee why he did not work on 17 February. Lee explained that he had a toothache, showed him the medicine he was taking, and offered to produce a doctor's note.

Lee stated that Chow changed the topic and asked: "How come you are still doing that thing?" Lee replied that he did not. Chow added, "Somebody reported to me that you are still doing this." Lee asked to confront his accuser, but Chow said that that was not necessary. Chow also said that "you have to stop doing this." Lee answered, "this matter is not merely my own opinion, it involves many other people's opinion. I cannot just stop it as I wish." Chow replied: "Then you don't have to come to work." Lee asked why he was being fired and Chow refused to give him a reason, but gave him a letter that stated that he was terminated.

On 27 February, Respondent received a letter sent by Lee. In the letter, Lee protested his dismissal, and mentioned that he had circulated a petition and enclosed a copy, but without the signatories' names.[7] On receiving the letter, Deputy Executive Director John Wang asked Chow for an explanation. Wang testified that Chow told him (Wang) that he heard that a petition, relating to improving working conditions, was being circulated and that the petition may be related to Lee. Chow, who made the decision to fire Lee, told Wrang that Lee had a poor attitude at work, and was absent on a number of occasions, and in his last week he was out for a couple of days and did not call in. In addition, Chow told Wang that certain supervisors complained about Lee and asked that he be transferred, and also that during worktime Lee went to other worksites without permission.

On 3 June, after the filing of the charge and in response to an inquiry from the Asian American Legal Defense Education Fund, Wang asked Chow for a written report of the reasons for Lee's discharge. Chow's letter to Wang referred to complaints from supervisors about Lee's work, attitude, and absence. The letter, which was received in evidence, stated that Lee was a good trainee from the time of his hire until 1 January when his attitude "changed." As demonstrated by his (a) wasting time by speaking with other trainees and disobeying orders, (b) failure to return calls from the office, (c) visiting worksites without authorization and causing dalays in the work schedule, and (d) taking the company van without informing the office and leaving it on the street for several days causing the truck rental company to cancel Respondent's rental contract.

The letter is hearsay and cannot be received as proof of Lee's conduct. It was written by Chow, and refers to reports of other supervisors on which, in part, Chow based his decision to fire Lee. Neither Chow nor the other supervisors testified and of course Chow's letter to Wang cannot be cross-examined. In addition, Wang was apparently unaware and did not have firsthand knowledge of any of the alleged incidents mentioned in the letter. He testified that he first learned of Lee's discharge when he received Lee's letter 1 week after the firing, and he then called Chow and received an oral report of the reasons for the discharge. Moreover, Chow's letter cannot qualify as a business record because it was prepared after the charge was filed and in response to an inquiry from the attorney for Lee. In addition, Chow, although no longer employed by Respondent, was not shown to be unavailable to testify.[8] I accordingly reject as inadmissible hearsay the letter written by Chow to Wang as proof of Lee's malfeasance. *Cumberland Farms*, 258 NLRB 900 fn. 1 (1981); *Auto Workers Local 259 (Atherton Cadillac)*, 225 NLRB 421, 422, 427 (1976). Even if that letter was not hearsay, Lee credibly denied receiving any complaints from supervisors; and Respondent could not produce, although they were subpoenaed, any canceled van rental contracts.

III. ANALYSIS AND DISCUSSION

A. *Lee's Status as an Employee*

Respondent argues that Lee is a student or trainee and not covered by the Act. The General Counsel asserts that Lee is an employee entitled to the protection of the Act.

As set forth above, Lee worked in apartment renovation 35 hours per week, and was paid an hourly wage, which was more than the minimum wage, from which taxes and social security payments were deducted. Respondent provides workers compensation and disability insurance for its trainees. Based on these facts, Lee would appear to be a regular employee.

However, the evidence establishes that the theoretical goal of the IRAR program is to train the workers so that they could graduate from the program and, with the skills learned, seek employment elsewhere. The program's contract also provides that Respondent shall conduct life skills classes for the trainees, with instruction in

[6] The site supervisors appear to have some supervisory authority: They assign work to the trainees, show them how the work is to be done, and can order them to redo the work if it is unsatisfactory. However, Lee considered them to be employees, not part of management. The evidence is insufficient to make a determination whether the site supervisors are statutory supervisors. In view of the decision herein, I believe that, in any event, such a determination is unnecessary.

[7] In the letter Lee referred to himself and others as "students."

[8] I reaffirm my rulings excluding documents in the personnel file of Lee, written by supervisors who did not testify, concerning his alleged malfeasance.

job interviewing, managing money, and functioning in society, and shall provide counseling and assist the trainees in obtaining medical, legal, social, and educational services. However, no life skills classes were taught during Lee's tenure because the program was new and, according to official John Wang, Respondent was primarily interested in getting the crews organized and the renovation work done. Lee credibly testified that he did not receive job counseling, English lessons, or instruction in anything not related to his work assignments.

Respondent contends that these aspects of the IRAR programs render the relationship between Respondent and the trainee one of teacher-student, and not employer-employee.

I cannot agree. Respondent's relationship to these "trainees" is indicative of a commercial and business operation. The "trainees" work and terms and conditions of employment are identical to that employed in other private enterprises. The only difference is the trainee aspect of their work. However, they are working at regular trade occupations while receiving on-the-job training. In this respect they are "apprentices" who are being trained in the trades covered by the Act and not students acquiring an education.[9] *Beecher Ancillary Services*, 225 NLRB 642 (1976).

The only other difference in the nature of the employment relationship is the theoretical social aspect of the IRAR program. However, no counseling or educational programs were offered by Respondent and Lee received none. Indeed, Official John Wang testified that none were given because the program was new and Respondent wanted to get the work crews organized and the renovation work done. Thus, the work aspect of the program was deemed to be more important than the social service aspect. Even if the counseling and classroom services were held, I would still find that Lee was an employee within the meaning of the Act. *NLRB v. Lighthouse for the Blind*, 696 F.2d 399 (5th Cir. 1983), and 244 NLRB 1144 (1979), in which it was found that certain handicapped workshop employees were statutory employees.

B. *The Discharge*

1. The General Counsel's prima facie case

Lee testified without contradiction[10] that from nearly the start of his employment in October 1986 he engaged in concerted activity by speaking about poor working conditions. He had these discussions with his fellow workers at jobsites, and two meetings at a discharged site supervisor's home. He wrote a petition protesting poor benefits and lack of materials and requesting that a meeting be held at which problems could be discussed. He obtained the signatures of 20 people, including 3 site supervisors, on the petition.

Although the petition was never submitted to management, Respondent was apparently aware of employee discontent. Thus Lee told official Jones Chow several times in January of employee complaints. Shortly after Lee obtained the last signature on the petition, Chow distributed a conciliatory letter in which he praised the workers, recognized that they received low wages and few benefits, and had insufficient materials. He told the workers that the "proper attitude" is to be "more patient." He also invited them to make their views known and promised to accept "reasonable suggestions" and immediately resolve any problems that could be quickly corrected. However, he warned them that their work should not sufer because of their attitudes or different views.

Eight days later, Lee was absent from work due to a toothache. The following day he was fired, during a conversation in which Jones Chow asked him why he was "still doing that thing?" Chow then told Lee that someone reported to him that Lee was "still doing this." Lee asked who the accuser was and Chow refused to identify him. Chow then said that "you have to stop doing this." Lee replied that what he did involved others, and he could not stop it on his own. Chow then fired Lee. The discharge conversation clearly related to Lee's activity among the employees in seeking better working conditions. Chow must have been aware of his activity since Lee told him, on three occasions, of employee complaints that he received at the jobsites. Chow's 9 February letter indicates an awareness of employee discontent generally, and asks them to exhibit the proper attitude of patience.

In addition, 10 days after his discharge, Chow told official Wang that he heard that a petiton relating to working conditions was being circulated and that the petition may be related to Lee.

Based on Lee's open conduct of concerted activities by discussing working conditions with fellow employees at jobsites and at a former site supervisor's home, his writing of a petition in protest of poor working conditions, his securing of 20 signatures on a petition at various worksites, the letter of Jones Chow to employees urging patience as the "proper attitude," and the discharge interview in which Chow accused Lee of continuing his activities and Lee refused to abandon them, all convince me that the General Counsel has made a prima facie showing that Lee's concerted activities were a motivating factor in Respondent's decision to discharge him. *Wright Line*, 251 NLRB 1083 (1980).

2. Respondent's defense

As set forth above, no one with firsthand knowledge of the discharge and the reasons for it testified. I have rejected as hearsay Official Wang's testimony of what Chow told him were the reasons for the firing, and letter

[9] *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), cited by Respondent, is therefore inapposite. *Firmat Mfg. Corp.*, 255 NLRB 1213 (1981), is also inapposite because the employee there was a full-time vocational high school student who was employed under a cooperative training program through the school. He was paid at a lower rate than regular employees and did not receive any of the benefits enjoyed by other workers.

[10] I note that at times Lee was combative with Respondent's counsel, and Lee objected to certain appropriate questions and attempted to refuse to answer them, but I do not believe that that these incidents caused his testimony to be fatally flawed, especially where much of his version of the facts was uncontradicted.

to that effect[11] and supervisors' letters regarding Lee's work record.

Even if I were to accept those rejected items of evidence, I would find that Respondent has not proven that Lee would have been discharged in the absence of his concerted activities. *Wright Line*, supra. Thus, certain reasons for the discharge are not credible:

(a) *Absences*—Lee was absent only once, on 17 February, during his 4-month tenure. He tried to call his site supervisor that day but could not reach him. When asked for the reason for his absence, Lee told Chow he had a toothache, showed him the medicine he was taking, and offered to supply a doctor's note. Chow did not respond to this offer. Although Chow allegedly told Wang that Lee was absent several times, and a couple of days in his last week, it appears that the 17 February absence was the only time he was out.

(b) *Van*—It was alleged that the van rental company canceled Respondent's lease with it because Lee left the van on the street for several days without notifying the rental company. Lee credibly denied any impropriety and, although subpoenaed, no cancellation notices were produced by Respondent.

(c) *Attitude change*—It was alleged that Lee's attitude changed beginning on 1 January at which time he visited worksites without authorization and spoke with other workers. This coincides with Lee's receipt of employee complaints and transmittal of them to Chow and his solicitation of signatures on the petition he wrote. Lee's undertaking of these activities was not welcome by Respondent—the proper attitude, as announced in Chow's letter, was one of patience. Further, the discharge interview in which Chow discharged Lee on Lee's refusal to be patient, and unwillingness to stop his concerted activity, demonstrated that the "attitude" problem referred to related to his protected, concerted activity.

I therefore find and conclude that Lee was discharged for his protected, concerted activities. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. Respondent Chinatown Planning Council is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Young Shi Lee because he made complaints to Respondent on behalf of his coworkers and himself regarding working conditions of Respondent's employees, and because he complained about Respondent's wages, hours, and working conditions, Respondent violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease an desist and to take certain affirmative action designed to effectuate the policies of the Act.

[11] Chow's 9 February letter to the employees is admissible. Both parties agreed to its receipt in evidence.

Having found that Respondent unlawfully discharged Young Shi Lee, I recommend that Respondent be ordered to reinstate him and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him. The amount of backpay shall be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[12]

On these findings of fact and conclusions of law and on the entire record, I make the following recommended[13]

ORDER

The Respondent, Chinatown Planning Council, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee because he makes complaints to it on behalf of his coworkers and himself regarding working conditions of Respondent's employees, or because he circulates petitions among Respondent's employees that complained about Respondent's wages, hours, and working conditions.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Young Shi Lee immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge of Young Shi Lee and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its New York City facility copies of the attached notice marked "Appendix."[14] Copies of the

[12] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Synergy Gas Corporation and Propane Transportation Corporation *and* Local 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1]
Case 22–CA–15150

September 14, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On May 18, 1988, Administrative Law Judge Harold B. Lawrence issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a statement in opposition to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, brief, and statement in opposition and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge incorrectly found that the petition was received at the South Plainfield facility the day after the Respondent had received notification of a speeding ticket issued to Brewster, the alleged discriminatee. Rather, the petition was received July 15, 1987, and notification of the ticket was received July 16, 1987. The judge's inadvertent error does not affect the decision.

Gary A. Carlson, Esq., for the General Counsel.
Elliot Mandel, Esq. (Kaufman, Frank, Schneider & Rosenweig), of Melville, New York, for the Respondent.
Albert G. Kroll, Esq. (Zazzali, Zazzali & Kroll), of Newark, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HAROLD B. LAWERENCE, Administrative Law Judge. This case was heard by me at Newark, New Jersey, on 28, 29, and 30 October 1987. The complaint alleges that Synergy Gas Corporation (Synergy) and Propane Transportation Corporation (Propane Transportation), referred to jointly in the complaint as the Respondent, are a single employer and violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by firing George Brewster for supporting Local 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, the Charging Party (the Union). The joint answer interposed on behalf of the two companies as Respondents denied that they were a single-integrated enterprise in commerce while admitting that each individually was an employer engaged in commerce, denied the material allegations of the complaint, and denied the commission of any statutory violation. The two companies will occasionally be referred to as the Respondents or as the Employer. At the hearing, the Respondents contended that they fired Brewster because he failed to adhere to safety standards.

The parties were afforded full opportunity to be heard; to call, examine and cross-examine witnesses; and to introduce relevant evidence. Posthearing briefs have been filed by the General Counsel for the Respondents.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

There is no issue concerning jurisdiction, counsel having admitted the pertinent jurisdictional allegations. The answer admits allegations to the effect that Synergy operates a bulk propane plant and is engaged in the wholesale distribution of propane; that Propane Transportation is bulk transportation of propane; that both companies operate out of an office and place of business in South Plainfield, New Jersey; and that both companies derive gross revenues in excess of $50,000 annually from the transportation, distribution, and sale of propane directly to points outside the State of New Jersey. I find that at all times material each company was and is engaged in commerce within the meaning of Section (2), (6), and (7) of the Act and that the Union was and is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *General Statement of the Facts*

1. Respondents' business and operations

The Respondents are subsidiaries of Synergy Group, Inc., a holding corporation owned by members of the Vogel family with offices in Farmingdale, New York. Jon Vogel is executive vice president and a principal. Daniel Shientag is general counsel. John P. Russell is vice president of operations of Synergy, Propane Transportation, and another affiliate named Skelgas, Inc., and is chairman of the safety committee of Synergy and Skelgas, Inc. At the pertinent times, Shientag, like the others, had his office at the central headquarters in Farmingdale. Control of labor relations for all the corporations controlled by the Vogel family is handled by Shientag. The

common ownership and control of these enterprises and the centralization of the control of labor affairs leads me to conclude that for the purposes of the Act, the Respondents constitute a single-integrated enterprise and a single employer.

Propane transports liquid propane from refineries and pipeline terminals to local bulk distribution plants in New York, New Jersey, Vermont, and New Hampshire, utilizing 11,000-gallon cylindrical barrel tractor-trailer transport. It has been compared to a pipeline on wheels. It employs 20 persons including, as of July 1987, 6 or 7 drivers.

Synergy is involved in wholesale and retail distribution of propane and maintenance of storage facilities for it. It operates straight chassis trucks with rack bodies to hold aluminum cylinders (for delivery to retail customers) or tanks, which hold 3000 gallons of liquid propane. Synergy operates nationally. The country is divided between 2 regional managers, under each of whom there are 10 area managers, each of whom supervises 8 to 10 branches. The 124 branch managers run the day-to-day activities of the local installations. The employee complement in each branch varies. There may be as few as 4 or more than 30, depending on market density and geographical location. Every branch has short-haul drivers who deliver propane locally and some also have long-haul transport drivers and mechanics. Two-thirds (1200) of the employees are drivers.

Russell's duties are the same in Synergy, Propane, and Skelgas, Inc. and involve all matters pertaining to product delivery and manpower requirements. He reports directly to Jon Vogel. At the time of the incidents involved in these proceedings, Philip Nicolette, the area manager who supervised South Plainfield, reported directly to Russell because the office of regional manager was temporarily vacant.

2. The hiring and discharge of Brewster

Brewster had 12 years' experience driving flammable liquids at the time he applied for a position with Respondents at South Plainfield, New Jersey, on 19 May 1987.[1] He was hired by William Hall, the branch manager, a week later, after a check was made with his previous employer. At the time of his interview with Hall, he took an open book test on rules of the Department of Transportation. In his previous employments, Brewster had received tickets pertaining to equipment violations but had never received one for a moving violation.

He soon became disappointed with the pay and working conditions and contacted John Braden, the business agent of the Union, which had a contract with Respondents covering their facility at Parsippany, New Jersey, about 30 miles away. Braden sent him authorization cards and early in June Brewster began soliciting signatures on the cards. His activities continued for approximately a month. He signed his own card on 10 June. And he enlisted the support and aid of Joseph D. Vuono, who signed a card on 8 July.

On 13 July, the Union filed a petition for an election, alleging that a substantial number of the 17 employees of Synergy at South Plainfield wished to be represented by it. A copy of the petition was mailed to Respondents on 14 July. It was received at South Plainfield on Thursday, 16 July, which happened to be the day on which Hall, Nicolette, and Russell had scheduled a meeting regarding a New Jersey fuel tax audit. Hall turned the petition over to Nicolette, who gave it to Russell when he arrived for the meeting. They discussed the question whether the dissatisfaction that gave impetus to the drive for unionization was concentrated among the short-haul or the long-haul drivers, but came to no conclusion. Russell delivered the petition to Shientag when he returned to Farmingdale later in the day.

The day before, Russell had received in his mail a notice from the New Jersey Turnpike Authority advising Synergy that on 7 July a ticket had been issued to one of its drivers, George Brewster, for traveling 69 miles per hour in a 55-mile-per-hour zone. Brewster had not advised Hall or anyone else in the Company that he had received the ticket. Russell, after ascertaining that Nicolette knew nothing about it, conferred with Jon Vogel, and later in the day instructed Nicolette to terminate Brewster. Russell testified that he made the decision to terminate Brewster.

On Monday, 20 July, Nicolette and Hall notified Brewster that he was being terminated. He requested a letter setting forth the reasons. Nicolette called Russell in Farmingdale and Russell agreed to issue a letter. Nicolette advised Brewster that, pending issuance of the letter, he would be on suspension.

On 23 July, Russell issued a letter on Propane Transportation stationery, notifying Brewster that his employment with Propane was terminated as of 20 July. The letter set forth three reasons for the termination: (1) the issuance of the summons to him for exceeding the posted speed limits; (2) violation of section 392.2 of the Federal Safety Regulations, which, according to the letter, required that regulated vehicles be operated in accordance with the laws of the jurisdiction in which they operate; (3) failure to comply with item 11 of the Synergy Gas Corporation Safety Manual Policies and Procedures for Operating Motor Vehicles, which, according to the letter, required drivers to report citations for traffic violations within 24 hours of receipt.

B. *Analysis of the Evidence*

1. The evidence adduced in support of the complaint

a. *The extent of Brewster's organizational activity*

Brewster testified that he became dissatisfied with the pay and working conditions shortly after he started with Respondents in June and began seeking signatures on the cards sent by Braden. He claimed that he did so openly without making any attempt to preserve secrecy, that he spoke to 10 or 12 persons, gave cards to at least 7 and possibly 10 persons, and spoke to them in the garage, in the lunchroom, and elsewhere on the premises. However, the evidence is not convincing that his efforts were extensive. He was not specific about when or where he spoke to any particular persons or obtained signatures on

[1] All dates mentioned are in 1987 except as otherwise stated.

cards. Except for the card signed by Joseph D. Vuono, he was unable to identify any significant number of cards or describe the circumstances under which they were executed or received by him from the signatories. The cards that he and Vuono signed are the only two cards in evidence. Despite Brewster's testimony that he began talking to the other employees early in June and that Vuono handed out the cards for him when he had to be on the road, Brewster's card is dated 10 June and Vuono's card is not dated until 8 July. Brewster's testimony that he had spoken to Vuono about the Union "on many occasions" indicates to me that Vuono took some time to become convinced and renders it unlikely that Vuono did much soliciting. There is no satisfactory evidence respecting the duration and intensity of Brewster's activities and insofar as Brewster claims to have engaged in such activities, the record is barren of corroboration from any source respecting the time, the extent, or the location of Brewster's activity in support of the Union. The picture he furnishes is not as sharply focused and I am left with the impression that his efforts were not open and in plain view or so intensive as necessarily to come to management's attention.

b. *Animus*

In other cases involving other corporations owned by them in similar lines of business, Respondents' management has been found to have committed unfair labor practices. In its dealings with the Union in connection with the situation at South Plainfield, Respondents' management failed to heed the direction of the Regional Director, contained in the order directing an election, that an *Excelsior* list be furnished to the Union. The attitude of management connoted something beyond refusal to cooperate with an adversary. When Russell arrived at South Plainfield and was given the petition by Nicolette, his reaction was, "Oh, boy!" He later asked Nicolette and Hall what the "problem" was and whether the union drive was among the long-haul transport drivers or the short-haul distribution drivers.

The musings of Respondents' managers about the "problem" that led the employees to seek the help of a union do not necessarily show their intention to search out and eliminate the union activities. If viewed as a sign of malaise among the work force, it is within the prerogatives of management to make proper inquiries regarding it. In this case, Russell interrogated the branch and area managers. He did not interrogate employees. But on the basis of the past history of his management's dealings with unions, the exsistence of union animus is not out of the question.

Russell conveyed an incredible picture of the reaction in Farmingdale to the Union's petition: according to him, there was no reaction at all. He testified that on his return to Farmingdale, he gave the petition to Shientag, who received it without comment. It was later the subject of a conference between Shientag and Jon Vogel, from which no significant quotations have emerged. This lack of candor at the hearing, combined with management's past record, leads me to believe that union animus existed. The question is whether the events at issue were motivated by it.

c. *Conversation between Brewster and Hall*

Brewster testified that on Wednesday, 22 July, he returned to Hall's office to turn in some paperwork and petty cash and to collect his pay. No one else was present. They exchanged amenities and took care of the several items of business. According to Brewster:

> And then right before I was ready to depart I said "Bill, off the record, and the reason I am getting laid off or fired and is this due to union activity?" And he said "Yeah, but I am going to deny it." And then from there I said "I am going to do what I have to do." And he said "Go ahead it is really out of my hands."
>
> And this is when I contacted the union and the law office was involved. And this is where I got my Petition and I knew it was unlawful . . . .

Hall denies having made the statement, asserting that when Brewster came in he turned in his paperwork and they talked about toll money, medical records, and paysheets.

In assessing the relative credibility of the two men regarding this conversation, I am compelled to offset numerous points on which Brewster's testimony was less than accurate or candid (such as the extent to which he was tested, the extent to which regulatory material was made available to him, and the extent to which Respondents supposedly ignored his requests for a new vehicle) with a solitary instance in which I find Hall's testimony questionable on a relatively immaterial point, whether Brewster and Hall had a conversation in Hall's office on the morning of Saturday, 18 July. Brewster testified he came in that morning and Hall told him to come in to see him again on Monday morning. Hall testified that he did not usually work Satrudays but could have been there that day, but he was firm in his denial that he had seen Brewster at that time.

It is apparent to me that Brewster's testimony is probably correct on this point. Nicolette testified that on the preceding Thursday he received Russell's instructions to terminate Brewster very late in the afternoon; since Brewster had already gone, he left the instructions with Hall. The following day Hall told him that he had not yet seen Brewster. Yet, though Hall had not seen Brewster on Friday and there is no testimony regarding any telephone contact, Brewster came in on Monday about 9:45 a.m. equipped with a tape recorder and prepared for a conference. As Hall did not explain how Brewster knew he was supposed to come in for a conference, I accept Brewster's explanation.

However, Hall's failure to recall this unimportant conversation with Brewster does not lend credibility to Brewster's contention that Hall, a manager experienced in labor relations, made a damaging admission to him that he was discharged for union activity. Accordingly, I do not find that Hall made the statement that Brewster attributes to him.

d. *Employer's knowledge of Brewster's activities*

There is no direct evidence in the record of any notice or communication to any person in a supervisory or managerial capacity, or to any person whose knowledge could be attributed to the Employer, that Brewster was engaged in activity in support of the Union. Accordingly, the General Counsel relies on circumstantial evidence from which he claims such knowledge or communication may be inferred: the allegedly small size of the plant at South Plainfield, the openness and lack of concealment of Brewster's activities, and the fact that two members of management had sons who were employed at South Plainfield as drivers. Of course, my finding that Brewster's efforts to organize support for the Union were not intensive undercuts the force of all of these arguments. There are other respects in which the factual basis for such an inference must be deemed insufficient.

James Gerard is the son of Joseph Gerard, the fleet manager for Synergy and Skelgas, Inc. Joseph Gerard's office is in the Farmingdale headquarters and he reports directly to Jon Vogel. Mark Rutledge is the son of Joan Rutledge, the dispatcher at South Plainfield. In another proceeding, Respondents stipulated that she was a supervisor within the meaning of Section 2(11) of the Act. The General Counsel contends that an inference is warranted that James and Mark would have brought Brewster's activities to the attention of management.

However, the evidence of family relationship is the only evidence in the case of the Rutleges, and there is not much more in the case of the Gerards. There is no evidence in the record that would establish the likelihood that either driver would have made such a communication to his parent. There is no evidence that either one lived in the home of the parent, took meals there, or discussed company business with his parent. There is no evidence respecting their views regarding unionization. Brewster testified regarding statements by James Gerard: "[c]onstantly he said you will never get a union in here and we will shut the plant down. . . . And he said there will never be a union down here and they will shut the place down. Mr. Vogel is a lawyer and he'll fire you and he will do anything if he finds out you are involved with the union." That is evidence of James Gerard's opinions and expectations, not that James Gerard made any communications to his father pertaining to organizational activity. Brewster also testified that James Gerard kept in close contact with his father through telephone calls, but he did not assert that the subject matter of any of the calls was Brewster's activity in support of the Union.

Brewster was vague concerning the knowledge that James Gerard and Mark Rutledge might have acquired. Asked whether he ever spoke to James Gerard about the Union, his response was that it was constantly, that James Gerard kept in close touch with his father, and that he made statements quoted above. However, Brewster subsequently limited his testimony to an assertion merely that James Gerard "was aware there was a union coming on and there was some things going on." Such a statement in direct response to a question whether he spoke to James Gerard about the Union indicates that he did not. Moreover, in view of James Gerard's relationship and his expressed attitude, it is inconceivable that Brewster would speak to him directly about joining the Union because he could not reasonably have expected him to do so or to sign a card.

In the case of Mark Rutledge, Brewster did not claim he ever spoke to him directly. He testified merely that Mark Rutledge was "around" when Brewster talked to other employees. That proves nothing. In fact, if Brewster spoke to or in the presence of James Gerard and Mark Rutledge, it can plausibly be argued that he did so because he was confident of their friendly feelings toward him and did not fear that they would do anything to jeopardize his employment. That would make it unlikely that they would report his activities to their parents.

The amount of room left for such guesswork demonstrates the size of the evidentiary void in this case. The kind of evidence that is required in such instances is noted in *American League*, 189 NLRB 541, 548–549 (1971), in which it was held that an inference that an employee informed the employer concerning the union activities of another employee is impermissible, and that such a contention must be established by direct evidence. The only permissible exceptions were held to be cases in which informers know the identity of union adherents, and inform the employer that the employees are engaged in union activity, and in which the fact that they made such statements to the employer is proved by direct testimony.

As would be expected, in view of the general lack of evidence to support an inference that James and Mark made any reports, there is no evidence that either parent had any significant discussions with other officers of the Company regarding any matter supposedly communicated by his son. The General Counsel's effort to adduce such testimony from Russell with respect to Gerard brought forth a complete denial that the senior Gerard had ever discussed anything about his son's work with Russell except for the solitary instance of a truck mishap.

The General Counsel argued that the length of the period of time—1 month—which Brewster claims he spent soliciting signatures justified an inference of knowledge of his activities on the part of his employer. The argument that a month is a lengthy period is based on the holding in *Friendly Markets*, 224 NLRB 967, 968 (1976), in which a shorter period was rejected as a circumstance justifying an inference of knowledge. The reverse conclusion does not necessarily follow and I reject the argument. I find the decision in *Friendly Markets* permitted chiefly for the observation there that the "small plant" doctrine is not applicable solely on the basis of the small size of a plant or the small number of employees, as those factors alone do not warrant an inference that management had knowledge of union activity of specific employees. There must also be evidence that the activities were carried on under conditions making it likely that management's attention would be drawn to them. See also *Hadley Mfg. Corp.*, 108 NLRB 1641, 1650 (1954) (organizational activities carried on at the plant, but not during working hours); *Samsonite Corp.*, 206 NLRB 343, 349 (1973) (small plant where supervision had close contact with employees); and *American League*, 189 NLRB

541, 548 (1971) (may consider employer's statements and conduct affording reason to believe it had gained knowledge of protected activities). In *American League*, it was commented that the size of a plant may be material if all the circumstances, including plant size, makes it likely that the employer observed the union activities of a discharged employee. See also *NLRB v. Joseph Antell, Inc.*, 358 F.2d 880 (1st Cir. 1966).

Respondents' drivers are out on the road a good portion of the time and seldom are present at the premises in large numbers at one time. The remainder of the employees engaged in different types of work in different portions of the premises; besides the drivers, there are mechanics, yardmen, and servicemen. Hall is on the premises all day and makes several tours each day through the entire facility, but that by itself does not make it likely that he would encounter union activity and he does not use the lunchroom at all. So he is not likely to hear of any union activity. Nicolette, who knows all the employees by name, is familiar with their employment history, and considers some of them to be his friends, nevertheless has jurisdiction over both the Parsippany and South Plainfield branches and divides his time between them.

On these facts, no inference of knowledge is warranted. On the contrary, they demonstrate the precise opposite of what the General Counsel contends. In his posthearing brief, counsel for the General Counsel refers to "[t]he compact size of the premises that comprise the South Plainfield branch." The premises consists of a yard, a loading dock, storage tanks, and a building which was described in the testimony as large. It houses a 2-day service facility for the trucks, six offices, and a small lunchroom. There is no evidence of the dimensions of the premises, but no one referred to them as compact.

Accordingly, there is no basis on which I can infer that Brewster's employer had notice that he was soliciting signatures on union cards. Counsel for the General Counsel seems to have recognized this himself, for, in his posthearing brief, he presented as "the only explanation that makes sense" a completely different theory to explain Brewster's discharge. This was that, on receipt of the petition, management conducted an investigation to ascertain the nature of the problem, and that the members of management were so enraged on identifying Brewster as the culprit that they could not control themselves and fired him within "hours" of the receipt of the petition. If that is the only explanation that makes sense, then we are certainly warranted in discounting the "small shop" theory and the possibility that the sons of management personnel reported Brewster's activities, especially since Brewster started in June and was not fired until 20 July.

e. *Timing of discharge*

As a general matter, the timing of a discharge does not, either by itself or in light of the severity of such disciplinary action, compel the conclusion that the discharge was discriminatory. *Ray's Liquor Store*, 227 NLRB 1800, 1801 fn. 3 (1977). Timing is one of many factors to be considered and, like the others, may raise only a rebuttable inference. *Central Buying Service*, 223 NLRB 542, 547 (1976).

The discharge of Brewster occurred within a week after Russell, Shientag, and Vogel learned of the union petition for election. It also occurred within a week of receipt of the notice from the New Jersey Turnpike Authority. The three events occurred at approximately the same time.

Though Brewster claims his union activity was open and notorious, there is a lapse of 5 weeks between the commencement of his activity and his discharge. He does not claim that during that period anything was said to him about it or that any attempt was made to impede his union activity. There is no evidence linking his discharge to the filing of the union petition rather than to the receipt of the notice of the speeding ticket, insofar as the element of timing is concerned.

f. *Claim of disparate treatment*

A discharge that is consistent with an employer's past practice of discharging employees who commit similar conduct will be upheld even though the employee's protected conduct was also a motivating factor in the decision to discharge. See *K & K Transportation Corp.*, 262 NLRB 1481, 1486 (1982). The General Counsel contended that the falsity of the asserted reason for discharge is shown by disparate treatment accorded Brewster, by general lack of concern on the part of management with safety matters, and by Respondents' assertedly faulty handling of driver discipline and safety matters.

I find that disparate treatment was not demonstrated. There is abundant evidence that other drivers were discharged following serious mishaps on the road and that Respondents were concerned about safety and sought to avoid situations involving peril to the public at large, their drivers, and their vehicles. Brewster's treatment was not substantially different from that accorded to others who had behaved similarly. Brewster had been employed for about 6 weeks when he was discharged. Joseph Smith, whose tractor-trailer overturned, was discharged after 2 weeks for driving at an unsafe speed (as distinct from driving in excess of a speed limit). Vuono was employed for a total of 10 weeks. He received a speeding ticket for driving a transport 55 miles per hour in a 45-mile-per-hour zone on 28 August. His tractor-trailer jackknifed. He was suspended pending analysis by the Safety Committee and discharged on 21 September. (That date is after the election, which was held on 18 September, negating any connection between Vuono's asserted union activity and his discharge.) Charles Breeze was fired in October 1986 for abandoning a loaded transport on the road. None of these drivers received warnings.

Russell testified that the incidents involving overturned trucks led to the issuance of an interoffice memorandum, dated 20 January 1987, addressed to all Transport Operating Locations, entitled, "Hiring Prerequisites and Procedures for Transport Drivers." That document appears to have been a bona fide attempt to ensure that all persons hired as drivers of transports were familiar with and adhered to recognized safety principles.

Brewster's offense was to drive a tanker 14 miles per hour over the posted speed limit. He was traveling at 69 miles per hour in a tanker fully loaded with 9000 gallons of flammable liquid propane. He compounded the offense by violating a company rule requiring that tickets be reported, on the lame excuse that the police officer told him that the Company would be notified directly. The General Counsel seeks to equate that conduct with lesser offenses of an altogether different nature for which drivers were not fired, such as failing to appear for work, failing to fill out equipment reports, and maintenance failures such as those just mentioned, which were not even attributable to the drivers. The comparison is completely inapt.

The General Counsel has pointed to Respondents' failure to discharge several drivers who received tickets, but the tickets in question were for equipment violations. A ticket issued to William J. Smith was for a truck loaded in a manner likely to result in a spill onto the road because of a loose binding. A ticket received by Bruce J. Golchuk was for insecurely fastened brake pads. Neither truck was a tanker and both tickets involved maintenance matters rather than moving violations. Even at that, it was not demonstrated that the deficiencies entailed continuation of any condition affecting the safe operation of the vehicles.

My conclusions are not affected by evidence that Respondents' disciplinary system is not highly organized or completely consistent or fool-proof in all cases. It appears that there is no written policy covering discipline and Respondents do not operate a progressive disciplinary system. But there is discipline. Oral and written warnings are issued by both branch and area managers and are generally geared to the gravity of the infraction. Hall testified that he customarily gives two verbal warnings and then a written warning, after which he asks Nicolette what further action to take.

Hall's testimony indicated the type of problems dealt with by warnings. Vuono was given verbal warnings for failure to write up his truck reports or complete his logs. Warnings were issued to drivers for failures such as omission to report equipment problems to the mechanics before leaving for home, for failure to come in to work (the latter resulting in discharge after three such warnings), lateness, and failure to fill in the logs. The warnings patently related to considerably less serious matters that were largely unrelated to safety infractions, and the issuance of warnings in such cases instead of dismissals did not constitute disparate treatment.

Nor is my conclusion affected by one apparently aberrant occurrence. Russell conceded that Jon Vogel observed a driver weaving back and forth between lanes in a dangerous manner. The driver was only given a verbal reprimand. Respondents offered no explanation and it appears to me to have been an utter failure to enforce discipline and safety rules. But this is the only known instance of failure to administer serious punishment for apparently dangerous action and it appears to be an anomalous occurrence which was offset by the other instances in which severe disciplinary action was taken.

Counsel for the General Counsel, in his posthearing brief, cites the failure of Respondents to produce subpoenaed documents consisting of lists of violations of motor vehicle traffic laws and ordinances by drivers employed at South Plainfield and urges that I infer that they would have shown that many drivers who received speeding tickets were not discharged. I decline to draw such an inference because Respondents' noncompliance was assented to by the counsel for the General Counsel. The subpoena was served at the South Plainfield facility 1 week before the scheduled date of the hearing. The Respondents timely moved to revoke the subpoena but the motion papers did not reach me in time. I ruled on the motion at the hearing and in effect denied it after modifying some of its requirements. Counsel for the Respondents stated that the subpoenaed records were stored in two 44-foot trailers and that the time-consuming task of extracting the pertinent records had been deferred pending the ruling on the motion. He offered to dig them out if I would grant a few days' continuance to enable him to do so. On the second day of the hearing, the matter was put to the General Counsel, who was expressly given the choice, by me, of going forward, resting his case, giving Respondents a few days to get the records, taking an adjournment to move for subpoena enforcement or whatever other action he deemed appropriate. He would not have been prejudiced by a continuance. He stated that he wished to proceed immediately. The existence and availability of the records could have been ascertained with certainty after a short continuance which was not granted because the General Counsel's election to proceed rendered it unnecessary. Under the circumstances, it would be unfair to draw an adverse inference from the Respondents' failure to produce the documentation.

g. *Single employer status*

The evidence warrants a finding that Respondents are a single employer, and a remedy, had I found a violation, would properly have been imposed on the two of them jointly and severally.

h. *Conclusion*

The evidence adduced by the General Counsel does not include any direct evidence or any persuasive circumstantial evidence that persons in positions of authority in Respondents' management were aware of Brewster's interest in, or activities on behalf of, the Union. There is no convincing evidence that the intensity or extent of Brewster's organizational activity made it likely that his activity would come to management's attention. There is no evidence of disparate treatment. A prima facie case was not proved. Moreover, even if it could be said that every element of a prima facie case of violation of Section 8(a)(1) and (3) was supported by some evidence, however slight, it could not be maintained that on the whole case the allegations of the complaint had been established by a preponderance of the evidence, for the Respondents convincingly rebutted the General Counsel's case.

The General Counsel has cited a number of cases in his posthearing brief in which an illegal discharge has been inferred from circumstantial evidence. None of the

evidence in this case, however, is comparable to the type of circumstantial evidence that was introduced in the cases cited.

2. Respondent's explanation for Brewster's discharge

a. *The explanation*

If the evidence had been sufficient to establish a prima facie case of violation of Section 8(a)(1) and (3) of the Act, the burden would have devolved on Respondents to show that the discharge had actually been for a reason not violative of the Act. Respondents offered one that I found completely credible: the gross violation of safety which resulted from Brewster's having seriously exceeded the legal speed limit with a fully loaded propane tank truck.

The nature and extent of a respondent employer's burden in cases such as this have been clearly spelled out. In *Wright Line*, 251 NLRB 1083, 1089 (1980), modified 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), it was held that in cases alleging violation of Section 8(a)(1) and (3), in which the employer had both permissible and impermissible reasons (under the Act) for discharging an employee, the General Counsel must establish a prima facie case that the employee's protected conduct was a motivating factor. The employer then has the burden of persuasion, or of going forward, and must demonstrate that it would have discharged the employee even in the absence of such protected conduct. The General Counsel retains the general burden of proof on the whole case. The extent of the employer's burden was clarified in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the employer must show that it acted for the claimed lawful motive by a preponderance of the evidence. See *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984), and the cases cited.

Brewster conceded that he had been given a ticket on 7 July for speeding at 69 miles per hour in a 55-mile-per-hour zone, at a time when his transport was fully loaded with flammable liquid propane. He pleaded guilty and paid the fine in court on 7 August.

Russell explained the nature of the hazard. The transport of tankers carry 9000 gallons of liquid propane, a flammable substance. They cost $130,000 a piece. An accident can cause one to rupture. Such an accident in the Catskills produced a fireball that severely damaged the town in which it occurred. Vital arteries, such as the George Washington Bridge, can be blocked for extended periods of time by disabled tankers. Flip over of a propane tanker could result in the release of liquid propane, which in gaseous form occupies a volume 270 times greater than its liquid form. It is combustible when mixed with air. Nine thousand gallons of liquid propane translate into 328,000 cubic feet of flammable vapor.

Russell testified that three employees (Smith, Gunter, and Riddle) whose trucks overturned were discharged for unsafe operation. These incidents led to the composition of the interoffice memorandum dated 20 January 1987 on the subject of hiring prerequisites and procedures for transport drivers. The procedures outlined for ensuring the hiring of experienced and competent drivers are as follows: before a driver is hired, an abstract of his operating record is obtained to determine if he meets the Company's standards; references are verified; and a 2-day minimum training period is prescribed for all drivers before they are put to work, with emphasis on the hazards of operating a transport with a liquid load. Nicolette testified that the fleet director in Farmingdale (the position currently occupied by Gerard) reviews the abstracts of the records of all drivers once a year.

The Company complies with the U.S. Department of Transportation (DOT) regulations governing safety and drivers' hours and also complies with New York City curfew regulations. The DOT's Bureau of Highway Safety audits Respondents to ensure compliance with DOT regulations. All traffic citations received by drivers throughout the United States are required to be forwarded to Farmingdale. Of the 200 traffic tickets received there since 1982, only 2 were for exceeding fixed speed limits. The General Counsel scoffed at Russell's testimony to that effect, but I do not share his skepticism. Recognition of the hazards involved in this type of work explains the small number of tickets received at Farmingdale that involve moving violations and the relatively few discharges arising from improper operation of vehicles, for Respondents' drivers must be assumed to be of average intelligence and emotional stability. Many tickets were for equipment violations, which Russell stated were considered serious, but not as serious as moving violations. The Company has no written rule that requires that a driver automatically be discharged for receiving a speeding ticket, but Russell noted that Government regulations require drivers to obey local laws in the operation of their vehicles.

The drivers sign for receipt of a copy of the Federal safety regulations. The Company also distributes a safety manual to the branches which, among other things, requires drivers to report citations for traffic violations. Nicolette conceded, however, that the safety manual is not distributed to the drivers; instead, the branch managers use them as discussion guides for their monthly safety meetings.

Russell testified that the Company's concern with safety is rooted in its basic desire to remove unsafe conditions for drivers and the public, to avoid property damage, and to avoid bad publicity for the Company resulting from flipovers and resulting traffic jams. He asserted that the Company does not discharge drivers for every ticket that they receive, but for situations in which they are personally involved by their own actions. Equipment violations are not regarded as causes for discharges; the Company accepts responsibility for them. Company policy is to discharge drivers for speeding, unsafe speed, flipping over tractor-trailers, and other unsafe personal conduct.

Russell testified that when he received the notice of the issuance of the ticket to Brewster, he advised Vogel of it and Vogel made it clear that violation of such important company policy aganist speeding was not to be tolerated. Accordingly, he telephoned Nicolette and instructed him to discharge Brewster, and the following week, in conformity with Brewster's request, issued a

letter stating the reasons for the discharge. Vogel contributed to the text of the letter to the extent of suggesting that the safety manual be consulted and cited in the letter.

b. *The rebuttal*

Brewster disputed the Company's asserted emphasis on safety. He testified that the only training he received before starting consisted of accompanying a transport driver on a trip to Philadelphia, primarily for the purpose of acquainting himself with the route. He claimed testing procedures for new drivers were faulty and that the propane safety test was not administered to him by Nicolette until 15 July. He conceded, however, that Hall had tested him on 20 May, in a test where he indicated his awareness that he was not supposed to exceed posted speed limits. He claimed never to have been shown or given a copy of the Synergy Gas Corporation Safety Manual referred to in the discharge letter though he had, on several occasions, asked whether such a company policy or procedure existed. He asserted that a cynical attitude prevailed in the shop and that the drivers joked about tickets they received (apparently tickets for New York City curfew violations). Most importantly, he accused Nicolette of giving him a runaround when he noted safety violations on his pretrip reports and when he requested repairs to his vehicle's heater, lights, front-end, and jumped wires.

However, the evidence shows that adherence to safety requirements was not as loose as Brewster contended. He conceded that he was given a new truck, and considering the short period of his employment, it is obvious that he did not have to wait too long for his complaints to be heeded. Nicolette testified that he offered Brewster a copy of the redbook when he took the test, but Brewster declined it because he said he already had one. That is credible, for Brewster came on as a driver with 12 years' good prior experience and he presumably would have, or say he had, a copy of it and Nicolette would have no reason to doubt him. Brewster did not contradict Nicolettes' testimony on that point.

It appears that Respondents were far less casual than Brewster contended despite lapses in compliance with or enforcement of various controls over the drivers stipulated by various governmental regulations. Respondents sought to excuse their failures in that regard on the basis of a change in management at the South Plainfield branch and the failure of Hall's predecessor to comply with paperwork requirements. Hall, who started as branch manager in November 1986, pleaded that subsequent omissions on his part were due to the fact that he had been in the job only 11 months and was uncertain of many of the procedures involving compliance with Government regulations covering drivers. However, at the time of the events in issue, he had already been on the job for 8 or 9 months. Granting that Respondents can be faulted, however, their failure to complete paperwork, by not keeping required documentation on file and in the driver's qualification files, still does not necessarily negate the assertion that Brewster was fired for failure to comply with regulations, nor does it even tend to negate it, especially since the proof shows that the requisite checks regarding Brewster's background were made at the time he was hired and that, regardless of deficiencies in paperwork, the essentials of a safety program were enforced.

Brewster also contended that if Russell had not received notice of the ticket, he would not have been fired at all. Brewster testified that when he came in on Monday morning, 20 July, to see Nicolette and Hall, they asked him why he let the notification go to Long Island; they said they could have handled it "internally" if the notice had come to South Plainfield. (Nicolette, in his own testimony, mentioned a discussion he had with Brewster in the shop on the afternoon of 16 July in which the fact that the notice went to Farmingdale was discussed.) It had gone to Long Island because the Company's address was on the registration, and Brewster explained that to them. Brewster's testimony has the ring of truth to it, but I assign to it an altogether different significance than that attached to it by the General Counsel. To me, it appears obvious that the three men were all in agreement that the arrival at company headquarters of the news of Brewster's ticket for speeding spelled serious trouble for him. Their attitude leaves no doubt that Brewster's infraction ran counter to an important company policy that was vigorously enforced. This interpretation receives added support from Nicolette's uncontroverted testimony that, when asked about it, Brewster acknowledged receipt of the ticket, but claimed that he was not required to turn it over or let them know about it. The fact that Brewster made the reporting requirement a point of contention shows the existence of a consistent position by management and its view, and Brewster's awareness of the view, that such violations were serious. Brewster even thought the ticket was serious enough to warrant retaining legal counsel at his own expense.

The General Counsel's case depended heavily on suspicion in lieu of evidence in its attack on Russell's credibility on the subject of the contents of his discussions with Vogel after he received Brewster's ticket in the mail. Russell's testimony is characterized as incredible. His cross-examination was designed to suggest that a man like Vogel, concerned with the operations of a nationwide organization, was unlikely to busy himself with a traffic ticket issued to 1 of 1200 drivers on the payroll and that the discussions must, instead, have involved more important things, such as the Union's petition drive and Brewster's participation in it.

The only persons who would know are, of course, Russell and Vogel, and possibly Shientag. Vogel and Shientag were not called as witnesses by either side.

Unquestionably, the story presented by Russell has some peculiar facets to it. Brewster's speeding ticket and the Union's petition for an election engaged the attention of top management simultaneously, but the way Russell tells it, the traffic ticket caused more excitement at headquarters than the union petition. When Russell brought the union petition back to Farmingdale and gave it to Shientag, Shientag put it on his desk without opening it and without comment. Russell testified he did not have any conversation with Jon Vogel about it. The exact re-

verse obtained at South Plainfield. While Russell was there he asked Nicolette and Hall what "might have led to this" and prodded them for answers. They attempted to figure out whether the long-haul or short-haul drivers were the focus of the union drive. The petition related to both companies, and Russell testified, "I asked them if they knew of any problems we had at the plant and because the things were combined we couldn't identify it."

In stark contrast to the silence that Russell says greeted receipt of the petition, at headquarters, the speeding ticket caused a great stir. Russell reported it to Jon Vogel, and had several conversations with Vogel about it in the course of which a decision was made to discharge Brewster. He quoted Vogel as saying "that he didn't want anybody driving company vehicles and speeding in them, and particularly since this was a transport the danger was magnified substantially." Russell asserted that Brewster's failure to turn in the ticket magnified the incident, and that it was unusual because most drivers turn in the tickets whether they are for moving or equipment violations.

Russell seemed to amplify Vogel's role in the discharge every time he was asked to repeat the conversations. When it became necessary to write a discharge letter, it was Vogel who suggested that Russell "check and see if there was anything in the safety manual that would be involved here." The third paragraph of the letter was the result of Russell's research into the safety manual. He quoted Vogel as saying, on being shown the notice of the ticket, "John, you know, you're the Chairman of the Safety Committee and I don't think you would endorse that either and I said, you're correct."

Pondering Russell's testimony, it is unclear to me why the safety manual would have to be researched when a solid ground for discharge already supposedly existed, or why top executives stood making statesmanlike speeches. It is unclear why the Brewster incident was handled as if such cases had never arisen before, and without conference with either Shientag or the paralegal who normally handled such matters in the Farmingdale office. It is especially unclear when the Respondents' defense is that Brewster's discharge was in conformity with established company policy and precedent, and when it is asserted that tickets came in from all over the country. (I note, but am not particularly disturbed by, the discrepancies in the various versions Russell gave of the "complete" conversations with Vogel to which he was repeatedly asked to testify, or by the discrepancy between him and Nicolette about the time of day of his telephone direction to Nicolette to discharge Brewster. I can overlook a witness' omission of parts of a conversation under the pressure of examination.)

In weighing all the evidence in the record, however, one comes to the realization that Russell's testimony furnished a credible version of what occurred. I accept it on the basis of his demeanor as a witness, the basic cohesion inherent in his testimony, the fact that doubts about it exist only doubts and do not exist as rebutting evidence, and the fact that there is no rebutting evidence.

Reflection shows that Russell's story is, in fact, highly plausible. Under the Company's normal procedures, drivers who receive tickets hand them in at the branches, which forward them to a paralegal at the central office in Framingdale, New York. Brewster's ticket came to Russell's attention accidentally and his first inquiry was whether the branch or area managers had been apprised of it. That is what he could reasonably have been expected to do. Since firing an employee is a serious matter in most business concerns, it is plausible that Russell, having become involved in Brewster's situation and being the officer responsible for safety matters, would pursue it personally and might discuss it with Vogel.

Russell testified that he spends little time in Vogel's office. That raises a question about why he would elect to do so on a matter such as Brewster's ticket. The explanation, of course, is the seriousness of Brewster's offense and its consequences. Yet, even if the ticket is treated as a minor matter, I do not find it incredible as does counsel for the General Counsel, that strict logic and efficiency did not govern Russell's conduct on that morning. He could have turned it over to the paralegal and need not have mentioned it to Vogel, but the existence of alternative courses of action does not require that his testimony be discredited. The state of the evidence, however, is that issuance of speeding tickets to drivers of propane tankers was an infrequent occurrence and not one to be anticipated in the course of normal operations, and that it was regarded as a serious matter. Russell's testimony about his talks with Vogel is unrebutted and I credit it. The gist of Russell's testimony is that the Company did not want drivers exceeding speed limits while driving their $130,000 tank trucks fully loaded with liquid propane, and Brewster did it, got a ticket for it, and did not report it, so they fired him. That is not hard to believe.

Further, I note that any link between the Vogel-Russell discussions and other events is purely speculative. There is no evidence that at that time they were aware that Brewster had been working in support of the Union or that they discussed his activities. The argument of the General Counsel is, essentially, an invitation to speculate that Russell and Vogel *could* have discussed Brewster from the standpoint of union activity or in connection with the union petition because they could have known about it from other management personnel who *could* have told them because they had sons who *could* have known about it and *could* have reported it to their parents. We are drowning in "could's" without a scintilla of evidence warranting an inference that any of these things actually happened.

CONCLUSIONS OF LAW

1. Synergy Gas Corporation and Propane Transportation Corporation constitute a single employer for jurisdictional purposes and are now, and have been at all times material, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is now and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents have not engaged in unfair labor practices within the meaning of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Hussmann Corporation *and* International Molders & Allied Workers, AFL–CIO, CLC. Case 15–CA–10270–2

September 15, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On February 2, 1988, Administrative Law Judge J. Pargen Robertson issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hussmann Corporation, Mt. Meigs, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent, a Delaware corporation with principal offices located in St. Louis, Missouri, is engaged in the manufacture of coolers and freezers at its Mt. Meigs, Alabama facility. During the past 12 months, the Respondent purchased and received goods and materials valued in excess of $50,000 at its Mt. Meigs facility directly from points located outside the State of Alabama.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) of the Act by terminating employee George Smoke because of his union activity. In doing so, we do not rely on the judge's finding that "several, perhaps all" the employees discharged under the Respondent's 3-day absentee rule had been tendered greater latitude than Smoke. In rejecting the Respondent's defense that it discharged Smoke in reliance on a good-faith belief that Smoke had violated the 3-day absentee rule, we rely in particular on the judge's crediting of Smoke's testimony that he had called in on March 31 and April 2, his discrediting of Supervisor Schwalbach's testimony that Smoke had claimed only to have called in on April 2, and his finding that the Respondent discharged Smoke without having made an investigation that could reasonably show that Smoke had in fact failed, in violation of the rule, to call in on any of the 3 days.

Clement Kennigton, for the General Counsel.
Christopher C. Antone and *Greg Richer Esqs. (Jackson, Lewis, Schnitzler & Krupman)*, of Atlanta, Georgia, for the Respondent.
Gerald T. Parks, Staff Representative, of Anniston, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Montgomery, Alabama, on 18 June 1987. The complaint, which issued on 20 May 1987, based on a charge filed on 9 April 1987, alleged that Respondent violated Section 8(a)(1) and (3) of the Act.

In its answer Respondent admitted the comerce allegations that it is an employer engaged in commerce and that the Charging Party (Union) is a labor organization. Respondent did not admit, contending rather that it is without sufficient information, the allegations regarding the filing of the unfair labor practice charge. However, the original charge, the service sheet, and the postal returned receipt were received in evidence without objection from Respondent. Those documents show that the charge was signed by the Union as charging party on 6 April 1987, that the charge was filed on 9 April 1987, and that Respondent, by Donna Wyatt, executed the postal return receipt on 20 April 1987. Because there was no evidence disputing the above-mentioned documents, I credit the above evidence.

FINDINGS OF FACT

I. THE EVIDENCE

A. *No Solicitation*

The General Counsel made several allegations that Respondent promulgated, enforced, and threatened employees regarding union solicitation on 9 March 1987.

Plant Manager Ned Gallis was called as an adverse witness by the General Counsel. Gallis admitted Respondent's employees engaged in two union organizing campaigns, that elections were held in May of both 1986 and 1987, and that Respondent openly opposed the Union on both those occasions.

The 1987 campaign was initiated with a union meeting with some of Respondent's employees on 8 March 1987. Those employees were advised to notify Respondent that they were engaging in union organizing activities. Union Staff Representative Parks testified that employee Ray Pruett was the primary employee spokesman for the Union in 1987.

On 9 March Ray Pruett rode to work with alleged discriminatee George Smoke. While at breakfast, en route to work, Smoke signed a union authorization card.

When Smoke and Pruett arrived at Respondent's facility, they prepared to solicit union cards at the back landing. Pruett offered a union card to employee Morrell Foster. Foster said he had already received a union card. After a few minutes Smoke and Pruett decided to wait and tell Plant Manager Gallis about the organizing activities before continuing to solicit. They entered that plant and, between the restroom and Plant office Manager Gallis' were discussing the 8 March union meeting, when Supervisor Leroy Hobbs approached. According to both Smoke[1] and Pruett, Hobbs said that he wanted

[1] Smoke did not know Hobbs by name. Hobbs, however, admitted talking to Pruett about distributing union cards.

to offer Pruett some friendly advise not to be passing cards out on company property. Hobbs testified that he told Pruett "not to be handing [union cards] out after the whistle blew, or during working time."

After the conversation with Hobbs, employees Pruett, Smoke, Jeff Fuller, James Goggans, and Scott Blackwell went into Plant Manager Gallis office. Gallis recalled that, in addition to himself, Supervisors Leroy Hobbs, Doug Cannon, and Mike Farrell were also present. Pruett told Gallis that the employees would conduct a union campaign on company property during nonwork-time. Pruett went on:

> He [Gallis] stressed it would be on our own time, and I told him, yes, it would. And he told me that passing out cards on Company time would be a violation of company policy and could result in termination.
>
> Q. Okay. Then what happened?
>
> A. Doug Cannon asked me if it was going to be on company premises. I told him yes, but on our own time. I thanked Mr. Gallis for his time and for listening to us and left the office and went to the break area to hand out union cards.

Gallis recalled that he told employees: "On the right time. I told them to be sure and do it on the rules, be sure and not do it during working time or they could get in trouble."

On that same day Plant Manager Gallis prepared a memo to General Manager Tim Garvey:

> 3/9/87 6:55 A.M.
>
> Ray Pruett—Spokesman
> Jeff Fuller
> Scott Blackwell
> James Dobbins
> George Smoke
>
> The above group of employees came into the shop office and advised me that they would conduct union business on company property on their own time.
>
> I accepted their demand, but told them to abide with all rules, and not to do any union business on company time or they would be in trouble. They accepted my reply.

Plant Manager Gallis admitted that by the word "trouble" he meant that employees "would end up getting fired for not working, but soliciting."

After meeting with Plant Manager Gallis, Smoke and Pruett solicited union cards for 3 or 4 minutes until it was time to start work. Smoke testified, without rebuttal, that Plant Manager Gallis and Supervisor Jim Schwalbach passed through the break area while he and Pruett were soliciting cards.

Plant Manager Gallis testified that in March 1987 Respondent was in the process of "revamping the rules." Gallis testified the rule on solicitation was taken down after the 1986 union campaign and was not reposted. Gallis admitted that the first the employees had direct notice that there was a rule against soliciting on company time was when he told them of the rule during the 9 March 1987 meeting.

B. *George Smoke Discharge*

George Smoke was terminated on 2 April 1987 for the stated reason: "23 days consecutive absent without notification. (G.C. Exh. 2-g.)

At material times one of Respondent's work rules dealt with absenteeism and the requirement to call in:[2]

> ANY EMPLOYEE WHO FAILS TO REPORT FOR WORK MUST CALL THE OFFICE (271-0730) by 9:00 A.M. OF THAT DAY TO REPORT THE REASON FOR ABSENCE !!!
>
> ANY EMPLOYEE WHO DOES NOT REPORT FOR WORK FOR THREE (3) CONSECUTIVE DAYS WITHOUT CALLING IN WILL BE CONSIDERED TO HAVE VOLUNTARILY RESIGNED FROM HIS JOB !!!

The evidence demonstrated that Respondent has on regular occasions enforced the 3-day rule by discharging employees.

There is no question that George Smoke missed work on 31 March and 1 and 2 April 1987. The evidence is undisputed that Smoke suffered from the flu, beginning when he was at work on 30 March. On 31 March Smoke visited a Dr. Kulkarn. The statement from Kulkarn (G.C. Exh. 7), was given to a foreman of Respondent on the afternoon of 3 April, the day Smoke was notified of his termination.

Although Respondent questions Smoke's involvement with the Union in its briefs, the evidence is not disputed that Smoke engaged in union activities beginning on 9 March 1987 and that Respondent was aware that Smoke was working for the Union. Plant Manager Gallis admitted that Smoke was one of the employees that met with him and told him of the Union's campaign on 9 March. Also the evidence stands unrebutted that Supervisor Leroy Hobbs approached Ray Pruett and Smoke and spoke about union solicitation in the plant on the morning of 9 March. It is undisputed that Supervisor Schwalbach and Plant Manager Gallis passed through the break area on 9 March as Smoke was soliciting union cards before work.

There is little controversy regarding the events that led to Smoke's discharge. On Monday, 30 March, although Smoke felt ill while at work, he completed the workday. Ray Pruett testified that he noticed that Smoke looked ill as they rode home together after work. Smoke admitted to Pruett that he was "feeling bad."

On 31 March Smoke phoned the plant "around" 8 a.m. and said that he "would not be in, and that [he] was going to the doctor to find out what my problem was." Respondent offered no probative evidence to dispute

[2] I do not credit the testimony of the General Counsel's witnesses Bruce LaFogg and Dorothy Miller to the extent their testimony cast doubt on the existence of the 3-day absentee rule. Both Ray Pruett and George Smoke admitted the existence of the 3-day rule.

Smoke's testimony that he phoned in on 31 March.[3] Nor is it disputed that Smoke was ill or that he visited a Dr. Kulkarn on that day. Moreover, it is not disputed that on 3 April, Smoke furnished Respondent with a statement from Dr. Kulkarn showing that he visited the doctor on 31 March.

Plant Manager Gallis originally testified that Smoke should have talked to his supervisor when he phoned in. Later in his testimony, Gallis admitted that employees were not required to talk to their supervisors. The written rule requires only that employees "must call the office." Moreover, the record shows that employees routinely reported to Respondent's receptionists. Therefore, Smoke's testimony that he reported his absence to the woman that answered the phone for Respondent on 31 March shows that he complied with the phone-in requirement of Respondent's 3-day rule.

George Smoke admitted that he did not phone in on 1 April. Smoke's wife told him she would phone in, but she failed to make the call.

Smoke testified that he phoned between 10 and 11 on 2 April and told the receptionist that he would not be in that day. Again there was no direct evidence disputing Smoke's testimony. Supervisor Schwalbach, however, testified that on 3 April he investigated Smoke's claim and discovered that all the women that Schwalbach felt could have received Smoke's call on 2 April denied receiving a call from Smoke.

According to the testimony of Plant Manager Gallis, Supervisor Schwalbach came to him at 9 a.m. on 2 April and told him that George Smoke had missed 3 days without phoning in. Gallis testified the matter was cut and dry and he told Schwalbach to terminate Smoke. Gallis admitted that he conducted no investigation other than his interview with Supervisor Schwalbach.

Smoke's termination report was signed by Schwalbach on 2 April 1987. The plant manager testified that Schwalbach had the "paper already filled out" when he and Schwalbach talked at 9 a.m. on 2 April.

On 3 April George Smoke was phoned by Ray Pruett. Pruett told Smoke that Respondent was getting ready to terminate him. Smoke then phoned Supervisor Jim Schwalbach. Schwalbach admitted that Smoke phoned him between 8:30 and 9:30 a.m. on 3 April.

Both Smoke and Schwalbach testified during that phone conversation that Schwalbach told Smoke that Smoke was being terminated because he had missed 3 consecutive days without calling in. Nevertheless, a significant dispute in testimony involves one element of the Smoke-Schwalbach phone call on the morning of 3 April. According to Smoke, among other things, he told Schwalbach "that I had called in, and that I had talked to the receptionist." Schwalbach's a testimony differs from Smoke's in that Schwalbach understood Smoke to say that "he did call in on Thursday, April 1."

[3] Supervisor Schwalbach testified that he was unaware of Smoke calling in on either 31 March or 2 April. However, Smoke did not contend that he talked to Schwalbach, and Schwalbach admitted that he did not investigate whether Smoke phoned on 31 March. Schwalbach testified Smoke told him that he phoned in on 2 April, but that Smoke said nothing to him about phoning in on 31 March.

The significance of the above dispute relates to Schwalbach's actions after talking to Smoke. According to Schwalbach he then conducted an investigation. However, because Smoke mentioned only 2 April as a date he phoned in, Schwalbach specifically limited his investigation to the question whether Smoke phoned in on 2 April. Schwalbach admittedly did not investigate whether Smoke had phoned in on 31 March or 1 April. According to Schwalbach, his investigation failed to support Smoke's contention that he had phoned in on 2 April.

On 3 April Smoke's termination paper reached the office of General Manager Tim Garvey. Garvey testified that he called Jim Schwalbach because Schwalbach had signed Smoke's termination paper. Schwalbach told Garvey that he had talked to Smoke and that Smoke claimed he had phoned in on 2 April. However, Schwalbach told Garvey that "he had checked out the story, and he could find no indication of the fact that [Smoke] had called." Garvey told Schwalbach he would have to notify Smoke that he was terminated.

C. *Discussion*

Despite Respondent's argument to the contrary, I find George Smoke was a credible witness. His testimony was supported by the testimony of Raymond Pruett who also impressed me as credible. The demeanor of both George Smoke and Ray Pruett convinced me that they testified truthfully. Pruett's testimony was in substantial accord with the testimony of all other witnesses. Only Pruett's (and Smoke's) testimony regarding comments by Leroy Hobbs was seriously disputed.

George Smoke's testimony illustrated candor. For example, Smoke admitted that Respondent was not phoned on the day of his second consecutive absence. Smoke testified before anyone else concerning his actions regarding the call-in rule when he missed work on 31 March and 1 and 2 April. Despite Smoke's admission of the existence of the call-in rule, Smoke admitted that on 1 April his wife failed to phone Respondent even though she told Smoke she would make the call. Moreover, Smoke's testimony accords with that of witnesses for both the General Counsel and Respondent. His testimony finds support in the testimony of Plant Manager Gallis, Supervisors Schwalbach and Hobbs, and employee Ray Pruett except as noted below.

Regarding Smoke's disagreement with Supervisor Schwalbach, the dispute involves only a segment of their early morning phone conversation on 3 April. As to his disagreement with Supervisor Hobbs, both Smoke and Pruett recalled that Hobbs said they could not pass out union cards on company premises or property. Hobbs testified that he said they could not pass out union cards "after the whistle blew, or during working time."

Respondent attacked Smoke's credibility regarding testimony that he told Supervisor Schwalbach of his 31 March visit to a doctor. However, the evidence is unrebutted that Smoke did visit Dr. Kulkarn on 31 March. A note from Dr. Kalkarn was given to a foreman of Respondent's on 3 April. The note, which is in evidence, indicates, according to Smoke, that he had a type of flu.

Respondent also argues that Smoke was not at home when Supervisor Schwalbach phoned back on 3 April. That testimony is rebutted by Smoke who testified it is incredible that Smoke was asleep in view of his imminent discharge, I do not find that contention incredible considering Smoke's illness.

Also Respondent argues that Smoke's reaction to his final discharge is incredible. However, Smoke's resigned attitude is not disputed. In fact Smoke's testimony regarding his action when he came to the plant later on 3 April are in accord with the testimony of Supervisor Schwalbach. That reaction does not appear strange considering Smoke's illiness. Moreover, the charge itself, which was signed by the Union on the following Monday, 6 April, shows that Smoke was in fact upset to the extent of immediately contacting the Union about his discharge.

Schwalbach's testimony regarding Smoke's discharge was not impressive. Schwalbach recalled that he submitted Smoke's termination papers on 3 April. However, the termination document itself and testimony of Plant Manager Gallis show that Schwalbach prepared the termination report on 2 April. Gallis testified that he talked with Schwalbach about discharging Smoke on the third day of Smoke's absences without calling in. The third day was 2 April. Gallis recalled they talked right at 9 a.m. Gallis' testimony squares with the testimony of Smoke. On 3 April Schwalbach admittedly talked with Smoke between 8:30 and 9:30. During that conversation he told Smoke he had already sent in Smoke's termination papers. On 2 April, according to Gallis, Schwalbach had Smoke's termination paper with him and Schwalbach said that Smoke had not phoned in on that date.

Gallis' testimony appears to be correct. Smoke said he called in between 10 and 11 on 2 April. If so, Gallis' testimony that Schwalbach told Gallis, at 9 a.m., that Smoke had not called in that day would be in accord with Smoke's testimony.

On the other hand if the facts are as related by Schwalbach, then he wrote up the termination and talked with Plant Manager Gallis on 3 April. Under that scenario Schwalbach would have told Gallis at 9 o'clock that Smoke had not phoned in on that date. Schwalbach, however, admitted that Smoke did phone in between 8:30 and 9:30 a.m. on 3 April. If Smoke had phoned in before Schwalbach talked with Gallis, it stands to reason that Schwalbach would not have misrepresented to his own supervisor that Smoke had not called that day. If, on the other hand, Smoke phoned shortly after Schwalbach's 9 a.m. talk with Gallis, the time would certainly have impressed Schwalbach. Obviously, Schwalbach would have recalled that Smoke phoned just a short time after Schwalbach told his boss that Smoke had not called. Therefore, Schwalbach's own testimony illustrates that he was not correct when he testified that he began to process Smoke's termination on 3 April. The testimony of Gallis and General Manager Garvey illustrates that Schwalbach discussed Smoke's termination with Gallis on 2 April and with Garvey on 3 April.

Because of their demeanor and the entire record, I credit the testimony of George Smoke and Ray Pruett.

D. *Findings*

1. No solicitation

The credited testimony shows that Supervisor Leroy Hobbs stated on 9 March, in the presence of employees Ray Pruett and George Smoke, that he wanted to offer Pruett friendly advise about not passing out union cards on company property.

In an on the-record discussion regardng a motion to dismiss, I commented that I did not feel that Hobbs' comments, constituted a threat of unspecified reprisals. On reflection, however, it is clear that Hobbs was telling the employees not to pass out cards at the plant. Obviously such a comment includes a broad admonition that incorporates both working and nonworking time.

Moreover, immediately after Hobbs' comment, Hobbs attended Plant Manager Gallis' meeting with Smoke, Pruett, and three other employees. During that meeting nothing was said to remedy any wrong impressions from Hobbs' earlier comments, and Plant Manager Gallis testified that he told the employees they "would be in trouble" if they decided not, among other things, to "abide with all rules" (See G.C. Exh. 3, Gallis' memorandum dated 9 March 1987).

Because of the above I find, in agreement with the General Counsel, that Hobbs did implicitly threaten employees with unspecified reprisals even though he began his comments by offering "friendly advise." Additionally, in that conversation Hobbs verbally promulgated a overly broad no-solicitation rule by prohibiting solicitation on company property.

Regarding the no-solicitation rule announced by Plant Manager Gallis, employees Bruce LaFogg, Dorothy Miller, and George Smoke testified they were unaware of the enforcement of a no-solicitation rule before 9 March and that employees and supervisors actually engaged in solicitation, including punchcards, Tupperware, and football pools during worktime and breaktime in the plant. Although Supervisor Leroy Hobbs testified that he chased employee Tommie Lutlow out of his department because Lutlow was soliciting Tupperware on an occasion in 1986, Hobbs admitted that he solicited football pools and asked his secretary to solicit for his son during break and nonworking time. Hobbs also admitted that other employees have come to him and solicited things during worktime. Hobbs testified, "I have not said anything to them." *Orval Kent Food Co.*, 278 NLRB 402 (1986).

Because of the above evidence and Plant Manager Gallis' admission that the no-solicitation rule was removed after the 1986 union campaign, I find that Respondent promulgated and maintained a no-solicitation rule on 9 March 1987 to discourage its employees union activities. *Harry M. Stevens Services*, 277 NLRB 276 (1985). Moreover, the credited testimony of Pruett and Smoke proves that Respondent, through Plant Manager Gallis, threatened employees with discharge if they violated its illegal no-solicitation rule.

2. George Smoke

The credited evidence shows that Respondent terminated George Smoke on 2 April because of Smoke's union activities. On 9 March Respondent learned that Smoke was one of five employees enegaged in union organizing activities. Moreover, earlier on 9 March Respondent became aware that Smoke was directly involved with the leading union advocate, Ray Pruett. Pruett demonstrated his leading role when he acted as spokesman at the 9 March meeting with Plant Manager Gallis. Before that meeting Smoke and Pruett had solicited for the Union on Respondent's back landing and they were cautioned by Supervisor Leroy Hobbs near Plant Manager Gallis' office. Immediately after the meeting in Gallis' office, Smoke and Pruett solicited union cards in the breakroom.

Respondent, through Plant Manager Gallis, admitted its opposition to the Union. That opposition was further demonstrated by Respondent's illegal activities regarding no-solicitation.

The testimony of Plant Manager Gallis illustrated Respondent's eagerness to terminate Smoke. At 9 a.m. on 2 April, Supervisor Jim Schwalbach presented Gallis with an opportunity to terminate one of the leading union pushers. At that time Schwalbach told Gallis that Smoke had missed 3 consecutive days without calling. In fact, 2 April was Smoke's third day of absence. Neither Schwalbach nor anyone else had conducted an investigation to see if Smoke had phoned anyone other than Schwalbach. Although Schwalbach testified that he conducted an investigation on 3 April, he admittedly never conducted a full investigation involving all 3 days of absence. No effort was made to determine what had happened to Smoke. At the direction of Gallis, Smoke was terminated on 2 April.

By the above, the General Counsel has established a prima facie case that Smoke was illegally terminated.

Regarding the question whether Smoke would have been terminated in the absence of union activities, the record includes documentation of nine employees, including Smoke, who was discharged in 1986 and 1987 for violation of Respondent's 3-day rule.

Record documents show there were approximately 100 employees in Respondent's bargaining unit in the spring of 1987.

Although, as mentioned above, nine employees were terminated under the 3-day rule, there was no showing that any of those employees, other than Smoke, contended that they did not violate the rule. Of those nine, three of the documents, other than Smoke's, indicate only that the employee missed 3 consecutive days without reporting. Regarding others, Rob Lockhart's termination shows that he was absent on Thursday, 5/28; Friday, 5/29; Saturday, 5/30; and Monday, 6/1, and that he was discharged on 6/1/87. Sharpe Green's termination record states, "left work station and absent 3-days without notification." Randy Winters' termination record states "absent *over* three days without notification" (emphasis added). Gregg Zachary's record states 3-day out and

> Gregg went to Doctor's office and tried to get Dr. to give him an excuse from work for the week. Gregg said that he was playing in a state tournament and did not want to chance hurting his knee. The Doctor told him he was able to work. The Doctor's office then called us and told us what Gregg had asked.

Doug Scarbrough's termination record includes the comment "on pay 10 day absent 4."

The above record shows that several, perhaps all, the employees discharged under the 3-day rule were tendered greater latitude than Smoke. Lockhart, Green, Winters, Zachary, and Scarbrough were not discharged until Respondent had justification that exceeded that afforded Smoke.

Of primary import, however, is the record evidence that shows that George Smoke did not violate Respondent's 3-day rule. Smoke's credited testimony shows that he personally phoned in on 31 March. That testimony stands unrebutted. Even if I should credit Jim Schwalbach's testimony that Smoke only mentioned phoning in on 2 April, it would remain that Smoke claimed both before and during the hearing that he also called in on 31 March. Nevertheless, no evidence was offered to rebut Smoke's testimony in that regard. I must assume that if Respondent had called its receptionists, one of them would have corroborated Smoke's testimony that he called in on 31 March 1987. Therefore, at best, Smoke had missed only 2 consecutive days without calling in when Respondent discharged him on 2 April 1987.

Moreover, even if I should credit Schwalbach that he did not terminate Smoke until 3 April, the record would show that Smoke did not violate the 3-day rule. Even Schwalbach admitted that Smoke phoned in as early as 8:30 a.m. on 3 April 1987. Therefore, even assuming the very best case for Respondent, it appears that Smoke missed no more than 2 days, 1 and 2 April 1987, without calling in by 9 a.m.

Respondent also argues that it had a reasonable belief that Smoke missed 3 consecutive days without calling in. The credited evidence shows that Respondent had no such belief. Respondent failed to produce any evidence that Smoke did not call in on 31 March. In order to establish reasonable belief it is necessary to show that Respondent actually believed that Smoke failed to comply with the 3-day rule. As shown above it was admitted that Smoke could have complied with the rule if he phoned the receptionist on 31 March. However, Respondent never checked with the receptionist to see if Smoke called in on 31 March. It is beyond belief that Respondent would not have checked out Smoke's story at some point. In the absence of some showing that Smoke did not call in on 31 March, I must conclude that Respondent did not have reasonable belief that Smoke missed that day without calling in. All I have before me in the record on Respondent's side of the ledger is a showing that Jim Schwalbach and Nick Gallis agreed to discharge Smoke at their earliest opportunity—9 a.m., on 2 April 1987. At that time Respondent did not know whether Smoke had phoned in on 31 March and 1 April. It knew only that Smoke had not talked with Schwalbach even though he was not at work on 31 March and 1 April and had not reported by 9 a.m., on 2 April. Nei-

ther Schwalbach nor Gallis, at that time or at any time subsequently, made any effort to see if Smoke had talked with anyone else on 31 March or 1 April. That evidence shows nothing more than an eagerness to terminate George Smoke. It does not illustrate a reasonable belief that Smoke had violated the 3-day rule. *Central Management Co.*, 284 NLRB 825 (1987).

I find that Respondent terminated George Smoke because of his union activity and Respondent failed to prove that Smoke would have been terminated in the absence of union activities.

CONCLUSIONS OF LAW

1. Hussmann Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Molders and Allied Workers Union, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. by promulgating and enforcing a no-solicitaion rule on 9 March 1987 in order to discourage its employees from supporting or assisting the Union, by threatening its employees with discharge for violating its illegal no-solicitation rule, by promulgating a no-solicitation rule prohibiting union solicitation on company property, and by threatening employees with unspecified reprisals if they engaged in union solicitation on company property, Respondent engage in conduct violative of Section 8(a)(1) of the Act.

4. By discharging employee George Smoke on 2 April 1987, Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall order it to cease and desist therefrom, and to take certain affirmative aciton designed to effectuate the policies of the Act.

Having found that Respondent has illegaly terminated its employee George Smoke in violation of Section 8(a)(1) and (3) of the Act, I shall order Respondent to offer Smoke immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and to make Smoke whole for any loss of earnings he may have suffered as a result of the discrimination aganst him. Backpay shall be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

[4] Under *New Horizons for the Retarded*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Hussmann Corporation, Mt. Meigs, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging and otherwise discriminating against employees because of their union and other protected concerted activities.

(b) Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by promulgating and enforcing a no-solicitation rule to discourage its employees from supporting or assisting the Union, by threatening its employees with discharge for violating its illegal no-solicitation rule, by promulgating a no-solicitation rule prohibiting union solicitation on company property and by threatening employees with unspecified reprisals if they engage in union solicitation on company property.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to George Smoke to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges, and make Smoke whole for any loss he may have suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Remove from George Smoke's personnel file any reference to its termination of him, and notify Smoke in writing that this has been done and that the evidence of his unlawful termination will not be used as a basis for future personnel action against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Montgomery, Alabama facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respond-

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate or enforce a rule against solicitation in order to discourage our employees from supporting or assisting International Molders and Allied Workers Union, AFL–CIO–CLC or any other labor organization.

WE WILL NOT threaten our employees with discharge for violating our illegal no-solicitation rule.

WE WILL NOT promulgate a no-solicitation rule prohibiting union solicitation on company property.

WE WILL NOT threaten our employees with unspecified reprisals if they engage in union solicitation on company property.

WE WILL NOT discharge our employees because they engage in union activities or other concerted activities protected under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL abolish our no-solicitation rule which was promulgated in order to discourage our employees from supporting or assisting the Union, and WE WILL abolish our rule prohibiting employees from engaging in union solicitation on company property.

WE WILL offer immediate and full reinstatement to George Smoke to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges.

WE WILL make George Smoke whole for any loss of earning he may have suffered by reason of our discrimination against him with interest.

HUSSMAN CORPORATION

Redd-I, Inc. *and* Sheet Metal Workers International Association. Case 10–CA–21436

September 16, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On November 10, 1986, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, to modify the remedy,[1] and to adopt the recommended Order as modified.[2]

The General Counsel excepts to the judge's refusal to allow the complaint to be amended to include an additional 8(a)(1) and (3) allegation concerning employee Don Kelley's discharge on August 19, 1985. Kelley was named as an alleged discriminatee, along with eight other employees,[3] in a charge filed September 30, 1985 (Case 10–CA–21246). This charge was withdrawn November 14, 1985. On January 6, 1986, the charge in the instant case was filed alleging that the Respondent violated Section 8(a)(1) and (3) by terminating the employment of all the employees named in the September charge with the exception of Kelley. This charge was amended March 3, 1986, to include seven additional employees who were also laid off August 15, 1985. Kelley's name was not included in this amended charge. On May 6, 1986, the Charging Party, by telegram, requested that the charge be amended further to include Kelley's name.

The General Counsel moved at the hearing to amend the complaint to include an allegation concerning Kelley's discharge.[4] The judge first granted the General Counsel's motion to amend but then denied it after reviewing the parties' arguments during a recess in the hearing. The judge relied on *Winer Motors*,[5] prohibiting the revival of withdrawn charges outside the 6-month limitations period, to find the allegation concerning Kelley's discharge barred by Section 10(b). Apparently the judge interpreted *Winer Motors* as prohibiting the revival outside the 10(b) period of any allegation contained in a withdrawn charge, no matter how closely related it is to another timely filed charge that is still pending. Thus, he refused to take any evidence on the circumstances surrounding Kelley's discharge to determine whether that allegation was closely related to the allegations in the pending timely charge, stating that Kelley's "separate discharge" was not sufficient "to trigger the 'relate back' doctrine." In his decision, the judge denied the General Counsel's posthearing request that he reconsider this ruling on the motion to amend.

In her exceptions, the General Counsel argues that the motion to amend the complaint should have been granted because Kelley's discharge is closely related to the allegations in the timely filed January charge. The General Counsel contends that this is not an attempt to resurrect the dead allegations of the withdrawn September charge outside the 10(b) period, but rather an attempt to add closely related allegations to the January charge which has been pending and viable at all times since it was filed.

Contrary to the judge, we would allow the General Counsel to litigate the allegation that employee Kelley's discharge violated Section 8(a)(3) and (1). Even though Kelley's discharge occurred more than 6 months before the General Counsel's motion to amend the complaint, we would not find the amendment barred under Section 10(b) as the judge did, because the discharge occurred within 6 months of a timely filed charge and the alleged violation appears to be closely related to the allegations of that charge. Furthermore, unlike the judge, we do not find the withdrawal of an earlier timely charge concerning Kelley's discharge relevant in

[1] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[2] The Respondent's exceptions state, and we agree, that the figure representing the Respondent's weekly sales bookings for the week ending August 2, 1985, should read $92,157 and not $95,157 as it appears in the table of weekly sales bookings in the judge's decision. It follows, therefore, that the total figure should read $235,548 and not $238,548 for the 3-week period covering August 2, 1985. However, this error does not affect the validity of judge's ultimate conclusion regarding the August 15 layoffs.

The General Counsel has requested that the Order include a visitatorial clause. We find no need for such remedial provision in the circumstances of this case. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

Finally, we have modified the judge's recommended Order to include a notification paragraph and have attached a new notice to our Decision and Order because the judge failed to include an expunction provision in the recommended notice attached to his decision.

[3] Seven of the other alleged discriminatees were laid off August 15, 1985. They are Robert Plemons, Bobby McFalls, Brenda F. Harte, Fred W. Harte, Marguerite Price, Diana Lowe, and Michael C. Parris. The eighth, Diane Hartman, was discharged September 20, 1985.

[4] The record does not indicate whether the General Counsel took any other action in response to the Charging Party's attempt to amend the charge.

[5] 265 NLRB 1457 (1982).

deciding whether the discharge allegation is closely related to the charge in this case. Neither *Winer Motors* nor *Ducane Heating Corp.*[6] applies here, because neither case involved an attempt to add closely related allegations to a pending charge. Rather, each involved an attempt to reinstate the dead allegations themselves without reference to any other pending timely charge.[7] Instead, we would apply the traditional Board test to determine if the untimely allegation is factually and legally related to the allegations of the timely charge, without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed.

On the record here, it *appears* that Kelley's discharge *may be* sufficiently intertwined with the other layoff and discharge allegations of this charge to be considered closely related under the traditional Board test. Because the judge did not permit the General Counsel to present any evidence about the circumstances surrounding Kelley's discharge, however, it is not possible to be sure. Therefore, we will remand that allegation to the judge for further evidence and findings both on the merits and on whether all the 8(a)(3) allegations are closely related.

Traditionally, the Board and the courts have allowed the General Counsel to add complaint allegations outside the 6-month 10(b) period if they are closely related to the allegations of the timely filed charge. The most frequently cited test for finding allegations closely related is set forth in *Dinion Coil*:[8]

> (1) A complaint, as distinguished from a charge, need not be filed and served within the six months, and may therefore be amended after the six months. (2) If a charge was filed and served within six months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within six months before the filing of the charge.

In deciding whether complaint amendments are closely related to allegations in the charge, the Board and the courts have looked at whether the amendments are factually and legally related to the charge. In *National Licorice*[9] the Supreme Court held that various complaint allegations were related to the charge when the violations alleged in the complaint were "of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects." The Second Circuit has said that "the complaint issued by the Board must deal with the same subject matter and sequence of events . . . although the specific events stated in the complaint may precede or follow those stated in the 'charge.'"[10] Finally, the Board has found complaint allegations closely related when they "arise from the same factual situation, are of the same class as, and clearly related to, the [allegations] . . . set forth in the charge."[11]

When applying this "closely related" test, neither the Board nor the courts have mentioned the existence of another withdrawn or dismissed charge as a factor considered determinative or even relevant. They have only looked at whether there is a timely charge now pending that would support the new untimely allegation. We see no reason to depart from these well-established precedents.

In his dissent, Chairman Stephens relies on procedural due process and fairness concerns to find that the charge here did not put the Respondent on notice that it would have to defend against an allegation concerning Kelley's discharge. He finds the allegation concerning Kelley's discharge is barred by Section 10(b) because the withdrawal of an earlier charge alleging the unlawfulness of this discharge misled the Respondent into thinking it would not be held accountable for any illegality concerning the discharge after the 6-month 10(b) period expired. Even though he finds that Kelley's discharge is closely related to the allegations of a timely charge that was still pending after the 10(b) period ended, he concludes this second charge did not put the Respondent on notice that it would have to defend against an allegation that Kelley's discharge was unlawful. It is not the function of the *charge*, however, to give notice to a respondent of the specific claims made against him. Rather,

[6] 273 NLRB 1389 (1985).

[7] In *Ducane*, Member Dennis specifically noted that the Board had no reason to pass on the question of whether another pending timely charge might have supported the dismissed allegations under a "closely related" theory, because of the way that case was litigated and briefed. Id. at 1391 fn. 9.

[8] *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1982), cited with approval in *NLRB v. Complas Industries*, 714 F.2d 729, 732–733 (7th Cir. 1983); *NLRB v. El Cortez Hotel*, 390 F.2d 127, 129–130 (9th Cir. 1968); *Gocat, Inc.*, 257 NLRB 270, 271 (1981); *Red Food Store*, 252 NLRB 116, 119 (1980); and *Fern Laboratories*, 240 NLRB 487, 488 fn. 2 (1979).

[9] *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940).

[10] *Douds v. Longshoremen*, 241 F.2d 278, 284 (2d Cir. 1957).

[11] *Jack LaLanne Management Corp.*, 218 NLRB 900, 913 (1975), enfd. 539 F.2d 292, 295 (2d Cir. 1976). In enforcing the Board's decision on this point, the Second Circuit stated that the additional complaint allegations "are all concerned with similar unfair labor practices designed to further the Company's common objective . . . represent 'closely related' parallel conduct toward other employees . . . and constitute 'the same class of violations as those set up in the charge.'" (Citing *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959), and *National Licorice*, supra.)

that is the function of the complaint.[12] Denial of due process is usually claimed in cases when the complaint has *never* been amended to include allegations that have been litigated and found to be violations.[13] Here, although the initial complaint did not allege that Kelley's discharge was unlawful, the General Counsel moved to amend the complaint on the first day of the hearing to add an allegation concerning Kelley's discharge. In *Dinion Coil*,[14] the Second Circuit specifically rejected an argument that making a complaint amendment during the hearing was a denial of due process, absent some showing of surprise that would have hampered presentation of the respondent's defense at the hearing.[15] There is no such showing in this case.

The First Circuit has stated that the test for allowing allegations that have *never* been alleged in a complaint to be litigated and decided is "one of fairness under the circumstances of each case—whether the employer knew what conduct was in issue and had a fair opportunity to present his defense."[16] The Respondent here cannot claim surprise because it knew on the first day of the trial that Kelley's discharge was in issue and this was well before it would have had to present its defense on this issue. Furthermore, the Respondent here cannot claim it had insufficient time to prepare its defense or was denied an opportunity to present its case, as the judge refused to allow the General Counsel to amend the complaint or present evidence concerning Kelley's discharge, so no defense was necessary. By allowing the complaint amendment, we are remanding the case to the judge. Thus, both parties will now have the time to prepare and the opportunity to present their cases. That is all that is required to establish procedural due process.[17]

Chairman Stephens also finds that the Respondent here would be prejudiced if we allowed the complaint amendment because it was misled into believing it would not have to defend against this allegation by the withdrawal of the first charge and by the failure to allege Kelley's discharge in the second charge. He notes that these events might have induced the Respondent not to preserve evidence relevant to Kelley's discharge. If an untimely complaint amendment is indeed factually and legally related to the allegations of a timely charge, however, a reasonable respondent would necessarily have preserved evidence relevant to all of these interrelated events. Thus, a decision whether or not the complaint amendment here is closely related to the second charge would also resolve the question of prejudice without any independent inquiry whether this particular Respondent was actually prejudiced.

Furthermore, when there is a timely charge pending giving us the authority to proceed on closely related events, we cannot be concerned solely with a respondent's right to rest easy when 6 months have passed about what claims it might have to defend, because we also have a duty to protect certain public rights. As the Supreme Court stated in *Fant Milling*[18]

> The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce. . . .
>
> Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining

[12] It is well settled that it is the complaint, not the charge, that is supposed to give notice to a respondent of the specific claims made against it. The Second Circuit stated in *Douds v. Longshoremen*, 241 F.2d 278, 283–284 (2d Cir. 1957):

> The complaint, much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing.

The "charge" has a lesser function. It is not designed to give notice to the person complained of or to limit the hearing or to restrict the scope of the final order. It serves in the function of drawing the Board's attention to a cause for economic disturbance.

The Supreme Court agreed with this view in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307–308 (1959), when Justice Stewart stated

> A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. . . . The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act.

See also *Texas Industries v. NLRB*, 336 F.2d 128, 132 (5th Cir. 1964), "[T]he charge is not a formal pleading, and its function is not to give notice to the respondent of the exact nature of the charges against him. . . . This is the function of the complaint."

[13] See, e.g., *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1073–1074 (1st Cir. 1981); and *NLRB v. Atlas Linen Supply*, 322 F.2d 216, 219 (6th Cir. 1963), cert. denied 376 U.S. 951 (1964).

[14] Supra, 201 F.2d at 491.

[15] Moreover, in *NLRB v. Atlas Linen Supply*, supra, 322 F.2d at 220, the Sixth Circuit stated that if the complaint was never amended, but the issue had been fully litigated, the respondent could not "be heard to complain of lack of opportunity to meet the charges against it, even though the complaint be found lacking, for a complaint may be amended to conform to proof adduced on the hearing."

[16] *Soule Glass v. NLRB*, supra, 652 F.2d at 1074.

[17] See, e.g., *NLRB v. Complas Industries*, supra, 714 F.2d at 734, when the Seventh Circuit found a denial of due process because *no adjournment* was provided to allow the respondent a meaningful opportunity to meet the amended claim and the amendment occurred during a 1-day trial. The court, however, stated that if the General Counsel's evidence on the amendment had made out a prima facie case it would have remanded to provide the respondent with an opportunity to offer a valid explanation of its actions. Id. at 735.

[18] Supra, 360 U.S. at 307–308.

such an inquiry to the precise particularizations of a charge.

Previous cases have generally not considered the existence of an earlier withdrawn or dismissed charge concerning the untimely allegation to have any bearing on the application of the "closely related" test.[19] Perhaps this is because before *Ducane* issued, the Board had interpreted the Act as allowing the General Counsel "virtually unlimited" discretion to reinstate dismissed charges outside the 10(b) period,[20] so there was no reason for the General Counsel to use the "closely related" test when the dismissed charge itself could be reinstated. Regarding withdrawn charges, the Board and the courts have traditionally found that they ceased to exist on withdrawal,[21] so there was no reason even to acknowledge a withdrawn charge when applying the "closely related" test to a later timely charge covering the same matters. Although *Winer Motors* and *Ducane* provide little guidance here, *Koppers Co.*,[22] which is cited in both *Winer Motors* and *Ducane*, is instructive. In *Koppers*, 163 NLRB at 517, the Board stated

> The practical effect of the proviso to Section 10(b) is that, *absent the existence of a properly served charge on file*, a party is assured that on any given day his liability under the Act is extinguished for any activities occurring more than 6 months prior thereto. [Emphasis added.]

When there is a pending timely charge on file, however, a respondent has no such right to assume his liability is extinguished; nor can he claim a lack of notice, at least about closely related allegations.

In deciding whether allegations are closely related, we will apply the traditional Board test described above to determine if the untimely allegation is factually and legally related to the allegations of the timely charge without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed. A decision whether certain untimely allegations can be added to a complaint as closely related to a pending timely charge should be entirely separate from a decision whether a withdrawn or dismissed charge containing these untimely allegations can be reinstated outside the 10(b) period. Under the "closely related" test, there is no reason why a person who has never filed a timely charge concerning a particular allegation should be in a better position than a person who has attempted to preserve his rights by filing a timely charge that is later withdrawn or dismissed.

In applying the traditional "closely related" test in this case, we will look at the following factors. First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

Here, the facts show that Kelley's discharge occurred within 6 months before the filing of the timely charge in this case. Further, the untimely allegation concerning Kelley's discharge is of the same class as the other layoff and discharge allegations in the timely charge because they all involve retaliation against union activities in violation of Section 8(a)(3). The record does not establish, however, whether Kelley's discharge arose from the same factual situation or sequence of events as the other layoffs and discharge alleged in the timely charge or whether the Respondent would have preserved similar evidence and prepared a similar case in defending against that allegation.

All we know about Kelley's termination is the date it occurred (3 days after the layoffs and about 1 month before the other discharge) and that it was called a discharge. Although it appears that Kel-

[19] See, e.g., *Soule Glass v. NLRB*, supra, 652 F.2d at 1083. There, the First Circuit dismissed a unilateral change violation on due process grounds because there was no complaint allegation specifically stating such a claim and the other unilateral change allegation in the complaint could not fairly be read to give notice of this different type of unilateral change being unlawful. The court noted in passing that this additional 8(a)(5) violation had previously been specifically alleged in a charge, but the Regional Director had refused to issue complaint on it; however, the court apparently did not consider the earlier dismissal of this particular allegation relevant in deciding whether to allow the Board's finding of a violation to stand, as it did not rely on this point, but rather went on to discuss due process and rule on the merits. See also *Southern Florida Hotel Assn.*, 245 NLRB 561, 600 (1979), enfd. in relevant part 751 F.2d 1571 (11th Cir. 1985).

[20] See *Ducane*, supra, 273 NLRB at 1391, citing *California Pacific Signs*, 233 NLRB 450 (1977).

[21] See Member Zimmerman's concurring opinion in *Winer Motors*, supra, 265 NLRB at 1460, quoting *NLRB v. Central Power Co.*, 425 F.2d 1318, 1321 (5th Cir. 1970), for the proposition that a withdrawn charge "is no charge at all."

[22] 163 NLRB 517 (1967).

ley's discharge involves similar conduct during the same time period as the other discharge and layoffs, it is difficult to tell from this record if Kelley's discharge had the same object as the other discharge and layoffs or if the Respondent would have preserved similar evidence and prepared a similar case in defending against that allegation. Thus, there is no evidence about the circumstances surrounding Kelley's discharge, such as the reason given, what supervisor made the decision, the factual basis for the decision, and any statements made about him or his discharge by the Respondent. Further, although the record reveals that Kelley was one of two employees who initially contacted the Union, there is no evidence whether the Respondent knew of his union activities or expressed any animus toward them. Finally, there is no evidence about any asserted justification for Kelley's discharge, whether the Respondent would have asserted similar defenses to all the allegations, or whether a reasonable respondent would have preserved evidence necessary to these defenses.

On this record, we cannot determine whether the allegation concerning Kelley's discharge is closely related to the discharge and layoff allegations of the timely charge. Because there is no evidence about the circumstances surrounding Kelley's discharge or about any asserted justification for the discharge on which to base such a determination, we will allow litigation on the merits of that allegation to decide whether it is closely related to the other allegations. Only if we find that the allegations are closely related will we proceed to a decision on the merits of the otherwise untimely allegation.

This does not mean that we would always allow litigation on the merits of an untimely allegation that the General Counsel claims is closely related to the allegations of a timely filed charge. In some cases there may be enough information in the pleadings and the parties' position statements to determine whether the allegations are closely related. In other cases, the General Counsel may make an offer of proof that provides more evidence on which to base a decision. However, we have no such information here.

Accordingly, we will remand the allegation concerning Kelley's discharge to the judge for the purpose of hearing evidence and making findings both on the merits and on whether all the discharge and layoff allegations are closely related.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Redd-I, Inc., Chattanooga, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified:

1. Insert the following as paragraph 2(e).

"(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the allegation in this proceeding concerning the discharge of Don Kelley be remanded to Administrative Law Judge J. Pargen Robertson for the purpose of holding a hearing to obtain evidence and make findings both on the merits and on whether all of the discharge and layoff allegations are closely related.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing findings of fact and conclusions of law in light of the Board's remand. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

CHAIRMAN STEPHENS, dissenting in part.

I disagree with the majority that under the circumstances of this case the "relation back" doctrine may warrant adding employee Kelley's discharge more than 6 months after the discharge occurred.[1] I would affirm the dismissal of the allegations regarding Kelley's discharge because, under the circumstances here, I do not believe that the Respondent was given timely notice during the 10(b) period that it might be called on to defend that discharge as part of an overall scheme to defeat the Union's campaign by a strategy of laying-off all suspected of being union supporters.

At the outset, I need to make clear my view of the latitude we possess in applying the 10(b) bar. Section 10(b) is a statute of limitations that must be applied to achieve its intended objectives; but it is not strictly "jurisdictional." Were it an inflexible limitation on jurisdiction, it would not be waivable; yet it is settled that this is a defense that will be deemed waived if not timely asserted.[2] Further, I

[1] I agree that *Winer Motors*, 265 NLRB 1457 (1982), and *Ducane Heating Corp.*, 273 NLRB 1389 (1985), do not bar any application on the relation back doctrine. Indeed, it is noteworthy in this regard that Member Dennis, a member of the three-member panel in *Ducane*, expressly noted that, because of the way in which that case was litigated and briefed, the Board had no occasion to pass on the question whether proceeding on the allegations that the Board there dismissed might have been justified on a theory that they were "closely related" to a timely filed charge. 273 NLRB at 1391 fn. 9.

[2] *Zipes v. Trans World Airlines*, 455 U.S. 385, 395 fn. 11 (1982); *Flex Plastics*, 262 NLRB 651, 656 fn. 26 (1982), enfd. on other grounds 726 F.2d 272 (6th Cir. 1984); *NLRB v. Penn Corp.*, 630 F.2d 561, 563 (8th Cir. 1979); *Shumate v. NLRB*, 452 F.2d 717, 721 (4th Cir. 1971); *Chicago Roll Forming Corp.*, 167 NLRB 961, 971 (1967), enfd. on other grounds 418 F.2d 346 (7th Cir. 1969).

agree that it is subject to equitable tolling on grounds such as fraudulent concealment.[3] Thus, in applying the 10(b) limitation, we must determine simply whether it is essential to bar litigation of a particular allegation in order to effectuate the basic policy of protecting respondents with clean hands from being forced to defend against a claim of which they had not been given even the most general notice within a period of 6 months after the charging party knew or should have known of the claim.

The relation back doctrine, which is well established in Board law and accepted by the courts,[4] is one way of balancing the interest in permitting litigation of alleged violations of our statute that have been called to our attention against the interest in avoiding the sort of prejudice to a respondent that the 10(b) limitation is intended to prevent. Under that doctrine, we permit a belatedly raised allegation to be litigated so long as it relates to a charge that was timely filed. This doctrine, which has a partial counterpart in Rule 15(c) of the Rules of Civil Procedure,[5] also has support in the common understanding of the function of a "charge" in our proceedings because the 10(b) bar applies to the filing of an unfair labor practice charge rather than to the General Counsel's subsequent issuance of a complaint. As the Supreme Court made clear long ago in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959), unfair labor practice charges may be read broadly and are "not to be measured by the standards applicable to pleading in a private lawsuit." Thus, a respondent cannot reasonably expect that all the particulars of the complaint that might ultimately issue against it will necessarily be included in the charge that starts up the Board's investigative machinery. Hence, if a respondent is charged with violating Section 8(a)(3) and (1) of the Act by discriminatorily laying off employees to defeat a union and by interfering with the employees' Section 7 rights by those "and other acts," it can reasonably assume that contemporaneous unfair labor practices related to the employees' union activities might also be included in a subsequent complaint if the General Counsel decided to issue one. *Clark Equipment Co.*, 278 NLRB 498 (1986); *NLRB v. Complas Industries*, supra, 714 F.2d at 733.

Although I recognize this significant difference between a charge and a complaint in our statutory scheme, I cannot agree with my colleagues that a charge has no notice function whatsoever. If it had no such function, there would be no reason for us to place the limitations of the relation back doctrine on subsequent amendments to a charge. It would be enough that a charge had started up our machinery against a particular respondent, and a respondent's protest against facing a totally new type of charge could be answered by saying that this was all part of the same proceeding against it and that the complaint would adequately apprise it of the particulars of this totally new charge. Of course, the relation back restriction means that the public interest in adjudicating and remedying unfair labor practices may be frustrated in some instances. But as the Supreme Court explained in *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 428 (1960), Congress saw fit to balance the interest in protecting respondents from stale charges against the interest in vindicating employee rights protected by the Act, and the resulting adjustment in Section 10(b) does not give absolute ascendancy to either interest.

In balancing the interest at issue here, I do not assume that simply because a particular charge was dismissed or withdrawn and not refiled within the 10(b) period, its allegations can never be included in an unfair labor practice complaint, no matter how closely it relates to another, timely filed charge. Rather, I would make two inquiries. First, I would consider whether the "relation back" doctrine would permit belated addition of that particular allegation if it had never been filed in the first place during the 10(b) period. If the answer to that is in the affirmative, then I would consider whether the original filing and withdrawal of the charge would necessarily have misled the respondent into believing that it would not be faced with that allegation in a Board proceeding and therefore might have induced the respondent not to preserve evidence generally relevant to the events concerned in that charge. In short, as in the administration of F.R.Civ. P. 15(c), it is a question of fairness. *Williams v. U.S.*, 405 F.2d 234, 236–238 (5th Cir. 1968).

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[3] *Ducane Heating Corp.*, supra, 273 NLRB at 1391.

[4] See, e.g., *Algreco Sportswear Co.*, 271 NLRB 499, 514–515 (1984); *NLRB v. Complas Industries*, 714 F.2d 729, 732–733 (7th Cir. 1983); *Gocat, Inc.*, 257 NLRB 270, 271 (1981); *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952).

[5] In applying Fed.R.Civ.P 15(c) to determine whether a new plaintiff may be added to a civil action after the statute of limitations has run, the courts have applied a two-pronged test under which they consider whether the new plaintiff's claim arises out of the same transaction as the one sued on and whether the defendant had fair notice from the original complaint of the existence of the belatedly added claim. *Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301 (D.C. Cir. 1983); *Williams v. U.S.*, 405 F.2d 234 (5th Cir. 1968); *Paskuly v. Marshall Field & Co.*, 494 F.Supp. 687 (N.D. Ill. 1980), affd. 646 F.2d 1210 (7th Cir. 1981). The parallel is not exact, however. There is greater room for relation back in Board proceedings because, as noted above, our limitations period relates to charges, which have traditionally been given a broader reading than would be given formal court pleadings. Although the Board clearly lacks "carte blanche authority to expand the charge as it might please, or to ignore the charge altogether," it is free to add, as related claims, whatever allegations of violations might reasonably be found in an investigation of the events referenced in the unfair labor practice charge. *NLRB v. Complas Industries*, supra, 714 F.2d at 733 fn. 3.

In the present case, I would find that if the charge concerning Kelley's discharge had not been filed within the 10(b) period and then withdrawn, it might have been fairly added later on as a charge "related to" the 8(a)(3) charge that was filed on January 6, 1986. But given the particular circumstances here, I believe that the withdrawal of the charge relating to Kelley would reasonably have led the Respondent to believe, at the end of the 10(b) period, that there was no possibility that it would be called on to defend against an allegation that Kelley's discharge violated the Act.

Several facts in the course of events here are significant to me. Although the General Counsel may be correct in alleging that the Respondent was engaged in an overall scheme to rid itself of the Union's supporters, the fact remains that Kelley's discharge occurred as a separate event between the August 15 mass layoff of 14 employees and the September discharge of another employee. Hence, when the charging party withdrew its September unfair labor practice charge, which had named nine employees—i.e., Kelley, seven of the employees laid off August 15, and another who was discharged in September—and when that withdrawal was followed by the filing of a new charge on January 6 naming all those employees except Kelley, the clear implications were (1) that none of these specific discharges had escaped the notice of the charging party, (2) that the August 15 layoffs and the discharge occurring in September were regarded as unlawful, and (3) that Kelley's was not regarded as unlawful. The Respondent would have no reason, therefore, to seek to preserve evidence for future litigation concerning Kelley's discharge; and forcing it to litigate that discharge by virtue of the belated attempt to amend would contravene the policies underlying Section 10(b).

Had Kelley been one among those terminated on August 15, however, his omission in the January charge might have appeared to be simply a clerical error. In any event, the Respondent would, as a result of the charge, have been induced to preserve evidence relating to events of that day. Indeed, that is why we do not regard as barred the March amendment of the charge to include the eight employees (not named in earlier charges), laid off on August 15. Even if Kelley's discharge had not been part of that mass layoff, but was arguably related as part of an overall discriminatory scheme, the January charge might have placed the Respondent on notice to defend against that discharge as a related allegation if it had not been misled by the specific withdrawal of the earlier charge regarding Kelley. Our relation back rule properly operates to allow for the litigation of matters related to a timely filed charge, because a prudent respondent will collect and preserve evidence about such matters. Under the circumstances here, however, the January charge simply did not constitute timely notice concerning Kelley.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees about their activities on behalf of Sheet Metal Workers International Association, or any other labor organization, or because of any other concerted protected activities.

WE WILL NOT threaten our employees with discharge because they engaged in union or protected activities.

WE WILL NOT solicit our employees to engage in surveillance of other employees' union activities and report those activities back to management.

WE WILL NOT threaten our employees with layoff because they engage in union or protected concerted activities.

WE WILL NOT threaten our employees that we will close our plant because of our employees' union or other protected activities.

WE WILL NOT discharge our employees because they engage in union activities.

WE WILL NOT lay off our employees because of our employees' union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Diane Hartman, Marguerite Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, and Donnie Keahey to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to the employees' seniority or other rights and privileges.

WE WILL make Diane Hartman, Marguerite Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, and

Donnie Keahey whole for any loss of earnings they may have suffered by reason of our discrimination against them with interest.

WE WILL remove from our files any references to the discharge of Diane Hartman on September 20, 1985, or the layoff of employees Marguerite Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, and Donnie Keahey on August 15, 1985, and notify each of them in writing that this has been done and that evidence of their unlawful discharge or layoff will not be used against them in any way.

REDD-I, INC.

Richard P. Prowell, for the General Counsel.
William G. Trumpeter, for the Respondent.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Chattanooga, Tennessee, on 8 and 9 May 1986. The complaint alleges that Respondent engaged in several actions in violation of Section 8(a)(1) and that Respondent laid off 14 employees and discharged an employee in violation of Section 8(a)(1) and (3). The charge was filed on 6 January 1986 and was amended on 3 March and 6 May 1986. The complaint issued on 21 February and was amended on 8 May 1986. Respondent admitted the commerce allegations, the jurisdictional allegation, that the Charging Party is a labor organization, and the supervisory allegations of the complaint. However, Respondent denied that the alleged supervisors acted on behalf of Respondent or as agents of Respondent in all cases and under all circumstances. Because of the above, and the entire record, I find that at material times Respondent is and has been an employer engaged in commerce within the meaning of Section 2(6) and (7) and that Sheet Metal Workers International Association is a labor organization within the meaning of Section 2(5) of the Act. I also find that the supervisors alleged in the complaint were agents of Respondent at times material to these proceedings. To the extent the issues involved the alleged supervisors, their actions were shown to have been conducted during the existence of employer-employee relationship.

At the hearing, Respondent objected on the basis of Section 10(b) of the Act to the General Counsel's motion to amend the complaint to allege three additional violations of Section 8(a)(1) through interrogations of employees and a threat to discharge employees, and an additional 8(a)(1) and (3) allegation regarding employee Don Kelley's discharge on 19 August 1985. I agree with Respondent and denied the General Counsel's motion to amend regarding the alleged discharge of Don Kelley. The General Counsel has requested that I reconsider and reverse my ruling in that regard. Jurisprudence supports Respondent's position. I deny the General Counsel's request for reconsideration. *Winer Motors*, 265 NLRB 1457 (1982); *Howard Mfg. Co.*, 231 NLRB 731 (1977); *NLRB v. Gaynor News Co.*, 197 F.2d 719 (2d Cir. 1952).

However, Respondent's motion that I should deny the General Counsel's motion to amend the complaint to allege additional 8(a)(1) violations was not granted during the hearing. The 21 February 1986 complaint was based on a 6 January 1986 charge that generally alleged actions violative of Section 8(a)(1). That charge and its amendments involved activities during a union organizing campaign during the late summer of 1985. The complaint amendments of additional 8(a)(1) allegations were allegedly part and parcel of that same campaign. The record evidence supports the General Counsel in that regard. Therefore, I deny Respondent's motion to exclude the additional 8(a)(1) allegations as amended during the hearing. That amendment does not violate the provisions of Section 10(b) of the Act.

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

The complaint allegations involve a union organizing campaign at Respondent's facility in the summer of 1985. Diane Hartman testified that she and some other employees were contacted by Organizer Jack Gregg of the Sheet Metal Workers International Association (Union) in late July 1985.

On 9 August the employees held the first union organizing meeting with Organizer Gregg. Hartman testified that one-third of Respondent's employees signed authorization cards within 3 days after the 9 August meeting.

A. *13 or 14 August 1985*

According to employee Diane Hartman, a day or two before a 15 August 1985 layoff Supervisor Jimmy Dover talked to employee Buddy Fuller about the upcoming layoff. Hartman testified that she overheard Fuller ask Dover if Dover thought Fuller would be one of the people that would be laid off. Dover replied "We have a list of people that had signed union cards and they would be the first ones to go."

Conclusions

Fuller testified that he did not recall talking to Dover about the 15 August layoff, or that he talked to Dover before 15 August about the Union. Fuller said that he did not know about the Union until after 15 August.

However, on cross Fuller demonstrated difficulty in recalling events before 15 August. For example, Fuller testified that he was not sure which supervisor he worked under on 15 August.

Jimmy Dover denied talking to Fuller on 14 August. Dover testified that he first learned of the employees' union activity during a 15 August supervisors' meeting. In that regard Dover's testimony does not square with that of former Supervisor Charles Songer. Songer, who was called by the General Counsel in rebuttal, testified that during the 15 August supervisors' meeting all the supervisors said they had heard about the Union. Songer

recalled that it was well known on 15 August that the employees were involved in a union organizing campaign.

I am convinced that Buddy Fuller did not truthfully recall that he did not talk to Jimmy Dover about the Union before 15 August. Fuller, by specifying on two occasions that he did not talk to Dover about the Union before the 15 August layoff, left the impression that he and Dover discussed the Union after that date. Fuller admitted that he and Dover talked about "everything" including "hunting, football, baseball, and softball." Fuller's testimony on cross illustrated that his recollection was not so precise as to permit him to pinpoint that he did not discuss the Union on the day before the 15 August layoff. Moreover, I am convinced that the union activity was discussed among employees before 15 August. Former Supervisor Songer testified that all the supervisors knew about the union activities before 15 August and former employee Greg Floyd testified that the union organization was a routine topic of discussions among the employees. Floyd recalled that union organization was generally discussed as early as June 1985. Floyd said he did not know of talk of the Sheet Metal Workers Union in June, but there was talk of "just union" and "if we could get a union in."

As shown below, I do not credit the testimony of Jimmy Dover. I do credit the testimony of Diane Hartman regarding the Dover-Fuller conversation. Hartman appeared to testify condidly regarding that conversation. The usual nature of her testimony and inclusion in Hartman's testimony of two other witnesses, tends to buttress its validity. The timing of the Dover-Fuller conversation is consistent with affidavit testimony of President Kenneth Redd. Redd testified, "I believe that the plant manager spread the work on 8–13–85 that there was going to be a layoff."

I find in agreement with the General Counsel that Dover's comments constituted a threat to discharge employees because of their union activities in violation of Section 8(a)(1).

B. *14 August 1985*

Respondent's president and part owner, Kenneth Redd, admitted that he was told about the union organizing activity on 14 August. Redd's bookkeeper, Joyce Davis, told Redd of the union activity. Davis told Redd that employees Diane Hartman, Diana Lowe, and Mickie Sewell were involved in the union campaign.

C. *15 August 1986*

On 15 August, around noon, Kenneth Redd told Plant Manager Charles Campbell of the employees' union organizing activities. According to both Redd and Campbell, Campbell expressed surprise. Redd testified that Campbell asked who was involved in the union activity. Although Redd admitted though that employees Hartman, Lowe, and Sewell were involved, he testified that he told Campbell that he did not know who was involved.

At the end of the shift on 15 August, Respondent notified 14 unit employees that they were being laid off due to slack work.

Kenneth Redd testified that he returned to work on 13 August from a 3-week vacation. According to Redd, he immediately reviewed the production figures, the "payables and receivables" from July and the first week of August (a partial week including 2 August), and sales bookings that had come into the plant since he left on vacation on 22 July. Redd testified that the records showed him that during his vacation, "(1) Our production was tremendously low; (2) we really were not picking up orders from backlog into the plant; (3) I knew immediately, just looking at these figures we had lost a lot of money in July." Redd asked Plant Manager Campbell about production being down. Campbell replied there were insufficient orders to keep each department busy. Redd and Campbell walked through the plant and confirmed, according to their testimony. that there were not enough orders to keep everyone busy.

After checking with his accountant, Redd told Plant Manager Campbell that he felt they needed to "lay off approximately 15 employees to get the payroll to the level that we needed to be at."[1] The General Counsel alleges that Respondent laid off the employees on 15 August in violation of Section 8(a)(1) and (3).

Conclusions

Record evidence substantially supports the General Counsel's allegation that Respondent's 15 August layoff was conducted because of the employees' union activities. That support regards the timing of the layoffs, coming 2 days after Kenneth Redd learned of the employees' organizing efforts; the threat by Supervisor Dover that the union card signers would be the "first ones to go"; and the 16 August comments of Plant Manager Campbell to employees Alder and Floyd that he had laid off employees who were trying to get a union in (see below).

The General Counsel also argues that by 12 August one-third of Respondent's employees had signed union authorization cards and on 15 August all but four of those employees had been laid off. As to that point the record is unclear. What the record does show is found in the testimony of Diane Hartman under cross-examination. Hartman's testimony in that regard refers to her affidavit, which was not introduced. An examination of Hartman's testimony shows that it could reflect, as the General Counsel argues, that all but three or four of all the employeees that signed union cards were laid off. However, the testimony shows that Hartman could have been talking about those employees that signed authorization cards at the "second" union meeting. If so, the record evidence does not show how many employees signed cards at that meeting. There is no other evidence

[1] The record shows 14 unit employees were laid off on 15 August 1985. Of those 14, 7 have since been recalled. Three were recalled on 16 September, one on 23 September, one on 29 October, one on 19 November, and one on 9 December 1985.

The total work force included 73 employees immediately before the 15 August layoff.

that shows that all but three or four card signers were laid off on 15 August.

In fact, the figures show otherwise. Hartman's testimony that one-third of the employee work force signed cards would place the total number of card signers at approximately 24 or 25. Since Respondent laid off some 14 unit employees on 15 August, there would be a minimum balance of 10 or 11 card signers that were not laid off.

Nevertheless, the proven elements of timing and actual threats from the plant manager and a supervisor illustrate that the layoff was called by Respondent because of the employees' union activities. Regarding that allegation, I find a prima facie case has been established.

Additionally, the threats by Campbell and Dover established that Respondent was under the impression that it was laying off some of the employees who were involved in union organizing efforts. It is not necessary for the General Counsel to show that Respondent was correct in that impression. *Crucible*, 228 NLRB 723 (1977); *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1174 (6th Cir. 1985). In that regard, I am mindful of evidence showing that Diane Hartman was one of two leading union advocates and that Hartman was not laid off on 15 August. However, jurisprudence has clearly established that it is not necessary in order to establish a case of illegal termination to show that an employer terminated all or even the leading union advocate. *Birch Run Welding & Fabricating v. NLRB*, supra. In fact, as shown below, Respondent illegally discharged Diane Hartman on 20 December.

Therefore, I must now consider whether the record evidence proved that Respondent would have laid off 14 unit employees on 15 August in the absence of the employees' union activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

The decision to conduct the 15 August layoff was admittedly made by Kenneth Redd. Redd testified that he made that decision on 13 August, the day he returned from a 3-week vacation. According to Redd, he made the decision on the basis of records he had that extended through the week of 2 August (i.e., 2 weeks before the week of 13 August), Redd testified that those records included the production figures, the "payables and receivables," and sales bookings that came into the plant since he left for vacation on 22 July. Redd testified that on checking with Plant Manager Campbell on 13 August, he learned that "there was very little in orders . . . out in the plant to keep each department busy."

The issue presented by Redd's testimony is a difficult one from Respondent's standpoint. According to Kenneth Redd, the situation on 22 July 1985 was not one that prevented him from leaving on a 3-week vacation. In fact, the record failed to show that Redd felt it was necessary for him to either personally monitor the financial situation or to have someone else, such as his accountant or the plant manager, keep a close watch on the financial figures during his absence. There was no indication that Redd felt a layoff was under consideration when he left on 22 July. Nevertheless, according to Redd, Respondent's financial condition changed so drastically between 22 July and 13 August that Redd decided to hold the largest layoff in Respondent's history immediatley on his return from vacation. The records relied on by Redd, and the record evidence as a whole, must be considered in light of the context of Redd's decisions.

The record evidence regarding payables and receivables, production and income, fails to show a drastically changed situation during the period of Redd's vacation. The record is blank concerning specific production figures. As to income, the record shows income (rounded to the nearest thousand) of $372,000, in June, down to $188,000 in July, but back up to $358,000 in August. However, the record also shows that Respondent had a 2-week shutdown in July.[2]

Regarding payables and receivables, the figures show (rounded to the nearest thousand):

Week	*Weekly Sales Bookings*
8/02/85	$95,157
7/26/85	35,777
7/19/85	107,614
Total, 3 weeks sales bookings	$238,548
7/12/85	$55,657
7/05/85	42,278
6/28/85	48,999
Total, 3 weeks sales bookings	$146,934

However, Redd's testimony shows that he was most directly influenced and on 13 and 14 August by orders received during his vacation.

In consideration of that testimony by Redd, the critical question must involve what records existed, vis-a-vis sales bookings orders, when Redd left on vacation on 22 July as opposed to sales booking orders on hand when he returned on 13 August. Redd had sales bookings records available that extended 2 weeks before each critical date (i.e., 2 weeks before 22 July and 2 weeks before 13 August).

Those respective records show that during the week of 2 August Respondent's weekly sales bookings totaled $92,157. On 22 July when Redd left for vacation, the records for the week of 2 weeks before (i.e., the week of 12 July), show weekly sales bookings of $57,157. Regarding the 3 weeks of records that surfaced during Redd's vacation, the record evidence shows the following:

Week	*Acct. Receivable*	*Acct. Payable*	*Cash Debit*
7/12/85	$715,000	$260,000	$80,000
8/02/85	627,000	238,000	45,000

A comparison for the last 3 weekly records available for Redd's examination on 22 July shows:

[2] Normally Respondent shuts down for 1 week around 4 July. During 1985 that shutdown was extended to 2 weeks.

Because of the above, it is apparent that Respondent experienced a comparative sales bookings increase in excess of $90,000 during the 3 weeks of Redd's vacation. The comparison shows that a greater need for a layoff existed on 22 July than on 13 August. The record showed that no critical factors intervened during Redd's 22 July to 13 August vacation other then the employees' union organizing activities.

In making a determination regarding how Respondent would have reacted in the absence of union activities, it is not sufficient to question whether Respondent's business conditions justified a layoff. Respondent's accountant testified that Respondent was in poor financial condition and that a layoff was justified. The accountant testified that he recommended a layoff in June 1985.[3] In fact, Respondent did lay off eight employees on 20 June 1985. Previously Respondent had two earlier layoffs—one involving five employees in March 1983 and one of six employees in October 1984. During those periods the total work force was at least as large as the work force of 15 August 1985.

The record shows that Kenneth Redd made the decision to lay off 14 employees on 13 August, despite records showing improved sales during the time he was on vacation. According to Redd's testimony, sales bookings records were the last factors he considered before directing the layoff. Redd testified that he checked with Plant Manager Campbell and was told that orders were too low to keep the departments busy. Redd then directed Campbell to lay off approximately 15 employees. The record shows that on 22 July when Respondent was faced with a recommendation from its accountant to cut costs, and with decreasing sales bookings, Redd did not elect to conduct a layoff. Indeed, Redd left the situation without personal attention for a 3-week vacation. On 13 August, when faced with increased sales bookings, and an employee union organizing campaign, Redd decided to conduct the largest employee layoff in the history of the Company. See *Purolator Armored, Inc. v. NLRB*, 765 F.2d 1423 (11th Cir. 1985); *Birch Run Welding & Fabricating v. NLRB*, supra; *Lemon Drop Inn*, 752 F.2d 323 (8th Cir. 1985); *Soil Engineering Co.*, 269 NLRB 55 (1984); *Jenkins Index Co.*, 273 NLRB 736 (1984).

Several other factors are noteworthy in considering the layoff allegation. Respondent called several employees who testified that work was slow before the 15 August layoff. However, two of Respondent's supervisors, Will Overall and Jimmy Dover, and alleged discriminatee Diane Hartman, contradicted Respondent's contention that work was slack in all departments on 15 August. Overall testified that employee Sewell was assigned to work with Hartman immediately following the layoff because the department was behind in its work. Dover testified in a pretrial affidavit that his department had a good bit of work on 15 August 1985. Hartman testified that there was an increase in orders between the 4 July shutdown and the 15 August layoff.

[3] Respondent's accountant also testified that he talked with Redd shortly before Redd left for vacation in July, but that he did not talk to Redd while Redd was on vacation. The accountant was not sure whether he talked to Redd on 13, 14, or 15 August 1985.

Respondent also argued that Kenneth Redd did not learn of the employees' union activities until the morning after he directed the August layoff. However, that testimony was contradicted by credited evidence that Plant Manager Campbell and Supervisor Dover told employees that the layoff was called to get the union supporters.

Respondent also argued that the employees were selected for layoff by their respective supervisors rather than by Redd or Campbell. Although that testimony was supported by several current supervisors, it was rebutted in part by the testimony of former Supervisor Charles Songer. Songer testified that he was told that on the occasion of the 15 August layoff, his employees would be selected by Campbell and Redd rather than through the normal method of having the supervisors select employees for layoff. Songer testified that he was directed to prepare a list in order to permit Campbell and Redd to compare the supervisors' recommendations with their own. Songer's testimony was corroborated by Charles Campbell's handwritten layoff list. According to Songer, he recommended that employees Sims, Harte, and Dotson be laid off. According to Songer, however, Campbell rejected Songer's recommendations and instead laid off employees Parris (Paris), Plemmons, and Harte. Campbell's handwritten list shows all five employees mentioned in Songer's testimony, i.e., the three recommended by Songer included the two not laid off, Sims and Dotson, plus the three selected by Campbell, i.e., one of which had been recommended by Songer. Respondent's other records also support Songer by showing that Parris, Plemmons, and Fred Harte were laid off on 15 August, but that Dotson and Sims were not laid off. Therefore, it is apparent that although Campbell listed all the employees recommended by Songer by writing them on his list, he chose instead one employee recommended by Songer, Fred Harte, and two that were not recommended by Songer: Plemmons and Parris.

After Songer testified, Charles Campbell was recalled. At that time Campbell testified for the first time that he told the supervisors during their meeting of 15 August that unless they actually selected for layoff those employees that were contributing the least, he, Campbell, would select employees for layoff in the future. It is noteworthy that other than Campbell, none of the current supervisors that testified about the 15 August supervisors' meeting recalled the above mentioned comments by Campbell. All those supervisors testified before Charles Songer. None, other than Campbell, was recalled after Songer testified.

In view of the above, and on the basis of my observation of their demeanor, I credit the testimony of Charles Songer over that of Charles Campbell regarding what Songer was told concerning how his employees would be selected for the 15 August layoff.

Respondent also pointed to a comparison of the weekly sales bookings records during the layoffs of 20 June and 15 August. On both those occasions Respondent experienced a large volume of sales booking around the time of the layoffs. However, Kenneth Redd was admittedly unaware of those sales bookings when the layoffs occurred. It is noteworthy, however, that the figures

available before those two layoffs showed sales bookings down 2 weeks before the decision to lay off on 20 June (i.e., those last available figures showed total sales bookings of only $47,532 if the last available figures were those for the week ending 31 May, or $58,771 if the last avaiable figures were those for the week ending 7 June),[4] as opposed to the last figures available before the decision was made to hold a layoff on 15 August. A comparison shows a substantially higher weekly sales bookings figure for the week ending 2 August—$92,157. Nevertheless, the layoff was called on 15 August and that layoff involved almost twice the number of employees laid off on 20 June.[5]

I am convinced because of the entire record that Respondent would not have conducted the 15 August layoff in the absence of its employees' union activities.

D. *15 August 1985*

Former employees Paul Alder and Greg Floyd testified to a conversation with Plant Mananger Charles Campbell at Alder's home on the morning of 16 August. At that time both Alder and Floyd were working for Respondent P. Alder asked Campbell about a 15 August supervisors' meeting.[6] According to P. Alder and Floyd, Campbell replied that the employees were trying to get a union in, and he had laid them off. Campbell asked P. Alder and Floyd to find out who else was supporting the Union. Campbell identified Diane Hartman as a union supporter.

Campbell admitted that he talked with Alder and Floyd at P. Alder's home on 16 August. According to Campbell, it was Alder who brought up the Union, saying that he heard that someone was trying to organize a union. Campbell testified that he denied knowing who was trying to organize Respondent, but admitted to P. Alder and Floyd that Kenneth "Redd did tell us that someone out there in the plant was trying to organize a Union."

Both P. Alder and Floyd admitted that they resigned from Respondent's employment in November because they felt Alder's wife, who is also Floyd's mother-in-law and was an employee of Respondent, was being harassed at her work by Supervisor Jimmy Dover and because Plant Manager Campbell did nothing regarding harassment.

Conclusion

Despite their actions in resigning under circumstances that generated hard feelings, I am convinced that P. Alder and Floyd testified truthfully regarding their conversation with Campbell. In many respects their testimony was confirmed by Campbell. Campbell admitted that he was at Alder's home, that Alder and Floyd were present, that they talked about the supervisors' meeting on 15 August, and that that meeting included discussion of the employees' union activities. Other testimony, including Campbell's and Redd's testimony that Redd first told Campbell on 15 August that Redd had learned of the employees' union activities and that Campbell asked Redd who was involved, casts doubt on Campbell's version of his conversation with Alder and Floyd. Campbell allegedly had not heard which employees were involved with the Union when he talked with P. Alder and Floyd. Nevertheless, according to Campbell he initially expressed no interest in learning of employees' union involvement from Alder and Floyd. However, Campbell admitted that when Alder told him that he would let Campbell know anything he learned about the Union, Campbell replied, "I'll sure appreciate that."

Campbell admitted that he P. Adler, and Floyd were good friends. In the context of Campbell's first learning of the employees' union activities on 15 August and his admitted interest in which employees were involved, I find that his version of the 16 August conversation is not believable. Campbell's version reflects that he expressed little interest in P. Alder's comments about the Union. Campbell responded that he knew nothing about which employees were involved although he admitted that Kenneth Redd had said someone in the plant was trying to organize a union. According to Campbell, P. Alder told Campbell that he was surprised that anyone would work for a union "because of the way Mr. Redd treated everyone." Because of the context of their conversation and their close friendship, I find it more believable that Campbell would pursue the conversation in the manner alleged by P. Alder and Floyd.

Moreover, I was impressed by the demeanor of P. Alder and Floyd. Both responded forthrightly to questions regarding their resignation from Respondent and their feelings regarding the alleged harassment of Alder. Finally, I am convinced that Campbell mentioned that Diane Hartman was involved in the Union. Campbell did not deny that part of the conversation and, as shown above, Kenneth Redd admittedly learned of Hartman's involvement 2 days before the Campbell-Alder-Floyd conversation.

E. *5 September 1985*

Diane Hartman testified that President Kenneth Redd held a meeting of all employees on 5 September. Hartman testified regarding Redd's comments to the employees:

> Mr. Redd discussed the Union. He said he had heard rumors of a Union. He had heard about Union cards being signed. He said he had discussed this with his lawyer, he had been going to the library studying on the matter. He was concerned about the uneasiness of the people. He told us, you know, before he would let someone come into his plant and tell him how to run his business, he would

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[4] The record does not show when Respondent made the decision to hold a layoff on 20 June. If the decision was made during the week of 20 June, the last sales bookings records would be those for the week of 7 June. If the decision was make during the week before 20 June, the last sales bookings records would be for the week ending 31 May.

[5] Eight employees were laid off on 20 June 1985. One was recalled before the 15 August layoff—on 5 August 1985. Another was recalled shortly after the 15 August layoff—on 16 September 1985.

The total work force included 84 employees on 20 June and 73 employees on 15 August.

[6] Respondent's president, Kenneth Redd, did hold a supervisors' meeting on 15 August. During that meeting Redd discussed the union organizing campaign.

close the door, go back to Miami where there would be no problem and find him a job.

The General Counsel also cited affidavit testimony by Kenneth Redd regarding his 5 December speech to employees. Redd testified in that affidavit as follows, inter alia:

> I urged whoever was involved in the Union to contact someone regarding the number of jobs that had been lost due to Union activities elsewhere. I said that the Union, by law, could promise them anything and I could promise them nothing. As I concluded the meeting I told them that with the business problems that I had with this added on top of them that I didn't need the aggravation. I said I could just as easily go back to Miami, that I could get a job anywhere and I didn't need this job.

In his testimony at the hearing Kenneth Redd denied that he threatened to close the plant. However, Redd admitted saying that if the people did not stop fighting each other "there will be not company here," because the "bank will shut us down."

Conclusion

Redd's testimony revealed that his recollection of his 5 September speech was not complete. His testimony both at the hearing and in his affidavit is somewhat similar to that of Diane Hartman. I am convinced that Hartman testified accurately concerning Redd saying he would close the doors, go back to Miami where there would be no problem, and find a job. I also credit Redd's affidavit testimony that he urged the employees to contact someone "regarding the number of jobs that had been lost due to union activities elsewhere."

Redd's threat to close the doors and go back to Miami was directed against the employees' union activities and constitutes a clear violation of Section 8(a)(1). Redd's comments regarding lost jobs also constitutes a clear threat. Redd offered no further explanation other than the implication that many employees have lost their jobs because of their union activities. Both the above comments tend to coerce employees in their protected activities.

F. *11 September 1985*

During September 1985, William (Will) Overall was made foreman of the Assembly and Wiring Department. Prior to Overall, the supervisor over Assembly was Janice Varner. As assembly and wiring foreman, overall was over some 14 employees. Of those 14, approximately 8 or 9, including alleged discriminatee Diane Hartman, were under Overall in Assembly. Shortly after becoming foreman, Overall held a meeting of the Assembly and Wiring employees. Diane Hartman testified about that meeting:

> Mr. Overall brought us into the meeting. He talked about him taking over the supervising job in our department. He said there would be changes made in the department on how order were run. He talked to us about rules that were to apply to us. We could not leave the department without his permission. He told us that the talking would be stopped. He told us that we would be given verbal warnings on our talking, that we would be given pink slips the second warning. The third warning we would be sent to the office and sent home.

Will Overall testified as follows regarding his meeting with the Assembly and Wiring employees:

> Q. Do you remember what you told them in that meeting?
>
> A. Yes.
>
> Q. What was that?
>
> A. About staying in their department. We're allowed to have coffee, go to the Coke machine, but I didn't want them cluttering up, abusive talking.
>
> Q. Abusive talking? What is abusive talking?
>
> A. Well, talking and you know, just stop working and just standing or talking, but if you can work and talk, this is okay.
>
> Q. Why did you hold this meeting?
>
> A. Well, I was new to some but not new to the department because I had had it before.

Former Assembly Foreman Janice Varner attended Overall's meeting. Varner testified:

> Q. Do you remember what he said?
>
> A. Well, he told them that he was going to be our supervisor, to cut down on the talking and not to go to other departments. In general, what I always told them.

Conclusions

On the basis of the entire record, I am convinced that Will Overall used strong expression in an effort to discourage work disruptions in the assembly and wiring departments. However, I am not convinced that Overall was actually forbidding all talking. Testimony of several employees indicated that Overall actually cautioned the employees against talking, which interfered with work. Diane Hartman's testimony that Overall threatened to progressively discipline continuous offenders was unrebutted.

Although I generally found Diane Hartman to be a credible witness, I am not convinced that she was correct in her testimony regarding the scope of Overall's no-talking rule. On the basis of the entire record, I am convinced that he prohibited talking that interfered with work and that he threatened to progressively discipline employees who violated that prohibition. There is no showing that Overall's prohibition in that regard differed from Respondent's previous policy.

I find that Respondent did not violate Section 8(a)(1) by forbidding the assembly and wiring employees to talk because of the Union.

G. *16 September 1985*

Former employee Theresa Pursley testified that after she was laid off on 15 August, she was recalled in Sep-

tember 1985. Pursley worked in the FHP department under Supervisor Jimmy Dover. On the day she recalled following the layoff, Pursley met with Supervisor Dover. According to Pursley:

> [Dover] asked me if I really needed the job and I told him, yes. He asked me if I had heard anything about the Union before I was laid off or if I knew anything about it. I told him that I had heard bits and pieces but nothing serious, you know, just that the Union was trying to come in. He said, well, we really need you to work for us and if you would please let me know of anything that's going on about the Union, your job may depend on this. So I agreed to it, but I never let him know anything bacause I never heard anything else about it.

Pursley testified that on several occasions after she returned to work, Dover asked her if she knew anybody that was involved with the Union.

Jimmy Dover denied that he had any discussion with Theresa Pursley regarding the Union and that he asked her to spy on others.

Conclusion

The testimony of Jimmy Dover conflicts with the testimony of three others—Diane Hartman, Brenda Harte, and Theresa Pursley. Additionally, on cross-examination Dover was shown his pretrial affidavit in which he testified that at the time of the 15 August layoff his department had a "good bit of work." Dover never explained the apprent conflict between his affidavit testimony and his testimony during the hearing that work was slow. Dover's testimony conflicted with that of Diane Hartman regarding a 14 August conversation with Buddy Fuller (see above), and with the testimony of Brenda Harte whether Harte volunteered to be laid off on 15 August. Harte testified contrary to Dover that she did not volunteer. Another witness for Respondent, Vickie Riness, testified that Harte actually said that if it came down between her and her husband, who also worked for Respondent, that Harte would rather it be her. At best, Riness' testimony shows that there was some ambiguity whether Harte would volunteer only to keep Harte's husband from being laid off. Dover, in his testimony, drew no such distinction and was, therefore, giving another version than that of Riness. In fact, both Brenda Harte and her husband, Fred Harte, were laid off on 15 August.

Because of the above, and my observation of Jimmy Dover, I am unable to credit his testimony. I credit the testimony of Pursley. Pursley impressed me as a candid witness. Pursley's testimony revealed that she was interrogated and threatened with discharge during her conversation with Dover. Pursley was not known as a union advocate. Therefore, I find that she was interrogated and threatened in violation of Section 8(a)(1).

H. *20 September 1985*

On 20 September Diane Hartman was summarily discharged. Will Overall told Hartman that she was discharged because of talking.

Will Overall testified that it was his decision to discharge Diane Hartman. According to Overall, Hartman "wouldn't stop her talking, she left her department (on a number of times)."

Conclusions

Diane Hartman was, according to her testimony which I credit, one of two employees that first contacted the Union. Respondent's president admitted learning that Diane Hartman was one of three primary union pushers.

In view of the timing of her discharge, coming just over a month after Respondent first learned that Hartman was a union pusher; the animus Respondent illustrated against its employees' union activities as shown above; the credited evidence showing a comment by Plant Manager Campbell to effect that Hartman was a prime union pusher; and the summary manner of her discharge, I am convinced that the General Counsel proved, prima facie, that Respondent discharged Hartman becasue of her union activities.

Moreover, the record fails to show that Hartman would have been discharged in the absence of union activities. Will Overall testified that he had never discharged anyone other than Diane Hartman. Obviously, in light of that evidence, discharging an employee was a serious matter for Overall. Nevertheless, Overall did not point to a single specific event that precipitated Hartman's discharge. Overall did testify that Hartman told him that he was not going to run over the department. However, that comment was allegedly made 2 weeks before Hartman's discharge. Additionally, nothing was done or said on that occasion to indicate that Hartman was being cautioned or otherwise disciplined.

Simiarly, tesitmony that Hartman was noticed to have been absent from her duty station on the day of Overall's meeting drew no words of caution. Additionally, as in the case above, that incident occurred 2 weeks before Hartman was discharged.

Overall said that he was displeased with Hartman's conduct on several occasions during the 2 weeks he supervised her. Nevertheless, Overall said nothing to Hartman. Hartman was never disciplined by Overall until she was discharged.

When asked why he did not give Hartman a warning for any of her shortcomings, Overall replied, "I just didn't."

Credited evidence proved that it was Respondent's policy to progressively discipline its employees if they engaged in excessive talking. Hartman was treated differently. She received no prior disciplinary action for talking.

Respondent's attorney asked Will Overall about Respondent's policy for disobeying a supervisor and was told that an employee could be discharged for that infraction. Respondent's "policy" which was received in evidence, supports Overall's testimony in that regard. However, there was no showing of specifics whether and when Hartman disobeyed Overall. At no time was Hartman told that an act by her constituted disobedience.

I credit Hartman's testimony that she was told she was discharged for talking. Overall never denied making that comment. On the basis of that evidence, and on the record as a whole, I find that Hartman would not have been discharged absent her union activities. Other employees in Hartman's department were shown to have engaged in excessive talking. None of those other employees was discharged.

I find that Hartman was treated differently from other employees and in a manner that was uncharacteristic of Respondent's policy and practice. Hartman, unlike all others, was discharged for talking and, although Respondent's practice was to progressively discipline employees for talking. Hartman did not receive the benefit of Respondent's progressive disciplinary policy. *Lemon Drop Inn*, 752 F.2d 323 (8th Cir. 1985); *Soil Engineering Co.*, 269 NLRB 55 (1984).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Sheet Metal Workers International Association is a labor organization as defined in Section 2(5) of the Act.
3. Respondent, by interrogating its employees regarding their union activities, by soliciting employees to engage in surveillance of other employees' union activities, by threatening its employees with discharge, by threatening its employees with layoffs, and by threatening its employees that it would close its plant because of its employees' union activities, has engaged in conduct violative of Section 8(a)(1) of the Act.
4. Respondent, by laying off employees Marguerite Price, Diane Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenday Harte, Jim Harvey, Wendell Whitley, Bobby McFalla, Boyd Webb, Donna Lambert, and Donnie Keahey on 15 August 1985 because of its employees' union activities, has engaged in unfair labor practices in violation of Section 8(a)(1) and (3).
5. Respondent, by discharging its employees Diane Hartman on 20 September 1985 because of her union activities, has engaged in conduct violative of Section 8(a)(1) and (3) of the Act.
6. The unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has illegally laid off employees Marguerite Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, and Donnie Keahey and has illegally discharged Diane Hartman in violation of Section 8(a)(1) and (3) of the Act, I shall order Respondent to offer Marguerite Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, Donnie Keahey, and Diane Hartman immediate and full reinstatment to their former positions, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and to make the abovenamed employees whole for any loss of earnings they may have suffered as a result of the discrimination against them. Backpay and interest shall be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[7]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Redd-I, Inc., Chattanoga, Tennessee its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, laying off, or otherwise discriminating against employees because of their union and other protected concerted activity.

(b) Coercively interrogating employees about the employees' union activities.

(c) Soliciting its employees to engage in surveillance of other employees' union activities.

(d) Threatening its employees with discharge because of their union activities.

(e) Threatening its employees with layoff because of their union activities.

(f) Threatening its employees that it will close its plant because of the employees' union activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to employees Diane Hartman, Marquerite Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, and Donnie Keahey immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make each of them whole for any loss of earnings plus interest he or she may have suffered by reason of Respondent's discriminatory actions.

(b) Remove from its files any references to the discharge of Diane Hartman on 20 September 1985 or the layoff of employees Margueritte Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie

[7] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, and Donnie Keahey on 15 August 1985, and notify each of them in writing that this has been done and that evidence of their unlawful discharge or layoff will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Chattanoga, Tennessee, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Amazing Stores, Inc. ***and*** **United Food and Commercial Workers International Union, Local 1357, AFL–CIO.** Cases 4–CA–15602, 4–CA–15683, and 4–RC–16096

September 16, 1988

DECISION AND ORDER GRANTING MOTION

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On June 15, 1988, the Board issued its Decision and Order in *Amazing Stores*, 289 NLRB 163.

On July 15, 1988, the General Counsel filed a motion to clarify and modify the Board's Order.

On July 18, 1988, the Respondent filed a letter opposing the General Counsel's motion. The Respondent argues that Section 102.46 of the Board's Rules and Regulations required the General Counsel to raise the issues presented in the motion in either exceptions or cross-exceptions to the administrative law judge's recommended Order and decision. Because they were not raised at that time, the Respondent claims the General Counsel has waived her right to raise them now. However, the Board possesses discretion to fashion remedies that will "effectuate the policies" of the National Labor Relations Act, *Ladies Garment Workers Local 512 v. NLRB*, 795 F.2d 705, 710 (9th Cir. 1986) (quoting *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969)), and this discretion is broad when deciding what remedies to impose. *Amalgamated Service & Allied Industries Joint Board v. NLRB*, 815 F.2d 225, 232 (2d Cir. 1987) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198–199 (1941)); *Schnadig Corp.*, 265 NLRB 147 (1982).

Having duly considered the matter, the Board grants the General Counsel's request to clarify and modify the Board's Order. Accordingly,

IT IS ORDERED that the General Counsel's motion to clarify and modify the Board's Order in *Amazing Stores*, 289 NLRB 163 (1988), is granted and that the following modifications be made to the Board's Order.

1. In paragraph 2(a) add "5645 N. 5th St., Academy Plaza, Academy and Red Lion Roads, and 139 W. Chelton Ave." after "7130 Frankford Ave.,".

2. In paragraphs 2(e) change "facility" to "facilities" and add "and its facility in Sharon Hill, Pennsylvania, and Allentown, Pennsylvania," after "Philadelphia, Pennsylvania."

Sorensen Industries, Inc., Cullen Machining, Inc. and American Brass and Bronze, Inc. *and* United Steelworkers of America, Local Union 5424, AFL–CIO, CLC *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, Local Union No. 384, Party in Interest. Cases 4–CA–16103, 4–CA–16357, 4–CA–16416, and 4–CA–16873

September 20, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

Upon charges filed by the Union September 30, 1986, January 30, 1987, February 24, 1987, and October 8, 1987,[1] the General Counsel of the National Labor Relations Board issued a consolidated complaint in Cases 4–CA–16103, 4–CA–16357, 4–CA–16416, and 4–CA–16873 on November 30, 1987, against the Companies, the Respondent.[2] The consolidated complaint alleges that the Respondent has violated Section 8(a)(5), (2), and (1) of the Act. Although properly served copies of the charges and complaints, the Respondent has failed to file an answer.

On January 4, 1988, the General Counsel filed a Motion for Summary Judgment. On January 11, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The consolidated complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the consolidated complaint shall be deemed to be admitted to be true and may be so found by the Board."

In its response to the Notice to Show Cause and request for permission to file an answer, the Respondent denies the commission of any unfair labor practices and asserts that it can produce evidence to that effect. With respect to the failure to contact the Regional Office concerning an answer or an extension of time to file an answer, the Respondent asserts that the "multiple charges and Orders, formed a mosaic which so confused Respondent that it was believed the matters were moot." In support of this assertion, the Respondent stated that the Acting Regional Director refused to issue a complaint on the charge in Case 4–CA–16357 alleging that Cullen Machining, Inc. is a single employer or alter ego of Sorensen Industries, Inc., and that because the Union did not file an appeal, the matter was closed. According to the Respondent, this amounted to a dismissal of the alter ego or single-employer portion of the case. The Respondent further stated that "for reasons never fully explained," the Regional Director "withdrew his dismissal of that aspect of the charge," and that the alter ego/single issue has survived to become part of the consolidated complaint.

The Respondent further argues that the Regional Director has been aware of its challenge to the unfair labor practice charges and that an answer filed now would be repetitious to information it earlier supplied the Regional Director (such as that which led the Regional Director to "dismiss" the single-employer/alter ego portion of the case). Thus, the Respondent argues, an answer filed now would not involve surprise to the General Counsel.

The Respondent also claims that good cause for failing to file an answer is shown by the fact that the Respondent, Sorensen Industries, Inc., filed a Chapter 11 bankruptcy petition on December 13, 1985, which was converted to a Chapter 7 petition on May 7, 1987, and Sorensen Industries, Inc., therefore, properly believed its liability under the National Labor Relations Act had ended. The Respondent further asserts that the Respondent, American Brass and Bronze, Inc., did not have notice of the alleged unfair labor practices before purchasing the assets of Sorensen Industries, Inc. on May 29, 1987. The bankruptcy court "simply directed" American Brass and Bronze, Inc. to resolve with the Union an itemized list of alleged pay and benefit discrepancies.

Finally, the Respondent argues that the Motion for Summary Judgment should be denied because the Party-in-Interest, Teamsters Local 384, has abandoned the bargaining unit at Cullen Machining and the Respondent is prepared to engage in settlement negotiations with the Charging Party, Steelworkers Local 5424.

We have reviewed each of the Respondent's contentions and, for reasons supplied below, conclude that none constitutes good cause for its failure to file a timely answer.

[1] The charges are in Cases 4–CA–16103, 4–CA–16357, 4–CA–16416, and 4–CA–16873 respectively. The charges in the first three cases were amended on October 8, 1987.

[2] A consolidated complaint was issued in Cases 4–CA–16103 and 4–CA–16416 on April 30, 1987. A second consolidated complaint in Cases 4–CA–16103, 4–CA–16416, and 4–CA–16357 issued on May 20, 1987.

First, we find no merit to the Respondent's contention that the multiple charges and orders created a situation so confusing as to explain its failure to file a timely answer or request an extension. The charges were timely filed and consolidated complaints were routine examples of Board procedure.[3]

Nor is there merit to the Respondent's assertion that its answer would be repetitious of information it has already provided the Regional Director during the investigation of the charges. To permit this to constitute good cause would effectively nullify the requirements of Section 120.20 for any respondent that cooperated at the investigatory stage.

Further, we reject Respondent Sorensen Industries, Inc.'s contention that the Board should deny the General Counsel's motion because it filed for Chapter 11 bankruptcy on December 13, 1985 (converted to a Chapter 7 petition on May 18, 1987). It is well settled that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition.[4] Board proceedings fall within the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers.[5] As for the Respondent's assertion that American Brass and Bronze, Inc. and its shareholders did not have notice of an outstanding unfair labor practices proceeding prior to its acquisition of Sorensen Industries, Inc., it is axiomatic that alter egos are each responsible for the unfair labor practices of the other without regard to any element of notice or knowledge.[6]

Finally, we deny the Respondent's request to hold in abeyance consideration of the present motion, pending settlement efforts by the Respondent. The possible settlement of a case does not provide an exemption from the requirement to file an answer. Thus settlement efforts are neither cause to deny a Motion for Summary Judgment nor to hold it in abeyance.[7]

For the above reasons, we find the Respondent's response does not constitute good cause for the failure to file a timely answer. Therefore, in accordance with Section 102.20 of the Board's Rules and Regulations, no good cause having been shown for the failure to file a timely answer, the allegations of the complaint are deemed to be admitted and the Board so finds. We, accordingly, grant the General Counsel's Motion for Summary Judgment[8] and deny the Respondent's request to now file an answer.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Sorensen Industries, Inc., a Pennsylvania corporation, was engaged in the operation of a foundry including a machine shop at 5th Street, Darby, Pennsylvania, with offices at 313 Elm Street, North Wales, Pennsylvania, and at Two North Ridge Avenue, Ambler, Pennsylvania, until June 30, 1987. During the past year, in the course and conduct of its operations, Sorensen Industries, Inc. sold and shipped products valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania.

The Respondent, Cullen Machining, Inc., a New Jersey corporation, is engaged in the operation of a machine shop located at 313 Elm Street, North Wales, Pennsylvania. The Respondent, American Brass and Bronze, Inc., a Pennsylvania corporation, has been engaged in the operation of a foundry at 5th Street, Darby, Pennsylvania, since May 18, 1987.

At all times material, Sorensen Industries, Inc., Cullen Machining, Inc., and American Brass and Bronze, Inc. have been affiliated business operations with substantially common ownership; common management, supervision, and business purposes; with the same operations and equipment; and have occupied the same premises. By virtue of these facts, the Respondents, Sorensen Industries, Inc., Cullen Machining, Inc., and American Brass and Bronze, Inc., are and have been at all times

[3] The Respondent asserts that the allegation that Cullen Machining, Inc. is a single employer or alter ego of Sorensen Industries, Inc. was "dismissed" in Case 4–CA–16357 with no appeal by the Union. It further asserts that despite this dismissal the allegation was included in the consolidated complaint at issue here. We find nothing faulty in the treatment of this alter ego allegation. In view of the identity of interests of alter egos, the Board has liberally permitted the addition of an alter ego as a party (even at the backpay stage of a proceeding). See, e.g., *BMD Sportswear Corp.*, 283 NLRB 142 fn. 1 (1987); *Volk & Huxley*, 280 NLRB 219 (1986), enfd. 817 F.2d 996 (2d Cir. 1987); *Teckwal Corp.*, 263 NLRB 892 (1982).

[4] *Image Systems*, 285 NLRB 370, 371 (1987); *Olympic Fruit & Produce Co.*, 261 NLRB 322, 323 (1982).

[5] See *Image Systems*, supra at fn. 3; *Goldstein Co.*, 274 NLRB 682 (1985).

[6] See, e.g., *George C. Shearer Exhibitors Delivery Service*, 262 NLRB 622 (1982), enfd. mem. 714 F.2d 124 (3d Cir. 1983); *Custom Mfg. Co.*, 259 NLRB 614 (1981).

[7] See *John Mahoney Construction Co.*, 274 NLRB 109 fn. 1 (1985) (summary judgment granted in absence of answer notwithstanding pending settlement discussions).

[8] The General Counsel also requests that the Order include a provision for a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

material alter egos and a single employer within the meaning of the Act.

We find, on the basis of the foregoing, that Sorensen Industries, Inc., Cullen Machining, Inc., and American Brass and Bronze, Inc. are an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

We further find that United Steelworkers of America, AFL–CIO, CLC (the International); Steelworkers Local 5424, its agent (the Local Union); and Teamsters Local 384 are each labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all times material, the Respondent, acting through Sorensen Industries, Inc., has recognized the International as the exclusive representative of the Respondent's employees in a unit referred to in article II of the most recent collective-bargaining agreement (the Agreement) between the International and Sorensen Industries, Inc. (The Agreement is effective from November 1985 to November 15, 1988.) The unit is, and has been, at all times material, appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

By virtue of Section 9(a) of the Act, the International is and has been, at all times material, the exclusive representative of the unit employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms of employment.

On July 31 the Respondent failed to abide by article XXIV of the Agreement by closing its machine shop in Darby, Pennsylvania, was closed.

From about July 31, 1986, to about November 17, 1986, the Respondent failed and refused to abide by the superseniority clause of article VII of the Agreement in connection with the Respondent's layoff of Local Union President Mike Calciano, an employee of Sorensen Industries, Inc., who was laid off when the machine shop in Darby, Pennsylvania, was closed.

On the following dates in 1986 the International, acting through Walter J. Kuchinski, an International staff representative, in writing, requested Sorensen Industries, Inc. to furnish it with certain information concerning the closing of Sorensen's machine shop necessary for, and relevant to, the International's performance of its function as the exclusive representative of the unit. On September 5, the International requested "information in writing concerning sales orders, shipping logs, all shipping information, destination of castings, etc." and "the whereabouts of the machines that were sold publicly" as well as information "whether or not, Mr. Taglianetti is financially sponsoring the owners and a machine shop in North Wales, Pennsylvania." On October 30, it requested "all documents that have information as to size, quantity, quality and anything else to determine our position in respect to contracting out," and on November 21, it requested "information for any castings that were machined after July 30, 1986 at the other machine shop(s)."

Since about September 5, 1986, and continuing to the present time, the Respondent has failed and refused to furnish the International the requested information described above.

Since about November 14, 1986, and continuing to the present time, the Respondent has been engaged in subcontracting to other firms, including Cullen Machining, Inc., the machine shop work performed in its Darby, Pennsylvania machine shop prior to July 31, 1986. The Respondent has engaged in this conduct without having afforded the Union an opportunity to negotiate and bargain, as the exclusive representative of the unit with respect to such acts and conduct, and the effects of such acts and conduct.

On February 2, 1987, the International, acting through Lynne Gerber-Saionz, Esquire, by letter, requested Sorensen Industries, Inc. to provide certain information referred to in a "Questionnaire" consisting of 14 pages attached thereto. This information is necessary for, and relevant to, the International's performance of its function as the exclusive representative of the unit. Since about February 2, 1987, and continuing to the present time, the Respondent has failed and refused to furnish the International the requested information.

By each of the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively with the representative of its employees, and the Respondent thereby has been engaging in unfair labor practices within the meaning of Sections 8(a)(1) and (5) and 8(d) of the Act.

Since about September 16, 1987, the Respondent, acting through Cullen Machining, Inc., granted recognition to and bargained with Teamsters Local 384 as the exclusive representative of the production and maintenance employees in the appropriate unit who were employed at Cullen Machining, Inc., notwithstanding the fact that Teamsters Local 384 did not represent an uncoerced majority of the production and maintenance employees in the unit employed. By these acts, the Respondent has rendered, and is rendering, unlawful assistance and support to a labor organization, and the Respondent thereby has been engaging in unfair labor prac-

tices within the meaning of Section 8(a)(1) and (2) of the Act.

CONCLUSIONS OF LAW

1. By failing to abide by article XXIV of the most recent collective-bargaining agreement with the Union (effective November 1985 to November 15, 1988) by closing its machine shop in Darby, Pennsylvania; by failing and refusing from about July 31 to about November 17, 1986, to abide by the superseniority clause of article VII of the collective-bargaining agreement in connection with the Respondent's layoff of Local Union President Mike Calciano, an employee of Sorensen Industries, Inc., who was laid off when the machine shop in Darby, Pennsylvania, was closed; by failing and refusing to furnish the International the information requested on September 5, October 30, November 21, 1986, and February 2, 1987, which is necessary and relevant to the International's performance of its function as the exclusive representative of the unit; by engaging in subcontracting to other firms, including Cullen Machining, Inc., the machine shop work performed in its Darby, Pennsylvania machine shop prior to July 31, 1986, without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the unit, with respect to such acts and conduct, and the effects of such acts and conduct since November 14, 1986, and continuing to the present time; the Respondent has failed and refused, and is failing and refusing, to bargain collectively with the representative of its employees, and thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), Section 8(d), and Section 2(6) and (7) of the Act.

2. By acting through Cullen Machining, Inc., granting recognition to and bargaining since September 16, 1987, with Teamsters Local 384 as the exclusive representative of the production and maintenance employees in the appropriate unit who were employed at Cullen Machining, Inc., notwithstanding the fact that Teamsters Local 384 did not represent an uncoerced majority of the unit employees, the Respondent has rendered, and is rendering, unlawful assistance to a labor organization and thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(2) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Sorensen Industries, Inc., Cullen Machining, Inc., and American Brass and Bronze, Inc. are alter egos and a single employer and that the Respondent has violated Section 8(a)(5), (2), and (1) of the Act, we shall order it to cease and desist and to take certain other affirmative action designed to effectuate the policies of the Act.

Thus, with respect to the violations of Section 8(a)(5), we shall order the Respondent to bargain on request, including concerning the decision to subcontract on November 14, 1986, the machine shop work performed in its Darby, Pennsylvania machine shop prior to July 31, 1986, and the effects of that decision; to abide by the superseniority provision of article VII and by article XXIV of its most recent collective-bargaining agreement with the Union; and to furnish the Union the information requested. We shall further order that unit employees, including Mike Calciano, be made whole for any loss of pay or other employment benefits suffered by reason of the unlawful subcontracting of unit work and the failure to abide by article XXIV and the superseniority clause of article VII of the collective-bargaining agreement. Backpay shall be computed in accordance with the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*.[9]

Further, with respect to the violations of Section 8(a)(2), we shall order the Respondent to withdraw and withhold recognition from Teamsters Local 384, as the exclusive bargaining representative of the unit of production and maintenance employees at Cullen Machining, Inc.

ORDER

The National Labor Relations Board orders that the Respondent, Sorensen Industries, Inc., Cullen Machining, Inc., and American Brass and Bronze, Inc., North Wales, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Steelworkers of America, Local Union 5424, AFL–CIO, CLC as the exclusive bargaining representative of the employees in the appropriate unit referred to in article II of its most recent collective-bargaining agreement with the Union (effective November 1985 to November 15, 1988); failing and refusing to abide by the superseniority clause of articles VII and XXIV of the collective-bargaining agreement; refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees; and

[9] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

subcontracting unit work without providing the Union an opportunity to bargain with respect to the subcontracting and its effects.

(b) Recognizing and bargaining with Teamsters Local 384 as the exclusive representative of the unit of production and maintenance employees who were employed at Cullen Machining, Inc.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit referred to in article II of its most recent collective-bargaining agreement with the Union on terms and conditions of employment.

(b) On request, bargain with the Union concerning the decision to subcontract on November 14, 1986, the machine shop work performed in its Darby, Pennsylvania machine shop prior to July 31, 1986, and the effects of that decision.

(c) On request, furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(d) Abide by the superseniority clause of articles VII and XXIV of its collective-bargaining agreement with the Union.

(e) Make whole unit employees, including Mike Calciano, for any loss of pay or other employment benefits they may have suffered by reason of the unlawful subcontracting of work and failure to abide by the collective-bargaining agreement, in conformity with the remedy section of the decision.

(f) Withdraw and withhold recognition from Teamsters Local 384 as the exclusive bargaining representative of the unit of production and maintenance employees at Cullen Machining, Inc. until the Union has been certified by the Board as their exclusive bargaining representative.

(g) Post at its facility in Darby , Pennsylvania, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Steelworkers of America, Local Union 5424, AFL–CIO, CLC as the exclusive bargaining representative of the employees in the appropriate unit referred to in article II of our most recent collective-bargaining agreement with the Union (effective November 1985 to November 15, 1988); WE WILL NOT fail and refuse to abide by article XXIV of the collective-bargaining agreement by closing our machine shop in Darby, Pennsylvania, or the superseniority clause of article VII; WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive representative of the unit employees; and WE WILL NOT subcontract work performed by employees in the appropriate unit without providing the Union with prior notice or an opportunity to bargain with respect to the subcontracting and its effects.

WE WILL NOT recognize and bargain with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, Local Union No. 384, as the exclusive representative of the unit of production and maintenance employees who were employed at Cullen Machining, Inc.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit referred to in article II of our most recent collective-bargaining agreement with the Union on terms and conditions of employment.

WE WILL, on request, bargain with the Union concerning the decision to subcontract the machine shop work performed in our Darby, Pennsylvania

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

machine shop prior to July 31, 1986, and the effects of that decision.

WE WILL abide by the superseniority clause of articles VII and XXIV of our collective-bargaining agreement with the Union.

WE WILL, on request, furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL make whole those unit employees, including Mike Calciano, for any loss of pay or other employment benefits they may have suffered by reason of our unlawful subcontracting of work and failure to abide by the collective-bargaining agreement, with interest.

WE WILL withdraw and withhold recognition from Teamsters Local 384 as the exclusive bargaining representative of the unit of production and maintenance employees at Cullen Machining, Inc.

SORENSEN INDUSTRIES, INC., CULLEN MACHINING, INC., AND AMERICAN BRASS AND BRONZE, INC.

basis and on the basis that discipline is management's domain, he continued to deny District 65's request for arbitration on this article. None of the other contracts on which Respondent relied for preparation of this article omits arbitration as recourse for just-cause discipline or discharge.[41]

7. No strike—no lockout

Respondent's initial no-strike proposal prohibited "strike, walk out . . . or any other curtailment, restriction or interference with any of the operations of Prentice-Hall in any manner." The Union's liability would be for the actions of "its local and international representaives. trustees, stewards, delegates or committees." Failure to abide by the terms of this article would result in liquidated damages of $250,000 to be paid to Prentice-Hall, and would also permit the Company to either sue for damages and/or injunctive relief, or seek an award through the arbitration article of the agreement.

Liability would also extend to violations of this article committed by independent employees, whose actions would be deemed authorized by the Union, if the Union failed to curtail them after 24 hours' notice. A violation of this latter provision would carry $10,000 in damages for such failure and $10,000 for each day the violation continued, in addition to any liquidated, actual, or compensatory damages awarded under the clause described above.

The Union expressed its willingness to accept a no-strike clause on April 9. However, Senick stated that the $250,000 liquidated damage penalty and the $10,000 daily fine were unacceptable; nor could the Union agree to accept liability for independent acts of employees who may or may not be union members. Senick also emphasized, at this and at the May 27 meeting, that agreement on the no-strike clause would be tied to agreement on the arbitration article.

On August 12, the Union presented a written proposal to Respondent that precluded the Union from authorizing a strike or otherwise impeding Respondent's operations. It also imposed a simultaneous obligation on Respondent to refrain from both attempting or carrying out a lockout of the employees. Senick represented that this clause would protect Prentice-Hall and that the punitive provisions in the Company's clause were superfluous.

At the next meeting, held September 3, the Company presented the Union with an article which retained the tenor of the original but reduced the liquidated damages to $200,000 per violation and eliminated the $10,000 per diem fine described above. Liability for actions of stewards, trustees, et al., remained, regardless of whether the Union ratified their acts, and failure to terminate an employee strike within 24 hours of being notified would make the Union liable for liquidated damages. This proproposal also included a no-lockout clause and permitted the Company to sue for damages or injunctive relief without resorting first to arbitration.

Senick's immediate response was that the liquidated damages clause was punitive, and that he saw problems with being bound by the unauthorized acts of individuals. Kelly recommend they study this article.

When the parties met again on September 24, Senick described management's proposal as "absurd," specifically with regard to the $200,000 damage clause. The Union's proposal on that date, in addition to its original language prohibiting it from calling a strike, also obligated it to make "every reasonable effort to secure the return of strikers to work as soon as possible" in the event of an unauthorized strike. Failure by the Union to terminate a strike would entitle Respondent to discipline or discharge the individual employees. Senick also expressed difficulty in accepting liability for the actions of individuals beyond that imposed by normal agency rules.

Kelly's reply was that he did not find the Union's language entirely responsive to Respondent's concerns. At this and the October 5 meetings, he explained that the $200,000 was to compensate the Company for expenses incurred as a result of a strike. He asserted that most of the costs incurred would be up front and, therefore, the damages would be due the Company regardless of the length of the strike. He cited such things as security, replacement employees, transpotation for employees crossing the picket line, strike replacements, interruption of shipped goods, locating shippers willing to cross the picket line, lost profits, and management's time as monetary losses for which the Respondent wanted to be assured they would be compensated. Senick objected, noting that if there were a 3- or 4-hour strike the Union would bear tremendous liability.

Regarding the theory of liability that Respondent wished to impose on the Union, Kelly stated that the Union was liable for collective action even if they did not sponsor it and that he could not imagine a strike ever occurring "without union concurrence in some form."

Canoni told Senick's negotiating team that he had seen liquidated damage provisions in other contracts. At the hearing the New York Times Mailers' contract was cited as an example of one such agreement. On cross-examination, the General Counsel established that that unit had a history of wildcat strikes before the clause was negotiated. The April 9 notes reveal that there was no history of strike or lockouts in the CSD unit.

No agreement was ever reached on a clause.

8. Subcontracting

Subcontracting was discussed on five different occasions between February 26 and October 5. During the presentation of its first proposal, the Union explained that it sought only to protect the work regularly done by CSD and the unit employees' positions, but did not seek to interfere with Respondent's ability to run its business. The language of the Union's original proposal with its oral representation and by its terms would have prohibited subcontracting "of work or the type of work that is normally, historically, or appropriately performed by bargaining unit members." Whether a layoff was caused or prolonged by the Employer was a question of fact to be resolved by an arbitrator.

[41] This observation is in direct conflict with Kelly's statement at the bargaining table on July 8 that other contracts did allow for discipline without arbitration.

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Respondent's position on subcontracting remained exactly the same from its introduction on April 1, until negotiations terminated in November. Kelly maintained that the Company required the "absolute right to subcontract and contract any and all work" and that as an operational decision it should not be subject to an arbitrator's scrutiny.

Kelly also asserted that he did not see the connection between layoffs and subcontracting that Senick emphasized in the Union's proposal. He pointed out that a layoff might be the result of schedule changes, technological advancements, lack of capacity in the department, its customer dissatisfaction, more competitive bids on the outside, and lack of punctuality and absenteeism among the employees.

Senick's response was that the Union did not seek to prevent Respondent from continuing its historical practice of subcontracting, but wanted to protect the unit employees' jobs from being lost. He acknowledged that although Respondent had not previously laid off employees or prolonged a layoff by subcontracting unit work, he wanted to ensure against that contingency in the future. He emphasized repeatedly that this clause was important to the Union. Again, no agreement was reached by the time negotiations broke off on November 5.

9. Seniority

On several dates between February 12 and October 22 the seniority article was discussed and various proposals were exchanged by the parties.

At the February 12 meeting the Union acknowledged that "Prentice-Hall is a nice place to work" which employees come back to. The Union also explained that its general intent with respect to this clause was "to design a workable seniority system that recognizes the different skills involved." It envisioned seniority as being a measure of the employees' total length of accumulated service with Prentice-Hall within their individual departments. Senick explained how this system would apply in a few specific instances, and stated that it was similar to the design in the loose-leaf contract.[42] Senick also stated that the length of an employee's accumulated service would not include periods of layoff, termination, discharge, or leave of absence.

According to the company notes, Kelly specifically asked whether the clause would be subject to grievance and arbitration procedures. When Senick responded, "Absolutely," Kelly stated, "You know my answer on that clause."

The Union's proposal also required Prentice-Hall to "make every reasonable effort to place affected employees elsewhere in the unit" if there was a reduction in force, or failing that, to "make every reasonable attempt to place them elsewhere in the Company." Senick stated that this portion of the Union's proposal incorporated the Company's current practice. This characterization was not challenged by management at this meeting.

On February 26 this proposal was discussed again. Kelly attempted to clarify some of the exact language used in the Union's proposal, including "interruption of service." The Company's notes reflect that Senick stated that it included termination and resignation, but did not include leave of absence, layoff,[43] or leave for military service, and that he had not considered whether it would include time served in a nonunit position.

Regarding the phrase, "every reasonable attempt" to place an employee elsewhere in the unit and if no openings are available in the unit, then elsewhere in the Company,[44] Senick defined this language as requiring a good-faith attempt. Kelly found this language problematic because it could apply in every instance. Senick agreed to discuss it with the committee and expressed his feeling that it could be worked out. In response to another question Kelly was also told that application of this clause would be subject to grievance and arbitration.

Respondent included seniority language in its package of proposals and on April 1 its language was discussed and the Union also submitted its own response. Respondent's proposal defined seniority, tied seniority to vacation benefits, and listed 11 possible ways that an employee could lose seniority. The proposal was expressly excluded from the grievance and arbitration procedures.

The Union's proposed definition of seniority on April 1 was similar to Respondent's, the total accumulated length of service which would continue to accure during vacations, holidays, paid sick, and other periods during which the employee was receiving his salary, but included, in addition, leaves of absence in its definition. Under both the union and company proposals, seniority would also accrue to employees who were unit members but were transferred out of the unit for a period of time and then returned to the unit and would be measured by their entire accumulated service to Prentice-Hall.

The Union specified only 3 ways an employee could lose seniority, as compared to the 11 listed in Respondent's article. Resignation and discharge for cause were included by both parties. The Union's third basis for loss of seniority was failure to respond within 4 weeks after receipt of written notice of recall by registered mail. Prentice-Hall included a similar cause for losing seniority but gave the employee 48 hours to respond and/or 5 working days to return to work following tender or delivery of notice.

Respondent's proposal did not include any reference to the layoff and recall of employees which, according to Senick, the Union regarded as absolutely essential. The Union's April 1 proposal required that employees be laid off and recalled in the reverse order of their seniority except when a less senior employee has greater competence or ability to perform the remaining work. In addi-

[42] The looseleaf contract defined seniority as "total accumulated length of service by regular employees" and further provided that:

> Layoffs shall be by job classification and shall be determined by inverse order of seniority where factors of competence and ability to perform available remaining work are equal.

[43] A change from the position Senick expressed on February 12.

[44] The looseleaf contract states that "the Employer shall make every reasonable effort to place the affected employees elsewhere in the unit." There is no obligation to attempt to place employees outside the unit in that contract.

tion, the laid-off employee would be offered any other position for which he might be qualified.

Kelly gave Respondent's response to the Union on May 12. Two changes had been made from the original. It now included the Union's language on seniority continuing to accrue during periods when the employee is receiving his salary and deleted "leave of absence with pay of more than six (6) months" as a way an employee would lose seniority.

Senick stated that the proposal was unacceptable. He raised specific objections to many of the possible ways that an employee could lose his seniority. He specifically referred again to any breach of rules as a ground for employees to lose seniority and to the exclusion of the article from grievance and arbitration, which he termed "unacceptable." Kelly responded that in extenuating circumstances he could rely on the Company's right to waive strict performance of any contract provision to avoid the consequences of the loss of seniority clause.

Senick characterized layoff and recall as "the heart of seniority" and noted the absence of any language in Respondent's article addressing that issue. He observed that Prentice-Hall concerned itself with vacation eligibility, but not with job security. Kelly pointed out that Senick had stated that Prentice-Hall is a good place to work and that the Company had no history of layoffs.

At the May 27 meeting, Senick introduced a proposal that incorporated Respondent's first paragraph verbatim, thus eliminating leave of absence as time counted toward seniority. The Union had also added a clause permitting the loss of seniority for layoffs exceeding 12 consecutive months and reduced from 4 weeks to 2 weeks the length of time allowed for an employee to respond to a notice of recall. In all other respects the Union's clause remained unchanged.

Senick repeated his request that language on layoff and recall be included in future proposals from Respondent. A discussion followed during which Senick attempted to clarify the application of such language to hypothetical situations. Senick also renewed his objection to the list of ways employees could lose seniority, which he termed punitive.

On June 4 Kelly gave the union bargaining team Respondent's newest proposal on seniority. It now had only five ways for an employee to lose seniority. Like the Union, these included resignation and discharge for cause. In addition, it included layoff of more than 4 months or the length of seniority, whichever is less;[45] failure to notify Prentice-Hall of intent to return to work after a layoff within 48 hours of receipt of notice and/or failure to return to work within 5 days of such notice; and disciplinary action taken pursuant to the rules and corrective discipline article. The remainder of the seniority article remained unchanged, including its exclusion from the grievance and arbitration provisions.

In response to the Union's request for layoff and recall language, Kelly explained that those decisions are based on a number of factors and that only management could balance those factors. Furthermore, company notes reflect that Kelly asserted:

> The Company has no history of layoffs, and you have no reason to suspect our motives here. It's not a compelling factor to block our agreement here. The primary objective should be to reach agreement. It would only add unnecessary language. This kind of language could turn into a real problem. It is only another attempt by District 65 to put in loose language so it can try to obtain to [sic] the arbitration process what it fails to obtain from negotiations. . . . Your language would lead to arbitration. . . . It should be based on competence, ability and the needs of the Company and other factors.

On numerous occasions Senick had referred to the exclusion of this clause from grievance and arbitration by Prentice-Hall. The company notes on June 4 reflect the following discussions as having occurred immediately following Kelly's above-quoted comments:

> M.S. There are many other provisions where you put they were not subject to the arbitration clause. We wouldn't mind seeing language here.
>
> J.K. You are open to that? Would you seriously consider it?
>
> M.S. Yes.[46]

At the June 11 meeting, Kelly presented for the first time a seniority proposal that included a layoff and recall provision, which was not subject to arbitration,[47] and which listed seniority as one of the factors to be considered during the decision-making process. Prentice-Hall deleted the language in a separate paragraph excluding the entire article from grievance and arbitration.[48] Although Senick testified that it was still too subjective, the company notes indicate that he initially viewed this language as a big step forward. There appeared to be little discussion of it at this meeting.

After considering the proposal, Senick stated at the June 24 negotiations session that this article was really no different than the Company's earlier proposal and that without arbitration, it was meaningless. Kelly maintained that layoff was too subjective for arbitration and would lead to frivolous grievances, and that its language reflected the discussion they had had at the table. Senick offered to return with other language.

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[45] Four months represented an increase from 30 days in its earlier proposal.

[46] It is clear that Senick's strategy was to induce Respondent to formulate language on layoff and recall tied to seniority. However, in subsequent discussions it became apparent that he never intended to agree to a proposal on layoff and recall which was not subject to arbitration.

[47] Canoni testified that Respondent used bargaining agreements between other parties as prototypes for formulating its own proposals for the CSD negotiations. Several of these contracts were introduced into evidence. In at least two of them the clause on employee recall was not subject to arbitration, and one of these also excluded recall from the grievance procedure. (See R. Exhs. 15, 16.) However, in these other agreements the order in which the employees were to be laid off was either arbitrable or negotiable to the point of impasse.

[48] However, the clause permitting Respondent to take action including loss of seniority under the rules and corrective discipline article remained nonarbitrable to the end under that article notwithstanding the modification made here.

The Union gave its next proposal to Respondent on July 8. Some of the language on layoff and recall had been modified and the clause now listed criteria for the Employer to consider in the decision-making process that were similar to those listed in Prentice-Hall's article. No discussion of this language took place on that date.

Respondent made a few changes in its language that it presented on July 16. It deleted the language reducing seniority for any disciplinary action against an employee under the rules and corrective discipline clause. However, loss of seniority as a disciplinary action still existed within the rules and corrective discipline clause.[49]

Arbitrability of the layoff and recall decision was the focus of the balance of this day's discussion. Kelly maintained that management's judgment on layoff and recall had to be paramount. Senick questioned the scope of the Union's recourse in the event of a management decision made in an arbitrary fashion. Kelly asserted that a regular grievance "could take care of that" but offered to consider language placing the burden of proving arbitrariness on the Union in the event of arbitration.

At the July 23 bargaining session, Senick presented what would be the Union's final proposal. The chief differences remaining[50] were between the parties' layoff and recall clauses; arbitrability of the decision as applied in individual cases, and the inclusion by the Union of a requirement that the Employer attempt to reassign the affected employees either elsewhere in the unit or, failing that, elsewhere in the Company. Senick reiterated that reasonable actions would be upheld by an arbitrator.

In its July 12 proposal Respondent included language regarding the placement of laid-off employees elsewhere in the unit or Company within Respondent's sole discretion. This language was as Kelly pointed out, similar to the clause found in both parties' proposals concerning promotions and transfers from and returns to the unit. Senick viewed this change as minimal and restated his position on arbitration.

Thereafter no new proposals were offered. On September 24 and October 5 and 22 there were discussions on seniority of various duration but no substantive progress was made. During the October 22 meeting Senick expressed the Union's desire to have external review of Respondent's decisions and noted that such review is customary in labor relations.[51] Kelly refused to make the entire clause subject to arbitration and stated that he "might entertain" language limiting the scope of arbitration. It is evident, however, from the foregoing facts that Kelly viewed layoff and recall as a decision for management only and that even though the Union had proposed specific criteria to guide an arbitrator on review, Respondent's position remained unchanged.

10. Wages

The Union initially proposed increased starting salaries, on average approximately 25 percent for each job classification, an immediate 32-percent increase, a minimum 15-percent increase upon promotion, and a yearly cost-of-living increase.[52] The Union explained that these rates were competitive with those of similar jobs in other shops in the New York-New Jersey area. Kelly responded that the department was operating at a loss and that the parties were "very far apart" on wages.

Senick also asked if the employees would be given the 3-percent increase received by many other company employees as a result of the wage study commissioned by human resources.[53] Kelly told the Union that Respondent was precluded from increasing wages unilaterally, but that Respondent was willing to discuss it. However, the employees would continue to undergo annual review and to receive increases pursuant to that process. Senick's view was that Respondent was unilaterally withholding an existing benefit. On February 4 the Union filed charges with the NLRB alleging a violation of Section 8(a)(3) and (5) of the Act. These charges were subsequently administratively dismissed by the Region.[54] Kelly acknowledged on cross-examination that CSD would have been included in the wage study had they not been represented by the Union.

The Company turned over its entire economic package on May 12. The wage proposal listed starting salaries and established an annual merit review system for determining if an employee would be granted an increase. This proposal was not subject to arbitration.

In January the Company had provided the Union with its current wage rates for both individual employees and for each job category. (R. Exh. 4.) In both cases the wages were expressed as annual salaries. Their first wage proposal to the Union however was expressed in terms of an hourly rate, and the Union subsequently converted its proposal into an hourly rate as well.

In order to get a clear idea of what the Company was proposing in response to the Union's demands as compared to what the employees were receiving without the Union, conversion of the annual salary into an hourly rate was deemed necessary. The results reveal that Respondent's initial wage proposal was somewhat less than

[49] See discussion sec. II,D,9, infra.

[50] The only other difference that remained was very minor. The Union would have an employee lose seniority "following a layoff of more than six months or the employee's seniority, whichever is less" while the employer would have the same result after only 4 months of layoff.

[51] The bargaining notes for October 22 show Kelly stating that "some of '65's' contract layoff is not subject to arbitration, for instance Harper and Row." Canoni testified that reliance was placed in part on the Harper and Row contract for the concept that the decision to lay off was not subject to arbitration. In fact, although the Harper and Row agreement excluded the decision from arbitration, it also provided that the layoff procedures, including the seniority provisions requiring layoff in inverse order of seniority and recall in order of seniority were specifically made subject to arbitration.

[52] The cost-of-living component was not expressly stated in the Union's wage proposal. Rather it was raised at the bargaining table and Senick acknowledged that cost-of-living increases keep the wages at the same relative level of earning power. Cost-of-living which was never expressly included was also never expressly removed from the bargaining table. According to Senick "it died on the table." However, Kelly testified that he assumed it remained on the table throughout the negotiations.

[53] This study was carried out by "Sibson" and was frequently referred to by that title by the parties.

[54] During negotiations, sometimes with reference to the Union's claim that the Sibson increase should be applied to unit employees, Kelly asserted that the Union had a proclivity for filing frivolous grievances even when Respondent had expressed a willingness to work the problem out. Yet, as this section reveals, the Respondent never offered to grant the 3-percent across-the-board increase to these employees in spite of its willingness to "discuss" it.

the starting annual salary already paid in those positions based on a 35-hour paid workweek, 52 weeks per year.[55] The difference ranged between 1 cent and 5 cents per hour less under the contract proposal.

Discussion of the Employer's proposal and the Union's counterproposal occurred on June 4. The Union had decreased the increase in starting salaries from 25 percent to 19 percent, the across-the-board increase from 32 percent to 25 percent, and continued the 15-percent minimum guaranteed increase on promotion. Kelly commented that a 25-percent increase was "ridiculous," but he agreed to look at it. Senick encouraged Respondent to look at the actual salary level, not the percentage increase. He asserted that the Union's proposal was really "not very much money" and that the numerous employees who had left Prentice-Hall in recent months to assume positions elsewhere were "making considerably more than here."

On several occasions during the negotiations the parties discussed the decrease in the unit's employee complement due to employee quitting. On May 5 Respondent informed the Union that the night supervisor had resigned and, depending on the results of its efforts to replace him and to fill the other vacancies, Respondent was considering closing down the night shift. By the June 24 meeting Respondent had hired 3 employees for the day shift but the night shift was down to 7 or 8 employees from 18 or 20. Kelly informed the Union that there had been a slippage on productivity and in scheduling on the night shift and that Respondent was still considering the option of closing it down. On both May 5 and June 24, Senick expressed his hope that Respondent would continue to operate a night shift.

In early October Respondent was still interviewing potential employees and by November 5 a new employee had been hired on the night shift. Respondent had been operating with 35 employees since April,[56] compared to the 50 employees who had formed the unit when the bargaining first began.

On June 24 Kelly turned over Respondent's next proposal which included two new clauses. One clause pertained to promotions which would trigger a review and a possible wage increase not to exceed 10 percent.[57] The second clause limited an employee entitled to two wage increases in the same pay period to only the greater of the two increases, not both. According to Kelly this clause was added "to deal with the problem of merit and promotion increases being given at the same time." The proposal also included some increases in the wages for some job classifications. In all other respects the proposal remained the same.

A discussion concerning annual wage increases followed. Kelly stated that the fixed annual increase sought by the Union was not in Respondent's best interest at this time.[58] Senick asserted that Respondent presently had a guaranteed minimum increase and that he could not understand Respondent's reluctance to agree to continue this practice with the CSD employees. Kelly asserted that Respondent's wage system included "a merit annual review which is open-ended to favor the productive employee." Senick pointed out that there was no performance appraisal system against which employees would be measured and that Respondent's proposal left any and all wage increases in the sole discretion of Prentice-Hall. Kelly confirmed that this was Respondent's offer.

The Union presented a revised proposal on July 8. The wage increase was divided into two steps; an 8-percent increase on signing the contract and an additional 7 percent months later. Senick asserted that this wage request was "not out of line with the way Sibson was administered elsewhere in the Company" and its implementation would bring salaries up to a competitive level.[59] Kelly alleged that the Union had already "tried the Sibson ploy and lost at the Board."[60] He also maintained that Respondent's proposal was competitive.

On July 16 Kelly characterized the Union's previous proposal as "a step backwards" because of the compounding effect of the 2-step increase. He gave the Union Respondent's counterproposal which provided a guaranteed 5-percent increase only to those employees who received any merit increase, but still did not offer a guaranteed increase across the board. It adopted the Union's language granting employees receiving promotions "the minimum salary for that classification or a 10-percent increase, whichever is larger." Also the prohibition against pyramiding increases for merit and promotions within a single pay period were removed. The article was still subject only to grievance, without recourse to arbitration and the actual wage levels remained the same as those in the earlier proposal.

Senick requested information relied on by Respondent in formulating its wage proposal including wage surveys used to determine wage patterns in the area, the results of the Sibson wage study with respect to the CSD unit, and information on employees performing similar work elsewhere in the Company. Respondent answered this request by letter dated September 24 (R. Exh. 8). In it Kelly provided the requested information and informed the Union that the Sibson study had not included CSD.[61]

Senick also inquired what the total cost of Respondent's proposal was and whether there were current minimums and maximums on salary increases. Kelly responded that the cost of Respondent's proposal was "[f]ive percent overall maybe," and that there was currently "[u]nder the guidelines that did and do exist" a maximum 12-percent increase and a minimum increase "in the four

[55] A 35-hour workweek was what Respondent offered initially and I have assumed that it would not have offered a shorter workweek than it already received from the employees.

[56] As noted previously, the CSD unit was comprised of 35 employees at the time of this litigation. See sec. II,B, fn. 3, supra.

[57] LLSD contained a guaranteed minimum 10-percent wage increase on promotion to a higher job classification.

[58] LLSD contained a guaranteed 5-percent annual increase in addition to any merit increase given at the Employer's discretion.

[59] The Union had previously given Respondent information on wages of other companies where employees were more well paid.

[60] See discussion at sec. II,B,10, supra.

[61] There was no attempt at the hearing to show that there existed such a disparity between the wage levels in the information provided and those proposed in the bargaining as to evidence bad faith.

to five percent range." This last statement by Kelly tends to contradict his earlier position that Prentice-Hall relied solely on a merit review system for its nonunion employees. (See discussion from June 24, above.)

On September 3 Senick gave Respondent a wage proposal notwithstanding his having not yet received the wage information he had requested on July 16. He later admitted that this proposal was "a shot in the dark" made in an attempt "to move things along." In substance this proposal called for an 8-percent increase on current wages from the date the contract is implemented and a 9-percent annual increase exclusive of any additional merit increases given by the Employer.[62]

Respondent's proposal of October 22 increased the minimum salaries in some job catagories between 10 and 25 cents an hour. Still, by Kelly's own admission at trial (Tr. 1094), only 7 of the 36 employees, who were earning less than this proposed new minimum, would have received an increase. Respondent also proposed language allowing it to pay a shift differential at its own discretion. Senick's initial response before studying the proposal was that the minimum on wages was looked at much closer. He also reiterated the need for across-the-board increases.

After reviewing Respondent's proposal, Senick gave the Union's reaction and counterproposal on November 5. He acknowledged again that they were close on minimums, but apart on both initial across-the-board increases and guaranteed annual increases.

Kelly asserted that the Union failed to take into account the raises given to CSD employees during the course of negotiations. Senick responded that the average increases given in April and July had been less than 6 percent and that from his preliminary information on October increases it appeared that those were in the same range.[63] He asserted that these increases were low compared to those previously given in CSD and to those given during the last several months to nonunion employees, which included some increases of 14 percent. In response to those comments, Kelly stated that the guidelines governing CSD were those that were in effect in September 1980, while those governing other employees had changed and therefore what occurred outside the unit had no relationship to CSD. He likened Senick's attempt to compare CSD's salary increases to nonunion employees "to compar[ing] apples to oranges."

The chief difference between the parties by this date was, as Kelly pointed out, that Prentice-Hall's wage proposal was a merit system and the Union wanted a guaranteed minimum raise plus merit. Senick asserted, both at the negotiations and at the hearing, that the Union's proposal reflected what happened, in practice, at Prentice-Hall. Furthermore, Respondent's wage proposal was not subject to arbitration, limiting employee or union recourse to protest an arbitrary grant of a less than 5-percent merit increases to the filing of a grievance (Tr. 1099).[64] Senick testified, "I also told the company that I couldn't agree to a wage proposal that wasn't subject to arbitration because it meant that I couldn't enforce the wage proposal, which was absolutely no good to me." (Tr. 135.)

Canoni offered several specific examples: he pointed out that the Brandeis University contract with nonprofessional library employees had no automatic wage increase and was not subject to grievance and arbitration. However, Canoni failed to note several other features included in that wage package and not offered by Prentice-Hall. Brandeis University included a review procedure for evaluating employees and granted employees receiving less-than-satisfactory rating a second review 3 months after the first one. In addition, the contract had a performance evaluation review appeal procedure whereby employees could question their supervisor's evaluation by going to, in succession, their department head, the university librarian or their designee, and the dean of the faculty.

Canoni also pointed to the Winthrop Publishing, Inc. agreement with District 65 which contained merit review of employees. However, also unlike the Prentice-Hall proposal, it granted a minimum 6-percent increase, or the amount necessary to achieve the minimum scale for the employee's job and experience level, whichever was greater.

According to Canoni, the Boston University contract with District 65 did not include a guaranteed wage increase or recourse to grievance and arbitration provisions. Contrary to Canoni's reading of this contract, this article granted salary increases in both the first and second years of the agreement (the term if the agreement was September 6, 1979, to June 30, 1981) with additional merit increases permitted at the Employer's discretion without recourse to grievance and arbitration.

In the bargaining agreement between Allyn and Bacon, Inc. (a former subsidiary of Prentice-Hall) and Local 925, Service Employees International Union, AFL–CIO there was a merit increase system with the possibility of no merit increase and no recourse to arbitration. In response to my questioning, Canoni also testified that there was an across-the-board increase in that agreement as well and that no similar offer was made in the CSD negotiations. It was this type of proposal that Senick repeatedly sought to have included in the CSD agreement.

Finally, both LLSD unit contracts had wage articles that were subject to arbitration and Kelly did not propose their exclusion in the negotiations leading to the second LLSD contract.

11. Union shop and dues checkoff

When Senick introduced the union-shop clause he emphasized its importance to the Union. He stated that the

[62] By this date Senick had decreased the minimum starting salaries to only a 5-percent increase over the preunion starting salaries.

[63] These dates were for annual reviews of employees whose employment anniversaries fell within those quarters.

[64] Since, as earlier noted, Respondent was insisting on language in its arbitration clause making grievances the "sole and exclusive" means for the settlement of all dispute, see sec. II,D,4, par. 9, supra, Kelly's later reference on re-direct examination to the possibility of a lawsuit to assert union claims of breach of the wage article (Tr. 1262) must be completely discounted.

committee had developed a consensus within the shop that was overwhelmingly in favor of this proposal. Union negotiation committee member Richard Piper explained that the union shop would prevent favoritism and friction among the employees because "all employees must be treated the same in a Union Shop." He stated further that if he paid dues, he wanted others to pay them also, and that the shop steward would be stronger and fewer disputes would go to arbitration. Senick added that all employees underwriting the cost of the Union would obviate the need for further organizing.

Kelly did not perceive any advantage for Respondent to have a union shop. He asserted that "[n]either a majority of the unit wants a union shop or the union." He also stated that the contract would govern all unit employees regardless of whether they were union members and that the root of what the Union wanted was the employees' dues. Kelly also asked a number of questions concerning the application of the article to specific circumstances in an effort to ascertain "where we might agree and where we don't agree."

At the June 4 meeting, Senick asked if Respondent planned an answer to the union-shop clause. Kelly responded, "We have more technical objections on checkoff. Our objections to the Union Shop are much more on the basis of principle." Specifically, he asserted that the Union had not obtained a majority of the employees' votes at the outset, only a majority of the employees who voted, and that there had been high turnover within the unit.

Senick's argument that a union shop was what the employees wanted so that they would have strength did not provide Kelly with the "compelling reason to persuade us that the union shop clause is in our best interest."[85]

No further discussions of this clause were conducted before the negotiations broke off.

12. Complete agreement (past practices and other benefits)

The Union included a clause in its original proposal that would require the Company to continue all practices and policies not expressly altered by the contract. Kelly's approach was, "[I]f something is not in the contract, it doesn't exist." He saw the Union's proposal as problematic because it did not spell out the intent of the parties and because of the potential expense of such general language "based on District 65's past record of filing grievances."

The Employer responded with an article entitled "Complete Agreement" whereby no past benefits or practices would extend beyond the contract execution date. The contract would be deemed to express "the full understanding of the parties as to all of the terms and conditions of employment for all employees in the bargaining unit." In a second paragraph (29.1) the parties waived the right to bargain for the life of the agreement as to any subject matter not specifically referred to or covered.

The first looseleaf editor contract also had a complete agreement article. It incorporated by reference the "policies or benefits set forth in the current issue of 'You and Your Company' [YAYCO] applicable to all regular full time P/H employees" except as modified by the bargaining agreement. This provision was excluded from the grievance and arbitration provisions. In addition, the clause also stated that the parties had bargained fully concerning all terms and conditions of employment. In this last respect it was similar to the language proposed in the CSD negotiations.

The second looseleaf editor contract contained separate clauses entitled "Complete Agreement" and "Other Practices." The complete agreement language was similar to that proposed in the CSD negotiations except that it did not include the restrictive language governing past practices, policies, and benefits. The other practices clause incorporated the provisions in YAYCO to substantially the same extent as YAYCO had been incorporated in the first looseleaf editor contract.

Kelly expressly rejected the Union's offer of July 8 to incorporate YAYCO by reference in the CSD agreement. He insisted that each provision be specified if it was to be considered an employee benefit or right and again raised the Union's record of frivolous arbitration as the rationale for his position. Yet, in spite of the fact that the grievances over job description which the Union had filed in the LLSD unit resulted in arbitrations costing the Employer in excess of $50,000 (Tr. 732)—a cost which Kelly attributed in large measure to the ambiguity in language of the first LLSD agreement—the second LLSD agreement continued to incorporate the employee benefits in YAYCO by reference.

When pressed to explain this apparent discrepancy in approach in company dealings with the attorney-editors on the one hand, as opposed to its dealings with composition service employees on the other, Kelly at first was evasive and confusing, and finally relied on a union grievance filed in the LLSD unit concerning an IRA plan benefit which he later conceded was not filed until April 1982, 5 months after CSD unit negotiations had ceased (Tr. 1085–1092).

On October 15, Senick presented a list of subjects the Union wanted included in the CSD contract and which were contained in the current YAYCO.[86] On October 22 the Company introduced a proposal on "Other Benefits" that expanded on the specific benefits from YAYCO that the Union had sought to be included in the agreement,[87] and exempted the entire article from grievance and arbitration. This article was initialed without modification.

The complete agreement proposal was not discussed again, however, Senick stated on October 22 that the Union would agree to something like this, but that it would wait until the end of negotiations to see what the entire contract said before doing so.

[85] No provision for union shop was included in the first LLSD contract, however, dues checkoff was provided for in the second LLSD agreement.

[86] Respondent had supplied Senick with a revised version of YAYCO in late June.

[87] These included such benefits as food and refreshment services, parking, check cashing, book discounts, and the like.

13. Credit union checkoff

The Union proposed that the Employer deduct from an employee's wages an amount authorized by the employee and transmit those funds directly to the District 65 credit union. When Senick first presented this clause on February 26 he explained that out-of-state members could use the credit union only if there was such an automatic deduction. He stated further that he believed this requirement was imposed by New York banking law, but Krawczyk corrected his statement on July 8 when she explained that checkoff for out-of-state employees was a union rule designed to expedite enforcement.

At the July 16 meeting, Kelly rejected the Union's proposal on the grounds that in his view the credit union was union business "properly done by the union on it[s] own time and location." He reiterated this position on October 22.[68]

Senick questioned Kelly's approach because there was a similar provision in the LLSD contract. Kelly responded, "I don't see the relevance in that."

On cross-examination Kelly testified that checkoff was an "administrative headache" to the payroll department because it had to be done manually for a limited number of employees.[69] However, credit union checkoff remained a part of the second LLSD contract which was signed even as the CSD negotiations continued.

14. Holiday for part-time employees

The Union sought to have paid holidays granted to the approximately 20 part-time unit employees on a pro rata basis. Respondent offered to pay part-time employees who had worked a minimum of 900 hours in the preceding calendar year for up to five holidays per year, provided the employee worked "both his scheduled work day before or [sic] his scheduled work day after the holiday, unless unavoidably absent for a reason acceptable to Prentice-Hall."[70]

Respondent explained that the situations of part-time employees is different from that of full-time employees. Kelly asserted that part-time employees enjoy greater scheduling flexibility, more informal working conditions, and the option to apply for full-time employment if they want full-time benefits. In addition, if they work a minimum number of hours, they receive the same medical insurance coverage as full-time workers because the insurance carrier makes no distinction between full- and part-time employees. Kelly further explained that Respondent had a different investment in full-time employees than in part-time employees.

The parties differences on this article were never reconciled.

15. Term of agreement

Senick twice attempted to establish the term of the bargaining agreement being negotiated. He informed Respondent on September 24 and October 22 that the Union's position was that they were discussing a 12-month proposal. Kelly maintained that Respondent had not proposed any time period and that their position remained open.

E. An Overview of the Bargaining Sessions: Their Format, Number, Frequency, Length and Pace, and the Circumstances of their Ultimate Termination

The first bargaining session was held at 6 p.m.[71] on January 22. This meeting was well attended with 5 persons representing Respondent and 14 representing the Union.[72] After submitting the bulk of the Union's contract proposals, a brief caucus followed[73] and the parties agreed on February 12 for their next meeting.

The February 12 meeting was attended by 4 representatives for Respondent and 15 representatives for the Union. The meeting began at 6:22 p.m. because the Union held a caucus first. Senick stated that the purpose of this meeting was to review the union contract proposals and to get Respondent's reaction to the various articles. At 9 p.m., after discussing several articles, Senick suggested the meeting continue until 9:30 p.m., but Bernice Krawczyk wanted to conclude the discussions at 9 o'clock and vetoed Senick's suggestion.

Before this meeting ended Senick noted that Thursday nights were good for meeting and opined that they should "try to set dates. Many dates." Kelly agreed to "schedule a couple of sessions, but let's not get too far ahead of ourselves." Meetings were scheduled for February 26 and March 5.

The third bargaining session was held on February 26, as scheduled, and concluded at 9 p.m. at Senick's request. The next session took place on March 12, the March 5 date having been canceled because of snow. Respondent was represented at each of these sessions by its entire five-person committee. The Union was represented by nine and eight persons at each meeting, respectively.

The Union completed its presentation of proposals on March 12. Kelly suggested the next meeting be held 3 weeks hence, on April 1, to allow Respondent an opportunity to draft its proposals, submit them to the Company's executive committee, and deliver copies to the Union in advance of the next meeting.

On April 1 Respondent's full committee met with Senick and nine other individuals who formed the union committee. Senick stated that he had met with the employees once since he received Respondent's proposals and the Union's impression was that the parties were "far apart" in their approach and on most items. Senick caucused with his committee for approximately 1 hour.

[68] This view of what constitutes union business as distinguished from employee matters typified Kelly's view of the union-employee relationship. See discussion sec. II,D,4, par. 31, supra.

[69] In this regard Kelly stated he considered checkoff to be an "economic item," but he never conveyed this belief to the Union (Tr. 1113).

[70] This "wrap around" language was agreed on in the holiday article governing full-time employees.

[71] All bargaining sessions commenced at or around 6 p.m. unless otherwise noted.

[72] The bargaining parties are described in greater detail in sec. II,C, supra.

[73] Caucuses were held on a regular basis throughout the negotiations. The notes do not always indicate which side requested these breaks but Kelly testified that several were caused by Respondent.

When they reconvened Senick gave Respondent several counterproposals. He also inquired about articles that were in the Union's proposed contract, but for which there were no specific articles in Respondent's proposed agreement.

In response Kelly offered Respondent's view of what the contract would be.

> Our position is, if it's not in the contract, it doesn't exist.[74] Our purpose is to avoid reliance on casual language. We would like to put the contract to bed during negotiations, not continue to argue about what we said after it's signed. If you look carefully at our proposals, you will see that many of these areas of concern have been covered.

Senick noted a difference in approach between the parties to the past practices clause and some preliminary discussion of other clauses followed. Before the meeting ended the parties agreed to meet on April 9. Kelly also informed the Union that the Company was seeking employees for both the day and evening shifts. Senick and his committee remained to meet among themselves after informing Respondent that its presence would not be required. The meeting concluded at 7:30 p.m.

The April 9 meeting was attended by Respondent's five-member committee and nine representatives for the Union. During the course of discussing the recognition clause Kelly raised the previously withdrawn unfair labor practice charge as a reason organizing activity should be limited on Prentice-Hall's premises. Senick changed the subject and turned the discussion toward the various clauses he found objectionable.

A number of items were discussed before the Union called for a caucus at 7:35 p.m. At 8:45 p.m. they reconvened until 9:10 p.m. Before the session ended Senick offered to meet the following evening or the following Tuesday. Neither date was convenient for Kelly who suggested they meet on April 21. Senick agreed.

During the April 21 session various clauses were discussed and a 5-minute caucus was held at the Union's request. Toward the end of this session Senick asked about the Company's economic proposals and expressed his eagerness to conclude the agreement after so many months. Kelly offered to come back with language on several articles, but stated that because two or more members of Respondent's committee would be out of town for the next 2 weeks, they would not be able to meet until the week of May 11. Senick objected to this delay. He argued that as chief spokesperson only Kelly's presence was required. Kelly responded that his committee's preference was not to meet without a majority of the committee present. He added, "there's a lot to get done and a lot to consider, we wouldn't want to rush through." Senick reluctantly agreed to meet on May 12 and requested another session the following week. May 27 was agreed on.

On May 12 and 27 the meetings were held as scheduled. Respondent's entire committee met with Senick and several other individuals on behalf of the Union. (There were seven and four persons in addition to Senick at each meeting, respectively). Many proposals were discussed and a caucus was requested by Senick during each meeting. On May 12 Respondent gave the Union its economic package.

The negotiators met for the 10th and 11th times on June 4 and 11. At Senick's request the June 4 session began at 6:20 p.m. to allow time for him and his five committee members to meet. On June 11 Senick and three others represented the Union's position. A half-hour caucus was held during each of these sessions.[75]

Senick was accompanied by six individuals at the next two meetings, held June 24 and July 7.[76] On June 24 the meeting followed the usual format of the parties' trading proposals, discussing their positions, and holding a caucus (this one at Senick's request) at some point during the evening. On July 7 Senick delayed the start of the meeting by 35 minutes in order to meet with his committee. Fifteen minutes after calling for a caucus at 8 p.m., Senick went to Respondent's caucus room to deliver a proposal, to arrange for two future meetings, and to indicate to Respondent that there would be no need to reconvene that evening.

July 16 and 23 were the 14th and 15th sessions. Respondent's full committee attended on both dates. Senick was accompanied by Krawczyk and two others on July 16 and by only the two other individuals on July 23.[77] These sessions proceeded in the usual manner.

At the end of the July 23 meeting, Senick announced that he would like to perpetuate the momentum he felt they had developed and begin wrapping up the negotiations. He stated, "We have significant movement in these back-to-back sessions. If we could meet regularly we could get the same accomplished in the future."[78] Further meetings were scheduled before their session concluded at 9:10 p.m.

The August 12 meeting followed the usual format. A caucus was held before the meeting ended at 8:25 p.m.[79]

The 17th and 18th meetings, held September 3[80] and 24, were attended by four of Respondent's five negotiators and by only Senick and one other person for the Union. Senick opened the September 3 meeting by announcing that after a week in Maine he had "come back and taken a new perspective on these negotiations." This meeting ended at 6:50 p.m. when the parties broke for a caucus and agreed to meet again on September 24.[81] On

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[74] This statement had been made by Kelly on other occasions during the negotiations.

[75] The notes do not indicate who called the caucus on June 4, and the one on June 11 was held at Senick's request.

[76] Among those accompanying Senick was Bernice Krawczyk.

[77] The union committee remained small at successive negotiations sessions. Caucuses were held at each of these sessions but the notes do not indicate who called them.

[78] For a summary of the progress made over the course of the negotiations, as evidenced by agreement on specific articles, see sec. II,D,1, fn. 8, supra.

[79] The notes do not disclose who called this caucus.

[80] A session had been scheduled for August 19 but was canceled by Senick (Tr. 168).

[81] There is no indication who called this caucus.

September 24 a half-hour caucus was held during the course of the meeting. That session concluded at 7:40 p.m. with the scheduling of two future meeting dates.

The final three negotiation sessions were held on October 5 and 22 and November 5.[82] The Union's committee was slightly larger at these sessions than it had been at the previous two. At the close of the November 5 meeting the parties scheduled another session for November 19.

The November 19 session never occurred. According to Kelly, Senick telephoned him on November 17 to cancel the November 19 date and reschedule the meeting for November 25. Kelly testified further that he told Senick that he would get back to him. Kelly did, in fact, send a letter to Senick dated November 18. (R. Exh. 9.)

Senick testified that he received a letter from Kelly advising him that the Company had received a petition from the employees indicating that they did not want the Union, and that the Company had filed an RM petition with the NLRB Regional Office.[83] I credit Senick's testimony over Kelly's assertion that Senick changed the date of the November 19 meeting because it is inconsistent with the text of the letter mailed by Kelly to Senick which concludes as follows: "Accordingly, our scheduled meeting for Thursday, November 19th should be considered canceled." When I repeatedly pressed Kelly to account for the discrepancy, he could offer no explanation (Tr. 829–830).

In the November 18, 1981 letter Kelly states "On the basis of [the] petition and other objective evidence,[84] and yesterday's expiration of District 65's certification year, Prentice-Hall has a good-faith doubt that District 65 continues to represent a majority of the employees in that bargaining unit." Kelly then refers to the Company's filing of the RM petition and declines to bargain further.

The Union's charge in this case preceded this letter by 13 days, having been filed on November 5, 1981, prior to the last meeting held between the parties the evening of that day. Prior to filing of the charge, Senick had learned of some dissatisfaction among unit employees with the Union's inability to get a contract.

Regarding the frequency of meetings, a pattern developed early in which the Union, by Senick, generally sought more frequent meetings than the Respondent, with Kelly as spokesman, was willing to arrange. Thus, after the second meeting held on February 12, Senick testified he sought another session the following week but that the Company would only agree to meet in 2 weeks. The notes show Kelly responding to Senick's request to set many dates, "[L]et's not get too far ahead of ourselves." The problem arising at the close of the April 21 session has already been discussed, including Senick's unsuccessful request for a meeting in the week of May 19. Senick's July 23 request for more frequent meetings after "the sixth or seventh month of bargaining" as confirmed by the notes of that session was also rejected. At the close of the October 5 session, Senick's request for a meeting the following week was not fulfilled, and the next meeting took place on October 22. Again, the Company rejected a meeting the following week and met for the last time on November 5. To the extent Kelly has disputed any of the union requests or the attribution to him of negative responses during his testimony, I credit Senick, particularly in light of the discussions of this matter contained in the Respondent's bargaining notes, my discrediting of Kelly's testimony regarding the cancellation of the November 19 session, and the corroborative testimony of Mariella Signoretto, an employee-member of the Union's negotiating committee (Tr. 1290–1292 and Tr. 1393).

In contrast to the slow pace of session dictated by the Respondent for the composition services unit, bargaining for the second LLSD contract proceeded weekly in the beginning and twice a week thereafter, Kelly's denial to the contrary notwithstanding.

F. *Credibility*

In the immediately preceding section of this decision with the timing of the bargaining sessions, I discredited Kelly's denials that he was responsible for cancellation or delays in meeting. It remains to consider a more serious matter involving the credibility of both Kelly and Respondent's counsel, Madigan, when the former, in testimony, and the latter, in cross-examination of Senick and in direct examination of Kelly, sought to establish that Senick in the course of the bargaining sessions had not objected to Respondent's proposals excluding various provisions from arbitration, refusing to make layoff and recall subject to seniority, the broad management-rights clause including the "precedence" language and no-strike clause assessing individual liability and liquidated damages, or the clause making grievances the sole and exclusive means for the settlement of all disputes. Time after time, Senick was confronted with his pretrial affidavit which failed to discuss his objections to these matters at particular bargaining sessions. Thus, Senick was forced to agree he had not referred in his affidavit to his concern with the exclusion of matters from arbitration at the May 12 session (Tr. 402–403). Similarly, Kelly on direct examination denied that Senick at the April 9 session had ever stated in "words or substance" that he could not agree to corrective discipline unless it was tied to arbitration (Tr. 746). These are only two examples of many instances where Respondent attempted to show union acquiescence at the bargaining table to Respondent's proposals which the General Counsel claimed in argument made at the hearing constitute evidence of bad-faith bargaining. Other examples appear at Appendix 2 to the General Counsel's brief. In each of the examples cited, as well as the others, the Respondent's bargaining notes of

[82] There is no indication who called any of the three caucuses held at each of these meetings.

[83] The petition filed on October 18 in Case 22-RM-588 was acted on by the Acting Regional Director for Region 22 who dismissed the petition on January 19, 1982, "without prejudice to reinstatement, if appropriate, on the final disposition" of the unfair labor practice case at bar. A copy of the petition, introduced into evidence by Respondent (R. Exh. 12) contains 14 legible signatures and evidence of 5 or 6 others that are illegible. The petition states that the undersigned employees desire the decertification of the Union. In his letter, Kelly refers to this petition as having been signed "by over 50 percent of the employees in the [CSD] bargaining unit." Since April 1981, Respondent had been operating with a complement of 35 employees.

[84] Kelly never clarified this phrase. During the course of bargaining he referred occasionally to the high turnover among unit employees.

the sessions that subsequently were produced on demand and became the agreed factual, albeit incomplete, record of what transpired at the meetings,[85] establishes that Senick repeatedly, and at the meetings as to which he and Kelly were questioned, raised the appropriate objections. Thus, on May 12, the notes quote Senick as saying, "On 13.4 your exclusion [sic] that article [seniority] is not subject to grievance arbitration is unacceptable. Frankly, I don't see any changes."

And, on April 9, Senick is quoted as follows:

> With regard to 4.6 [of Rules and Discipline] it is not what we want. The only adequate protection for employees is to have a just cause clause with recourse to the grievance and arbitration mechanisms. . . . With regard to 4.8, we're not interested without essential grievance and arbitration protection.

The earlier presentation of the areas in disputes in this decision is replete with numerous references to Senick's objections to Respondent proposals severely limiting arbitration, precluding any means of contract enforcement for disputes subject to grievance procedures, giving precedence in arbitration to management rights in conflicts with other contract clauses, and its liquidated damages and extensive individual liability in the event of a strike in violation of the no-strike clause (See, e.g., sec. II,D,3,4,6,7,9, supra).

Respondent's chief witness, Kelly, as well as its counsel, Madigan and Canoni, who also participated in the negotiations and had reviewed Prentice-Hall's own bargaining notes prior to the hearing, were or should have been aware that Senick had indeed raised appropriate objections to these major differences cited, among others. Thus, one may reasonably have a great degree of skepticism when weighing Kelly's or counsels' assertions that they could have, in good faith, sought to impugn and indeed impeach[86] Senick's testimony by reliance on the theory of failure to include such matter in his affidavit or by virtue of Kelly's negative response to questions couched repeatedly in the language of whether Senick had raised objections either in word or substance. Kelly is thoroughly discredited by virtue of his firm denials to such inquiries which Respondent's own document show to be patently false, and counsel had no business asserting claims that they knew to be unsupported by material prepared by and in Respondent's possession and reviewed by them prior to the hearing. (Tr. 1359.) As both counsel were active participants in the negotiation process,[87] their position in this matter may also shed light on the issue of the merits of Respondent's defense that it, indeed, sought in good faith to reach agreement and, thus, did not engage in a refusal to bargain in violation of the Act.

One other significant credibility issue is raised by Kelly's denial, under oath at the July 16 session, that he "in words or substance" asked whether the Union was "willing to forgo the right to union activity at the Company in order to reach agreement." (Tr. 784.) Canoni also denied he heard that (Tr. 1345–1346). Senick testified that at this session the parties again got into a discussion on the issue of union activities on the company premises. According to Senick he told Kelly he thought it was an illegal clause and that the Union could not agree to waive the employees' Section 7 rights to engage in union activities. Senick believed Kelly replied that "the employees had no absolute right to the union activities and that we should ask them . . . if they were willing to give up those rights or not to get some agreement." (Tr. 153.)

At the July 23 session, the notes shown Kelly agree with Senick's assertion that "the primary difference [on the grievance procedure article] is the on-premises requirements." Senick also stated the committee could not abridge employee statutory rights. Kelly asked if this position was in the self-interest of the Union or to establish an effective grievance mechanism. Senick asserted a majority of the employees wanted this and the discussion concludes. Having in mind Kelly's statement at the June 4 session that "the union did not obtain a majority of the employees in the unit," the fact that the parties were in locked positions on this issue by July and not until the last session on November 5 did the Company finally offer to limit the prohibition of union activities to a "work area" rather than the "premises" in the union stewards article where the prohibition had, since August 12, been lodged,[88] and in consideration of having generally discredited Kelly as a reliable witness on certainly the confrontations involving the most serious differences between the parties expressed at the various sessions, I conclude that Kelly did insist on a poll of the unit employees to seek a waiver of the exercise of a Section 7 right in order to reach agreement on the grievance article. Senick proved to be a generally reliable witness whose testimony was corroborated to a very high degree by the bargaining notes, and where, as in this instance, it does not appear in the July 16 notes but does not conflict with them, I am prepared to credit Senick that such an interchange took place as he has sworn, but that it took place at either the July 16 or 23 session.

Analysis and Conclusions

In *Chevron Chemical Co.*, 261 NLRB 44, 46 (1982), the Board has described the standard governing the duty to bargain in the following language:

> [I]n ascertaining whether the duty to bargain in good faith has been complied with, it must be remembered that Section 8(d) does not "compel either party to agree to a proposal or require the making of a concession . . . ." Thus, the Board does not,

[85] See sec. II,D,1, fn. 8, supra.

[86] On the record, Canoni claimed the omissions from Senick's affidavit warranted his impeachment and buttressed Respondent's claim that the Union had not objected to the contract proposals which now formed the heart of the General Counsel's case of bargaining in bad faith (see Tr. 622, 663–664).

[87] Both are also named as agents of Respondent who are alleged to have negotiated with the Union in bad faith in an amendment of the complaint offered and received in evidence in response to Respondent's pretrial motion for a bill of particulars (Tr. 8).

[88] See sec. II,D,4, supra.

"either directly or indirectly, compel consessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952).[6] On the other hand, as stated by the Supreme Court, "[T]he Board has been afforded flexibility to determine . . . whether a party's conduct at the bargaining table evidences a real desire to come into agreement . . . . And specifically we do not mean to question in any way the Board's powers to determine the latter questions, drawing inferences from the conduct of the parties as a whole." *NLRB v. Insurance Agents' International Union, AFL-CIO* [*Prudential Insurance Co.*], 361 U.S. 477, 498 (1960). The Board does, of course, with court sanction, consider the content of bargaining proposals as part of its review when making a determination as to the good faith of parties negotiating a contract.[7]

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[6] But see fn. 10, infra.

[7] See, e.g., *Seattle-First National Bank v. NLRB*, 638 F.2d 1221, 1225–1226 (9th Cir. 1981); *Pease Company v. NLRB*, 666 F.2d 1044 (6th Cir. 1981).

In *Chevron*, supra at fn. 10, the Board noted that unusually harsh, vindictive, or unreasonable proposals may be deemed so predictably unacceptable as to warrant the evidentiary conclusion that they have been proffered in bad faith, citing *Pease Co. v. NLRB.*, supra at fn. 4, and cases cited with approval, but rejected the application of that principle to the proposals at issue in *Chevron.*

In the same decision the Board also recognized that the search to determine whether there has been compliance with the standard must often be based on circumstantial evidence and entails an examination of the whole record:

> Determining whether parties have complied with the duty to bargain in good faith usually requires examination of their motive or state of mind during the bargaining process, and is generally based on circumstantial evidence, since a charged party is unlikely to admit overtly having acted with bad intent. Hence, in determining whether the duty to bargain in good faith has been breached, particularly in the context of a "surface bargaining" allegation, we look to whether the parties' conduct evidences a real desire to reach an agreement—a determination made by examination of the record as a whole, including the course of negotiations as well as contract proposals. [*Chevron*, supra at 645.]

An analysis of the record must start with the simple fact that the Union was certified as exclusive bargaining representative following an election in which it received a majority of the votes cast. That status cannot be undermined by the claim, advanced by Kelly in discussions regarding the union-shop and dues-checkoff demands, that the Union did not represent the majority of the employees in CSD because they received only 25 votes out of the total complement of 50 employees. Put another way, the Union, in winning the election by 1 vote had the same legally recognized status as a union that had won by 20 votes. And the Union was entitled to the same duty to negotiate regardless of the size of its plurality among all employees or the extent of its majority among those employees who chose to cast a ballot.

Over a period of 11 months, a series of 21 meetings were held, during which time tentative agreement was reached on over 20 bargaining subjects, but at the end, the parties remained far apart on 15 other items. Many of these 15 items were central to the Union's role as exclusive representative and collective-bargaining agent for the unit employees in determining jointly with the employer the terms and conditions of their employment. In a significant number of these subjects the Respondent's proposals undermined the Union's role and made evident an intention of denying to the Union any effective voice in jointly determining the terms of employment or in enforcing the terms and conditions of employment on which the parties had already tentatively agreed or which were embodied in the proposals that Respondent had made or modified in response to union demand. Thus, only after a series of meetings and toward the end of lengthy bargaining was the Union able to obtain the reluctant "concession" that disciplinary action against employees would only be taken for just cause—a well-recognized and well-defined standard. Yet, Respondent's concession was illusory. This was so because the final arbiter of the application of that standard to a particular disciplinary act was to be the Company itself; company conduct was not to be subject to third-party review. Furthermore, because a disciplinary act was grievable, under the Respondent's sole recourse proposal, the Union was limited to grieving an incident and could neither, in view of the Board no-strike article and the sole recourse language, engage in self-help or a contract action to enforce the just-cause standard or correct an alleged breach of it. As Kelly explained on the witness stand, the Union could not bring a lawsuit disputing a Respondent's disciplinary action (Tr. 1290).

In its brief, Respondent suggests that the sole recourse language nonetheless permitted breach of contract actions for all disputes not subject to arbitration. The plain meaning of Respondent's proposal ("the procedures set forth here and in Article 5, grievances shall serve as the seol and exclusive means for the settlement of all disputes that may arise between them") belies that claim. When coupled with Kelly's clear testimony on this point the matter is free from doubt. Contrary to Respondent's attempt in its brief also to portray Senick as understanding and sympathetic towards its strained, after the fact, interpretation of the sole recourse clause, the Union's chief negotiator protested early, on receipt of the company proposal, that "many of the clauses would be unenforceable. I would have no means of resolving disputes between us." (See sec. II,D,4, fn. 25 supra.) Senick's comment at the October 5 session cannot be taken as agreement to Respondent's posthearing reinterpretation. (See sec. II,D,4, supra.) Even if it was, that does not change the legal effect and impact of Respondent's proposals on the arbitration and rules and corrective disci-

pline articles that were finally never agreed to for the reasons stated above, among others.

Not only was the Union limited to grieving disciplinary decisions but it could not be assured that even relatively minor rules, infractions, or alleged unsatisfactory performance would be subject to the progressive discipline procedure. Thus, employees were not assured of notice by warnings or evaluative review which would provide them with reasonable time to improve their performance before being subject to discharge or other severe discipline not itself subject to any effective union review or recourse.

What has been said about the impact of the sole recourse language affected, of course, not only disciplinary acts but all matters made grievable under the proposed agreement. I do not believe any terms or conditions of employment were excluded from the grievance procedure, but a significant number were excused from arbitration; among them, profit sharing, other benefits, wages, rules and corrective discipline, seniority, medical and life insurance, and subcontracting.

Respondent's rejoiner to the Union's demand for arbitration as a last resort for disputes arising in these areas does not withstand close scrutiny. The so-called frivolous and costly arbitrations under the first LLSD contract did not cause Prentice-Hall to seek the exclusion of, e.g., seniority or discharge disputes from ultimate resolution through arbitration in the second LLSD contact. Neither did the costly nature of the arbitrations cause Respondent to seek a tightening of the time limits for processing grievances to arbitration under that agreement. See sec. II,D,4, fn. 15, supra. Furthermore, there was no evidence that as to disciplinary actions by the Employer, the Union, representing these employees, would act in an irrational or abusive manner. And it was the exclusion of arbitration from the rules and corrective disciplines article that was central to the Union's expressed concerns, not promotion or upgrading—the issues arbitrated under LLSD I.

In its brief, Respondent refers to the fact that the management-rights article was made subject to binding arbitration. Therefore, it argues, the Union could seek an outside award restricting the application of that article to conduct alleged to breach another clause. In answer, first, that other clause itself had to be arbitrable, because the Union would grieve a breach of another clause and the Company would interpose the management-rights article in its defense and, as already noted, at least seven articles governing certain benefits and working conditions were not, including, in particular, seniority and corrective discipline. See *Florida Machine & Foundry Co.*, 174 NLRB 1156 (1969), remanded 441 F.2d 1005 (D.C. Cir. 1970), supplemental decision 190 NLRB 563 (1971), enfd. sub nom. *Steelworkers v. NLRB*, 78 LRRM 2895 (D.C. Cir. 1971). Second, the broad range of management rights diminished and restricted the areas over which the parties had a joint role. Third, the precedence language on which Respondent insisted to the end makes clear that the broad and specific range of matters over which the Company exercised unilateral control, including a whole host of personnel decisions, among others, affecting the operation of its business, would and must prevail in any conflict with another clause, not only where, as asserted by Respondent in its brief (R. Br. 66), the clause was unsupported by specific conflicting language. Certainly, no argument would be persuasive to an arbitrator based on an interpretation of another clause that did not in haec verba establish the claim as against a specific management right.

Respondent's further assertion that it would not be able to enjoin a strike protesting nonarbitrable grievances under *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235 (1970), and *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976), is small comfort[**] when the Union would surely face the strong likelihood of success against it in a damage action under Section 301 of the Act alleging breach of the express and broad no-strike commitment, *Ryder Truck Lines v. Teamsters Local 480*, 727 F.2d 594 (6th Cir. 1984), cert. denied 469 U.S. 825 (1984). Just as in *Ryder*, the no-strike pledge would have been given, if the parties had agreed to Respondent's last proposal made on October 5, in exchange for the Company's no-lockout pledge, and not in exchange for the onerous, narrow, and slanted grievance and arbitration procedure. That being the case, just as in *Ryder*, the no-strike clause clearly applied to disputes over nonarbitrable, as well as aribtrable, matters. Thus, strikes to protest discharges, disciplinary acts, personnel actions in which seniority was disregarded as well as arbitrary wage decisions affecting one or all employees would violate the no-strike clause and subject the Union not only to suit but to the punitive and extensive liquidated damage provisions insisted on by Respondent and, as noted at sec. II,D,7, par. 5, supra, without the necessity of first bringing the matter to arbitration.

The conclusion is almost self-evident from the foregoing that the conjunction of Respondent's grievance, arbitration, management rights, rules and corrective discipline, no-strike, and seniority proposals established such a disparity between the rights the Respondent would enjoy, as against the disabilities the Union and employees would suffer because of the lack of effective monitoring and enforcement of even the limited benefits and rights granted by Respondent, that the agreement proposed by Respondent lacked mutuality and was not mutually enforceable.

As observed by the Board in *San Isabel Electric Services*, 225 NLRB 1073, 1079 at fn. 7 (1976):

> We have consistently found bad-faith bargaining in cases in which an employer has insisted on a broad management rights clause and a no-strike clause during negotiations, while, at the same time, refusing to agree to an effective grievance and arbitration procedure. See generally, *Kayser-Roth Hosiery Company, Inc.*, 176 NLRB 999 (1969); *ITT Henze Valve Services, Controls, and Instruments Divi-*

[**] It is also decidedly unclear whether the principle of *Boys Market* would apply where Respondent's last no-strike proposal made on October 5 provides an agreement by the Union that Prentice-Hall may sue, inter alia, for injunctive relief. Would not this language constitute a waiver of the rights the Union could assert under *Boys Market* and *Buffalo Forge* with respect to a strike over a nonarbitrable subject?

sion, ITT, 166 NLRB 592 (1967); *East Texas Steel Castings Company, Inc.*, 154 NLRB 1080 (1965); *"M" System, Inc., Mobile Home Division Mid-States Corporation*, 129 NLRB 527 (1960).

In *Continental Insurance Co. v. NLRB*, 495 F.2d 44 (2d Cir. 1974), the court recognized that in addition to other indications of bad faith, some of the employer's proposals made "it impossible for the Union to reach a collective-bargaining agreement without virtually surrendering its right to represent the employees in disputes over working conditions . . . . " Id. at 48. Particularly apt was the court's highlighting of the employer's insistence on a no-strike clause coupled with a limited opportunity for arbitration of disputes. The court stated that "[t]he Board was fully justified in concluding that the proposal was not made in good faith." Id. at 49. Also, just as in the instant case, the Company insisted on union agreement not to organize (or represent) other company employees. See also *American Parts System*, 232 NLRB 41, 47–48 (1977), in which the Board, quoting from *San Isabel*, supra at 1080, stated:

> The Company's proposed contract in effect "would strip the Union of any effective method of representing its members" further excluding it "from any participation in decisions affecting important conditions of employment . . . thus exposing [the company's] bad faith."

When the onerous demand made here, not present in either *San Isabel* or *Continental Insurance Co.*, prohibiting union and employee recourse to the courts to redress all contractual matters on which Respondent had the last word under the grievance procedure, is added to the other restrictive and punitive demands on which *San Isabel* and *Continental* essentially relied, it is clear that Respondent made throughout the course of bargaining such unusually harsh, vindictive, and unreasonable proposals to warrant the evidentiary conclusion that they were offered in bad faith, in violation of the duty to bargain under Section 8(a)(5) and (1) of the Act.[90] See *NLRB v. Wright Motors*, 603 F.2d 604 (7th Cir. 1979); see also *A-1 King Size Sandwiches*, 265 NLRB 850 (1982), and *Kayser-Roth Hosiery Co.*, 176 NLRB 999 (1969).[91]

In fact, the employees would have been better off without the Union than with the contract Prentice-Hall proposed. Without the Union, the employees could peacefully strike over any alleged unfair employer policy directed to them or any unjust personnel decision without fear of damage liability of any sort.

Without the Union, a disciplined employee could seek to assert under New Jersey law in an appropriate case falling within the public policy exception, claim to wrongful discharge—a claim probably foreclosed by the sole and exclusive means contract language on which Respondent insisted. The public policy exception to the employment-at-will principle was applied by the Supreme Court of New Jersey to a retaliatory discharge in *Lally v. Copygraphics*, 85 N.J. 668, 428 A.2d 1317 (1981), in which the plaintiff alleged a wrongful discharge arising from her filing of a compensation claim. Until Respondent deleted its 6-month-old demand prohibiting the exercise of Section 7 rights by employees on its premises, the employees and the Union would have been unable to retain their full organizational rights under the Act without any restriction whatsoever.[92] That Respondent finally transferred this restriction to the stewards' article and then, at the last meeting, agreed to permit the union steward to perform his duties in a nonwork area is not evidence of good-faith bargaining, but rather evidence of the lengths to which Prentice-Hall was prepared to go to stretch out and unduly prolong the bargaining process to the point where employees would predictably lose interest and a decertification petition could be timely filed. Such a demand, including the insistence on a poll of unit employees to seek a waiver of the exercise of such rights, was unlawful and the Union could not legitimately waive these basic organizational rights under the Act. *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974). Kelly's justification for such a waiver of basic rights, that the unit should be limited "to unit business" and that permitting such activity will lead to the filing of charges, is no justification at all, indeed there could be none. Just as in *Romo Paper Products Corp.*, 220 NLRB 519, 526 (1975), "as long as the Respondent insisted on these demands it adopted a position so demonstrably antithetical to the bargaining principle as to constitute a defiant breach of Section 8(a)(5)."

The employees also would have been at last equally well off without the Union as to those among the 23 agreed items that merely provided the existing YAYCO benefits granted unilaterally to all nonunion employees. Even to achieve parity with nonunion employees, numerous bargaining sessions were held before Prentice-Hall would finally agree to provide YAYCO benefits, e.g., in the areas of profit sharing, leave of absence, holidays, severance pay, and vacations (this last agreement not having been reached until October 22 after the exchange of eight written proposals). Furthermore in a number of areas the Company, without adequate explanation, refused to offer benefits provided the LLSD employees. For example, without any restriction on the time for jury duty imposed on the 15 percent of nonattorney-editors in the LLSD unit, Prentice-Hall insisted on such limits for the composition service employees. Also credit union checkoff was rejected for these em-

[90] Although there is no evidence or claim of independent 8(a)(1) or (3) conduct in this proceeding, I note that this Employer has been found to have violated those sections of the Act by conduct engaged in the period immediately prior to, and overlapping the beginning of, negotiations in this proceeding regarding certain clerical employees employed at its West Nyack, New Jersey facility where the same charging union had engaged in organizing activities in mid- to late-1979. *Prentice-Hall, Inc.*, 258 NLRB 1340 (1981).

[91] "Viewed together, these three interrelated demands—broad freedom to act unilaterally in the treatment of employees, denial of an amicable and definite method for final resolution of the predictable and recurring disputes in the administration of the contract and the surrender of the employees' statutory right to act in concert—pervasively indicate a pervasive intent to deny the employees the right to an effective collective voice in their economic destinies." *Kayser-Roth Hosiery Co.*, id. at 1003.

[92] For 2 months after making its bargaining proposals on April 1, Respondent would have even prohibited steward-employer grievance meetings any where or time on its premises.

ployees as was arbitral review of seniority decisions, at the same time these were agreed to in the second LLSD unit contract. As to the other benefits article, there was some prevarication, but finally, no justification, for Prentice-Hall's refusal to incorporate the YAYCO benefits by reference as it had in the LLSD agreements. See sec. II,D,12, supra. Requiring the Union to list these other benefits seriatim before agreement about their retention could be reached was another cause of the stretch out in bargaining which prolonged it to the end of the certification year. Another area where the duration of bargaining, covering almost every session held from their submission in April to October or November, showing the length to which the Company was prepared to go in setting up road blocks to meaningful agreement, was regarding both the arbitration and grievances articles. Their history is recounted at sec. II,D,4 and 5, supra, respectively. Although agreement was reached on one of the two grievances, the Company's proposals in certain procedural and even substantive areas where agreement would normally have been considered easily achievable excessively prolonged the negotiation process to the point when employee unrest and dissatisfaction with the Union could have been predicted.

Regarding wages, the Company's unwillingness to propose even a guaranteed minimum 5-percent increase in the face of persuasive evidence that such an increase conformed with existing companywide practice, see section II,D,10, supra, its exclusion of the article from arbitration, as well as its failure to provide the Union with any input into or even notice of an appraisal review system where the contracts Respondent claimed to rely on for preparation of its wage proposal all included either minimum increases or review and appeal review mechanism for denial of increases, buttresses the conclusion I have reached that the Union was effectively excluded from consulting or participating in setting *or* reviewing the terms and conditions of employment of unit employees.

This last point illustrates another tactic engaged in by Respondent, evidencing its lack of good faith. In a number of instances, including the foregoing—another arising in the area of its no-strike proposal, section II,D,7, supra, and a third appearing regarding seniority as governing order of layoff, section II,D,9, and section II,D,9 at fn. 51, supra—Respondent misinformed the Union that the contracts it had relied on to draft its proposals had provisions that fully supported the postition it was taking in the composition services bargaining.

It is no doubt true that Respondent made concessions in various proposals over the course of bargaining, that indeed 23 items were initialed and set aside, and that its movement in certain areas induced positive reactions from Senick at various times in the bargaining. Yet, certain of the concessions were of the nature of belated recognitions of the validity of fair and timeworn standards and procedures—for example the "just cause" standard for discipline of employees and the adoption of the provision relating to jointly sharing the costs of arbitration, compliance with time limits on processing of grievances and for selection of an arbitrator, which did not represent real movement toward agreement on the Company's part. As noted by the court in *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960), and as I find existed here "one must recognize as well that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or . . . to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail."

The Company was no doubt bargaining from a position of strength. It is relatively large and had substantial resources, not least of which is the experience of the members of its bargaining team, including its chief negotiator Kelly and lead counsel Canoni. The Union, having won the election by a paper-thin margin, and employing a relatively inexperienced negotiator operating with little organizational support, represented a unit constituting a very small percentage of Respondent's work force, in a work area in which 95 percent of the work it performs had been historically subcontracted outside the Company. Thus, the economic and practical realities gave the Company enormous advantages in striking a bargain that reflected these factors.[93]

What the facts show, however, is that the Company used its strengths to impose terms that it knew left the Union with almost no voice in the employment decisions affecting employees and with no effective consultative role in these matters.

Instead of recognizing the real nature of the legal issue presented by the history of the bargaining between the parties as analyzed here, Respondent's chief negotiator and counsel sought to dwell at the hearing on a fraudulent factual issue concerning whether during the course of bargaining, and at appropriate times, the Union's negotiator raised timely objections and voiced concern regarding the Company's proposals in key areas restricting the union participation in the establishment of working conditions and treatment of employees, resolution of disputes in the administration of the contract and the exercise of employee rights to protest, act in concert, and pursue claims in other forums. I conclude that the Respondent's agents' emphasis on an issue they knew lacked credibility in light of the later production of its bargaining notes, reinforces the conclusion I have reached based on the totality of the circumstances including these discredited tactics, that Prentice-Hall engaged in a course of conduct from the outset of bargaining, which manifested an unwillingness and lack of desire "to reach ultimate agreement, to enter into a collective-bargaining contract" *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960).

It also follows from what has already been concluded, that Respondent's withdrawal of recognition from the Union as exclusive bargaining representative in the certi-

[93] The bargaining on the subcontracting clause reflected this disparity, as did the periodic company references to employee turnover and its difficulties in restaffing the unit. Although the bargaining on subcontracting may not have risen to the level of a refusal to bargain, the Company's inflexibility on providing any protection for existing employees jobs, if only procedural in nature, reflects on employer motivation. So, too, the various delays in bargaining sessions which I have found attributable, without justification, to Respondent although not forming the basis of the decision I reach here, reflects as well on employer motivation.

fied unit, by its letter of November 18, 1981, at a time when it had not fulfilled its bargaining duty toward the Union, constitutes an independent violation of Section 8(a)(5) and (1) of the Act. Respondent's assertion of a good-fatih doubt in that letter, based at least in part on a petition signed by an apparent majority of unit employees, is rendered a nullity by its pattern of bad-faith bargaining. Of course, Respondent's prior unlawful course of conduct completely taints the signature petition as well as the decertification petition filed in Case 22-RM-588, previously dismissed by the Acting Regional Director.

It remains for other defenses raised by Respondent in its brief to be considered. In section II,D,15, and in the Analysis and Conclusions section; paragraphs 22-24, supra, Respondent first asserts that Kelly never indicated that Prentice-Hall's position on management rights or arbitration was a final position. At the last meeting, on November 5, in response to Senick's inquiry, Kelly responded that he would consider union proposals on arbitration, just cause, or seniority. Respondent further points to Senick's acknowledgement that no final position had been taken on any matter by Prentice-Hall. With these open items and the seven items agreed on in the last three sessions and two in the last session alone, bargaining had not been completed. In *Alkahn Silk Label Co.*, 193 NLRB 167, 172 (1971), cited in support of this theory, in contrast to the case at bar, by the fourth, if not the third, of a series of postsettlement meetings, the employer had made a wage offer slightly higher than the union's last preceding wage proposal, and tentative agreement had been reached on articles for a contract except for three noneconomic items of arbitration, checkoff, and union security. After the union had indicated its unwillingness to sign without some form of either union security or checkoff, and some form of arbitration and had made revised proposals in these areas at the last meeting, respondent indicated its willingness to bargain further on these matters. It did so by its vice president's stating there was merit to the union's latest arbitration proposal and he was willing to discuss the possibility of agreeing to it. It was the union's failure to follow up on this offer to further negotiate that led to the conclusion of the administrative law judge, affirmed by the Board, that bargaining had not yet been completed and the postsettlement complaint alleging a refusal to bargain was dismissed.

Regarding management rights, at the last meeting, when Senick said if the precedence language (incorporated since June 11 in the Company's written proposal) was deleted from the arbitration article, then the parties would be close on both arbitration and management rights, Kelly's response was, "We will look at this and consider it." Thus, 10 meetings after first proposing the limitation on an arbitrator's discretion and first stating that this provision "is very important to us" and first learning that this provision was a "problem" for the Union, Respondent claims that Kelly's words mean that movement is possible. I cannot agree, not with the lengthy bargaining history on this clause presented on this record. See also my finding at section II,D,4, fn. 27 that the breach was profound as early as June 11. Kelly's response, consistent with other statements by him which also held out false hope of movement, is just another instance of the surface bargaining in which Respondent engaged. Following this meeting, Kelly canceled one scheduled for November 19 and refused to meet again on any bargaining subjects.

At the last meeting, Kelly's response to Senick's inquiry about making just cause subject to arbitral review, "Not at this stage. It falls under an area we feel is best served by management's sole review" hardly shows an openness or willingness to consider change. Kelly's later comment that "we will consider proposals you have in the matter" of arbitration and just cause or on seniority does not show any movement in light of its consistent longstanding opposition to third-party arbitral review in these areas. In essence, Respondent was paying lip service to the bargaining principle without making any meaningful effort to reach agreement. *Alkahn Silk*, supra, is thus clearly distinguishable on the facts. Neither is it necessary for the General Counsel to establish that an impasse was reached on any of these subjects, so long as Respondent insisted, until it ceased to bargain, on demands which are antithetical to the bargaining principle, *Romo Paper Products Corp.*, supra.

Respondent also claims in its brief (R. Br. 66) that in *Gehnrich & Gehnrich, Inc.*, 258 NLRB 528 (1981), the Board rejected the argument that the making of a proposal discriminatory of rights of economic strikers, not insisted on and later withdrawn, and not implemented, was not unlawful. Thus, by implication, Respondent's proposal seeking the waiver of Section 7 on the premises of organizational rights, later withdrawn, was not unlawful.

In *Gehnrich*, unlike the instant proceeding, the administrative law judge and the Board, including the dissent, did not conclude that the employer was engaging in surface bargaining. Also, the demand in *Gehnrich* was not an unlawful one, concerning rights of strikers, which could be waived, see *Gem City Ready Mix Co.*, 270 NLRB 1260 (1984), unlike the demand regarding basic organizational rights in the instant case, see *Magnavox Co.*, supra.

Furthermore, unlike the situation in *Gehnrich*, Respondent maintained its unlawful demand consistently for 8 months, switching it from one article to another, and, only at the last meeting, just prior to the expiration of the certification year, withdrawing it. Such conduct here, in contrast to *Gehnrich*, cannot be weighed without also placing it in a context of other proposals and bargaining and trial tactics, indeed, the totality of Respondent's conduct, which demonstrates that it was seeking to avoid an agreement.

Regarding the string of citations appearing in Respondent's briefs (R. Br. 67-68), I would reject the conclusions in each of them as inapplicable to the facts at hand. In the final analysis, the ultimate finding of bad faith is based on the totality of the circumstances. *NLRB v. Milgo Industrial*, 567 F.2d 540, 545 (2d Cir. 1977). Those circumstances here are most closely related to the cases on which I have relied. When, in addition to a close analysis of the proposals Respondent made, its con-

duct and tactics in bargaining and at trial are also weighed, the conclusion is strong that this employer did not meet its obligation "to make *some* reasonable effort in *some* direction to compose his differences with the Union," the minimum requirement "if Section 8(a)(5) is to read as imposing any substantial obligation at all." *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 135 (1st Cir. 1953).

Respondent also suggests that *Aughenbaugh v. North American Refractories Co.*, 65 LRRM 2968, 2971 (Pa. Sup. Ct. 1967), would not preclude a breach of contract action filed by the union where the grievance article was said to provide an exclusive remedy (R. Br. 65). *Aughenbaugh* must be limited to its facts. Those show that the agreement provided that "Complaints arising under the provision will be subject for discussion by the Company and the Union only at the Union's request." That language was held not to spell out any element of finality; or in context, any inference of finality. In contrast, the "sole and exclusive means" language in the arbitration article surely spells out a finality; it directly precludes any other means of settling all disputes that may arise. The parties' discussions, in particular, the ones held on April 1 and June 4, show union recognition of the impact of this clause and no respondent attempt to allay the Union's misgivings. Finally, Kelly admitted the preclusion of court suit under the language at the hearing.

Finally, Respondent relies on the holding by the Board in *Chevron* to support its defense, claiming its facts closely parallel those in the case sub judice. *Chevron* is clearly distinguishable on the facts, unlike the arbitration, grievance, and management-rights proposals in *Chevron*. Prentice-Hall insisted on its precedence language to the end, excluded major terms and conditions of employment, including discharge and discipline, seniority and other benefits, from arbitration, and closed the circle by precluding union or employee suits even where grievances on all disputes arising between them could only end in the employer's unilateral review. Unlike the *Chevron* no-strike proposal, injunctive relief and substantial liquidated damages are obtainable and recoverable on immediate court suit without the necessity of exhaustion of the arbitration process, and Respondent insisted on union steward responsibility in a separate article irrespective of whether he actually participated in strike action. Further, unlike the fact in *Chevron*, the Respondent never proposed any across-the-board wage increase whatsoever and relied on other contracts, falsely, to preclude even evaluation procedures and review mechanisms to assist employees in improving and so, warranting, merit increase. Furthermore, far from ending up with improvements over the terms Respondent had agreed to in the LLSD units, Prentice-Hall, without reasonable explanation and, in at least one case with an explanation which was false, insisted on terms no better than and, in some cases, worse than those received by the LLSD employees. Finally, Respondent's unlawful demand for waiver of basic organizational rights has no counterpart in the *Chevron* case. Neither did its bargaining tactics throughout the period covered by the sessions designed to unduly prolong the process without any real attempt to come to agreement, nor its conduct at the hearing, relying knowingly and heavily on claimed but false union acquiescence in its proposals.

CONCLUSIONS OF LAW

1. The Union is the certified bargaining representative for Respondent's employees in the following appropriate unit:

> All full-time and regular part-time advertising production coordinators, camera operators, compositors, pasteup artists, system operators, quality control personnel, control clerks and proofreaders employed by the Employer in its Composition Services Department at its Englewood Cliffs, New Jersey facility but excluding all managerial employees, confidential employees, casual employees, professional employees, watchmen, guards and supervisors as defined in the Act.

2. Respondent violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith with no intention of entering into any final or binding collective-bargaining agreement and by withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the employees in the unit described in paragraph 1.

3. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.[94]

THE REMEDY

Having found that Respondent engaged in the unfair labor practices set forth above, I recommend that it cease and desist from such conduct or like or related conduct and take affirmative action to effectuate the policies of the Act. I shall also recommend that Respondent be ordered to bargain collectively in good faith, on request, with the Union as the exclusive bargaining representative of its employees in the above unit; in the event that an understanding is reached, to embody such understanding in a signed agreement; and to post the attached notice.

In order to ensure that the employees will be accorded the statutorily prescribed services of their elected bargaining agent for the period provided by law, I shall recommend that the initial year of certification begin on the date that Respondent commences to bargain in good faith with the Union as the bargaining representative in the appropriate unit. *Southern Paper Box Co.*, 193 NLRB 881, 883 (1971).[95]

[94] Respondent's motion to correct typographical errors in the record is granted. Copies of that motion have been incorporated into the official record of this case.

[95] Although I am precluded from concluding that Respondent unlawfully refused to bargain prior to the May 5, 1981 date alleged in the complaint (because the General Counsel does not allege a prior date and Sec. 10(b) of the Act would not permit it), nonetheless, I am confident in concluding that the Employer's totality of conduct both within and without the 10(b) period is such that the period of required bargaining will be 1 year with no setoff for the period of some 3-1/2 months from the commencement of bargaining not alleged as a violation of the bargaining obligation in the complaint. Cf. *Glomac Plastics*, 234 NLRB 1309 (1978), enfd. 592 F.2d 94 (2d Cir. 1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[96]

ORDER

The Respondent, Prentice-Hall, Inc., Englewood Cliffs, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with District 65, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO by bargaining with the Union in bad faith with no intention of entering into any final or binding collective-bargaining agreement and by withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time advertising production coordinators, camera operators, compositors, pasteup artists, system operators, quality control personnel, control clerks and proofreaders employed by the Employer in its Composition Services Department at its Englewood Cliffs, New Jersey facility but excluding all managerial employees, confidential employees, casual employees, professional employees, watchmen, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above-named Union as the exclusive bargaining representative of its employees in the above-described unit, and embody in a signed agreement any understanding reached. The initial year of the Union's certification as the exclusive bargaining representative of the employees in the above-designated unit will begin on the date Respondent commences bargaining in good faith with the Union as such representative.

(b) Post at its facility in Englewood Cliff, New Jersey, copies of the attached notice marked "Appendix."[97] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[96] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[97] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with District 65, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO as the exclusive bargaining representative of our employees in the unit described below:

> All full-time and regular part-time advertising production coordinators, camera operators, compositors, pasteup artists, system operators, quality control personnel, control clerks and proofreaders employed by the Employer in its Composition Services Department at its Englewood Cliffs, New Jersey facility but excluding all managerial employees, confidential employees, casual employees, professional employees, watchmen, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above Union as the exclusive representative of our employees in the appropriate bargaining unit as stated above, and embody any understanding reached in a signed agreement.

PRENTICE-HALL, INC.

Seligman & Associates, Inc. and its Wholly Owned Division, Scott Management Company *and* Local 79, Service Employees International Union, AFL–CIO *and* David Younce. Cases 7–CA–13576, 7–CA–13752 (1–4), 7–CA–14086, and 7–CA–13948

July 29, 1988

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On December 14, 1984, the Board issued its Supplemental Decision and Order in this proceeding,[1] requiring the Respondent, inter alia, to pay backpay to unlawfully discharged discriminatees David and Susan Younce. On a petition for enforcement, the United States Court of Appeals for the Sixth Circuit denied enforcement in relevant part.[2] The court found that the Younces had willfully failed to mitigate their losses because they "had deliberately refused to seek comparable and equivalent employment opportunities [in their former work as apartment caretakers] and that such work was in fact available at all relevant times."[3] In this regard, the court relied on uncontroverted evidence from the Respondent that apartment caretaker couple positions comparable to the Younces' former employment were available in the Detroit area monthly throughout the entire 6-1/2-year period covered by the backpay specification. Although the Younces had occasionally succeeded in obtaining other interim jobs while seeking a change in lifestyle, the court reasoned that a wrongdoing employer does not have to underwrite such activity indefinitely when comparable and equivalent job opportunities were so clearly available.

Accordingly, the court remanded this proceeding to the Board for recomputation of the backpay award, taking into account the court's willful loss finding. The court left to the Board the determination of "what would have been a reasonable time for the Younces to wait after rejecting the [invalid] offer of alternative employment made by Seligman" on November 11, 1976.[4] Subsequent to the court's remand, both the General Counsel and the Respondent have filed statements of position. The Respondent has also filed a response to the General Counsel's statement.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having accepted the court's remand, and having duly considered the parties' statements of position, we accept the court's opinion as the law of the case. Contrary to the General Counsel, we view the court's finding of willful loss of earnings as comprehensive of the entire postdischarge period rather than just the time from the Younces' October 7, 1975 discharge until the spring of 1978, when they moved away from the Detroit, Michigan area of their former employment. It is clear from the court's opinion that the court was cognizant of evidence both that the Younces secured numerous interim jobs and that they made some inquiries about caretaking jobs after moving from upstate Michigan to Wisconsin in the summer of 1980. Consequently, although the court is not explicit on this point, we find that its decision to recompute the Younces' backpay award limits us to determining that initial period in which it may have been reasonable for the Younces to explore alternatives to their former profession and after which no further backpay is appropriate in light of their failure to seek available caretaking jobs.

The Respondent contends that the Younces are not entitled to any backpay because they have already received the equivalent of 6 weeks' gross backpay by remaining in their apartment for 6 months after their unlawful discharge without paying rent. The General Counsel has made no specific alternative contention concerning the definition of an initial reasonable period for the Younces to have refrained from seeking available caretaking positions. Under the particular circumstances of this case, including the law of the case as decided by the court, we find merit in the Respondent's view that 6 weeks encompassed whatever period the Younces could reasonably have allowed to pass before initiating a search for caretaking positions. Accordingly, we find that David and Susan Younce are not entitled to any further backpay.[5]

[1] 273 NLRB 1216.

[2] *NLRB v. Seligman & Associates*, 808 F.2d 1155 (6th Cir. 1986), cert. denied (Jan. 19, 1988).

[3] Id. at 1165.

[4] Id. at 1168.

[5] The Respondent remains obligated, however, to remedy its unlawful discharge of the Younces by making a valid offer of reinstatement. Its failure to do so may result in backpay liability beyond the period covered by the backpay specification of this ligitation.

ORDER

On the basis of the opinion of the United States Court of Appeals for the Sixth Circuit and the entire record in this case, the National Labor Relations Board modifies its previous order so that no further backpay shall be due to discriminatees David and Susan Younce for the period covered by the backpay specification.

Western Stress, Inc. ***and*** **Thompson Della Cioppa** ***and*** **John Traynor** ***and*** **Manuel Gonzalez.** Cases 4–CA–14866–1, 4–CA–14866–2, and 4–CA–14866–3

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On July 19, 1985, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

The judge found and we agree that the Respondent violated Section 8(a)(1) of the Act by discharging employees Thompson Della Cioppa, Manuel Gonzalez, and John Traynor for refusing to cross the picket line set up at a customer's place of business.

On January 30, 1985,[4] the Respondent's operations superintendent, David Spencer, assigned Della Cioppa and Gonzalez to work on a project at the Gulf refinery in Philadelphia, Pennsylvania. Della Cioppa and Gonzalez were to work with other Gulf employees under Gulf Oil Supervisor Jerry Hansen. The two employees worked January 30 and 31, Wednesday and Thursday, without incident. They entered and exited the refinery through gate 51 in one of the Respondent's trucks, which was clearly marked with the Respondent's decal and logo. On January 31, Hansen informed Gonzalez that there might be picketing at gate 51. The next morning, Friday, February 1, Della Cioppa and Gonzalez entered the refinery through gate 24 in an unmarked car. That day Hansen told the two employees that there would definitely be a strike on the following Monday, February 4,[5] and that they should report to work through gate 24 in an unmarked car. Della Cioppa and Gonzalez were also advised to exit the refinery through gate 51, which had been assigned to the Union for primary picketing. When they left the refinery on February 1, Della Cioppa asked the guard if it would be all right for them to use gate 51 on the following Monday. The guard told them not to use the gate because there would be picketing at all gates and if they tried to go through the gate they would be beaten up.

On returning to the Respondent's facility, Della Cioppa and Gonzalez told Spencer and Operations Manager Raymond Toppin that if there were a strike on Monday they preferred not to cross the picket line. They also told Spencer and Toppin that they felt conditions were unsafe as they had heard that some employees of another company had been beaten up after leaving the refinery through gate 51. Spencer responded that as the strike was not scheduled to start until 7:30 a.m. on Monday, Della Cioppa and Gonzalez should report to the refinery at 7 a.m. in an unmarked vehicle. After this meeting, Della Cioppa and Gonzalez discussed the situation with other employees for about 2 hours and decided that if there were a picket line at the refinery on Monday they would not cross it for reasons of safety and business ethics.

On Monday, February 4, Della Cioppa and Gonzalez arrived at the refinery at 7:30 a.m. instead of at 7 a.m. as instructed by Spencer because they did not want to arrive before the pickets, enter the gate without obstruction, then later find themselves trapped behind the picket line on the way out. On arriving, the two employees found about 40 to 50 pickets at gate 51. A truck that was attempting to enter through that gate was surrounded by a crowd of pickets.

Della Cioppa and Gonzalez decided not to enter the site and made several trips around the refinery to assess the situation. They found pickets at all the gates. Gonzalez called Spencer and told him that they did not want to cross the picket line. Spencer instructed them to meet Hansen at gate 24. Gonzalez indicated that because he felt it would be unsafe and for business reasons he still did not want to cross the picket line. Della Cioppa and Gonzalez returned to the Respondent's facility.

Before Della Cioppa and Gonzalez arrived, Traynor was asked if he would cross the picket line to work at the refinery. Traynor told Spencer

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In agreeing with the judge that the discrepancies in Della Cioppa's and Gonzalez' timesheets do not preclude a remedy here, we rely solely on the judge's finding that there is no evidence that the Respondent would have terminated these employees on the basis of this misconduct in the absence of their protected activity.

[4] Unless otherwise indicated all dates are in 1985.

[5] We correct the judge's inadvertent error that the date was July 4.

that he did not want to cross because he did not have enough facts as to who was striking and why.

On arriving at the Respondent's office, Della Cioppa and Gonzalez told the other technicians about the pickets and the violence involving the employees of another company. When Gonzalez was summoned to the phone to speak with the Respondent's regional general manager, he was told that if he refused to go to the refinery he would be laid off. Toppin then asked Della Cioppa, Gonzalez, and Traynor each, if they would go to work at the refinery. Della Cioppa and Gonzalez refused. Traynor told Toppin that he felt that more information was necessary. Toppin responded, "You know your option." All three employees were discharged.

Later that morning, Spencer and technician William Mason went to the refinery, completed the job, and left the site around 2 or 2:30 p.m., apparently without incident.

The judge found that the Respondent unlawfully discharged the three employees for their refusal to cross the picket line at the Gulf refinery. In so finding, the judge relied on *Business Services By Manpower*, 272 NLRB 827 (1984); and *ABS Co.*, 269 NLRB 774 (1984), in which the Board held that the Act protects an employee's refusal to cross a picket line even when the sole motivation is fear.[6]

The Respondent argues that the Board should balance its legitimate business reasons for discharging the employees—performance of work assignments—against the employees' interest in the concerted activity at issue here and find that the type of conduct engaged in by Della Cioppa, Gonzalez, and Traynor is entitled to less weight than the Respondent's valid business considerations.

Even under this approach, the Respondent's interest in the performance of its work assignments is outweighed by the Section 7 rights of the employees in refusing to cross a stranger picket line. As found by the judge, the work that the three dischargees refused to perform was performed by Spencer and employee Mason within 1 or 2 hours of the discharges and was completed in a couple of hours. Thus, this is a case in which the work that the dischargees failed to perform could be completed with little or no disruption in the Employer's operation or with only a harmless delay. Moreover, the dischargees had given the Respondent advance notice on Friday of their concern regarding crossing the picket line on Monday morning. Thus, this case is plainly distinguishable from *Business Services by Manpower*, 272 NLRB 827 (1984), enf. denied 784 F.2d 442 (2d Cir. 1986). In denying enforcement of the Board's order, the Second Circuit noted that the nature of the operation in that case—a temporary help service—rendered the smooth replacement of the employee or performance of the work impossible, so that the failure of these employees to report to work meant that business was lost forever. As shown above, this factor does not exist in this case.

The Respondent also stresses that Gonzalez and Della Cioppa were instructed to arrive early so that they would not have to cross the picket line to enter the plant. As the judge found, Gonzalez and Della Cioppa did not want to arrive before the picket line was set up, enter the gate, and later find themselves caught behind the picket line, subject to possible violence. We cannot agree that the employees' refusal to arrive early weakens their Section 7 interests. Gonzalez and Della Cioppa were discharged for refusing to cross a picket line, not for refusing to report early. Had the latter been the case, and only then, would we need to address whether the refusal to report early was itself an act in concert with the strikers.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Western Stress, Inc., Philadelphia, Pennsylvania, and Mt. Laurel, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER CRACRAFT, concurring.

I concur in the result. I would find a violation here under either the approach applied by the Board in its decision in *Business Services by Manpower*, 272 NLRB 827 (1984), enf. denied 784 F.2d 442 (2d Cir. 1986), or under the balancing test applied by the Second Circuit in that case and advocated by the Respondent here.

Marvin L. Weinberg, Esq., for the General Counsel.
Doris J. Dabrowski, Esq., of Philadelphia, Pennsylvania, for the Respondent.

[6] We note that, although the judge concludes that Della Cioppa, Gonzalez, and Traynor refused to cross the picket line out of fear for their personal safety, in his discussion of the facts the judge presents evidence that Della Cioppa and Gonzalez were also motivated by business ethics. As we agree with the judge that the employees were protected by Sec. 7 regardless of whether their motive for refusing to cross stranger picket lines was fear, we need not reach this alternative basis for Della Cioppa's and Gonzalez' refusal to cross the picket line.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on 8 May 1985[1] at Philadelphia, Pennsylvania. The charges in Cases 4–CA–14866–1 and 4–CA–14866–2 were filed on 6 February by Thompson Della Cioppa, and John F. Traynor, respectively. The charge in Case 4–CA–14866–3 was filed on 7 February by Manual Gonzalez.[2] The complaint issued 27 March alleging that the above-named individuals were terminated by Respondent Western Stress, Inc. on 4 February because they concertedly refused to work at Respondent's jobsite at the Gulf Oil Corporation's Philadelphia refinery because of adverse working conditions in violation of Section 8(a)(1) of the Act. Respondent, in its answer and amended answer, denied the commission of any unfair labor practices.

The parties were represented at the hearing and afforded full opportunity to be heard and to present evidence and argument. Briefs were filed by both the General Counsel and Respondent.

On the entire record in the case, my observation of the demeanor of the witnesses, and after giving full consideration to the briefs, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, a Texas corporation with an office and place of business in Mt. Laurel, New Jersey, is engaged in the service of onsite heat treating of process piping and vessels at various refineries, powerhouses, chemical, and fabrication plants located throughout the United States. During the past year, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $1 million and purchased and received materials valued in excess of $50,000 directly from points located outside the State of New Jersey. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Supervisory Issue

As noted above, Respondent does onsite heat treating of process piping and vessels. As of 4 February, the date of the alleged unfair labor practice, it employed eight full-time technicians and four part-time technicians, the latter on an on-call basis, three salespersons, a secretary, an operations manager, and an operations superintendent, all nonunion.

Operations Superintendent Spencer or Operations Manager Toppin assigns Respondent's technicians to their jobs, and the latter report directly to these two members of management. At the jobsite, the technicians do the actual physical labor involved in the heat treatment but may also oversee fellow employees or employees of other employers, union or nonunion, doing the actual physical labor. Whether a particular technician is to be employed as a helper on a project, or is to be a lead technician is determined by Spencer or Toppin. In each case, the designation of lead technician is based on which technician is first on the job, which has the most overall experience, or which has the most experience with regard to a specific type of job. The lead technician, whoever it might be, is responsible for filling out daily time tickets that keep track of the technicians' time, weekly timesheets, and project forms. At one time or another, all three of the alleged discriminatees have worked as helpers and as lead technicians.

Thompson Della Cioppa, a level 2 field technician, has worked for Respondent for 4 years, and at the time of his discharge was earning $9.50 per hour while working in the field, and $7 per hour while working in the shop or on travel. Della Cioppa worked directly under Spencer, the person who hired him, and was assigned as lead technician only when he worked with part-time or casual employees. On these occasions, he received no increase in wages over and above those he earned when he worked as a helper doing only manual labor. Della Cioppa credibly testified that he did not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, or interview for employment either Respondent's other employees or employees of other employers.

John Traynor, a level 3 senior technician, has worked for Respondent for 4 years and 9 months and, at the time of his discharge, was earning $11.50 per hour while working in the field and $8 per hour while working in the shop or traveling. On these occasions, when Traynor was assigned the job of lead technician or supervisory technician on a project, he received no additional remuneration over and above his regular wages for performing these duties. Traynor did not interview employees for hire nor did he have authority to hire, fire, transfer, suspend, promote, reward, or discipline Respondent's employees or the employees of other employers working with him on the job.

Manuel Gonzalez, a technician, has worked for Respondent for 6 years and 8 months and, at the time of his discharge, was earning $10.50 per hour for field work and $7 per hour for shop work and travel. Gonzalez credibly testified that he has on occasion served as leadman on some projects but if he arrived on a job after other technicians were already on the job, he would not be assigned as leadman. Similarly, if other technicians on a particular project had more experience than he had, Gonzalez again would not be assigned to the leadman's position. Whether Gonzalez worked as leadman or field technician, he still received the same hourly wage. Gonzalez did not interview employees for hire nor did he have authority to hire, transfer, promote, recall, discharge, lay off,[3] or suspend either Respondent's employees or those of other employers.

[1] All dates are in 1985 unless otherwise indicated.

[2] The motion of counsel for the General Counsel to correct spelling is granted.

[3] Gonzalez credibly testified that on one occasion, on the Eddystone job, he laid off certain union craft workers hired by Respondent but that the decision to do so was not his own. Rather, he merely served as a

Continued

The record reveals that all the 10 full-time technicians have, at one time or another, served as lead technicians; that when so serving, they performed physical labor right alongside other employees; that the type of work performed by the lead technicians was the same as that performed by other technicians except for the filling out of various forms; that the designation of leadman was determined by which employee arrived first on the job or by which one had the most experience in general or in particular in the type of work being performed; and that the leadmen did not receive any remuneration over and above his regular wages.

I conclude from the above that when the technicians, including Della Cioppa, Traynor, and Gonzalez served as leadmen they had none of the authority usually associated with supervision; that the control that they exercised was merely derived from their experience in the type of work involved; and that whatever direction they exercised reflected that of a more experienced employee helping a less experienced one, rather than the authority responsibly to direct, as recognized in connection with the statutory definition of supervisor. *Bugle Coat, Apron & Linen, Inc.*, 132 NLRB 1098 (1961). In short, I find that Della Cioppa, Traynor, and Gonzalez were and are rank-and-file employees, and not supervisors as defined in the Act.

The Discharges

On 30 January, Respondent's Operations Superintendent Spencer assigned employees Della Cioppa and Gonzalez to work on a project at the Gulf refinery, Philadelphia, Pennsylvania. They were to perform mechanical physical labor on a compressor located there, and were assigned to work with other Gulf employees under Gulf Oil Supervisor Jerry Hansen. On Wednesday and Thursday, 30 and 31 January, the two employees went to work without incident, entering and exiting refinery gate 51 in one of Respondent's pickup trucks clearly marked with its decal and logo.

On January 31 Hansen advised Gonzalez that the following morning, Friday, 1 February, there might be picketing at gate 51 and suggested that Gonzalez and Della Cioppa report to work the following day in an unmarked vehicle. In accordance with Hansen's instructions, Gonzalez and Della Cioppa drove to work the following day in an unmarked car, entering the facility through gate 24. That day, Hansen told the two employees that the following Monday, 4 July, there would definitely be a strike and that they should report to work on that day, once again in an unmarked car, and enter through gate 24. He added that they would probably finish the job on Monday and, after doing so, should exit through gate 51, the very gate that Gulf assigned to the Union for primary picketing.

On leaving the refinery grounds through gate 51 on Friday, 1 February, Della Cioppa asked the guard if it would be all right for them to use that gate the following Monday. The guard replied that Della Cioppa and Gonzalez should not use gate 51 on Monday because there would be picketing at all gates, and that if they tried to go through the gate, they would be beaten up. When Della Cioppa and Gonzalez arrived back at Mt. Laurel, they advised Spencer and Toppin that if there were a strike on Monday at the refinery they preferred not to cross the picket line. They informed their superiors that they had been told that certain employees of Joule Maintenance Corporation had been beaten up after leaving the refinery through gate 51, and felt that conditions were unsafe. Spencer replied that the strike was not scheduled to start until 7:30 a.m. on Monday, and that Della Cioppa and Gonzalez should report to the project at 7 a.m. driving an unmarked vehicle. He told them to give him a call if there was any problem. Following this discussion, Della Cioppa and Gonzalez went out to the parking lot, where they remained for about 2 hours discussing with other technicians the forthcoming strike, the expected picketing, the possible hazard connected with crossing the picket line, their safety, and what they should do the following Monday. Previous incidents of strike violence directed at Respondent's employees were also discussed. As a result of these considerations, Della Cioppa and Gonzalez decided that they would go to the refinery the following Monday, but if there was a picket line, they would not cross it, both for reasons of safety and business ethics.[4]

Despite Spencer's instructions that they should arrive at the jobsite at 7 a.m., before the picket lines were established, Della Cioppa and Gonzalez reported at 7:30 a.m. because they did not want to arrive before the pickets, enter the gate without obstruction, then later find themselves trapped behind the picket line, subject to possible violence on the way out. They found two or three pickets at gates 24 and 19, and about 40 to 50 more at gate 51. At gate 51, a truck attempting to gain entrance was being surrounded by the crowd of pickets. Someone was taking pictures of the truck and its driver. Della Cioppa and Gonzalez at that point decided that they would not attempt to enter the refinery. They proceeded to drive around the refinery grounds, taking second and third looks at the various gates, but found none of them free of pickets at any time.

Finding no apparent change in the situation after several trips around the block, Gonzalez called Spencer from a telephone booth, told him that there was picketing at every gate, that he felt it was unsafe to cross the picket line, and that he preferred not to do so. Spencer told Gonzalez to call back in a little while. When he did so, Spencer advised him that he had been in contact with Hansen and that Hansen had informed him that he, Hansen, had gotten into the refinery without any problem and that Della Cioppa and Gonzalez should report to gate 24 where Hansen would pick them up. Gonzalez replied that he still felt it would be unsafe and, for this and business reasons, he did not want to cross the picket line. Della Cioppa and Gonzalez then returned to Mt. Laurel.

conduit of orders decided on by his superior. When the testimony of Regional Administration Manager Thomas Dougher conflicts with that of Gonzalez, the latter is credited.

[4] By business ethics Gonzalez meant that he had reservations about going through a picket line manned or supported by people with whom he might eventually have to work again, shoulder to shoulder.

Before Della Cioppa and Gonzalez arrived at the Mt. Laurel office, Toppin asked Traynor if he would be willing to cross the picket line to work at the refinery. Traynor decided that he would not and went into Spencer's office to say so. He told Spencer that he was unwilling to cross the picket line because Respondent did not have enough facts about who was striking and why. Toppin, Spencer, and Traynor then discussed the violence that had occurred involving the Joule employees and agreed that they could not blame Della Cioppa and Gonzalez for refusing to cross the picket line. Traynor asked Toppin to call the Union or go over to the refinery, presumably to get more information, but Toppin refused, stating that it was not the Respondent's problem. Traynor then discussed the situation at the refinery with the other technicians present.

When Della Cioppa and Gonzalez arrived, they engaged some of the other technicians present in conversation. Gonzalez told them what they had seen at the picket lines at the refinery and of the violence that had occurred involving the Joule employees. At that point, Toppin advised Gonzalez that Regional General Manager Paul Napeloni was on the phone and wanted to speak with him. When Gonzalez got on the phone, he told Napeloni that there was picketing at all gates at the refinery, and that he did not feel that it was either safe or good business to go through the picket line. Napeloni replied that Respondent was nonunion, had a commitment to Gulf, and if Gonzalez refused to go into the refinery he would be laid off. He then asked to speak to Toppin. After speaking to Napeloni, Toppin came out and asked Della Cioppa, Gonzalez, and Traynor, each separately, if they would go to work at the refinery. Della Cioppa and Gonzalez both refused. Traynor, having witnessed labor-connected violence in the past, was, like Della Cioppa and Gonzalez, also concerned for his safety. He told Toppin again that he felt that more information was necesssary. Toppin replied, "You know your option." To all he said, "If you don't go over there, that's it, you're done."[5] none of the three went to work at the refinery.

Later that morning, about 11:30, Spencer, along with technician Bill Mason went to the refinery, through the picket line, and did the job begun by Della Cioppa and Gonzalez. They completed the work and left the jobsite about 2 or 2:30 p.m. apparently without incident.

On 19 February Gonzalez visited the Mt. Laurel office of Respondent to pick up layoff slips for himself, Della Cioppa, and Traynor. After obtaining the requested slips, and as he was leaving, he noticed that the boxes on the slips labeled "discharge" and "resignation" were checked, whereas the one marked "layoff" was blank. Gonzalez realized that under these circumstances, he would be unable to collect unemployment. He returned, therefore, to Toppin's office where he asked for an explanation, inasmuch as he had been told on 4 February that he was being *laid off*, not discharged, if he refused to go to work behind the picket line. Toppin, however, denied that either he or Napeloni had used the term "layoff" during the conversations of 4 February. Gonzalez angrily called Toppin a "liar" and demanded to know if Toppin had given Napeloni the whole story. Toppin replied that he did not want to discuss it further, then proceeded to ignore Gonzalez. Gonzalez lost his temper and backhanded all of Toppin's books and papers off his desk. When Toppin threatened to call the police, Gonzalez left. Contrary to accusations leveled at Gonzalez by Toppin, Gonzalez credibly testified that he did not strike, swing at, or threaten Toppin.[6]

[5] Elsewhere, Gonzalez testified that he was told by Toppin that he was laid off. Compare Tr. 36 and 38. Traynor testified (Tr. 76) that Gonzalez announced as he came out of Spencer's office that he and Della Cioppa had been fired for refusing to cross the picket line. I find that Gonzalez and the others were fired rather than laid off on 4 February.

Conclusion

The 8(a)(1) allegations

Record evidence in the instant case clearly reveals that Della Cioppa, Gonzalez, and Traynor refused to cross the picket lines established at the Gulf refinery because of fear for their personal safety. The record is equally clear that these three employees were terminated because they refused to cross the picket line for the reasons stated. In a recent Board decision,[7] the issue before me was discussed:

> Indeed, we recently held in *ABS Co.*, 269 NLRB No. 138, slip op. at 4 (1984), that the Act protects an employee's refusal to cross a picket line even where the employee's sole reason is a fear of personal bodily injury. We stated, "[T]he focal point of the Board's inquiry is the nature of the activity itself; the employee's motives for engaging in the activity are irrelevant."

I find that the cited cases are controlling, and that by terminating Della Cioppa, Gonzalez, and Traynor because they refused to go through the picket line at the Gulf refinery, Respondent interfered with these employees' Section 7 rights in violation of Section 8(a)(1).[8]

Gonzalez' Postdischarge Conduct

Respondent argues that even if a violation of Section 8(a)(1) is found with regard to the discharges of the three discriminatees, their misconduct precludes the award of any relief. In support of this argument Respondent points to certain discrepancies in the reporting time of Della Cioppa and Gonzalez while employed at

[6] Where Toppin's description of events differs from that of Gonzalez, insofar as the events of 19 February are concerned, I credit Gonzalez.

[7] *Business Services By Manpower*, 272 NLRB 827 at fn. 8.

[8] Respondent argues that the three dischargees lost the protection of Sec. 7 because the picket line they refused to cross was unlawful. The record is devoid of any evidence to support this contention. The consent decree dated 19 February contains a nonadmission clause and is not evidentiary as to what the situation was on 4 February at the refinery. Moreover, the dischargees were told to exit through gate 51, a legal primary picket site where 40–50 pickets were located and where those pickets were told by Gulf to picket.

Respondent argues further that the discharge of the three employees was necessitated by business considerations. However, the record indicates that the work that the three dischargees refused to perform was, in fact, performed by Spencer and Mason within 1 or 2 hours of the discharges, and was completed in a couple of hours. Thus, there was no business consideration behind the discharges. *Browning-Ferris Industries*, 259 NLRB 60 (1981), revd. 700 F.2d 385; *Business Services*, supra.

the Gulf refining job, a matter discovered after their discharge. With regard to these discrepancies and the minutes of worktime involved, I find that Della Cioppa and Gonzalez did not engage in such serious misconduct so as to forfeit the Section 7 protection accorded employees who participate in lawful activities. *Arrow Industries*, 245 NLRB 1376 (1979). Moreover, there is no evidence that Respondent would have terminated these employees on the basis of such misconduct absent their participation in protected concerted activities. *Arrow Industries*, supra.

Respondent's reliance on the events of 19 February as a basis for denying Gonzalez' reinstatement, I find to be inadequate in light of my earlier finding that Gonzalez neither threatened, swung at, nor struck Toppin. Though Gonzalez did, in fact, call Toppin a liar and did admittedly sweep Toppin's desk clear of Toppin's papers and books, an action certainly not condoned, it must be remembered that the confrontation was the direct result of Respondent's unlawful termination of Gonzalez and consequent denial to him of wages desparately needed. In my opinion, to deny Gonzalez his Section 7 rights and reinstatement because he showed visible signs of anger over the treatment he suffered would be unconscionable. Since no one was physically injured and there was no apparent damage to property as a result of the altercation, I shall recommend that Gonzalez not be denied reinstatement on the basis of the quarrel that took place on 19 February. *Hagerty Catering Co.*, 236 NLRB 1553 (1978).

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section II, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent unlawfully terminated Thompson Della Cioppa, John Traynor, and Manuel Gonzalez I shall recommend that Respondent offer them immediate reinstatement to their former positions or, if such jobs no longer exist, to substantially equivalent positions, without loss of seniority or other rights and privileges, discharging, if necessary, any replacements, and make them whole for any loss of earnings they may have suffered by reason of their unlawful terminations, by payment to them of sums of money equal to the amounts that they normally would have earned from the date of their termination to the date on which a bona fide offer of reinstatement is made, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[9]

CONCLUSIONS OF LAW

1. Respondent is, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Thompson Della Cioppa, John Traynor, and Manuel Gonzalez because they engaged in concerted activities for the mutual aid or protection guaranteed to employees by the Act, the Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Western Stress, Inc. Philadelphia, Pennsylvania, and Mt. Laurel, Maryland, its officers, agents, and assigns, shall

1. Cease and desist from

(a) Interfering with the rights of employees to engage in protected concerted activity by discharging employees for refusing to cross a lawful picket line.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Thompson Della Cioppa, John Traynor, and Manuel Gonzalez immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges dismissing, if necessary, any replacements and make them whole for any loss of earnings they may have suffered, in the manner set forth in the remedy section.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Remove from their files any references to the discharges of Thompson Della Cioppa, John Traynor, and Manuel Gonzalez on or about 4 February 1985, and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

(d) Post at its Philadelphia facility copies of the attached notice marked "Appendix."[11] Copies of the

[9] See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Nation-

Continued

notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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al Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interfere with the rights of employees to engage in protected concerted activity by discharging them for refusing to cross a lawful picket line.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL offer to Thompson Della Cioppa, John Traynor, and Manuel Gonzalez full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered.

WE WILL remove from our files any references to the discharges of Thompson Della Cioppa, John Traynor, and Manuel Gonzalez on 4 February 1985 and WE WILL notify them that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

All our employees are free to engage in concerted activities for their mutual aid and protection within the meaning of Section 7 of the Act or to refrain from such activities.

WESTERN STRESS, INC.

McLean County Roofing and Accurate Roofing *and* United Union of Roofers, Waterproofers, and Allied Workers, Local No. 69, AFL–CIO. Cases 33–CA–6083 and 33–CA–6198

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND JOHANSEN

On December 27, 1983, Administrative Law Judge James M. Fitzpatrick issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with the Decision and Order.

The Respondent, McLean County Roofing, is a sole proprietorship of David Riddle engaged in the business of roofing construction. In May 1977, the Respondent entered into the first of three successive 1-year collective-bargaining agreements with Roofers Local 130 covering all the Respondent's roofing employees. Throughout the term of the three agreements the Respondent deducted union dues and permit fees from a majority of its employees and made regular monthly contributions on their behalf to Local 130's pension fund. There is no evidence that Local 130 became the exclusive representative of the Respondent's employees through a Board-conducted election or by voluntary recognition based on a claim and clear showing of majority support among the Respondent's employees in an appropriate unit.

On January 1, 1980,[1] Local 130 merged with its sister local, Local 69 (the Union). Local 69 survived the merger and assumed responsibility for administrating the remaining 4 months of the Local 130 contract and for negotiating a successor agreement. On April 22 the Union, the Respondent, and representatives of other area roofing contractors who had been signatories to Local 130 contracts met to negotiate a successor agreement.[2] The parties used the existing Local 130 contract as a basis for negotiations but adjourned this meeting without reaching an agreement.

Riddle attended and represented the Respondent's interests at the April 22 meeting but did not attend the next negotiation session that took place on April 29. Following expiration of the contract on April 30, the parties met a third and final time on May 8 when agreement on a new contract apparently was reached. At this last session as at the first, Riddle did not specifically state that he agreed or disagreed with the contract proposals exchanged and agreed to by the Union and the spokesman for the contractors, although he did state he would not sign anything that would interfere with his making a living.

At the conclusion of the last negotiating session, the Union made arrangements to have the contract typed and mailed or hand delivered to the contractors. Joe Keen, former business representative of Local 130, delivered two copies to Riddle about June 1 and instructed Riddle to sign one and return it to the Union. Riddle told Keen that he "wouldn't sign it but I would try to live by some of it, whatever I could, but I couldn't live by the whole thing because it would break me." As noted by the judge, Riddle was disturbed by the contract's wage provisions that called for periodic raises over the next 2-1/2 years. Accordingly, he told Keen that he would probably sign if it was a 1-year contract.

The contract delivered by Keen, though otherwise complete, did not contain terms specifying its duration. Article 19 of the document was entitled "Duration of Agreement," but nowhere in that provision is a termination date either expressly stated or a procedure set out that provides for termination following notice given by one of the parties.

Union Business Agent Charles Ford visited Riddle in late June or early July to pick up a signed contract. Riddle claimed that he handed Ford an unsigned copy of the contract although Ford testified that the copy had Riddle's signature on it. No copy of the contract was produced at trial. The judge found the evidence insufficient to establish that Riddle had signed the contract.

Notwithstanding Riddle's refusal to sign the contract, the judge found that the Respondent became a contracting party because it substantially adopted and implemented the agreement. Having determined that the Respondent employed a permanent and stable work force during the relevant period, the majority of whom financially supported the Union with their dues, the judge concluded that the status of Local 69 as the representative of the Respondent's employees was, in effect, converted and governed by Section 9(a) of the Act rather than Section 8(f), and that Local 69 was entitled to

[1] All dates are in 1980 unless otherwise indicated.

[2] The Respondent participated in negotiations as a separate entity and not as a member of a multiemployer bargaining group.

recognition as the representative of the roofing crew on that basis.[3] Accordingly, he determined that the Respondent violated Section 8(a)(5) when it withdrew recognition from the Union in October 1982. We disagree.

In our recent decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), we rejected the "conversion doctrine" relied on by the judge and adopted instead the principle that a union signatory to an 8(f) agreement acquires immediate but *limited* 9(a) status and may enforce the agreement under Section 8(a)(5). Specifically "the obligations we impose on an 8(f) employer through our application of Section 8(a)(5) to 8(f) agreements are limited to prohibiting the unilateral repudiation of the agreement until it expires or until that employer's unit employees vote to reject or change their representative." *Deklewa*, 282 NLRB supra at 1387. Furthermore, "[t]he enforceable Section 9(a) status we confer on signatory unions is also only coextensive with the bargaining agreement which is the source of its exclusive representational authority. Beyond the operative term of the contract, the signatory union acquires no other rights and privileges of a 9(a) exclusive representative." Id. at 1387.

Implicit in these new governing principles is the fundamental requirement that the parties to an 8(f) relationship reach a meeting of the minds on all material terms and voluntarily enter into an agreement. As noted earlier, the collective-bargaining agreement is the sole source of the union's exclusive representational authority in the 8(f) context.[4] Absent an agreement, an 8(f) union has no limited 9(a) status. Here, the record does not support a finding that the parties entered into an agreement.

The Respondent's owner, David Riddle, never consented to be bound by an agreement and when the written contract was presented to him by the Union for signature he refused to sign it. He told the union business agent that he would live by some, but not all, of the agreement and he expressly stated that his reason for refusing to sign was the contract's lack of a 1-year durational term and its call for escalating wages at periodic intervals over 2-1/2 years.

The absence of a termination provision in the contract is further evidence that the parties did not have an agreement. The Board has refused to find a violation of Section 8(a)(5) when a contract, though otherwise complete, did not contain terms specifying its duration and the parties have reached no understanding with respect to that issue. *Springfield Electric Service Co.*, 285 NLRB 1305 (1987). Finding that the contract in that case was incomplete in an important respect, the Board effectively determined that it could not supply the omission and found the respondent did not unlawfully refuse to execute the contract.[5] In the case at bar, the contract presented to Riddle by the union business agent contained no termination date, despite the fact that all three contracts with Local 130 previously signed by Riddle explicitly provided for set terms of 1 year. The parties clearly failed to agree on a termination date. Indeed, Riddle told the Union that if it were a 1-year contract he would probably sign it on the spot.

The Respondent's statement that it would not sign the contract because "it couldn't live by the whole thing," the omission of a termination date, and the failure to sign the contract show that the parties never entered into a collective-bargaining agreement. That the Respondent substantially followed *most* of the provisions of the agreement[6] is not a substitute for a voluntary agreement on *all* material terms which is binding on the parties. The absence of such an agreement is particularly critical here, in an 8(f) relationship, when the Union's access to the provisions of Section 8(a)(5) can only be secured from, and is limited to, the duration of a valid 8(f) agreement. We, therefore, find that the

[3] The "conversion doctrine" provided that a collective-bargaining agreement/relationship governed by Sec. 8(f) could become an agreement/relationship governed by Sec. 9(a) on a showing by the Union that it enjoyed majority support among an appropriate unit of the signatory employer's employees. Under this doctrine, 9(a) status could be attained in the absence of a Board certification or a prior demand for recognition based on the clear showing of majority support.

[4] As we emphasized in *Deklewa*, we do not mean to suggest that a union involved in the construction industry could not achieve 9(a) exclusive representative status by the traditional means of voluntary recognition based on a clear showing of majority support among the unit employees, e.g., a valid card majority. *Deklewa*, supra, 282 NLRB at 1387 fn. 53. We have also held that in light of the legislative history and the traditional prevailing practice in the construction industry, we will require the party asserting the existence of a 9(a) relationship to prove it. Id. at 1385 fn. 41. Here, as noted earlier, there is no evidence that the Union attained 9(a) status either through a Board-conducted election or through voluntary recognition based on a prior claim and clear showing of majority support among the employees in an appropriate unit.

[5] See also *Roman Iron Works*, 282 NLRB 725 (1987) (a contract arises only after a meeting of the minds on all material terms); *Interprint Co.*, 273 NLRB 1863, 1865 (1985) (no meeting of the minds because, inter alia, the agreement lacked commencement and termination dates).

In the instant case, the judge noted the absence of a termination date and determined that the agreement was a contract with no fixed duration. However, the cases cited by the judge do not hold that contracts of no fixed duration are enforceable agreements. Instead, the cases cited by the judge concern questions of contract bar and do not reach the issue of whether there was a meeting of the minds on all material terms. Thus, in *Pacific Coast Assn. of Pulp & Paper Mfrs.*, 121 NLRB 990 (1958), the Board held that contracts having no fixed duration will not be considered a bar to a representation petition. Without addressing the issue of whether such contracts were otherwise valid agreements, the Board concluded that it would unjustifiably abridge the statutory right of employees to seek representatives if the contract-bar policy were extended to parties who did not enter into "mutual and binding commitments thereby reasonably insuring that for the duration of the agreement neither party will disrupt the bargaining relationship by unilaterally attempting to force changes in the conditions of employment upon the other." Id. at 994.

[6] The judge found that in certain respects the Respondent did not abide by the agreement.

Respondent did not violate Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union in October 1982 or in any other respect as alleged by the General Counsel herein.[7]

ORDER

The complaint is dismissed.

MEMBER JOHANSEN, dissenting in part.

I agree with the majority in all respects save one—the decision to overrule the judge's unexcepted-to finding that it was unlawful for the Respondent to tell employees "that it was a nonunion company and they was [sic] union. I said I would have to get some different help because you guys want to be union members." The majority converts this ultimatum to employees to choose between union membership and jobs into an innocuous statement that they must work under nonunion conditions and finds the ultimatum, in its new guise, is not unlawful.

I do not agree. The reasonable tendency of an employer's statement that it has to get "new help" because its employees "want to be union members" is to induce employees into forswearing allegiance to the union. That is unlawful, and I would find it so.

[7] In light of our determination that the Respondent had no bargaining obligation with the Union, we find it unnecessary to pass on the judge's findings that Accurate Roofing, a nonunion company, was the alter ego of the Respondent and that Accurate and the Respondent are a single employer.

The judge found an 8(a)(1) violation based on testimony of Dennis Casey, a half owner of Accurate, concerning remarks he made to three roofers who had worked for McLean and who inquired about working on some jobs for Accurate. We reverse. The statements quoted by our dissenting colleague, when read in context, did not reasonably convey the message that these employees would have to surrender their union membership if they worked for Accurate. It merely suggests that he thought that union members would not want to work for the nonunion scale that Accurate paid. The employees indicated that if no union work was available, they were willing to work on lower-paying nonunion jobs, because they did not "really go by the union all the time anyway." Hence they were offered the jobs. Because, as we have found, there was no recognitional obligation on the part of McLean that could have been imposed on Accurate, Casey was simply giving a lawful and correct report of the nonunion status of Accurate's jobs. For these reasons, *Mueller Insulation Co.*, 263 NLRB 757, 760 (1982), relied on by the judge, is distinguishable. In *Mueller*, an employer that was currently bound to a union agreement told its employees that they must surrender their union representation and work for its new nonunion company or lose their jobs. There was no such forced choice here.

We note that, although no specific exception was taken to the 8(a)(1) finding, the Respondent did except to the judge's finding on which this violation was based, i.e., that the Respondent had a bargaining obligation with the Union.

Will Vance, Esq. and *John Gwynn, Esq.*, for the General Counsel.

J. Reed Roesler, Esq., of Peoria, Illinois, for the Respondents.

Patricia Benassi, Esq., of Peoria, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. FITZPATRICK, Administrative Law Judge. In this case a unionized roofing contractor set up a parallel nonunion or "double-breasted" enterprise. The ultimate question here is whether this ploy involved unfair labor practices. I find it did. Further questions are whether he could, at a later point, without consulting the Union, raise the take-home pay of employees by paying them instead of the Union the union dues and contributions to the union health and welfare fund because many employees indicated disaffection with the Union and then refuse to recognize the Union further on the claim that it no longer represented a majority of employees. I find he cannot do this because he acted in an atmosphere of continuing unfair labor practices.

These proceedings arise from unfair labor practice charges filed July 27, 1982, and amended October 1, 1982, in Case 33–CA–6083 and filed October 7, 1982, and amended November 4, 1982, in Case 33–CA–6198 by United Union of Roofers, Waterproofers, and Allied Workers Local No. 69, AFL–CIO (Local 69) against McLean County Roofing and Accurate Roofing (Respondents). A complaint based on the charges in Case 33–CA–6083 issued September 3, 1982, and was amended October 1, 1982, and another complaint based on the charges in Case 33–CA–6198 issued November 5, 1982, and was amended on January 11 and 13, 1983, both complaints alleging that Respondent had engaged in unfair labor practices proscribed by Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondents answered each complaint and the admendments, denying commission of any unfair labor practices. On November 5, 1982, the two proceedings were consolidated.

Although the pleadings appear to raise an issue as to Board jurisdiction, there is no such issue, the parties having stipulated facts sufficient to establish jurisdiction. Other issues raised by the pleadings are whether McLean and Accurate are a single employer or one the alter ego of the other; whether McLean recognized Local 69 and its predecessor and maintained contracts with them covering McLean employees; whether the roofing employees of McLean and Accurate together constitute an appropriate bargaining unit; whether Local 69 represents a majority of roofing employees of McLean and Accurate in that bargaining unit; whether Respondents unilaterally and unlawfully changed the pay and conditions of employment of employees working for Accurate and later for those working for McLean, refused to supply Local 69 with relevant information for bargaining, solicited employees to abandon Local 69, informed employees they would have to be nonunion in order to work for McLean; and whether McLean unlawfully withdrew recognition of Local 69. As affirmative defenses Respondents assert (1) that objective evidence indicates a majority of the employees of both McLean and Accurate do not desire Local 69 to represent them and (2) that the collective-bargaining agreement contains illegal union-security clauses. The consolidated cases were heard before me at Peoria, Illinois, on January 6, 7, 11, and 12, 1983.

Based on the entire record, including my observation of the witnesses and consideration of the briefs filed by the General Counsel and the Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

McLean is a sole proprietorship of David A. Riddle (Riddle). Accurate is a partnership of Riddle and Dennis Casey. Both McLean and Accurate are engaged at Bloomington, Illinois, in the roofing construction business. During the 12 months preceding issuance of the complaints, a period representative of its operations, McLean purchased and received at Bloomington, Illinois, products and materials valued over $50,000, which came directly from points outside Illinois or from suppliers within Illinois who had purchased them directly from sources outside Illinois. In addition, during the same period McLean performed work valued over $50,000 for commerical customers within Illinois which were engaged in commerce within the standards applied by the National Labor Relations Board (the Board). McLean is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The evidence respecting Accurate, considered as a separate enterprise, is insufficient to satisfy Board jurisdictional standards. However, as found hereinafter, McLean and Accurate are a single employer, one is the alter ego of the other, and the employees of both together constitute a unit appropriate for collective bargaining. Accurate is therefore subject to Board jurisdiction.

II. THE UNIONS

Local 69 historically has represented employees performing roofing, waterproofing, and similar types of work in the construction industry in Peoria, Illinois, and the surrounding area. Prior to January 1, 1990, its sister local, United Slate, Tile and Composition Roofers, Damp and Waterproof Worker's Association, Local Union No. 130, AFL–CIO (Local 130), represented employees similarly engaged in and around Bloomington, Illinois. On January 1, 1980, Local 130 merged into Local 69, Local 69 surviving the merger and subsequently representing roofing employees in the entire area previously served by both Locals. Local 130 then ceased to exist as a separate organization. At all times material to these proceedings Local 69 has been, and prior to January 1, 1980, Local 130 also was, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background of McLean County Roofing Co.*

McLean was established by Riddle as a roofing enterprise in early 1977. He has been its sole owner and chief operating officer. In May 1977 on behalf of McLean he entered into the first of three successive, annual, collective-bargaining agreements with Local 130, covering all the full-time and regular part-time journeymen roofers, helpers, and apprentices employed at McLean's Bloomington, Illinois facilities. I find this to be an accurate description of a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

1. The status of Local 130

Respondents contend that the majority status of Local 130 during its incumbency has not been established. No Board election nor certification has determined the status of Local 130 as the representative of those employees. The parties agree that during the terms of the three Local 130 collective-bargaining agreements McLean deducted union dues and permit fees for a majority of its roofing employees and forwarded those deductions to Local 130. McLean also made regular contributions to the union pension fund for a majority of its roofing employees.[1] These circumstances tend to show the majority status of Local 130 and I find they are sufficient to demonstrate that status. *Haberman Construction Co.*, 236 NLRB 79, 84 (1978), enfd. 618 F.2d 288 (5th Cir. 1980), modified 641 F.2d 351 (5th Cir. 1981).

2. The incumbency of Local 69

With the merger of Local 130 into Local 69 on January 1, 1980, Local 69 took over the administration of the outstanding Local 130 collective-bargaining agreements. Each of the contracting employers, including McLean, was informed of the merger and assured that the provisions of the Local 130 agreement would remain unchanged through the balance of its terms, which ran until April 30, 1980, at which time a successor collective-bargaining agreement would be negotiated by Local 69. McLean continued to adhere to the Local 130 agreement throughout its term.

a. *Negotiation of the Local 69 contract*

On April 22, 1980, prior to the expiration of the Local 130 agreement, representatives of Local 69 met with officials from three roofing enterprises in the Bloomington area respecting a successor agreement. Acme Roofing was represented at the meeting by William Nafziger, Union Roofing by Ted and Stan Hoselton, McLean by David Riddle, and Local 69 by its Business Representative Charles Ford. Ford proposed a new agreement which would raise wage rates in the Bloomington area to parity with the higher rates in effect in the Peoria area. The proposed increases engendered strenuous opposition from the employer side, particularly from Stan Hoselton, and the meeting ended without agreement being reached. Riddle participated by his presence and, as did the others, going over item by item an old contract being used as the basis for negotiations, but he said little during the session. He did not overtly express agreement nor, apparently, disagreement with the proposals. It is unclear precisely how the meeting ended. Riddle testified he was the first to leave, and there is no evidence about what went on after that other than the undisputed fact that no agreement was reached. A second session, held April 28, was not attended by Riddle although he had notice of it.

[1] Local 130 apparently had no health and welfare fund.

That meeting also ended with no agreement between Local 69 and the Bloomington contractors.

While Ford was negotiating with the Bloomington contractors, he was carrying on parallel negotiations with the Peoria contractors. As the April 30 contract expiration deadline approached without agreement being realized for either area, Ford agreed with the Peoria contractors to extend their existing agreement 10 days beyond expiration to accommodate further negotiations. He also contacted Ted Hoselton of Union Roofing in Bloomington to inquire whether the Bloomington contractors would similarly agree to an extension of their old agreement. On the evening of April 30, Hoselton informed Ford the Bloomington contractors would not agree to an extension. At midnight that agreement expired. For the next 2 days Local 69 picketed the Bloomington contractors, including McLean. On or about May 2, Ford and Earl Kruse, an International vice president of the United Union of Roofers, Waterproofers and Allied Workers, AFL–CIO, the two Hoseltons and Nafziger, attended a meeting in Bloomington unrelated to these contract negotiations. However, following that meeting they engaged in some unscheduled, informal, negotiating in the course of which the Hoseltons and Nafziger informally agreed with Ford on a wage and benefit increase package which could eventually result in wage parity between Bloomington and Peoria.

The final formal negotiating session for Bloomington took place May 8 and was attended by Nafziger, the two Hoseltons and Riddle on the employer side, and by Ford, Joe Keen, previously business representative of Local 130, and members of the Local 69 negotiating committee on the union side. The union proposal was to phase in wage increases over a 3-year period, as had been discussed at the earlier informal meeting on May 2. Other matters such as health and welfare and fringe benefits were also discussed. On the employer side Ted Hoselton did most of the talking. According to Ford, he was the spokesman for all the contractors. Riddle voiced his concern, stating he would not sign anything that would interfere with his making a living, but he had little else to say. He did not specifically say he agreed, nor did he specifically say he disagreed. Both Ford and Keen received the impression that all the contractors, including Riddle, agreed. A consensus was reached between the Union and Ted Hoselton, the de facto spokesman for the employers. Although Riddle was the first to leave. I find, based on the credited testimony of Keen, that agreement was reached before Riddle left. There is no evidence of any negotiations after he left, and although Riddle testified that discussions were still going on when he left, it is obvious he was not present to observe whether they continued. The testimony of Ford indicates negotiations did not continue. The testimony of Keen, who impressed me as a reliable witness, indicates that agreement was reached while Riddle was still present. Accordingly, I do not credit Riddle's contradictory testimony that he had not knowledge of any agreement.

Subsequent to the conclusion of negotiations, Ford drafted the test of the new agreement and arranged with one of the contracting companies for typing. Because of difficulties in the typing, 3 to 4 weeks passed before copies finally were available for distribution at the end of May or the first part of June. The opening language of the agreement states it is made and entered into as of May 1, 1980. From this, as well as the substantive terms of the agreement, it is clear that it went into effect as of that date. The duration of the agreement, however, is open to question. No date for termination is stated in the agreement nor do its terms provide a procedure for termination. Article XIX is entitled "Duration of Agreement," but the text of that article deals only with the undertaking of signatory employers who are not members of the Greater Peoria Area Roofing Contractors Association to be bound by any amendments, extensions, or changes in the contract agreed to between that association and the Union, and to be bound by all subsequent contracts between the association and the Union unless the individual employer notifies the Union of its revocation of this authorization 90 days "prior to the expiration of this or any subsequent agreement," which expiration date appears nowhere in the document. Although the agreement contains no expiration date, various of its substantive terms became effective at definite times subsequent to the commencement date of May 1, 1980. Thus, article III provides that in the Bloomington-Pontiac area makeup days will remain the same until May 1, 1981; Sunday and holiday work will be at double rate and other overtime at time and a half until January 1, 1983; and loading time will remain unchanged until May 1983. Article V with respect to wages in the Bloomington area provides a rate effective May 1, 1980, and thereafter periodic increases on September 1, 1980; November 1, 1980; May 1, 1981; September 1, 1981; May 1, 1982; and September 1, 1982, on which last date the Bloomington area wage scale would reach parity with that in effect in the Peoria area. In article X, extra compensation is provided to employees working on jobs outside the city of employment, including reimbursement for, "food-first year–$13, second year–$14, third year–$15." Article XXVI, entitled "Union Dues and Building Trades Dues Checkoff," requires that effective May 1, 1982, the employees' wages be increased by an additional 4 cents per hour which is to be checked off and remitted to the West Central Illinois Building and Construction Trades Council. Although it is possible from these provisions to determine that the agreement remained effective through certain times, it is not possible to determine with certainty when it expires. Accordingly, I find that the agreement is not one with a fixed term but rather is a contract of indefinite duration without stated provisions for termination. See *Pacific Coast Assn. of Pulp & Paper Mfrs.*, 121 NLRB 990, 993 (1958); *William-McWilliams Industries*, 130 NLRB 223 (1961).

Joe Keen delivered two copies of this final document to Riddle on or about June 1. Riddle indicated to him that he could probably live with the first year's wage provisions and that if it were a 1-year contract he would probably sign it on the spot. He apparently was disturbed by the periodically escalating wage package. He told Keen that although he would not sign it, he would try to live by whatever part he could; that he could not live by the whole thing because it would break him. Although

Keen testified he had no discussion with Riddle on that occasion, I think his memory failed him. Riddle was very detailed in his report of the conversation and his testimonial version is consistent with his prehearing affidavit as revealed in his examination during the hearing.

According to Riddle, he never signed either copy of the agreement that Keen delivered to him. Instead he directed his secretary to put them in a file where, according to him, they remained until the following September when, so he volunteered, he had them removed and sent to his attorney. If he is to be believed in this, both documents would have been available at the time of this hearing. No one actually privy to this last transmittal of the documents testified they were sent or received, nor did counsel represent he had received them. Neither document was offered in evidence although they might have supported Riddle's testimony. Because such evidence was within the control of McLean at the time of the hearing and no explanation was offered for its nonproduction, I infer that the evidence, if produced, would have been unfavorable to Respondents. *Pacific Grinding Wheel Co.*, 220 NLRB 1389, 1390 fn. 2 (1975), enfd. 572 F.2d 1343, 1348 (9th Cir. 1978); *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). Considering the evidence in the record, particularly the testimony of Glenn Smith noted below, Riddle could not reasonably believe there was no need to produce the documents he indicated were within his control. Cf. *NLRB v. Chester Valley, Inc.*, 652 F.2d 263, 271 (2d Cir. 1981).

Ford testified that at the end of June or the first part of July, he and Glenn Smith called on Riddle for the purpose of picking up a signed copy of the contract. Smith is the business representative of a small glazers union in Bloomington who customarily accompanies Ford in jointly calling on contractors in that area. He testified, and I find, that on that occasion Ford told Riddle they had come to pick up the contract, that Riddle handed him some papers that Ford put in his briefcase. Smith testified this was the Local 69 contract because he saw the front page, but that he did not see whether it was signed. Ford's testimony is consistent with Smith's but Ford added that when he was handed the contract he looked at it and that it was signed by Riddle. I do not rely on Ford's unsupported testimony that he verified that the contract was signed because his vacillating testimony generally, as well as his demeanor, indicates such reliance is not warranted. Ford testified further that after receiving the document from Riddle, he placed it in the files of Local 69 and that it has since disappeared. He speculates that it and the contract of another employer were lost in the course of moving the Local's offices. At any rate, neither Local 69 nor the General Counsel produced in evidence a collective-bargaining agreement signed by Riddle. Riddle denied he signed the agreement. Based on the credited testimony of Smith and considering that none of the parites produced either of the documents delivered to Riddle by Keen nor one signed by Riddle, I find that about the first of July Riddle handed to Ford one of the documents that Keen had earlier delivered to him. Whether Riddle signed the agreement, an issue on which the General Counsel has the burden of proof, I find the evidence insufficient to establish that fact. In so concluding I have considered that Keen delivered two copies of the agreement to Riddle, neither of which McLean has offered in evidence, that Riddle delivered one copy to Ford in the presence of Smith, that there is no reliable evidence this copy was signed, and that the General Counsel and Local 69 failed to produce a signed copy of the agreement or persuasive evidence that it was signed. But even if Riddle did not sign the document, McLean was a contracting party to the agreement because, as found below, Riddle admitted as much to Ford and Glenn Smith in early June 1982 when Ford objected to the nonunion working conditions of the Accurate crew, and he substantially applied the agreement to the McLean crew from its inception in early June 1980 through September 1982.

b. *McLean's adherence to the Local 69 contract*

The parties are in dispute regarding whether McLean adopted the Local 69 agreement. I find the agreement was sufficiently implemented so that McLean must legally be considered a contracting party. From the effective date of the agreement in May 1980, McLean, following past practice, deducted union dues and permit fees from the pay of a majority of its employees in the roofing unit described above and continued doing so through September 1982. And beginning at least in January 1981, and possibly sooner, until the end of September 1982, it contributed to the union roofers pension fund and the health and welfare fund for a majority of those employees. During the period May 1980 until May 1982, McLean paid all roofing employees at a rate at least as high as the scale provided in the agreement and also paid time and a half for Saturday work and double time for Sunday and holiday work. From September 1980 through September 1982, pursuant to the agreement, it provided Local 69 with a contractor's wage and welfare fund surety bond assuring payment of the agreed wages, deductions, and contributions. On at least one occasion in 1980, Riddle and Local 69 adjusted a grievance involving employee Terry Segbianao, as provided in the contract. Ford testified that in 1982 he and Riddle adjusted another grievance on behalf of employee Clyde Decker, but I do not credit his tesitmony in view of the contradictory testimony of both Riddle and Dennis Casey. As business representative of Local 69, Ford visited McLean's premises from time to time and on some of those occasions delivered receipts for union payments made by McLean on behalf of employees. Ford testified without contradiction, and I find, that he also appointed Danny Casey, a brother of Dennis Casey, to be the Local 69 steward for all contracting employers, including McLean, in McLean and Livingston Counties. Local 69 has had no designated steward among the employees of each company as contemplated in the collective-bargaining agreement.

Respondents contend that in certain respects McLean did not follow the agreement. One item to which Respondents point is McLean's practice respecting pay for overtime work. However, after reviewing the testimony and the provisions of the agreement, particularly articles III and XXII, it does not appear that McLean deviated

from the contract in this respect except that in practice time-and-a-half overtime pay for Saturday work was paid only if the employee already had worked 40 hours during that week. McLean also deviated from the agreement in that its regular weekly payday was Thursday instead of Friday, as provided in the agreement, and also with respect to contributions to the West Central Illinois Building and Construction Trades Council, which it apparently did not make. The collective-bargaining agreement also contemplates an apprentices' program and employment of a fixed ratio of apprentices or helpers to journeymen roofers. These provisions were neither complied with by McLean nor enforced by the Union because of a shortage of journeymen. Along the same line Respondents emphasize various ways in which Ford failed to administer the agreement in an effective manner. None of his inadequacies, however, go to the heart of the question of whether a collective-bargaining relationship and an understanding existed. There is nothing in the record indicating that Ford administered the new Local 69 agreement any differently than the old Local 130 agreement. The logical inference is that both he and the employers, including McLean, carried on the collective-bargaining relationship as they had in the past by means of a collective-bargaining agreement.

Considering those aspects of the agreement that McLean honored, as well as those that were ignored, I find that it substantially adopted the agreement and became a contracting party. *Haberman Construction Co.*, supra, 236 NLRB at 85–86. The testimony of Riddle, which is largely self-serving, and to which Respondent's brief points as indicating that his adherence to the agreement was motivated by a variety of considerations other than a desire to abide by the agreement, is immaterial. Even if credited, such testimony goes to his motivation, which is not at issue if, as I find, he applied the terms of the agreement. The objective evidence demonstrates substantial adherence to, and therefore adoption of, the collective-bargaining agreement. This finding is buttressed by Riddle's participation in the negotiations that lead to the most recent contract and further by the fact that when Ford and Smith came to his office to pick up the signed contract, Riddle, without comment, handed a copy of the document of Ford.

3. Union-security considerations

As an affirmative defense, Respondent's urge that the Local 69 collective-bargaining agreement should be set aside because it embodies unlawful union-security provisions not separable from the balance of the agreement. The agreement provides for various deductions to be made from the wages of employees and remitted to the local or other union-affiliated organizations and does not provide any waiting period following the start of an employee's employment before such deductions commence. Respondents point particularly to articles XI and XVI of the agreement as failing to satisfy the 30-day statutory waiting period of Section 8(a)(3), or the 7-day waiting period of Section 8(f), of the Act. Counsel for the General Counsel takes the position, with which I agree, that the agreement does not contain union-security provisions. I find no clause in the agreement that specifically conditions employment on membership in Local 69. Accordingly, I find the provisions of the agreement to which Respondents refer are not the sort of union-security provisions addressed by either Section 8(a)(3) or Section 8(f) of the Act. The pertinent portions of the contractual articles in question read as follows:

> ARTICLE XI
> TOOLS
>
> . . . .
>
> Contractors desiring to perform work in the Craft over which jurisdiction is claimed by Roofers Local #69 agree to employ on said work where more than one Employee is required at least fifty percent of Employees of Roofers Local #69.
>
> ARTICLE XVI
> UNION DUES AND BUILDING TRADES DUES CHECK OFF
>
> The Employer shall add to the negotiated base rates of pay an amount equal to the West Central Illinois Building and Construction Trades Council Check Off, as set forth below, and shall deduct same from the employees wages each week and remit same to the West Central Illinois Building and Construction Trades Council, 400 N.E. Jefferson, Peoria, Illinois 61603; together with a list of names and total hours worked of each employe from whom deductions were made. The payment and the payroll report shall be mailed to reach the office of the Council not later than fifteen (15) calendar days following the end of each calendar month.
>
> Effective May 1, 1980, 3¢ per hour (Those employers who previously deducted 1¢ per hour shall add 2¢ per hour to the employee base rate for a total of 3¢ per hour. Those employers who previously did not make a deduction shall add a total of 3¢ per hour).
>
> The Contractors agree to deduct initiation fees, monthly dues and hourly deduct from Helpers, Apprentices and Journeymen Roofers of Local #69.
>
> The Employer shall be furnished a written authorization from each employee which shall not be irrevocable for more than one year, or beyond the termination date of this agreement, whichever occurs sooner.[2]

[2] The emloyee authorization form for such deductions provides:

> ROOFERS & WATERPROOFERS LOCAL UNION NO. 69
>
> I hereby authorize and direct my Employer to deduct from my pay, working dues, Union dues, permit money, and all other deductions agreed to by Roofers & Waterproofers Local No. 69 and Peoria Area Roofing Contractors agreements. Said moneys to be paid to Funds in accordance with the terms of the bargaining agreement the employers and the Union. This authorization shall be irrevocable for a period of one year from the date hereof or until the termination date of said agreement whichever occurs sooner and I agree that this authorization shall be automatically renewed and ir-

Continued

Article XX is a somewhat parallel provision dealing with health and welfare and pension fund contributions. It provides for the contracting employer to make periodic contributions on behalf of employees in the unit to the National Roofing Industry Pension Fund and to the Indiana State Council of Roofers' Health and Welfare of Illinois, Indiana, and Kentucky. Like articles XI and XVI, article XX provides no waiting period following the hiring of an employee before the commencement of such contributions.

Article XI, quoted above, could be read as requiring half of the employer's new employees to be union members immediately on their employment, and if read in that manner it would violate the Act. The language, however, is not entirely clear and could be understood as a jurisdictional requirement that when the employer hires roofers, at least half come from Local 69. There is no requirement that any employees who are or become members must remain members of Local 69. There appears to be a practice in the roofing industry of employees represented by one local union working within the territorial jurisdiction of other locals. Article XVII of the agreement involved here, which article is entitled "Work Performed in Jurisdiction of Any Other Local Union," provides for rates of pay and travel expenses when employees covered by the Local 69 agreement work outside the territorial jurisdiction of Local 69.

Article XVI is less ambiguous. The first two clauses require the employer to increase the employees' basic rate of pay by the amount to be deducted and remitted to the West Central Illinois Building and Construction Trades Council. Arguably, these provisions have no effect on the employees' real wages. The third clause requires the employer to deduct from the employees' wages initiation fees and dues but the provision appears to be limited in application to those employees who are members of Local 69. And, as noted above, there is no requirement that an employee be or remain a member of Local 69 as a condition of employment with the employer. Even if, pursuant to article XXI, one-half of the work force is made up of Local 69 members, union membership by any particular employee is not required. Nothing in the language requires that any employee become or remain a member of the Union.

Article XX is merely an agreement whereby the employer pays to a health and welfare fund and to a pension fund contributions on behalf of each employee. Union membership is not a stated condition of coverage.

Although analysis of the ambiguous clauses leaves some doubt as to legality, they are not explicitly in violation of the Act but rather are ambiguous and should not thereby be found illegal. In *Paragon Products Corp.*, 134 NLRB 662, 664 (1961), the Board pointedly quoted the Supreme Court's language in *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961), as follows: "*we will not assume* that unions and employers will violate a federal law . . . against a clear command of this Act of Congress. As stated by the Court of Appeals *'In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.'* [Emphasis added.]" Where contract language is ambiguous, the Board looks to the intent of the parties when they draw up the contract and to their practice in operating under the contract. See *Kaiser Aluminum & Chemical Corp.*, 98 NLRB 753 (1952); *Bath Iron Works Corp.*, 101 NLRB 849 (1952). Here there is no evidence of the parties' intent in this regard at the time the contract was drawn up. The record does reflect that in practice Riddle checked off union dues and permit fees from the outset of the employment of many, but not all, employees, and there is no evidence that these deductions were required from the employees in contravention of the statute, that is, as a condition of their employment. In sum, I find that because the contract has no provisions explicitly calling for unlawful union-security arrangements, and the record fails to demonstrate that the ambiguous contractual provisions in fact have operated to violate Section 8(a)(3) or 8(f) of the Act, I find the Respondents have not sustained their affirmative defense on this issue.

4. The McLean work force

The parties disagree about whether McLean employed a permanent and stable work force. The evidence relating to this consists for the most part of McLean payroll records for 1982, its health and welfare contribution records from Janaury 1981 through September 1982, and its pension contribution records from December 1980 through October 1982. These are not entirely satisfactory because the health and welfare and the pension records do not necessarily reflect the precise size of the work force, and the payroll records do not include 1981 and those for 1982 which are in evidence are incomplete.[8] Nevertheless, payroll and contribution records together give a valid month-by-month picture of the 1982 roofing crew and a fair approximation of crew makeup in 1981.

Over the course of a year, and considering employee turnover and fluctuation in crew size, the total number of roofers employed was modest. During 1981 McLean paid union fringe benefits for only 26 individuals. Company records show employment of 30 roofers during 1982. Certain seasonal fluctuations are apparent, employment being lowest in winter. Thus, fringe contributions were made for four, five, and seven roofers in December 1980 and January and February 1981, respectively, and for three in December 1981. The records show seven, nine, and five roofers in January, February, and March 1982, respectively. By contrast, fringe contributions were made for 17 in June 1981, the highest month that year. A nonseasonably induced increase developed in late August 1982 when McLean obtained two large contracts and the crew increased from 6 to 10, then to 16 in September and October, and then dropped to 12 in November and

revocable for successive periods of one year unless revoked by written notice to you and the Union ten (10) days prior to the expiration of each one year period, or of each applicable bargaining agreement between the Employer and the Union, whichever occurs sooner.

Signature _____

Date _____ Social Security No. _____

[8] The 1982 payroll records for three employees, Eric Niepagen, Stanley Shelton, and Tim Hardin, are not included in the records offered in evidence.

to 10 in December. Monthly employment of roofers averaged at least 9 in 1981 and about 10 in 1982. During 1982 total employment by month numbered 7 in January, 9 in February, 5 in March, 12 in April, 8 in May and June, 6 in July, 10 in August, 16 in September and October, 12 in November, and 10 in December. Thus, through July, and with the exception of April, the monthly total remained fairly constant. In late August it began to increase and remained larger for the balance of the year.

Despite fluctuation in crew size, a core of the same roofers was employed with substantial regularity on successive jobs. Until he became a supervisor in May 1982, Dennis Casey was a regular crewmember as well as crew foreman and thereafter, as a supervisor, he continued as crew foreman. Tom Howell was a regular throughout 1981 and 1982 and ultimately became crew foreman. Tim Hardin was a regular through all 1981 and until October 1982. Ed Seth was a regular from April through September 1981 and for much of 1982. Robert Godbey was a regular through September 1981. Steven Stalter was a regular for most of the year from May 1981 through April 1982. In 1982 Greg Riddle worked regularly from June through October, and again in December. Michael Riddle worked in each month from May through December 1982.[4] Dale McCumsey worked regularly for 4 months in mid-1982. Richard Black Sr., Ed Casey, David Graves, Wesley Jeakins, and Bobby Sylvester all worked regularly from late August through December 1982, the last month for which evidence was offered. The record reveals a pattern of a partially evolving but regular core of 4 to 5 roofers throughout 1981 and until late August 1982 when the core enlarged to about 8 or 10 for the balance of the year. Thus, the crew, although experiencing some evolution, was also characterized by substantial continuity in identity of persons employed.

It is clear from the record as a whole that employees in the bargaining unit did not work, nor were they paid, unless there was work to do. The work available for the most part consisted of onsite roofing work, an aspect of the construction industry. Many of these projects are relatively small. Some are repair and maintenance jobs rather than new construction or replacement. The testimony and McLean's records indicate that, although the roofers are employed on an as-needed basis, that need frequently carriers over from job to job. Roofers are hired on an indefinite basis for as long as work remains available. These circumstances demonstrate permanence and stability in the work force, as those terms are understood by the Board and the courts. See *Precision Striping*, 245 NLRB 169 (1979); *Land Equipment*, 248 NLRB 685 fn. 2 (1980), enfd. 649 F.2d 868 (9th Cir. 1989); *Hageman Underground Construction*, 253 NLRB 60 (1980); *Pacific Erectors*, 256 NLRB 421 (1981), enfd. 718 F.2d 1459 (9th Cir. 1983); *Redland Construction Co.*, 265 NLRB 586 (1982). On somewhat similar facts the Board reached the opposite conclusion in *Giordano Construction Co.*, 256 NLRB 47 (1981). But the circumstances in that case differ in that that employer's jobs were few in number, of long duration, and with substantial hiatuses between. A substantial number of those employees did not carry over from job to job as do the crewmembers of McLean where the jobs typically are smaller and of shorter duration and the hiatuses between these jobs appear shorter. McLean has a greater measure of continuity in its work force than *Giordano* because of its core crew, the relatively small total number of employees over a year's time, and the absence of long hiatuses in the workflow. A result opposite to that reached in *Precision Striping* also was reached by the Ninth Circuit in *Construction Erectors v. NLRB*, 661 F.2d 801, 804 (1981), in which a larger number of employees was involved, a total of 62 having been referred for work over about a year's period, and where the record did not indicate continuity of personnel beyond the first 6 or 7 weeks of the year under consideration. Although the issue in the present matter is not free from doubt, particularly in view of McLean's reliance on new hires during seasonal upswings in business and the big increase in the latter part of 1982, its situation appears more akin to *Precision Striping* and its progeny than to *Giordano* or *Construction Erectors*. Accordingly, I find that McLean employs a permanent and stable work force within the meaning of Board standards.

5. Union majority status

During the life of Local 130 contracts, as noted above, McLean deducted union dues and permit fees for a majority of its employees covered by those contracts and remitted those funds to Local 130 and later to Local 69. McLean continued this practice under the Local 69 agreement from the beginning of May 1980 until the end of September 1982. McLean's records show that during 1982 these deductions were made in January for 4 of its 7 roofers, in February for 6 of it 9 roofers, in March for 4 of its 5 roofers, in April for 11 of its 12 roofers, in May for 7 of its 8 roofers, in June for 6 of its 8 roofers, in July for 4 of its 6 roofers, in August for 8 of its 10 roofers, and in September for 12 of its 16 roofers. In October it had 16 roofers but only deducted dues and permit fees for 2. In November it had 12 roofers and in December 10 but deducted no union dues or permit fees for any in either month. It is apparent from this history that for an unbroken period of about 5-1/2 years Local 130 and its successor Local 69 enjoyed the financial support of a majority of McLean employees. *Haberman Construction Co.*, 236 NLRB (1978), enfd. 518 F.2d 288 (5th Cir. 1980), modified 641 F.2d 351 (5th Cir. 1981); *VM Construction Co.*, 241 NLRB 584 (1979); *Land Equipment*, supra; *Trowel Trades Employees v. E. DeAngelis & Son*, 562 F.Supp. 847, 849 (D.C.S.D.Fla. 1983). In these circumstances, the status of Local 69 as the representative of McLean employees was governed by Section 9(a) of the Act, rather than by Section 8(f) as urged by Respondents, and it was entitled to recognition as the representative of the roofing crew on that basis. *Haberman Construction*, supra; *VM Construction*, supra.

[4] Greg and Michael Riddle, being sons of the company owner, were not employees under the Act but their presence on the crew demonstrates the continuity of the work force.

B. *The Relationship of Accurate to McLean*

About April 1, 1982, David Riddle and Dennis Casey, foreman of the McLean work crew, formed the partnership called Accurate Roofing Company for the purpose of engaging in the roofing business on a nonunion basis. Although requested by Local 69, Accurate has refused to recognize it as the representative of its employees and has not adhered to the terms of the Local 69 collective-bargaining agreement for roofers in the Bloomington area.

All capital for Accurate has been provided by Riddle. He initially contributed $2000 and by the time of the hearing had loaned an additional $12,000 although the partnership agreement provides that additional capital will be provided equally by the partners. The partnership agreement names Riddle as general manager with responsibility for all machinery, equipment, leased facilities, any other leasing, purchasing or procuring, and all bookkeeping and gives him responsibility for the partnership bank accounts, including the writing of checks. Dennis Casey is named assistant general manager and operating manager in charge of roofing activities and the supervision of employees.

McLean's offices and warehouse are in a building owned by Riddle, the only sign on the building read "McLean County Roofing." Accurate's rented office is in the same building but in a separate room. Its warehouse is located across the street in premises rented by it from a third party.

McLean employs two office secretaries. Accurate employs one. The two companies share a telephone system in which two separate lines, one for each company, come into the same telephone with extensions in each office. This allows any of the secretaries to answer the telephone for either company. Accurate's telephone also has an extension in Dennis Casey's home where his wife normally answers for Accurate in the absence from the office of Accurate's secretary. Whether the office secretaries work jointly in any other respect does not affirmatively appear in the record, but in testifying, Riddle named the same person as his own secretary and the secretary for Accurate. The two companies have different mailing addresses, McLean using a post office box and Accurate a rural route address. Riddle is the only person authorized to sign checks for both firms but a secretary for McLean also is authorized to write McLean checks and the Accurate secretary also is authorized to write Accurate checks.

McLean maintains an inventory of roofing supplies and materials for its own use and for sale to Accurate. Accurate purchases most of its supplies from McLean and maintains only a small inventory for its own use. Accurate does not own any equipment. It uses a truck owned by Dennis Casey personally and any additional equipment needed for roofing jobs is leased from McLean. Both companies engaged in the same type of business, namely, commercial and residential roofing. They differ in that McLean does a greater volume of business and the jobs for which Accurate contracts are generally smaller. Up to the time of the hearing they had not served the same customers.

Respecting control of labor relations, the record as a whole shows that Riddle has the ultimate control for McLean and also executes most of those responsibilities. He is the one who historically negotiated and contracted with the Unions. He does almost all the notifying of roofing employees regarding when they are to report for work and he apparently hires all new employees for McLean. In performance of the work on the job, on the other hand, Dennis Casey in general directs the employees. I find he can effectively recommend the hiring, firing, or disciplining of McLean employees. I infer that at the end of a day's work he indicates to crewmembers whether they are to report the next workday. I further find that on occasion he contacts roofers to come into work for McLean. Casey does not about the same thing for Accurate as he does for McLean. He testified he does all the hiring for Accurate. But this really appears to be an assigning of McLean crewmembers to Accurate jobs when they have been informed in most instances to come into work by Riddle, or Casey knows they will be available because a McLean job is coming to an end and he has them available for work on Accurate jobs. Casey's testimony in this respect suggests that the infrequent and smaller Accurate jobs are meshed in schedule wise with the larger and more frequent McLean jobs. That conclusion fits with the relative size and importance of the two operations, with Casey's function as the job supervisor for both, and with the repeated use of regular McLean crewmen on Accurate jobs.

Riddle testified he never calls employees into work for Accurate and has nothing whatever to do with those employees. I do not credit these categorical statements. Other credible testimony, notably that of Dale McCumsey, demonstrates that Riddle involves himself in Accurate employee relations. Thus, McCumsey, a regular employee of McLean, was invariably called by Riddle to report for work. The work he performed included jobs for McLean as well as seven jobs for Accurate. On one occasion McCumsey spent time on an Accurate job working for estimator Ted Tice, who did the estimating for both Accurate and McLean, but at Riddle's request McCumsey was paid by McLean as if he worked for McLean. In fact the roofers who work for Accurate are the regular McLean crew. The testimony, the payroll, and other records indicate that virtually all roofers used by Accurate are also used by McLean on a regular basis. Thus, during 1982 Accurate employed a total of nine roofers, all of whom at one time or another were members of the McLean crew. The hours each worked for McLean and Accurate from May through October are as follows:

	May 82		June 82		July 82		Aug. 82		Sept. 82		Oct. 82	
	McL	Acc	McL	Acc	McL	Acc	McL	Acc	McL	Acc	McL	Acc
J. Crow					[1]0	33						
T. Hardin	50	43	67	36	42	64	36	16.5				
T. Howell	26.5	20			50	67	39.5	7				
D. McCumsey	57	18	57	36	31	44						
R. McDonald	16	19										
G. Riddle			30	30	20	34	25	0				
M. Riddle			19	23	45	53	33.5	12				
E. Seth	101.5	44.5	63	42.5	33	62					40	15
R. Sylvester	0	17			0	41	40	4	115	4		

[1] Crow previously worked for McLean in March and April 1982.

Except for the one instance with the estimator, referred to by McCumsey, the roofers have been paid for the work performed for McLean by a McLean check and for work performed for Accurate by an Accurate check. Their rates of pay, however, differ in that until at least the end of September 1982 work for McLean was paid at the Local 69 wage rate or better, and contributions for union fringe benefits were paid for a majority of the crew. By contrast, work for Accurate was paid for at a lesser rate and no contributions were made for fringe benefits.

As already noted, Accurate leased all roofing equipment from McLean with the exception of the personal truck of Dennis Casey. As a result, the roofers work on Accurate jobs with the same equipment as when they work on McLean jobs. On some occasions McLean trucks were used on Accurate jobs although the name "McLean Roofing" appeared on the side. On at least one occasion a magnetic sign with the name Accurate was placed over the McLean name. In two other regards there is commonality in employment with McLean and Accurate. At the premises of McLean and of Accurate, roofers use the same break area and same washroom irrespective of which company they are working for. Finally, there appeared to be no difference in the work they perform for either company, each roofer, whether journeyman apprentice, or helper, performing the same kind of work under the same supervision.

C. *The Single Employer and Alter Ego Issues*

1. Single employer

The General Counsel and Local 69 contend that McLean and Accurate are a single employer for purposes of collective bargaining. The standards for determining whether two enterprises are a single employer were described by the Supreme Court in *Radio Union Local 1264 v. NLRB*, 380 U.S. 255 (1965), in the following language:

> The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.

In the present matter the operations of McLean and Accurate are interrelated. Although McLean is a larger operation than Accurate, neither is a large business and little separates top management from the rank and file in either company. Both are engaged in the same kind of business, in the same market, and from approximately the same location, their separate offices being in the same building owned by McLean and their separate yards being across the street from each other. They have separate telephone service but common equipment and it is possible for the office personnel of one company to answer the telephone of the other.

McLean, solely owned by Riddle, is managed almost entirely by him with the assistance of a couple of office employees, an estimator, and Dennis Casey as his supervisor of field operations. Riddle's overall management of McLean includes financial control and control of labor relations. Dennis Casey also is involved in labor relations in directing the McLean crew, and on some occasions in calling crewmembers to work, or in informing them whether they will continue to work, be laid off, or be recalled. With Accurate, Riddle is more remotely involved in day-to-day management than Dennis Casey, who as a partner carries a greater managerial responsibility than he does with McLean where he is only a supervisor. Even so, Riddle is significantly involved in the management of Accurate. Under the partnership agreement he has complete financial control and has provided all the working capital. Although under the agreement Dennis Casey is in charge of operations and presumably of labor relations, Riddle also has involved himself in crew selection by contacting crewmembers to work on Accurate jobs. Both men joined in the partnership with the intention that it be nonunion, thus together setting this underlying labor relations policy. Interrelation of the operations, centralized control of labor relations, and common management are also indicated in the interchange of crewmembers between the two companies and the fact that virtually all roofers working for Accurate also work for McLean. Significant points of interrelation are the facts that Dennis Casey manages field operations for both concerns and that McLean provides most of the supplies and, with the exception of Casey's own truck all the equipment for both, although Accurate pays for the supplies and rental of the equipement. It is these supplies and equipment with which the crews of both McLean and Accurate work. Both companies also use the same estimator.

Although Dennis Casey has no proprietary interest in McLean, common ownership exists in the person of Riddle as the sole owner of McLean and one-half-ownership interest in Accurate and also involve him in the management of Accurate.

In these circumstances I find McLean and Accurate are a single employer. The facts demonstrate the "presence of a very substantial qualitative degree of centralized control labor relations," and "evidence a substantial qualitative degree of interrelation of operations and common management—one that . . . would not be found in the arm's length relationship existing among unintegrated companies." *Operating Engineers Local 627 v. NLRB*, 518 F.2d 1040, 1046–1047 (D.C. Cir. 1975). See also *NLRB v. Campbell-Harris Electric*, 719 F.2d 292 (8th Cir. 1983).

2. Alter ego

The General Counsel contends further that Accurate was created to subvert the collective-bargaining relationship with Local 69 and is legally the alter ego of McLean. Although alter ego questions more frequently arise in situations where one enterprise succeeds another (see *Crawford Door Sales Co.*, 226 NLRB 1144 (1976)), the issue may also arise with parallel contemporaneous enterprises as in the present case (see *Don Burgess Construction Corp.*, 227 NLRB 765 (1977)). In resolving alter ego issues the Board applies single employer criteria and further examines whether one enterprise operates to circumvent and evade collective-bargaining obligations of the other. The Fifth Circuit states this additional consideration in *Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 508 (5th Cir. 1982):

> However, the focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective-bargaining agreement through a sham transaction or technical change in operations. E.g., *Amalgamated Meat Cutters v. NLRB*, 663 F.2d 223, 227 (D.C. Cir. 1980).

In the present matter McLean and Accurate are sufficiently interrelated so that an arm's length relationship does not exist between them. Rather, there is substantial unity of operation inseparable from the persons of Riddle and Casey, with one set of employees performing the same type of work on a regular basis for two employers which, as their employers, are virtually indistinguishable from each other. The crewmembers have the same community of interest respecting their employment whether working on a McLean or an Accurate job. In these circumstances, for purposes of collective bargaining within the meaning of Section 9(b) of the Act, the crew of both companies together constitute an appropriate collective-bargaining unit described as follows:

> All full-time and regular part-time journeymen roofers, helpers, and apprentices employed by McLean County Roofing or Accurate Roofing Company at their Bloomington, Illinois, facilities and their various jobsites; but excluding professional employees, office clericals, guards and supervisors as defined in the Act, and all other employees.

When Accurate began business in May 1982 using six McLean roofers, no effort was made by management to contact Local 69 respecting its operation and the provisions of the Local 69 contract were not applied about the work the crewmen did for Accurate. It was late May before Business Representative Ford learned of the existence of Accurate when Danny Casey, the Local 69 steward for the Bloomington area, told him Riddle had opened a nonunion operation. About the same time Accurate ran a newspaper advertisement in the McLean County newspaper announcing its business. In early June, Ford accompanied by Glenn Smith called on Riddle at his office in McLean Roofing for the purpose of discussing this new operation. Riddle told Ford then that Accurate was his nonunion company. Ford informed him his actions were in violation of the agreement with Local 69. But Riddle took the position that his attorneys had helped him plan the new operation and everything was legal. He declared that Accurate would not abide by the terms of the Local 69 agreement. According to Smith, whom I credit, Ford said he was going to have to do something about it, and Riddle responded that if Ford felt that way, maybe he should just tear up his existing contract with the Local and go nonunion with both shops. Following this meeting, Ford took a wait-and-see attitude, instructing Steward Danny Casey to keep an eye on things.

In late July roofers Dale McCumsey and Ed Seth, who had been working for both McLean and Accurate, complained to Ford about being paid less than the union wage rate for straight time and not being paid time and a half for Saturdays or double time for Sundays, as provided in the collective-bargaining agreement. As a result of these complaints Local 69's attorney, Patricia Benassi, sent Riddle a letter on July 27 setting forth the Union's position that the collective-bargaining agreement applied to Accurate operations and that its employees should be paid in accordance with those terms. She requested bargaining with Local 69 regarding the matter. That same day Local 69 filed the initial unfair labor practice charges here against McLean and Accurate.

Considering the close relationship that makes McLean and Accurate a single employer, evidenced particularly by their use of the same roofing employees working on the same equipment and supplies under the same supervision by Dennis Casey, and the shared responsibility for work assignments in the two operations by Riddle and Casey, I find that crewmembers were performing bargaining unit work when working for either Accurate or McLean. Considering also that Accurate began operations during the week ending May 12, 1982, with the employment of Tim Hardin and Tom Howell under nonunion conditions and without consulting Local 69, as well as Riddle's declaration to Ford and Smith in early June that Accurate was his nonunion operation, and his prophetic threat, in the face of Ford's objections, that McLean might go nonunion as well, I find that Riddle and Casey shifted bargaining unit work to Accurate with the purpose of avoiding the Local 69 contract terms,

which were applicable to such work if performed by McLean employees. Thus, for labor relations purposes Accurate is the alter ego of McLean. The shifting of unit work to evade contractual and bargaining obligations violated Section 8(a)(5) and (1) of the Act. *Edward J. White, Inc.*, 237 NLRB 1020, 1026 (1978); see also *Denzil S. Alkire*, 259 NLRB 1323 (1982); *Land Equipment*, 248 NLRB 685, 688 (1980); *Al Bryant, Inc.*, 260 NLRB 128, 141 (1982); *Nabco Corp.*, 266 NLRB 687 (1983); *American Pacific Concrete Pipe Co.*, 262 NLRB 1223, 1226 (1982); *All Kind Quilting*, 266 NLRB 1186 fn. 4 (1983); cf. *Shellmaker*, 265 NLRB 749 (1982); *Longshoremen ILA (Rukert Terminals)*, 266 NLRB 846 (1983).

D. *Nonunion Terms as a Condition of Employment with Accurate*

It is admitted that sometime in April or May 1982, Dennis Casey informed the crewmembers who would be working on Accurate jobs that they would have to be nonunion to work for Accurate Roofing. That statement, given the circumstances found above, violated Section 8(a)(1) of the Act. *Mueller Insulation Co.*, 263 NLRB 757, 759–760, 766 (1982).

E. *McLean's Withdrawal of Recognition*

1. The nature of the withdrawal

Local 69's Business Representative Ford, in the first few days of October 1982, called on Riddle to talk about union relations with McLean. Riddle refused to discuss such matters without first obtaining permission from his attorney. Ford then spoke with an attorney for Riddle named Semmler who told him that as long as the Union's unfair labor practice charges were pending with the Board, Riddle would not talk with union representatives.[6] As a result, Ford consulted Union Attorney Patricia Benassi who on October 7 telephoned Respondents' attorney Reed Roesler. She inquired of Roesler about the identity of Semmler, who was unknown to her. Roesler informed her that although Semmler was an attorney for Riddle, Roesler's firm was handling labor relations. Benassi further inquired whether the information Ford had received from Semmler was the position of McLean, and Roesler confirmed that that was McLean's position, and that Mclean was withdrawing recognition from Local 69 and would not bargain with it. Thus, McLean also withdrew from and abrogated its contract with Local 69. Roesler stated the Union no longer represented a majority of the employees. This was the first occasion on which Respondents asserted the Union lacked majority status among the employees. Such a defense must be evaluated as of October 7, 1982, the time of withdrawal of recognition based on that assertion. *Bartenders Assn.*, 213 NLRB 651 (1974). Since then McLean has persisted in that position. At no time has Accurate recognized or bargained with Local 69 nor has it retreated from Riddle's initial position taken months earlier that Local 69 enjoys no status as a representative of Accurate employees.

[6] At that point the charges and the complaint were outstanding in Case 33-CA-6083.

McLean implemented its withdrawal of recognition retroactive by ceasing to remit to the Union or to union funds, effective October 1, 1982, those deductions of union dues, permit fees, health and welfare funds contributions, and pension fund contributions which until then it had routinely made. A number of employees from whose paychecks union dues or permit fees deductions had been made after October 1, and for whom health and welfare contributions had been noted on company books, which deductions and contributions were not remitted to the Union, or to union funds, subseqenetly received checks from McLean for these amounts. Thereafter these deductions and contributions were not made but instead were included in the regular paychecks of employees, thus raising their wages. This was, of course, at variance with the terms of the collective-bargaining agreement that contemplated that these amounts be remitted to the Union or union funds. The Union had no specific notice or opportunity to bargain about these changes.

The General Counsel and the Union contend that McLean's withdrawal of recognition and cessation of bargaining with Local 69, the cessation of payroll deductions and fund contributions, and the resultant inclusion of those amounts in the weekly paychecks of employees were unfair labor practices prohibited by Section 8(a)(1) and (5) of the Act. Respondents contend that unfair labor practices were not involved because, based on objective considerations, Riddle had a good-faith doubt that Local 69 represented a majority of McLean employees and McLean had no further duty to recognize Local 69. This is a possible defense because the collective-bargaining agreement, being of indefinite duration, would not bar a competing union from filing a representation petition with the Board thereby raising a question concerning representation. *Pacific Coast Assn. of Pulp & Paper Mfrs.*, 121 NLRB 990, 993 (1958). Thus, there is no extant contract term during which the Board will conclusively presume that the majority status of Local 69 continues unimpaired. In this respect this case differs from those where the employer could not unlawfully withdraw recognition of a union so long as a valid election petition could not be timely filed. See *Quad C Corp.*, 246 NLRB 463, 467 (1979); *Shamrock Dairy*, 119 NLRB 998, 1002 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (D.C. Cir. 1960), cert. denied 364 U.S. 892 (1960); *Hexton Furniture Co.*, 111 NLRB 342, 344 (1955). The present situation is more analogus to those cases where an employer, before expiration of a contract term, makes an "anticipatory withdrawal of recognition" in relation to a future contract. Such a withdrawal is lawful if on the date of withdrawal the union in fact has lost its majority status or a reasonable doubt, based on objective considerations, exists as to its majority status, and provided the withdrawal is untained by unfair labor pratices. The presumption of continued majority status is thus rebuttable. See *Abbey Medical/Abbey Rents*, 264 NLRB 969 (1982); *Cutten Supermarket*, 220 NLRB 507 (1975); *Terrell Machine Co.*, 173 NLRB 1480 (1969). Accordingly, the crucial issues here are (a) whether the withdrawal of recognition was founded on a reasonable doubt of Local

69's majority status in the light of objective considerations, and (b) whether the withdrawal was tainted by unfair labor practices.

2. Objective considerations about majority status of Local 69

Richard Black Sr. went to work for McLean as a roofer during the weekly pay period ending Thursday, August 26, 1982. When he received his first paycheck and realized that health and welfare contributions and union permit fees had been deducted from his wages, he complained to both Dennis Casey and Riddle. According to Black, he told Riddle, "Dave, I don't want to belong to this union . . . . I'm not paying $100 a week out of my check for some idiot to run around in a Cadillac when I drive a Vega . . . . I don't want to belong to the union. I'm not planning on retiring in Illinois and I'm too damn old to stay here for 10 or 15 years to get retirement from the union; and to me, it's no benefits . . . ." After his second paycheck on September 9 the deductions were discontinued, no payments were made to the Union for Black Sr., and the difference was reflected in his subsequent paychecks. This change was unilateral with no notice to Local 69 or opportunity for it to bargain regarding it.

Riddle testified that in September and early October he had comments from a number of crewmembers indicating their objections to the union deductions from their paychecks. He reacted by informing them he wanted their position in writing and for that purpose he made available to them Xeroxed copies of the form of card supplied to McLean by Local 69 for authorizing union deductions and contributions. Thus, on October 1, 1982, in the room at McLean's facility used by the crew, Riddle handed Black Sr. one of these cards, saying to him, "Here, do you want to join the union or not. It's up to you to write on here whether you do or not." Black wrote on the card, "I don't want to join the union." He signed the card, dated it, and handed it back to Riddle. About 2 weeks later, October 15, after withdrawal of recognition from the Union, he received an unsolicited raise in pay.

Richard Malcome began working for McLean in the week ending September 9, 1982, and continued until October 8, the second payday in October. Deductions were made from his pay to cover union permit fees and health and welfare contributions even though at the time Riddle hired him, and on occasion thereafter during his employment, he indicated his preference that such deductions not be made. His testimony indicates that his reason for this preference was that in the past he had been in and out of a number of unions, had had an unsatisfactory experience with the Laborers Union, that he was not a roofer by trade and expected his employment with McLean to be temporary, that he did not think it likely he would attain journeyman status in the roofers' trade, and that in the circumstances he did not think Local 69 would benefit him. When he was hired he told Riddle he was not a strong unionman. He first objected to the deductions when he received his first paycheck on September 9. On October 7 he went into McLean's office and asked for one of the form cards for authorizing union deductions. He signed it, noted on the card, "No, I do not want dues withheld," and returned the card to the office secretary. However, Malcome's last day of work for McLean was October 6 and he did not work thereafter although the pay period did not end until October 8. It appears from his testimony that he signed the card in order to receive a partial refund of deductions already made because he considered himself a temporary employee and not a regular roofer. Riddle testified that Malcome had indicated to him that he was concerned, saying that he had never been a unionman and wanted to know whether Riddle would let him work if he did not authorize union withholdings from his check. This does not square with Malcome's testimony that he had been in and out of the Laborers Union several times as well as other unions. I credit the account of Malcome who was the less interested witness.

David N. Riddle is Riddle's nephew and normally works for his own father who operates a small nonunion roofing firm. In September 1982, however, they had no work and he came to work for his uncle at McLean during the week ending September 16. He stayed less than 6 weeks. On September 15, a day or two after he began working, his uncle gave him a Xeroxed copy of a blank card for authorizing dues and other union deductions, and told him he could fill it out either to be a union member, or not to be in the Union, that it would not affect his employment with McLean in either case; and to fill it out however he wanted and in his own words if he did not want to be in the Union. According to the nephew, he did just that, writing on the card, "I don't want to be in the Union." He then returned the card to his uncle.

Although David Riddle, the nephew, was not asked if he made any oral statement to his uncle indicating his preference, his uncle testified that the nephew expressed himself verbally on the matter in the latter part of September in the presence of Dennis Casey, Ed Casey, and possibly several other crewmembers. None of these other persons were asked, or testified about statements by the nephew, but his uncle quoted him as saying, "I don't want nothing to do with the Union or Charlie Ford because I've already had some dealings. My dad threw him off the roof once." I credit this uncontradicted testimony. This statement apparently occurred subsequent to the card signing. It seems to me that his nephew's nonunion disposition must have been known to David Riddle, the uncle, before he hired him, and further that he must have realized his nephew would only temporarily be with McLean, as proved to be the case, because the nephew's permanent employment was with his father. Throughout his employment with McLean, the Company made no union deductions from his pay, remitted nothing to the Union on his behalf, and increased his paycheck accordingly. This was done without notice to Local 69 or opportunity for it to bargain on the matter.

John Glasscock became a roofer with McLean in the week ending September 23, 1982. The record indicates he was already working on September 17 and, according to his uncontradicted testimony, he had told Riddle prior to then that he did not want to be in the Union and

Riddle should not hold anything out of his paycheck. On September 17, Riddle called him into the office after work, handed him a Xeroxed copy of the form for authorizing union deductions, saying as he did so that he wanted to know whether Glasscock wanted to join the Union. Glasscock signed the card, dated it September 17, 1982, and wrote on it the following, "Don't want held out," and returned the card to Riddle. Beginning with his first paycheck on September 23 no union deductions were made, nor any sums remitted to the Union on his behalf, nor was any notice or opportunity given to Local 69 to bargain about it.

Richard Dailey went to work for McLean in the week ending September 16, 1982. No deductions for health and welfare and union permit fees or dues were made from his paycheck for that week but they were from his check at the end of the second week on September 23. He then, according to Riddle, asked, "If I don't permit you to hold out permit money, can I work?" Riddle replied he could. Dailey then told him, "Well, then, don't hold it out." Company records show that starting October 1 neither permit fees nor health and welfare contributions were deducted from Dailey's paychecks. No payments were made to the Union on his behalf, nor was any notice or opportunity given to Local 69 to bargain on the matter.

Wesley Jeakins started working for McLean in the week ending August 26, 1982, and union permit fees and contributions for health and welfare were deducted from his first four paychecks. Chris Akins began working during the week ending September 16, but no union deductions were made from his paychecks. Sometime in September at a time when Akins and Jeakins were in the office together, Riddle either informed Akins that union dues would be withheld from his paycheck or inquired of him whether he authorized such withholding. Jeakins then interjected, "Hey, man, you don't want nothing to do with no union. Especially that one," or words to that effect, and Akins responded, "Yeah, that's right." Respondents contend that it was obvious to Riddle that neither employee wished to be associated with the Union. The last withholding of union deductions from Jeakins' paychecks was made with the pay period ending September 16 and did not thereafter resume. Union deductions for Akins never commenced. No sums were paid to the Union on Akins' behalf, nor on Jeakins' behalf after September 16, nor was Local 69 given notice or opportunity to bargain respecting these matters.

Robert Sylvester joined the McLean crew in the week ending August 26, 1982, becoming a permanent member of the crew. Union dues and health and welfare contributions were deducted from his pay from the beginning of his employment through the pay period ending October 8. According to Riddle, he had heard during September and early October comments by a number of employees indicating objection to the union deductions. He recalled Sylvester saying he did not want a penny of his money going to the Union. As already noted, Riddle made available to crewmembers the union form for authorizing deductions. He handed some to individuals employees and also placed a supply in what is referred to as the crew shack where the roofers congregate before and after work. On October 7 in the crew shack Riddle told Sylvester to read one of these cards, fill it out, and sign it if he wanted to. Sylvester dated and signed the card entered thereon, "I do not wish to be part of Roofers Local 69." He then delivered the card to Riddle. Thereafter he received a refund of the union deductions already made for the first 2 weeks of October.

Ed Casey, one of several brothers of Dennis Casey, also started working for McLean in the pay period ending August 26, 1982. Deductions for the union permit fees and health and welfare contributions were made from his paycheck for that period and for subsequent pay periods through October 8. Sometime in late September or early October, during a period when McLean was engaged on a roofing job for Eagle's Grocery Store, a site rumored to be the target for a Local 69 picket line, according to Dennis Casey, he told the crew one morning as they started for the job, "Boys, there's supposed to be a picket on the job this morning. If any of you guys want to be union members, you had better not go." Apparently on the same occasion Riddle made a similar statement to the crew. Nevertheless, they all got in the truck indicating they wanted to work and were not worried about the Union. Ed Casey testified that on this occasion he declared in no uncertain terms his dislike for the Union as well as for Danny Casey, another of his brothers who was the Local 69 steward. Subsequently, on October 7 Riddle handed Ed Casey the form for authorization of union deductions, telling him he should indicate on it whether he wanted deductions made. Ed Casey signed the card, dated it October 7, 1982, and added the words, "No, I do not." He subsequently requested, and received, a refund of union deductions previously made from his pay for the periods ending October 1 and 8.

David Graves also went to work for McLean during the week ending August 26, 1982, at a time when he had been laid off from other employment. He was a longtime member of other unions, being a member of the Rubber Workers for 4 years and the Railroad Carmen for 7 years, but had become disenchanted with them because of layoffs from other jobs. He had worked for McLean 3 years earlier and permit fees and health and welfare contributions automatically had been deducted from his pay at that time. When he went to work for McLean in August 1982, the same thing occurred and the deductions continued through the week ending October 8.

According to Riddle, on the morning referred to above when it was expected there might be a Local 69 picket line at the Eagle's supermarket job, Graves was the first to indicate his willingness to work under those conditions when he ran to the truck saying that he had belonged to two or three unions that had not done him any good and he did not suppose this one would either. Although Graves denied generally he ever told Riddle how he felt about the Union, he did not specifically contradict the detailed description of the incident as given by Riddle and I credit Riddle's account.

In early October Riddle handed Graves a Xeroxed copy of the form for authorizing union deductions, instructing him to read it and fill out what he thoought, if

he wanted to have the money deducted or not. Graves asked him whether his election would affect his job and Riddle replied it would not. Graves read the card, dated it, signed it, and wrote on the card, "I don't want any dues taken out of my check." He then laid the card on the office desk. The date entered on the card, which is the only evidence respecting the date Graves executed it, is October 8, 1982, the day after Respondent withdrew recognition from Local 69. Graves' testimony generally, and specifically respecting his reasons for executing the card as he did, indicates that he was in need of money because of his layoff from other employment and that was the reason he did not want the deduction of permit fees to continue. His testimony also indicates, as does the card he executed, that he believed his election to discontinue deductions applied only to the permit fees and not to health and welfare contributions, which he believed were still continuing at the time of the hearing. Company records, on the other hand, indicate that deductions for both health and welfare and permit fees made for the first 2 weeks in October were refunded to him and that after October 8 no further deductions in either category were made. Whether Graves was accurate or inaccurate respecting what contributions were discontinued, his testimony and the legend he wrote on the dues-deduction form indicate that his intent was to continue the health and welfare deductions and to discontinue the permit fees, thus continuing to benefit from Local 69's representation but not paying for such in the form of permit fees. This does not indicate a desire to end representation by Local 69. See *Randle-Eastern Ambulance Service*, 230 NLRB 542, 552 (1977). In any case, his intentions, in executing the card, are irrelevant on the question of good-faith doubt because the card was executed after withdrawal of recognition from Local 69. Objective evidence to support a good-faith doubt of majority support for a union, in order to be considered, must be known to the employer at the time of its withdrawal of recognition. *Orion Corp v. NLRB*, 515 F.2d 81 (7th Cir. 1975); *B & B Gallo Pest Control Services*, 265 NLRB 535 (1982).

Richard Black Jr., son of Richard Black Sr., started with McLean in the week ending September 23, 1982. The Blacks reside in Iowa, but when working for McLean, temporarily reside in a motel in Bloomington, Illinois. On October 1, the younger Black, a helper, left work in midafternoon and went to their motel. At the end of the workday his father came to the motel, handed him one of the Xeroxed forms for authorizing union deductions, and asked him whether he wanted to join the Union. The son dated and signed the card, writing on it, "I don't want to join the union." He returned the form to his father who later delivered it to Riddle. This appears to be the only indication the son made respecting his attitude toward the Union. Health and welfare contributions were deducted from his first paycheck on September 23 but not thereafter and instead, beginning with his paycheck on October 1, were included in his paychecks. Local 69 had no notice or opportunity to bargain regarding this matter.

From the above it is apparent that as early as August 26, 1982, when the elder Black expressed himself, Riddle became aware of some lack of employee support for Local 69. This was followed by the unsolicited observation of Malcome when he was hired in early September that he was not a strong unionman, and his objections to the deductions when he received his first paycheck on September 9. Then on September 15, shortly after he had hired his nephew, Riddle gave him the form for authorizing union deductions, as contemplated in the collective-bargaining agreement, and instructed him to fill it out as he wished. The nephew indicated on the card that he did not want to be in the Union and later in the month verbally gave his reasons for his attitude. Also, in mid-September, Glasscock told Riddle he did not want to be in the Union and Riddle should not make union withholdings from his paycheck. Shortly thereafter, observing he wanted to know whether Glasscock wished to join the Union, Glasscock responded by signing the card in a manner indicating he did not want the deductions made. This was followed on September 23 by a query from Dailey whether he could work if he did not have the permit money withheld. When Riddle told him he could, Dailey directed him not to make the deductions. In the latter part of September and early October (but prior to October 7), Riddle heard verbal expressions from Jeakins, Akins, Ed Casey, and Graves indicating their lack of support for Local 69 and, in fact, the entire crew, when informed that Local 69 might be picketing the Eagle's job, nevertheless proceeded to work with apparent enthusiasm.

In addition to verbal statements of employees, Riddle received authorization forms from seven employees filled out in a manner indicating less than full support for Local 69.[6] Three of these cards indicated the signing employee did not wish union dues, permit money, and other deductions made from their paychecks, and, standing alone, do not amount to categorical rejections of Local 69 as employee representative. See *Randle-Eastern Ambulance Service*, supra. The other four cards express a broader desire not to be identified with the Union, one indicating a desire not to be "in the Union," another not to "join the Union," another not to "belong to the Union," and another not "to be part of Roofers Local 69." The oral comments and the cards are evidence tending to erode the presumed continued majority status of Local 69. There is no basis in the record for finding that Riddle solicited employees to oppose the Union or withdraw support from it, as alleged in the complaint, nor is there evidence of an illegal poll of employee sentiment respecting the Union as urged in the General Counsel's brief. The collective-bargaining agreement contemplates that the Employer shall obtain employee authorization for union-related deductions and in all instances it is clear that Riddle underscored that the employee should express his own wish in the matter. I find, therefore, that these expressions of employee sentiment were evidence on which, unless tainted by unfair labor practices, Riddle was entitled to rely in assessing whether Local 69 should or should not continue to be recognized as the represent-

[6] Riddle received an eighth card from Graves, which was filled out on October 8, 1982. As noted above, this card cannot be a basis for the employer's good-faith doubt of the Union's majority status on October 7.

ative of his roofing employees. *Bellwood General Hospital v. NLRB*, 627 F.2d 98 (7th Cir. 1980).

The General Counsel argues that the evidence relied on by McLean to support the good-faith doubt defense is inadequate because a majority of the employees did not execute cards indicating their rejection of the Union. The argument, as stated, is faulty because it takes account only of the cards, ignoring the oral expressions of sentiment noted above. On October 7, when McLean withdrew recognition of Local 69, it employed 12 roofers within the admitted appropriate bargaining unit.[7] Of these 12 employees Riddle has as of October 7 some information from all but 2 (Tim Hardin and Tom Howell) indicating lack of support for Local 69. Noting that it is not essential that a good-faith doubt be supported by such information from a majority of the employees, I find that on October 7 Riddle had sufficient objective knowledge, which would have justified a good-faith doubt of the majority status of Local 69 in the absence of tainting unfair labor practices.

3. The context of the unfair labor practices

The General Counsel urges that a good-faith doubt defense is not available because of Respondents' unfair labor practices in (1) refusing to recognize and bargain with Local 69 concerning the working conditions of Accurate employees and the requirement that roofers working on Accurate jobs do so under nonunion conditions, (b) unilaterally changing terms of employment of McLean employees, and (c) soliciting employees to abandon the Union. For Respondents to be deprived of that defense, the unfair labor practices must have tainted the Employer's good-faith doubt asserted at the time of withdrawal of recognition. The McLean crewmen who expressed their reservations concerning Local 69, verbally or in writing, did not work on Accurate jobs or under the nonunion conditions that the General Counsel contends were violations of the Act. Some testified they knew nothing about Accurate or its operations. I do not credit these disclaimers. Given the modest size of the McLean work force at its largest, together with the proximity of Accurate, the common supervision of Dennis Casey, and the fact that almost all Accurate roofers were members of the McLean crew, I infer that the nonunion status of Accurate was general knowledge among McLean roofers. These nonunion conditions had been apparent at least since May 1982 and remained so through the time of McLean's withdrawal of recognition on October 7, 1982. Thus, the ongoing refusal to recognize and bargain about the Accurate operation provided a pervasive and continuing atmosphere of unfair labor practices during the time Riddle was noting and collecting antiunion sentiments from employees and up to and beyond the date of withdrawal of recognition. As the Board stated in *C & C Plywood Corp.*, 163 NLRB 1022, 1024 (1967), "The failure to accord the Union its rightful role in the establishment of new wage rates . . . necessarily tended to undermine the Union's authority among the employees whose interests it was obligated to represent in such matters."

Beginning in early September this context of unfair labor practices increased further with the diversion of union dues, permit fees, and health and welfare contributions from the union recipients to the employee, thereby effectively increasing the employee's pay. These de facto increases were carried out without notice to Local 69 or opportunity for it to bargain on the matter, while it was still presumptively the majority representative, and before the October 7 withdrawal of recognition based on doubt on the Union's majority status. In this fashion the take-home pay of employees was increased as follows: Richard Black Sr. on September 9, David N. Riddle and Chris Akins on September 16, John Glasscock and Wesley Jeakins on September 23, and Richard Black Jr. and Richard Dailey on October 1. I find these unilateral increases, which further undercut the status of the Union, were additional unfair labor practices prohibited by Section 8(a)(1) and (5) of the Act. *C & C Plywood Corp.*, supra and see *Abbey Medical/Abbey Rents*, supra. I also find that the cessation of health and welfare and pension payments to the union funds violated Section 8(a)(1) and (5) of the Act. *Cauthorne Trucking*, 256 NLRB 721 (1981). It is arguable that the sums involved in these changes belonged to the respective employees and that McLean merely gave them what was already theirs. Be that as it may, there is no disputing the unilateral nature of the changes with the attendant undercutting effect on the Union's status. Even if the employees were entitled to the money, McLean was obligated to take the matter up with the Union as their lawful representative. It is also arguable that the changes complied with the collective-bargaining agreement. I find they did not because the pattern of the agreement is to funnel certain amounts to the employees and other amounts to the Union or union funds. The most that can be contended for the defense on this point is that the agreement is ambiguous. If so, Respondent is not thereby relieved of its duty to bargain with the Union on such matters. See *C & C Plywood Corp.*, supra.

Considering the totality of the circumstances, I find that Riddle may not assert a good-faith doubt as of October 7, 1982, regarding the majority status of Local 69 because, even though he knew of considerable antiunion sentiment among the employees, that doubt thrived in the context of continuing unfair labor practices which nurtured disaffection from the Union. *Celanese Corp.*, 95 NLRB 664 (1951). In this respect these circumstances differ from those in *Sofco, Inc.*, 268 NLRB 159 (1983), where the Board found objective considerations sufficient to support the employer's good-faith doubt of union majority status. There there appeared to be no comparable context of unfair labor practices. The basis for McLean's withdrawal of recognition from Local 69

[7] The employees within the bargaining unit included Chris Akins, Richard Black Sr., Richard Black Jr., Ed Casey, Richard Dailey, John Glasscock, David Graves, Tim Hardin, Tom Howell, Wesley Jeakins, David Riddle, and Robert Sylvester. Although Michael Riddle, a son of the owner of McLean, was employed by the Company as of October 7, 1982, he was not an employee within the meaning of Sec. 2(3) of the Act or within the bargaining unit. Richard Malcome was an employee within the bargaining unit through October 6, but that was his last day of work. He did not work for McLean thereafter and cannot be considered as within the bargaining unit as of October 7.

is, therefore, unfounded and constitutes no refutation of its presumed majority status. That presumption of continuing majority status is based on the Union's labor relations history with McLean. *Barrington Plaza & Tragniew*, 185 NLRB 962, 963 (1970), enf. denied on other grounds 470 F.2d 669 (9th Cir. 1972). It follows that by its withdrawal of recognition on October 7, 1982, McLean reneged on its continuing duty to recognize and bargain with Local 69 and in so doing violated Section 8(a)(1) and (5) of the Act. *Celanese Corp.*, supra; *Shamrock Dairy*, supra, 119 NLRB 998 and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (D.C. Cir 1960), cert. denied 364 U.S. 892 (1960); *Bartenders Assn.*, 213 NLRB 651, supra.

It also follows from McLean's continuing duty to recognize and bargain with Local 69 that the unilateral reimbursement to employees after October 7, 1982, of union dues and deductions made before that date and the increase in take-home pay that resulted and continued thereafter also violated Section 8(a)(1) and (5) of the Act. Such increases were given after October 7 to Ed Casey, David Graves, and Robert Sylvester.

4. The failure to provide information

When McLean withdrew recognition from Local 69 on October 7, 1982, Union Attorney Benassi that same day in a letter to Respondent Attorney Roesler protesting the withdrawal of recognition also requested that Respondents furnish the Union certain information for use in collective bargaining, including employment records of both companies showing rates of pay, hours worked, and fringe benefits paid since January 1, 1982. It is undisputed that this information has not been supplied. The information requested, apparently relevant for bargaining purposes, has not been furnished because of the defense that Respondents have no duty to bargain with Local 69. Inasmuch as it has been found above that such duty exists, it follows that the relevant information requested should be furnished for bargaining and Respondents' failure to do so constitutes an additional violation of Section 8(a)(1) and (5) of the Act. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

CONCLUSIONS OF LAW

1. Respondents McLean and Accurate are employers within the meaning of Section 2(2) of the Act, a single employer for labor relations purposes; alter egos of each other for labor relations purposes; and engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. All full-time and regular part-time journeymen roofers, helpers, and apprentices employed by Respondent McLean or Accurate at their Bloomington, Illinois facilities and various jobsites; but excluding professional employees, office clerical, guards, and supervisors as defined in the Act, and all other employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. Local 69 was and is, and prior to January 1980 Local 130 was, a labor organization within the meaning of Section 2(5) of the Act.

4. Respondent McLean adopted and became bound by the collective-bargaing agreement of Local 69 with Bloomington, Illinois roofing contractors effective May 1, 1980.

5. By informing employees in April and May 1982 that in working for Accurate they would be working under nonunion conditions, Respondents engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. Respondents engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 8(d) of the Act by

(a) In June 1982 and thereafter, although requested to do so, refusing to recognize and bargain with Local 69 as the representative of the roofing employees of Accurate.

(b) In September 1982 and thereafter increasing the take-home pay of employees by the amounts previously deducted as union dues, permit fees, and health and welfare contributions.

(c) Effective October 1, 1982, ceasing to remit employee union dues and permit fees to Local 69 and contributions to the health and welfare fund to the roofers pension fund designated by Local 69.

(d) On October 7, 1982, withdrawing recognition from Local 69 as the representative of Respondents' roofing employees and refusing thereafter to bargain collectively with that Union.

(e) Since October 7, 1982, failing and refusing to furnish to Local 69 relevant information necessary for collective bargaining.

7. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 8(d) of the Act, I shall order that Respondents cease and desist therefrom, and, on request, bargain collectively with Local 69 as the exclusive representative of all employees in the appropriate unit.

I shall further order that Respondents make whole the employees in the unit found appropriate here by paying all contributions to the health and welfare and pension trust fund as provided in the collective-bargaining agreement of Local 69 effective from May 1, 1980, until its abrogation October 7, 1982, which have been paid absent Respondents' refusal to apply the terms of agreement to Accurate employees and McLean's unilateral discontinuance of such payments, and to post the attached notice.[8]

[8] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. The Board leaves to the compliance stage the question of whether Respondents must pay any additional amounts into the benefit funds in order to satisfy the "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence

Continued

See *Bro. Concrete Cutting*, 266 NLRB 100 (1983); *G. T. Knight Co.*, 262 NLRB 328 (1982); *Haberman Construction Co.*, 236 NLRB 79 (1978); *Vin James Plastering Co.*, 226 NLRB 125 (1976). This make-whole remedy shall include reimbursing employees for contributions they themselves may have made or the maintenance of their coverage for benefits after Respondents unlawfully ceased contributing, for any premiums they may have paid to third-party insurance companies for coverage heretofore provided by the trust, and for any medical bill employees have paid to health care providers that the trusts would have covered, together with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).[9] See *Hudson Chemical Co.*, 258 NLRB 152 (1981); *Kraft Plumbing & Heating*, 252 NLRB 891 (1980). The General Counsel urges that the remedy include enforcement of the Local 69 contract beyond October 7, 1982. It is not demonstrated in this record, however, that, absent clear contractual provisions controlling the duration and termination of the agreement, Respondents violated the contract by canceling it. The appropriate remedy, therefore, is for Respondents to bargain with Local 69 regarding terms and conditions of employment after October 7, 1982. Respondents also will be required to preserve and, on request, make available to authorized agents of the Board all records necessary or useful in determining compliance with this Order.

[Recommended Order omitted from publication.]

of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[9] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

New Process Company *and* United Food and Commercial Workers International Union, Local 1, AFL–CIO–CLC. Cases 6–CA–13933, 6–CA–14403, 6–CA–14578, 6–CA–14597, 6–CA–14697, 6–CA–15995, and 6–RC–8922

July 29, 1988

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On February 6, 1984, Administrative Law Judge Marvin Roth issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a supporting brief, and the General Counsel filed a brief in opposition to the Respondent's exceptions.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.

I.

This case concerns the conduct of the Respondent and the Charging Party during a lengthy union organizing campaign that culminated in an election that the Charging Party lost by a vote of 1049 to 231.[4] In his decision, the judge found that the Respondent, New Process Company (NPC), committed a number of violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, and he sustained several of the Charging Party's objections to the election and directed that a new election be held. The judge also dismissed a number of alleged violations and overruled many of the Charging Party's election objections. NPC excepts to all the violations that were found and all the objections that were sustained. The Charging Party, the United Food and Commercial Workers International Union Local 1 (UFCW or the Union), excepts to the judge's denial of the UFCW's request for reimbursement of its organizational expenses and to the findings on which the denial was predicated. No party excepts to the judge's disposition of any of the alleged violations that he dismissed or any of the election objections that he overruled.

On the basis of NPC's exceptions, we reverse, for reasons stated below, the judge's conclusions that NPC committed unfair labor practices by not granting nonemployee union organizers access to its property. We adopt the judge's conclusion that NPC violated Section 8(a)(3) and (1) by refusing to reinstate former employees Freeda Carr and Nancy Race.[5] We also adopt the judge's conclusions that NPC violated Section 8(a)(1), (3), and in some instances (4), by refusing to recommend for rehire and refusing to rehire the six former employees who are the subject of Case 6–CA–15995. Additionally, except in the few instances discussed below, we adopt the judge's disposition of the remaining violations and objections to which NPC excepted,[6] and we adopt the judge's recommendation that the election be set aside and a new election ordered.[7] We have not considered, and ex-

[1] On February 21, 1984, Judge Roth issued an errata correcting par. 2(h) of the recommended Order and correcting the decision number.

[2] The Respondent has requested oral argument. In support of its request, the Respondent also submitted a supplemental letter and a portion of a union newsletter. The request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent in its brief initially states that it does not take issue with the judge's credibility findings. Later, however, it challenges the judge's credibility findings concerning certain testimony of the Respondent's assistant vice president Stark, Supervisor Gern, and employee Hockenberry. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] There were also 81 challenged ballots and 3 void ballots.

[5] As appropriate affirmative relief may be ordered on the basis of the 8(a)(3) and (1) violations, we find it unnecessary to pass on the judge's conclusion that the refusal to reinstate Carr and Race also violated Sec. 8(a)(4).

[6] In adopting the judge's conclusion that Supervisor Nick Pollock unlawfully interrogated Alan LaCava and other employees, we reject NPC's contention that the judge's resolution of this issue is contrary to our decision in *Rossmore House*, 269 NLRB 1176 (1984). Unlike that case, it was not shown here that the employees questioned by Pollock other than LaCava openly supported the Union. Moreover, unlike *Rossmore House*, Pollock's questions concerned the employees' union activities rather than union sentiments.

[7] The judge held that the critical period began on the date of the filing of the initial election petition, October 27, 1980, although this petition was withdrawn on December 22, 1980, a second election petition was filed on January 2, 1981, and the election was held on June 9, 1981. NPC excepts to the critical period found by the judge. The judge, however, found no unfair labor practices or other objectionable conduct to have occurred between October 27, 1980, and January 2, 1981, except for NPC's refusal to rehire Barbara Morgan, which occurred both before and after January 2, 1981. Thus, we need not consider whether the judge was correct in determining that the critical period began on the date that the first petition was filed, rather than the date that the second petition was filed.

Although we reverse some of the judge's findings of unfair labor practices and other objectionable conduct that were alleged to have occurred during the critical period, we find that the allegations of objectionable conduct that we sustain warrant setting aside the election, even assuming that the critical period did not begin until the Union filed its second election petition. These instances of objectionable conduct are as follows: (1) Supervisor Mary Bloom's warning to Warren employees Sheila Mack and Dawn Dickson for copying the names of employees from timecards in the timecard rack; (2) Supervisor Kerry Gern's written warning to Irvine employee Joan Hockenberry for similar conduct; (3) Gern's warning to Hockenberry to stop "union arguing" after she answered another employee's questions about the Union while continuing to do her work; (4) NPC's informing Carr that she was denied access to NPC's property

Continued

press no views concerning, the judge's findings and conclusions about which no party filed exceptions. See Section 102.46(b) and (h) of the Board's Rules and Regulations, 29 CFR § 102.46(b) and (h).

II.

The General Counsel's allegation that NPC violated Section 8(a)(1) by refusing to allow nonemployee union organizers access to NPC's property concerns only NPC's Irvine Distribution Center facility (Irvine), at which approximately 538 bargaining unit members were employed. No similar allegation was made concerning NPC's Warren facility, 7 miles from Irvine, at which approximately 917 unit members were employed.[8] Irvine is located on a large tract of land owned by NPC adjacent to U.S. Highway 62 in a semirural area of northwestern Pennsylvania. The access roads connecting the Irvine facility to the highway are on NPC property. On October 6, 1980, two union organizers and three former NPC employees attempted to distribute union literature to employees along a sidewalk that leads from the main building exit to a parking lot at Irvine. NPC Vice President John Carter told one of the organizers that they were on private property and requested them to leave, which they did. The next day the same group plus an additional organizer returned and were ordered to leave by a Pennsylvania state trooper, who was present at NPC's request. The three organizers left but returned shortly and distributed leaflets to employees leaving the plant. At the request of NPC, the trooper charged the organizers with criminal trespass. The organizers did not return thereafter. Subsequently, on February 26, 1981, during the pendency of the election petition, the UFCW wrote Carter requesting that NPC allow the Union to handbill the employees at Irvine or provide the Union a list of the names and addresses of those employees. NPC did not reply to the request.

After conducting an extensive review of the Union's organizing efforts, the judge concluded that, despite conscientious efforts, the Union did not have a viable means of communication with Irvine employees other than entering Irvine premises for the purposes of distributing literature and talking to the employees. He therefore concluded that NPC violated Section 8(a)(1) by excluding nonemployee union organizers from its premises. We do not agree.

Subsequent to the judge's decision, the Board issued its decision in *Fairmont Hotel*, 282 NLRB 139 (1986). In *Fairmont*, the Board reviewed *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and its progeny, and determined that in cases involving conflicts between Section 7 rights and property rights, the Board's task is "first to weigh the relative strength of each party's claim." The Board found:

> If the property owner's claim is a strong one, while the Section 7 right at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative. [*Fairmont Hotel*, supra at 142.]

The Board also set forth some of the factors that may affect the relative strength or weakness of an asserted property right or Section 7 right. Applying those factors here, we find that NPC has a strong property right at Irvine. NPC is engaged in the mail order retail sale of merchandise, primarily clothing. Irvine is essentially a warehouse operation engaged in the storage, inspection, packing, and shipping of merchandise. NPC has retail outlets for direct sales at three other locations but not at Irvine. As Irvine is set back from the highway on a large tract of land devoted exclusively to NPC's business and to which retail customers are not invited, NPC has a strong property right at Irvine.

We also find that the Section 7 right at issue is quite strong. The right of workers to organize freely for the purpose of collective bargaining is a very strong Section 7 right, one found by the Supreme Court to be "at the very core of the purpose for which the NLRB was enacted."[9] Here, the union organizers sought access to the plant exterior at Irvine, a facility of NPC, the targeted employer,

unless she first received permission to enter; and (5) NPC's refusal to rehire Barbara Morgan. Although Morgan first applied for reemployment in December 1980, she went to NPC and updated her application a week or two later, and she thereafter contacted NPC three or four times about being rehired. We thus conclude that her efforts to obtain reemployment continued into the period between the Union's filing of its second election petition on January 2, 1981, and the date of the election, June 9, 1981.

We additionally adopt the judge's conclusion that issuance of a bargaining order is not warranted. The judge's discussion of the bargaining order issue, however, has been superceded by our decision in *Gourmet Foods*, 270 NLRB 578 (1984).

[8] Union organizers and prounion employees distributed literature to employees on the sidewalk directly in front of the Warren facility, which was located on a downtown street. Sixty-three percent of the bargaining unit members were employed at the Warren facility.

[9] *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978); see *G. W. Gladders Towing Co.*, 287 NLRB 186 (1987); *SCNO Barge Lines*, 287 NLRB 169 (1987); *Emery Realty*, 286 NLRB 372 (1987).

in furtherance of this paramount right of employees to organize.[10]

We thus find that both the property and Section 7 rights at issue are strong and, thus, relatively equal. Accordingly, we deem it necessary to consider whether reasonable alternative means by which the Union could have communicated its message were available.[11]

In considering this question, it is instructive to review the Supreme Court's decision in *Babcock & Wilcox*, supra, the seminal case involving the accommodation of property rights and Section 7 rights. In *Babcock & Wilcox*, union organizers sought access to privately owned parking lots at an industrial site so that they could organize the employees. As both rights claimed were important ones, the Court carefully reviewed the facts before it to ascertain if there were some way that the Section 7 right in issue could be effectuated without requiring trespassory access. The Court concluded that access to the employees could be obtained in the adjacent town or at the employees' homes. Therefore, access to Babcock & Wilcox's private property was denied. The Court specifically acknowledged that in rare circumstances the accommodation principle may require trespassory organizational activities, citing *NLRB v. Lake Superior Lumber Corp.*,[12] a case invalidating restrictions placed on access to employees living and working at an isolated lumber camp. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,[13] the Court again acknowledged the existence of such rare circumstances, citing *Lake Superior Lumber*, and also *NLRB v. S & H Grossinger's*,[14] a decision ordering union access to employees living and working on the premises of a resort hotel. Therefore, had *Babcock & Wilcox* involved a company town, for example, where all or a majority of the employees in question both lived and worked, the Court might well have struck the balance differently. But, clearly, on the facts before it in *Babcock & Wilcox*, the Court implicitly found the obvious additional burden or cost of organizing in the town, on the street, and at the employees' homes was not sufficient to overcome the private character of the property right at stake.

On the record before us here, the General Counsel has not demonstrated the existence of "unique obstacles to nontrespassory methods of communication with the employees"[15] such as were present in *Lake Superior Lumber*, supra, or *Grossinger's*, supra. Thus, the record shows that the UFCW conducted an extensive organizing campaign among NPC's employees. It established an internal organizing committee at Irvine and Warren that numbered between 75 and 80 employees, although the size of the committee varied over the course of the campaign. A number of the committee members, including Freeda Carr, Kay Davis, Donna Fehlman, Joan Hockenberry, and Alan LaCava, distributed union literature to employees at Irvine in front of the building between shifts or in the cafeteria at lunchtime. Union representatives made about 1000 house calls at the homes of employees. The Union also compiled a list of the names and addresses of 800 employees and sent between 12 and 15 mailings to employees. The Union held regular weekly meetings in a motel meeting room and held a large meeting in a school auditorium shortly before the election. The Union for a time broadcast commercials on a Warren radio station and later did the same on a radio station in Jamestown, New York, 24 miles from Warren.

As detailed by the judge in section IV,A,8 of his decision, the UFCW did encounter obstacles in its organizing efforts. There was a 15- to 20-percent annual turnover rate among NPC's employees, some of the employees' homes were widely scattered over a rural area, the Warren newspaper declined to run UFCW ads, the Warren radio station discontinued UFCW ads, and the UFCW had difficulties arranging for a large meeting hall. Nevertheless, despite these impediments, the Union was able to communicate with the employees through the various means described above. Although the judge also emphasized NPC's unlawful interference with employee organizing activity as impeding organizational efforts, we note that some prounion employees nevertheless passed out literature in the cafeteria and in front of the building at Irvine, and a larger number wore union T-shirts or other union paraphernalia to work. Additionally, the great majority of violations committed by NPC occurred prior to the start of the lengthy critical period, which the judge found to extend from October 27, 1980, to the election on June 9, 1981. Moreover, as detailed below, some of the actions that the judge determined to be unlawful interference we do not find to be such.

Thus, we find that there were channels of communication available to the Union through which, with reasonable efforts, it could reach its intended

[10] *Fairmont Hotel*, supra at fn. 18.

[11] In accordance with his concurring opinion in *Fairmont Hotel*, Chairman Stephens finds it unnecessary to engage in any balancing of rights before reaching the question of alternative means. He agrees, however, with his colleagues' analysis of the availability of reasonable alternative means of communication and he agrees that the denial of access at issue here did not violate the Act.

[12] 167 F.2d 147 (6th Cir. 1948).

[13] Supra, 436 U.S. at 205 fn. 41.

[14] 372 F.2d 26 (2d Cir. 1967), enfg. as modified 156 NLRB 233 (1965).

[15] *Sears*, 436 U.S. at 205 fn. 41.

audience with its message. The Union emphasizes that it was not, in many cases, able to have its message conveyed personally by its professional organizers, as it would have preferred, and instead had to rely on prounion employees, leaflets, mailings, and radio commercials, as well as home visits by organizers, to spread its message. As the Section 7 right and property right at issue here are relatively equal, however, the Union possessed no right to have its organizers come onto NPC premises in person to deliver its message as long as there were other available channels of communication through which, with reasonable efforts, it could reach its intended audience.

The judge, in section IV,B,6 of his decision, also found NPC's failure to grant access in response to the Union's request of May 7, 1981, constituted a violation on the basis of the Board's decision in *Montgomery Ward & Co.*, 145 NLRB 846 (1964). That decision held that a nonunion employer, which was engaged in retail sales, and thereby could lawfully maintain a privileged broad no-solicitation rule as to sales areas, violated Section 8(a)(1) by imposing an unlawfully broad rule banning union solicitation in nonworking areas during nonworking time and at the same time denying the union an opportunity to enter the employer's premises to respond to antiunion speeches the employer made to its employees. *Montgomery Ward* is not applicable here, however, because unlike the employer in that case, NPC did not generally prohibit employees from engaging in union solicitation in nonworking areas during nonworking times. Although we adopt the judge's finding of a violation concerning NPC's no-solicitation policy, this violation is based on the discriminatory nature of that policy, rather than overbreadth. Accordingly, union access to NPC's premises was not mandated under *Montgomery Ward.*

III.

We also reverse the judge's decision on certain other matters. A statement made by NPC representatives to assembled groups of employees during the week prior to the election was found by the judge in section IV,B,5,a of his decision to imply that if the employees decided in favor of union representation, NPC's policy of allowing employees to have direct access to management would end. Assuming arguendo that this statement implied what the judge found it to imply, on the basis of our decision in *Tri-Cast*, 274 NLRB 377 (1985), we nevertheless dismiss the allegation that this statement constituted a threat in violation of Section 8(a)(1). In *Tri-Cast*, which addressed a similar but more explicit employer statement of the consequences of unionization, we held there is no threat in a statement that explains to employees that, when they select a union to represent them, the relationship between the employees and the employer will not be as it was before. That holding is dispositive of the alleged violation here.

Other statements made by NPC spokesmen to assembled groups of employees during the first week of June 1981 were found by the judge to constitute threats. Statements were made to the effect that the Union was likely to seek a contract provision requiring union membership as a condition of employment, and, under such a provision, if employees for any reason then lost their union membership, they would also lose their jobs. In section IV,B,5,a of his decision, the judge found that these statements constituted threats of loss of job security. We disagree. The statements were an inaccurate account of the law, but they did not amount to a threat that the employees would be fired if they voted for the Union or that unionization would result in the employees' losing their jobs. Moreover, the possibility of job loss was predicated on the Union's first terminating the employees' union membership, an event beyond the control of NPC. In *Metropolitan Life Insurance Co.*, 266 NLRB 507 (1983), the Board held unobjectionable an employer's election campaign statement that employees who continued to work during a strike could be fined by the union, even if they were not members of the union. That the statement constituted a misrepresentation of the law did not warrant finding it to be objectionable conduct. The Board did not discuss whether the statement constituted an unlawful threat, but in finding the statement unobjectionable the Board implicitly rejected such a view. We find similarly that NPC's statements here, although a misrepresentation of the law, did not constitute objectionable conduct or an unlawful threat. We therefore dismiss the allegation that they violated Section 8(a)(1). See *John W. Galbreath & Co.*, 288 NLRB 876 (1988). In section IV,B,5,b of his decision, the judge similarly found statements that a union member could be fined for writing an antiunion letter and that an employee could be fined or expelled from the Union for filing a decertification petition to constitute threats of loss of job security. Again, we reverse the judge and find these statements not be threats but, as most, misrepresentations, and, therefore, not objectionable conduct under *Metropolitan Life.*[16]

[16] In agreement with the judge, Member Johansen would find violative of Sec. 8(a)(1) NPC's election campaign statements that the Union would be likely to seek a contract provision requiring union membership and if employees for any reason then were expelled from the Union, they

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IV.

In affirming the judge's remaining findings of violations or objectionable conduct, we make certain modifications to the judge's rationale, as follows. In adopting the judge's conclusion in section IV,A,4 of his decision that NPC violated Section 8(a)(1) by increasing the amount of supervision on the night shift at its Warren facility, we note the NPC's explanation for the increase in supervision is unconvincing.[17] We find particularly unpersuasive the testimony of NPC Assistant Vice President George Stark that starting in the summer of 1980 the night-shift supervisors at Warren, who were all experienced supervisors, began asking Stark numerous questions about "how they were to do this and how they were to do that," which necessitated assigning day-shift supervisors to assist and advise the night-shift supervisors. Stark failed to explain why the experienced night supervisors' sudden need for assistance happened to coincide with the onset of the union organizing effort.

In adopting the conclusion in section IV,A,5,f of the judge's decision that NPC violated Section 8(a)(1) and (3) by issuing to employee Vivian Newton a written warning after Newton requested employee Chris Nuhfer to show her Nuhfer's union authorization card while at work, we note that at the time Newton made the request she was not neglecting her work, as her work tasks were completed at that point. Indeed, the phrase "rather than doing her work" was deleted from her warning in order to reflect this fact. Moreover, the language of the warning did not assert Newton was impeding Nuhfer's work. Rather, the conduct for which Newton received a warning was characterized as "conducting union organizing business while on Company time." We, therefore, adopt the judge's finding that the issuance of the warning constituted an unfair labor practice. See *Gemco*, 271 NLRB 1190 (1984) (prohibition of solicitation on "company time" found unlawful).[18]

As we have concluded that NPC has committed certain unfair labor practices, we issue the following remedial order.

ORDER

The National Labor Relations Board orders that the Respondent, New Process Company, Warren, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in United Food and Commercial Workers International Union, Local 1, AFL–CIO–CLC, or any other labor organization, by discriminatorily refusing to reinstate, recommend for rehire, or rehire employees; by discriminatorily transferring employees; disciplining them because of their union activities; segregating them at work; conspicuously or closely observing them or scrutinizing them at work; prohibiting them from talking at work; or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

(b) Refusing to reinstate, recommend for rehire, or rehire employees, or otherwise discriminating against them because they give testimony or are subpoenaed to testify under the National Labor Relations Act.

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would lose their jobs. Coupled with these statements, NPC enumerated all the offenses listed in the Union's constitution for which a member could be expelled. To be lawful, predictions of the consequences of unionization "must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Although NPC's prediction that the Union would seek a contractual union-shop provision may have been objectively probable and beyond NPC's control, NPC's further statement that if employees for any reason were expelled from the Union they would lose their job was not. Contracts cannot lawfully provide that expulsion from a union for any reason requires termination of employment; employment may be conditioned only on payment of union dues and fees. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). Thus, NPC's statement about employee job loss was premised on a prediction that NPC and the Union would agree to an illegal contract clause and that NPC would discharge employees pursuant to this clause, a prediction of events neither objectively probable nor beyond NPC's control. As the judge noted, the statements here are unlike the employer misstatement of law at issue in *Daniel Construction Co.*, 257 NLRB 1276 (1981), which was found not to violate Sec. 8(a)(1) because it contained "no express threat that the employer by its own action would impose dire consequences, such as discharge on the employees and no implicit threat to the employees' rights." There, in response to an employee question, the employer's manager stated that the employee would have to join the union if the union won the election. Nothing was said regarding the consequences if the employee failed to join the union. In the present case, by contrast, NPC specifically raised the prospect of discharge, a "dire consequence," if employees lost union membership. Cf. *SMI of Worcester*, 271 NLRB 1508, 1524 (1984) (statement that, if requested by union, employer would discharge employee who refused to sign union membership application found to violate Sec. 8(a)(1)). Similarly, the statements at issue here are unlike the employer misstatement of law found unobjectionable in *Metropolitan Life Insurance Co.*, 266 NLRB 507 (1983), as the statement there merely threatened nonunion members with union fines, not the "dire consequence" of discharge, if they worked during a strike; moreover, the threatened union fines there were beyond the employer's control. Accordingly, Member Johansen would find NPC's statement that employees would lose their jobs if expelled from the Union to violate Sec. 8(a)(1).

[17] In adopting the judge's decision on this issue, we do not rely on his statement that, in increasing supervision, NPC used eight or nine additional supervisors to cover the night shift. As the judge noted in the paragraph that preceded the one containing this statement, these additional supervisors covered the night shift on a rotating basis. Normally only one additional supervisor at a time served on the night shift.

[18] In addition, in adopting the judge's conclusion in sec. IV,A,5,c of his decision that NPC's policy concerning display of prounion and antiunion signs on "heisters," or forklift trucks, was an unfair labor practice, we rely solely on NPC's discriminatory implementation of this policy. We do not adopt, in the context of this case, the judge's statements that NPC could not prohibit the signs simply because they were taped onto NPC property and that prohibiting the display of both prounion and antiunion signs violated the Act.

(c) Interrogating employees concerning their union activities or those of their fellow employees.

(d) Threatening employees with lack of equal or fair opportunity for advancement or benefit, or other more onerous terms and conditions of employment, if they designate or select the Union or any other labor organization as their bargaining representative.

(e) Threatening employees with management disapproval or other reprisal because of their union activities.

(f) Wiping dirt or grease on union T-shirts or other union insignia worn by employees.

(g) Threatening to destroy union literature or paraphernalia.

(h) Confiscating union literature in nonworking areas.

(i) Maintaining or enforcing any policy which prohibits employees from union solicitation or talking about the Union or union business at times when the employees are properly not engaged in performing their work tasks, or which prohibits such activity while permitting other forms of solicitation or conversation.

(j) Prohibiting displays of union signs while permitting display of antiunion signs.

(k) Denying employees access to its bulletin boards to post prounion or related material, or removing such material from its bulletin boards, while permitting posting of other nonwork literature.

(l) Engaging in surveillance of union activities, or increasing supervision in order to engage in surveillance of employees because of their union activities.

(m) Prohibiting off-duty employees, including employees who have been discriminatorily denied reinstatement, from entering or remaining on outside nonwork areas of the Respondent's premises for the purpose of engaging in union solicitation or distribution of union literature.

(n) Prohibiting employees from copying names from timecard racks for lawful organizational purposes at times when the employees are properly not engaged in performing their work tasks, or disciplining employees because they engage in such activity.

(o) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Freeda Carr and Nancy Race immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(b) Offer Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca Stuart Walton immediate and full employment, in a nondiscriminatory manner, to positions for which they are qualified, without prejudice to their seniority or other rights and privileges to which they would be entitled absent the discrimination against them, and make them whole for losses they suffered by reason of the discrimination against them, in the manner and to the extent set forth in the remedy section of the judge's decision.

(c) Remove from its files the negative or qualified reemployment recommendations for Freeda Carr, Nancy Race, Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca Stuart Walton, and notify each of them in writing that this has been done and that such recommendations will not be used as a basis for further personnel actions against them.

(d) Revoke, and expunge from its files, the written warnings which were given to Vivian Newton in October 1980, and to Joan Hockenberry in February 1981, and any references to the oral warnings which were given in January 1981, to Hockenberry, Sheila Mack, and Dawn Dickson, and notify each of them in writing that this has been done and that such warnings will not be used as a basis for future personnel actions against them.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its plants in Warren and Irvine, Pennsylvania, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Re-

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent to ensure that the notices are not altered, defaced, or covered by any other material.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in United Food and Commercial Workers International Union, Local 1, AFL–CIO–CLC, or any other labor organization, by discriminatorily refusing to reinstate, recommend for rehire, or rehire you, by discriminatorily transferring you, disciplining you because of your union activities, segregating you at work, conspicuously or closely observing or scrutinizing you at work, prohibiting you from talking at work, or in any other manner discriminating against you in regard to your hire or tenure of employment or any term or condition of employment.

WE WILL NOT refuse to reinstate, recommend for rehiré, or rehire you, or otherwise discriminate against you because you give testimony or are subpoenaed to testify under the National Labor Relations Act.

WE WILL NOT interrogate you concerning your union activities or those of your fellow employees.

WE WILL NOT threaten you with lack of equal or fair opportunity for advancement or benefit or other more onerous terms and conditions of employment if you select Local 1 or any other labor organization as your bargaining representative.

WE WILL NOT threaten you with management disapproval or other reprisal because of your union activities.

WE WILL NOT wipe dirt or grease on union T-shirts or other union insignia worn by employees.

WE WILL NOT threaten to destroy union literature or paraphernalia.

WE WILL NOT confiscate union literature in nonworking areas.

WE WILL NOT maintain or enforce any policy which prohibits you from union solicitation or talking about the Union or union business at times when you are properly not engaged in performing your work tasks, or which prohibits such activity while permitting other forms of solicitation or conversation.

WE WILL NOT prohibit display of union signs while permitting display of antiunion signs.

WE WILL NOT deny you access to our bulletin boards to post prounion or related material, or remove such material from our bulletin boards, while permitting posting of other nonwork literature.

WE WILL NOT engage in surveillance of union activities or increase supervision in order to engage in surveillance of you because of your union activities.

WE WILL NOT prohibit off-duty employees, including employees who have been discriminatorily denied reinstatement, from entering or remaining on outside nonworking areas of our premises for the purpose of engaging in union solicitation or distribution of union literature.

WE WILL NOT prohibit you from copying names from timecard racks for lawful organizational purposes at times when you are properly not engaged in performing your work tasks, or discipline you because you engage in such activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL offer Freeda Carr and Nancy Race immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from the discrimination against them, plus interest.

WE WILL offer Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca Stuart Walton immediate and full employment, in a nondiscriminatory manner, to positions for which they are qualified, without prejudice to their seniority or other rights and privileges to which they would be entitled absent the discrimination against them, and make them whole for losses they suffered by reason of the discrimination against them, with interest.

WE WILL remove from our files the negative or qualified reemployment recommendations for Freeda Carr, Nancy Race, Pamela Damon, Rhonda

Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca Stuart Walton, and notify each of them in writing that this had been done and that such recommendations will not be used as a basis for future personnel actions against them.

WE WILL revoke, and expunge from our files, the written warnings which were given to Vivian Newton in October 1980, and to Joan Hockenberry in February 1981, and any references to the oral warnings which were given in January 1981, to Joan Hockenberry, Shelia Mack, and Dawn Dickson, and notify each of them in writing that this has been done and that such warnings will not be used as a basis for future personnel actions against them.

NEW PROCESS COMPANY

Charles H. Saul, Thomas R. Davies, and *Stanley R. Zawatski, Esqs.*, for the General Counsel.
Joseph D. Luksch and *Michael Zeller, Esqs.*, of New York, New York, for the Respondent Employer.
Nicholas R. Santangelo and *Gene M. J. Szuflita, Esqs.*, of New York, New York, for the Charging Party Petitioner.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Warren, Pennsylvania, on October 18 through 22, December 6 through 10, 14, and 15, 1982, and as reopened on April 27, 1983. The charges and amended charges were filed by United Food and Commercial Workers International Union, Local 1, AFL–CIO–CLC (the Union) as follows: Case 6–CA–13933 on October 15, 1980, and as amended on October 7, 1982; Case 6–CA–14403 on April 2, 1981; Case 6–CA–14578 on May 19, 1981; Case 6–CA–14597 on May 26, 1981; Case 6–CA–14697 on July 7, 1981; and Case 6–CA–15995 on December 10, 1982. The consolidated complaint in Cases 6–CA–13933, 6–CA–14403, 6–CA–14578, 6–CA–14697, which issued on June 28, 1982, and was amended at the hearing, and the complaint in Case 6–CA–15995, which issued on February 15, 1983, and was consolidated with the other cases on motion of the General Counsel by my order of February 25, 1983, and was also amended at the hearing, allege that New Process Company (Respondent or the Company) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act. The complaints do *not* allege that the Company violated Section 8(a)(5) of the Act. The Company's answers deny the commission of the alleged unfair labor practices, and further assert by way of affirmative defense, in sum, that certain allegations of the complaint were the subject of charges on which the Regional Director and/or the General Counsel declined to proceed, and that certain allegations of the complaint in Case 6–CA–15995 are time-barred under Section 10(b) of the Act. I have heretofore ruled on some of these affirmative defenses.

Pursuant to a Decision and Direction of Election issued by the Regional Director on May 1, 1981, an election was conducted on June 9, 1981, among the employees in the following appropriate unit:

> All full-time and regular part-time Mailing Department, Order Handling Department and Merchandise Handling Department employees, including pallet tally clerks, inventory control clerks, hold up release clerks, receiving clerks, order preparation clerks, order distribution clerks, cancel desk clerks, invoice lookup clerks, and returns section records clerks, maintenance employees and maintenance clerks, Accounting deposit clerks, computer operators, Data Processing operations clerks, and Marketing Department merchandise inspectors employed by the Company at its Hickory Street and Bell Building, Warren, Pennsylvania, and Irvine, Pennsylvania, facilities; excluding other Marketing Department employees, other Financial, Employee, Plant Services Department employees, computer programmers, office clerical employees, confidential employees, seasonal employees, janitor/watchmen and other guards, professional employees and supervisors as defined in the Act.

The tally of ballots showed that of approximately 1425 eligible voters, 231 voted for the Union, 1049 voted against the Union, and there were 3 void ballots. The 81 challenged ballots were insufficient in number to affect the results of the election. The Union filed timely objections to the conduct of the election, numbered 1 through 17, but subsequently withdrew Objection 11 (alleged omission of names of employees from the voter eligibility list). On August 3, 1982, the Regional Director issued his order directing hearing on objections and notice of hearing finding that the objections raised "substantial and material issues with respect to the election," which warranted a formal hearing, and that "some of the issues involved in these objections" were encompassed by the outstanding unfair labor practice complaint. The Regional Director did not otherwise make specific findings concerning the objections, although, as will be discussed, the objections were so broadly worded as to encompass virtually every form of potentially objectionable conduct, including the subject matter of allegations on which the Regional Director and/or the General Counsel declined to proceed by way of unfair labor practice complaint. The Regional Director ordered that the unfair labor practice and representation cases be consolidated for the purposes of hearing, ruling, and decision by an administrative law judge, and that after decision by an administrative law judge, the representation case be transferred to and continued before the Board.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. On the entire record in this case,[1] and from

[1] Certain errors in the transcript have been noted and corrected.

my observation of the demeanor of the witnesses and of the Company's plant premises, and having considered the briefs submitted by the General Counsel, the Union, and the Company, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a Delaware corporation with its principal offices at Warren, Pennsylvania, is engaged in the mail order retail sale of merchandise, primarily clothing.[2] The Company maintains plants at Warren and Irvine, Pennsylvania, and it is these facilities that are involved in the present proceeding. The Company's Warren plant, where the executive offices are located, is principally engaged in the processing of orders and distribution of sales and advertising literature. The Irvine plant, known as the Irvine Distribution Center (IDC), is essentially a warehouse operation that is engaged in the storage, packing, shipping, inspection, and processing of returns of merchandise. In the operation of its business, the Company annually derives gross revenues in excess of $500,000, and annually ships from its Pennsylvania facilities merchandise valued in excess of $5000 directly to points outside of Pennsylvania. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. AN OVERVIEW OF THE CASE AND THE ISSUES PRESENTED

In light of some of the issues presented in this case, it is necessary at the outset to review the context in which the alleged unfair labor practices and objectionable conduct occurred. In February 1980 the Union commenced an organizational compaign among the Company's employees. During the period from February 1980 through June 1981, there were, within the unit eventually found appropriate by the Regional Director, approximately 917 employees at Warren and approximately 538 employees at the Irvine Distribution Center, which is located about 7 miles from the Warren plant. On October 15, 1980,[3] the Union filed its initial charge in Case 6–CA–13933, alleging that the Company violated Section 8(a)(1) and (3) of the Act, inter alia, by discriminatorily transferring union adherents Freeda Carr and Nancy Race from the housewares department to less desirable work in the returns department, thereby causing them to quit (i.e., constructively discharging them). The charge was served on the Company on October 16. By letter dated January 30, the Regional Director informed the parties that he was declining to proceed on several aspects of the charge, including the matter of Carr and Race. By letter dated January 29, 1982, the General Counsel sustained the Regional Director's refusal to proceed on the allegation of constructive discharge, but concluded that a hearing was warranted insofar as the charge alleged that the Company unlawfully refused to reinstate Carr and Race when they offered to return to work in the returns departments. However, the Regional Director declined to proceed on an allegation (in Case 6–CA–14403) that the Company unlawfully refused to rehire Carr as a clerk-typist on February 16, 1981, and this determination was sustained on appeal to the General Counsel.

In the meantime, on October 27, 1980, the Union filed a petition for an election (Case 6–RC–8874) among the merchandise handlers and maintenance employees at IDC (i.e., a unit substantially comprising the Irvine, but not the Warren, plant). The Regional Director determined that a larger unit would be appropriate. The Union then requested leave to amend the petition to define a substantially larger unit, but the request was denied because the Company indicated that it was willing to proceed to an election in the original petitioned-for unit. At this point, the Union requested leave to withdraw its entire petition, and such leave was granted on December 22. On January 2 the Union filed its second (and present) election petition. This time, the Union sought a unit at both plants, comprising about 900 employees, but still proposed to exclude the order handling department, which contained a substantial number of the Warren employees. The Union contended that they were office clericals. A hearing was held beginning on February 4, 1981. On May 5 the Regional Director issued a Decision and Direction of Election, finding that the order handlers were properly included in an appropriate unit, and directing an election, contingent on the Union making an adequate showing of interest in the appropriate unit. The Union indicated that it was willing to proceed to an election in any unit found appropriate, and notwithstanding its pending unfair labor practice charges. As indicated, the Union lost the election that was held on June 9.

The complaints in this case contain some 44 subparagraphs, each alleging separate acts of unfair labor practice conduct. The complaint allegations may be grouped into four general categories. The first, and most numerous group consists of alleged acts of intimidation, coercion, and interference directed against employee union adherents (e.g., discriminatory restrictions on union solicitation and distribution, discriminatory restrictions on union adherents, threats, interrogation, disciplinary warnings, surveillance, harassment, and ostracizing and segregating union adherents). As will be discussed, many of these allegations involve supervisory surveillance and restrictions on employees at times when the employees were engaged at work or normally expected to be engaged at work. The second category involves the alleged unlawful exclusion of union organizers from the IDC premises, and the Company's alleged unlawful refusal to afford the Union an opportunity to respond to statements made to employees by the Company in captive audience meetings. The Union contends that in any event, such access is warranted as a remedy for the Company's al-

[2] The Company maintains retail outlets for direct sales at Warren, Starbrick, and Erie, Pennsylvania. However, the vast majority of the Company's sales are processed by mail order.

[3] All dates are for the period from July 1, 1980, through June 30, 1981, unless otherwise indicated.

leged unfair labor practices. The third category involves alleged threats and misrepresentations contained in speeches or other statements by company officials and supervisors. The fourth category consists of the Company's alleged discriminatory refusal to rehire and/or recommend for rehire eight employees who quit and subsequently reapplied for employment, because they supported the Union, filed charges, and/or were subpoenaed to testify for the Union in the representation proceeding. The eight employees are Freeda Carr and Nancy Race, who were named in the original consolidated complaint, and Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca Stuart Walton, who were subsequently named in the complaint in Case 6–CA–15995. The complaint does not allege that any employee was discriminatorily terminated, either constructively or otherwise. The Union contends that by way of remedy for the alleged unfair labor practices, the Company should be ordered to bargain with the Union; or in the alternative, that a rerun election should be held with the Union given access to nonworking areas, equal time at captive audience meetings, an opportunity for preelection speeches, a list of employees' addresses and telephone numbers, and reimbursement for the Union's organizational expenses.[4]

With respect to the election proceeding, the Union contends that the critical period for determining objectionable conduct should begin with the filing of the first election petition on October 27. I agree. In *Monroe Tube Co.*, 220 NLRB 302 (1975), revd. on other grounds 545 F.2d 1320 (2d Cir. 1976), involving a similar situation, the Board held that "where the first [withdrawn] petition was filed a short time prior to the filing of the second petition and a petition was on file at the time that unlawful conduct took place, we deem it proper to begin the critical period at the filing of the first petition and to evaluate conduct occurring from that date until the election." (220 NLRB at 305.) The present case meets both conditions set forth in *Monroe Tube*. The first petition was filed shortly before the second, during the same organizational campaign, and remained on file until December 22. There is no allegation of objectionable conduct during the brief hiatus between December 22 and January 2, when the second petition was filed. However, the Company is alleged to have engaged in objectionable conduct during the period when the first petition was on file. Therefore *Monroe Tube* is applicable. With regard to the substance of the objections, I have (as I indicated at the hearing) declined to consider any grounds for objection that, if meritorious, would also constitute unfair labor practice conduct, but on which the Regional Director (unless reversed by the General Counsel) declined to proceed by way of complaint. See *Times Square Stores Corp.*, 79 NLRB 361, 365 (1948); *Martinolich Ship Repair Co.*, 111 NLRB 761, 762 (1955). As the Board pointed out in *Martinolich*: "Under established practice, the Board dismisses pro forma objections to an election which are mere reiterations of unfair labor practice charges which have been dismissed." Moreover, sound administrative practice requires that the order directing hearing on objections be interpreted in a manner that is consistent with the disposition of the unfair labor practice charges. It makes no sense to interpret the order as one directing a hearing on matters on which the Regional Director, with the approval of the General Counsel, declined to proceed by way of complaint. The Regional Director who issued the order was not the same individual who initially passed on the unfair labor practice charges. However, the Regional Director is not simply an individual, it is an office, and the actions of one Regional Director should be interpreted in a manner that is consistent with the actions of his predecessor, particularly when the earlier actions have been sustained by the General Counsel.

[4] At the hearing, the Union also requested reimbursement for its costs incurred in connection with the present unfair labor practice litigation. However, in its brief (Br. 15, 19), the Union abandoned this request.

IV. THE ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONS TO THE CONDUCT OF THE ELECTION

A. *Alleged Violations of Section 8(a)(1), (3), and (4) of the Act prior to October 27, 1980*

1. Threats and interrogation by Nick Pollock

Nick Pollock was, at all times material, receiving dock crew chief at IDC. He directed the work of unloading deliveries, and assigned warehouse employees to such work as needed. Pollock reported to the supervisor of the warehouse, who in turn reported to John Carter, vice president in charge of merchandising, who was in overall charge at IDC. In its answer to the consolidated complaint, the Company initially denied that Pollock was a supervisor. However, during the hearing the Company admitted that Pollock was a supervisor within the meaning of the Act. Pollock was still in the Company's employ at the time of the present hearing.

Alan LaCava was a forklift operator in the warehouse. Pollock was not LaCava's immediate supervisor. However, LaCava was required to obey Pollock's work orders. LaCava was one of the first union activists. On February 1, 1980, the Union informed the Company by mailgram that LaCava was a member of its employee organizing committee. LaCava testified that he distributed union literature in the plant cafeteria and in front of the plant after work, and that he brought the literature to the plant in his lunch bag. LaCava made no effort to conceal his union activity, and like other prounion employees, he wore a union T-shirt in the plant. Crew Chief Pollock knew that LaCava was a union adherent. LaCava testified that on several occasions early in the organizing campaign, Pollock asked him whether he had union literature in his bag. LaCava would answer that he did. LaCava further testified that on several occasions early in the campaign, when Pollock observed employees in conversation, he would ask whether they were having a union meeting, or while cupping his ear, comment that "I'm not supposed to be listening." LaCava's testimony does not indicate that the employees were either at work or expected to be at work during these conversations. According to LaCava, the employees "laughed off" these incidents. On direct examination, LaCava also testified that in the spring of 1980, Pollock told him that

"Mr. Blair" (i.e., Company President Jack Blair) told him that if the Union ever came in to New Process he would shut the doors. However, in his investigatory affidavit to the Regional Office, LaCava testified that Pollock made such a statement to him in May 1979, during the course of another organizational campaign by a different union. No other witnesses testified concerning these incidents. In particular, Crew Chief Pollock was not presented as a witness. Company witnesses testified without contradiction that President Blair has not been at IDC since 1973. The General Counsel presented in evidence a photograph of the Company's 25-year club, taken in the summer of 1980, showing Pollock standing next to Blair. No other evidence was presented that would indicate what if any other contact Pollock might have had with Blair.

In light of LaCava's affidavit, I find that the alleged threat of plant closure, if made at all, was made in May 1979. Therefore, the pertinent allegation of the complaint is precluded by the time limitation of Section 10(b) of the Act, and for this reason, I am recommending that paragraph 7(a) of the complaint be dismissed. The cutoff date for 10(b) purposes is April 16, 1980. LaCava's references to a timeframe early in the campaign could have referred to times after April 16, 1980. The time limitation of Section 10(b) is an affirmative defense, and the respondent has the burden at least of coming forward with evidence to establish that defense. Here, the Company did not present evidence that would demonstrate that the alleged interrogation either did not or could not have taken place on or after April 16, 1980. Therefore, the alleged interrogation is properly before me for consideration on its merits. I credit the uncontroverted testimony of LaCava. I find, on consideration of such testimony, that the Company, by Pollock, violated Section 8(a)(1) of the Act by interrogating LaCava and his fellow employees concerning their actual or ostensible union activities. Pollock had no legitimate reason for questioning the employees, and he did not give them any assurance against reprisal. Moreover, as will be discussed, the interrogation was followed by other unlawful conduct. LaCava's lunch bag was his personal property. LaCava did not testify that he regarded Pollock's repeated questioning in this regard as a joke. Indeed, it is evident from LaCava's testimony that he felt obligated to answer Pollock's question. Concerning the ostensible "union meeting," Pollock's repeated questioning was addressed to several employees. While some of the employees may have regarded the questioning as funny, it does not follow that every employee who heard Pollock would feel the same way. Therefore, Pollock's questioning of the employees constituted unlawful interrogation.

2. Threats of abuse and physical abuse by maintenance supervisors

During the summer of 1980, Randy McWilliams and Charles Martin were supervisors of mechanics at the Warren plant. McWilliams subsequently quit his job. Martin was discharged in November 1980, allegedly for falsifying timecards for employees.[5] Vivian Newton, Barbara Wilson, Diane Savugot, and Barbara Morgan worked on the second shift (which normally operated from 5:30 to 10:30 p.m.) in the mailing department at Warren. All four joined the Union, became members of the organizing committee, and wore union T-shirts at work. Newton, Wilson, and Savugot testified without contradiction concerning incidents involving Martin and McWilliams, which occurred about August 1980. Newton testified that when Martin saw her wearing a union T-shirt, he said that they were told that if they saw any union literature or anything around they were to rip it up, and he made a gesture as if to rip her shirt. Newton further testified that she did not take Martin seriously. Wilson and Savugot testified in sum that on several occasions McWilliams would wipe his greasy hands on their T-shirts, leaving marks, that he did the same to Morgan, and that he did this in the presence of other employees. Management learned of these actions by McWilliams, but he was not disciplined. The employees did not complain directly to the Company. However, they did complain to the Union, which protested to the Company on their behalf.

I credit the uncontroverted testimony of Newton, Wilson, and Savugot. Newton may not have believed that Martin would actually tear her shirt. However, Newton could reasonably believe that the Company intended to destroy or remove union literature or paraphernalia. As will be discussed, there is additional evidence that the Company did engage in such conduct. I find that the Company, by Martin, interfered with employee rights in violation of Section 8(a)(1), by threatening to destroy union literature or paraphernalia whenever and wherever it was found. I further find that Martin's statement may properly be considered as evidence with respect to other allegations, discussed below. It is immaterial that Martin was subsequently discharged, or that he may have been personally sympathetic to the Union. Martin was a supervisor who was purporting to inform an employee concerning company policy; and he was not discharged because of what he told Newton.[6] I further find that the Company violated Section 8(a)(1) by engaging in physical abuse of union adherents, when Supervisor McWilliams repeatedly wiped his greasy hands on the union T-shirts of female employees. See and compare *General Electric Co.*, 255 NLRB 673, 688 (1981). It is immaterial that the employees did not complain directly to their supervisors. As indicated, the employees complained to the Union, which protested on their behalf. It is evident that the employees took McWilliams' conduct seriously.

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[5] The Union subsequently filed an unfair labor practice charge alleging that Martin was discharged in violation of Sec. 8(a)(3) of the Act. The Regional Director declined to proceed on the charge because of his supervisory status, and also because of insufficient evidence of unlawful motivation.

[6] The complaint also alleges (par. 7(i)) that about October 1980, Supervisor Rick Arthur threatened employees with unspecified reprisals if they wore union T-shirts. No evidence was presented in support of this allegation. Therefore, I am recommending that the allegation be dismissed.

3. Isolating and ostracizing union adherents, related threats, and stricter work conditions

During the summer of 1980, Jerry Selini was stock department supervisor at IDC. Subsequently Selini replaced Rick Arthur as supervisor of the housewares department. Alan LaCava testified that on a couple of occasions, Selini told him that "we had better watch ourselves because the supervisors were watching us." LaCava further testified that Selini also told him, in August, that the supervisors were not to associate with forklift operators Jerry Stewart and Jeff Atkins because they wore union T-shirts. According to LaCava, until that time Stewart and Atkins regularly played whiffle ball at the lunchbreak with four supervisors (Selini, Ken Bastow, Kerry Gern, and Jim Hagg). However, the supervisors failed to show up for the game that day, and there were no more whiffle ball games. Stewart and Atkins were not presented as witnesses, and LaCava was the only General Counsel witness to testify concerning this matter. Selini, who was presented as a company witness, categorically denied saying that supervisors could not associate with prounion employees or that the employees should be careful because supervisors were watching them. However, Selini testified that in the fall of 1980, he asked LaCava "if he wasn't concerned what some other people might think of what he was doing," referring to LaCava's union activity. Selini testified that he began playing whiffle ball with Stewart and Atkins in the fall of 1980, stopped in late November when the weather got bad, resumed in 1981, and continued through the time of the election. Selini testified that he never discussed the matter with Vice President Carter. Carter testified that he never instructed supervisors not to associate with prounion employees. However, Carter and Stock Replenishment Supervisor Randall Chase testified in sum that Chase told Carter that he did not wish to be seen playing whiffle ball with employees wearing union T-shirts, that Carter told him that it was on his own time, and therefore his own decision, and that thereafter, without saying anything to the employees, he stopped playing whiffle ball with Stewart and Atkins. According to Chase, four other supervisors stopped playing whiffle ball for the same reason.

I credit the testimony of Supervisor Selini, who impressed me as a generally credible witness. In contrast, LaCava sometimes displayed a tendency to accommodate his version of the events to the needs of the present litigation. It is also evident that LaCava, who was not himself one of the whiffle ball players, did not have accurate knowledge of the course of those games. Nevertheless the General Counsel did not call Stewart and Atkins, the employees who were involved in the games, as witnesses. Therefore, I find that Selini did not tell LaCava that the employees should watch themselves because the supervisors were watching them, or that the supervisors could not associate with prounion employees. However, on the basis of Selini's testimony, I find that the Company by Selini violated Section 8(a)(1) by asking LaCava if he was concerned what some other people might think of his union activity. Selini did not indicate that he was referring only to the attitude of other employees. Therefore, LaCava could reasonably infer that Selini was conveying a message that LaCava was incurring the displeasure of management by actively supporting the Union. Such statements carry with them the implied threat of employer reprisal, and constitute unwarranted and unlawful interference with Section 7 rights. See and compare *Wilker Bros. Co.*, 236 NLRB 1371, 1372 (1978), enfd. in pertinent part 652 F.2d 660 (6th Cir. 1981); *Appletree Chevrolet*, 237 NLRB 867, 872–873 (1978), enfd. in pertinent part 608 F.2d 988 (4th Cir. 1979); *Goshen Litho, Inc.*, 199 NLRB 769, 772 (1972). I further find, on the basis of the credited testimony of the company witnesses, that the Company did not violate the Act when certain of its supervisors personally decided that they did not wish to play whiffle ball with employees who wore union T-shirts. This was personal activity in which the supervisors participated on their own free time. The supervisors did not act on behalf of the Company either when they played whiffle ball or when they ceased playing whiffle ball. Moreover, there is no credible evidence that the employees had reason to believe that the supervisors were acting pursuant to company instructions or policy. For these reasons, I also reject the Union's alternative theory that the Company acted unlawfully because the supervisors avoided associating with prounion employees; but later demonstrated common cause with antiunion employees. Therefore, I am recommending that paragraphs 7(d) and 10(a) of the consolidated complaint be dismissed.

The complaint alleges (par. 9(a)) that about August 1980, at Warren, the Company segregated machine operators based on the wearing of union T-shirts. Frances Work was employed as a Nester machine operator in the mailing department. Fred Rulander was her immediate supervisor. The employees were assigned in teams of three, with each team operating two machines. Work testified that her normal team included, besides herself, Joan Fredericks and Carol Anderson. Union meetings were normally held on Tuesday evenings, at the Holiday Inn in Warren. Work testified that on Tuesdays, some employees, including herself and Fredericks but not Anderson, wore union T-shirts to work. Work testified that on these occasions, Anderson would be replaced on the team by Joan Abbey who wore a union T-shirt, and that this pattern continued until one of them stopped wearing a union T-shirt, whereupon Anderson remained on the team regardless of whether the others wore union T-shirts. Barbara Wilson and Diane Savugot, who as indicated, worked in the mailing department, testified concerning a similar pattern in their area. Jane Guthrie was their immediate supervisor. Wilson and Savugot testified, in sum, that beginning in August, employees wearing union T-shirts invariably found themselves all working in the same area, which was located near the supervisors' office. According to Wilson and Savugot, it seemed that whenever they looked up from their work, a supervisor would be staring at them. Joanne McMeans, another mailing department employee, testified that after she began distributing union literature in July, Supervisors Pauline Stec and Helen Littlefield would constantly stare at her, and would follow her to the bathroom and to the water fountain. Barbara Wilson testified that Assistant

Supervisor Lorraine Roblesky would follow her to the restroom.

Assistant Vice President for Mailing George Stark, who was in overall charge of the mailing department, testified as a company witness. Stark denied that the Company intentionally segregated employees who wore union T-shirts, but he admitted that in fact such isolation took place about August 1980. Stark testified that the Company had a practice of honoring employee requests to work or not to work with other specific employees. According to Stark, in August 1980 some employees requested of their supervisors (Stec, Littlefield, and Jane Guthrie) that they not be assigned to work with employees who were "haranging them or whatever; talking to them constantly about their beliefs." Stark testified that eventually Stec complained to him that there were so many such requests that it was causing production problems, and she asked what she should do. According to Stark, he said that the Company could not have such production problems, and that she should tell the employees to work out their personal problems themselves. Stark testified that thereafter Stec made assignments on the basis of production efficiency. However, Stark admitted that the union adherents were assigned to an area near Steck's office. The credibility of Stark's explanation is undermined by the fact that it is substantially based on his own hearsay testimony. The Company failed to produce as witnesses any of the supervisors who were directly involved, or any of the employees who allegedly requested that they not be assigned to work with union adherents. (At the time of the present hearing, Littlefield, Guthrie, and Rulander were still employed as supervisors and Stec was working as a machine operator.) Moreover, the uncontroverted testimony of Frances Work demonstrated a pattern of work assignment that was obviously intentional on the part of management, and did not come about as the result of employee requests. Additionally, as has been and will be discussed, other evidence indicates a policy on the part of management to be extremely solicitous of complaints of alleged harassment by union adherents, while tolerating harassment of union adherents by supervisors and antiunion employees. I do not credit Stark's explanation. I find in light of the present and other evidence that will be discussed, that the Company intentionally segregated union adherents at their workplace in order to limit communication between active union adherents and other employees, create a feeling of isolation among the union adherents, and create antagonism between the union adherents and their fellow employees. The Company thereby violated Section 8(a)(1) and (3) of the Act. *Lowery Trucking Co.*, 200 NLRB 672, 677 (1972); *Daylight Grocery Co.*, 147 NLRB 733, 738 (1964), enfd. 345 F.2d 239 (5th Cir. 1965). The matter of alleged surveillance will be deferred at this point, pending discussion of other evidence concerning surveillance.

The consolidated complaint alleges (pars. 8(e), 9(b), and 9(c)), that the Company violated Section 8(a)(1) by discriminatorily rescinding previously granted permission to employees to read books when work was slow, and violated Section 8(a)(1) and (3) by requiring Vivian Newton to sit at a table behind materials that blocked the view of the machines that other employees were operating, and by forbidding Newton permission to help other machine operators as she had done in the past. The first allegation also involved Newton. Newton's job was to stock the machines that insert advertising literature into mailing envelopes. Newton testified that Night Shift Mailing Supervisor William Moore told her that if she had nothing to do, she could bring a book to read, and she did. However, according to Newton, Moore told her in September that she could not do this anymore because some employees were complaining. Newton testified that some machine operators were given the same admonition, but continued to read anyway unless they were caught. On cross-examination, Newton admitted that in September she was reading a book at work for 3 consecutive days, when Moore asked (apparently sarcastically) whether it had any interesting parts. On the fourth day, Moore told her to stop. Newton answered that if he did not like it he should find her some work. Moore said that he would check with another supervisor. Newton testified that thereafter she continued to read a book for a few minutes at a time, and that she did so on the work floor. However, on her earlier direct testimony, Newton testified that the day after Moore told her to stop reading, he told her to sit at a certain table when she was not working. Newton testified at one point that the table faced a wall, and at another point (and in her affidavit) that there were rolls of material in front of the table that blocked her view of the machines. Newton testified that previously she was told that she could sit at the table if she wanted. However, in her investigatory affidavit, Newton stated that about October 16 (when she was still wearing a union T-shirt), she asked Moore if she could sit in the aisle in order to see the machines, and he answered that he did not care where she sat. Newton further testified that in mid-September, Moore told her that she could help machine operators, and that she did so for 2 days, but that on the third day Moore told her to stop. According to Newton, Moore told her about a week later that he stopped her because of complaints that she was helping only certain employees. Newton testified that this was not true, but she admitted that she helped three specific individuals because in her opinion, they needed help.

Supervisor Moore testified that in the fall of 1980, he told Newton that she was talking and visiting too much. According to Moore, he told her that if she had nothing to do, she could use an area in the rear of the department, but he did not require her to sit there. Moore testified that he saw her spending a lot of time talking to operators at their machines. According to Moore, he gave Newton permission to read a book but told her not to make a habit of it. However, that evening he saw her sitting on a skid, reading her book, in an area where other operators were working. He told her that she should not just sit there reading. Moore testified that on another occasion he told Newton that she could help other employees, but that she should help eqfially. According to Moore, he said this because she was spending too much time at one machine. However, Assistant Vice President Stark told him that she could not do any work other than her own unless she volunteered to do such work,

and if she was just going to visit the operators, he would rather that she not help at all.

The General Counsel contends (Br. 29) that the alleged unlawful conduct was part of a campaign to isolate prominent union supporters. As has been and will be discussed, there is evidence that the Company did unlawfully seek to restrict communication between union activists and their fellow employees, and did engage in discriminatory action against Newton in particular. Nevertheless, even on the basis of Newton's testimony (including the contradictions therein), and the testimony of operator Joanne McMeans, who partially corroborated the testimony of Newton, it is difficult to find discriminatory action based on the present three allegations. Newton enjoyed the privilege of reading a book when she was not busy (i.e., a privilege that was not available to other employees) and she was given this privilege during the union campaign, when her union sympathies were known to management. Nevertheless Moore said nothing to her until it became evident, as it would to a reasonably minded supervisor, that she was possibly abusing the privilege. Newton was a capable employee who performed her job well, and because of this and the nature of her regular work, there were periods of time when she had nothing to do. However, the evidence fails to indicate that the Company had a policy of permitting employees to sit around reading books in the presence of other employees who were working at their machines. Moore did not require Newton to sit in the rear area at all times when she was not working. However, Newton evidently understood that the Company preferred that she do so rather than read books on the work floor or talk to operators who were working at their machines. Such a preference cannot be viewed as discriminatory unless the workplace is viewed as a public library or social center. I do not credit the testimony of Newton that she could not see the machines from the rear table. If so, she would not be able to know when the machines needed stocking. However, Newton never claimed that this was a problem. As for helping other operators, it is evident on the basis of Newton's own testimony that she was exercising selectivity in this regard. Under the circumstances, it is reasonable to expect that an employer would wish to exercise some control over the work performed by its employees. By reason of the nature of her work, Newton had ample opportunity to go from one machine operator to another during the course of her working day. Whether the Company discriminatorily prohibited her from talking to other employees is a matter that will be taken up at a later point in this decision. However, with respect to the present allegations, I find that the evidence is insufficient to show that the Company discriminatorily altered Newton's working conditions, and therefore I am recommending that the pertinent allegations of the complaint be dismissed.

4. Surveillance

Union organizer Daniel Glather testified that from June to September 1980, he distributed union literature to employees on the public sidewalk ajoining the Warren plant, and that while engaged in such activity, he saw Supervisor Pauline Stec come out of the plant with a notebook and pencil, watch him, and write on the pad. Glather's testimony was uncontroverted. I find nothing inherently incredible in his testimony. The Company correctly points out (Br. 28) that Stec had no apparent reason to do this for the purpose of obtaining information. In light of the Company's outspoken opposition to unionization, and its unlawful actions, some of which involved Stec, I find that Stec engaged in this activity in order to intimidate employees and thereby discourage them from receiving union literature. Therefore, the present situation is distinguishable from those cases in which the Board found that an employer did not violate the Act by observing union activity that was conducted in full public view outside the employer's premises, where the employer did nothing out of the ordinary. I credit Glather, and I find that the Company, by Stec, violated Section 8(a)(1) by engaging in surveillance of employee union activity.

The consolidated complaint alleges (par. 8(c)) that from the end of July through October 1980, the Company by its supervisors violated Section 8(a)(1) and (3) of the Act by scrutinizing union adherents more closely as they worked, following them around the plant and engaging in surveillance of the employees' union activities. The complaint also alleges (par. 7(m)) that about November 1980 the Company violated Section 8(a)(1) by increasing supervision on the night shift at Warren in order to engage in surveillance of union activity. The testimony of both the General Counsel and company witnesses indicates that there was increased supervision at Warren, but that the Company began this practice well before November. Therefore, I am considering both allegations under the heading of alleged unfair labor practices prior to the critical period. As previously discussed, employees Wilson, Savugot, and McMeans testified that Supervisors Stec, Littlefield, and Roblesky began a practice of constantly staring at them or following them. As a general rule, an employer may lawfully engage in surveillance of its employees at their work stations. Working time is for work, and the employer has the right to observe their employee's work or to determine whether they are performing that work. However, the employer cannot engage in such surveillance for unlawful reasons (e.g., in reprisal for the employee's union activities or for the purpose of obtaining pretextual grounds for disciplining the employee in reprisal for such union activities). See *Brown & Root-Northrup*, 174 NLRB 1048, 1058 (1969). As indicated, I have credited the testimony of the employees. I find in light of the credited evidence that the supervisors had no legitimate reason for closely scrutinizing the work and actions of the union adherents. Rather, the supervisors' conduct was motivated by the same considerations that led the Company to segregate prounion employees and place them in close proximity to the supervisors' office. I find that the Company, by its Warren supervisors, scrutinized openly prounion employees more closely as part of a campaign to isolate and harass the employees, and thereby violated Section 8(a)(1) and (3) by imposing more onerous and rigorous terms of employment on them.

Union activists Joan Hockenberry and Alan LaCava testified to a similar pattern of employer conduct at IDC, principally involving Assistant Plant Manager Carl Nelson and Vice President Carter. Hockenberry testified that one day in September, she began wearing a shirt with "Be wise—let's organize" on the back. Hockenberry testified that beginning about an hour later, a number of supervisors, including Carter and Nelson, individually passed by her work station and observed her. Hockenberry further testified that when she would use the pay phone or go to the cigarette machine, Nelson would stand nearby. LaCava testified that early in the campaign, when he would distribute union literature in front of the IDC facility, Carter and Nelson would stand in the cafeteria window and watch him. LaCava further testified that during this period Carter would frequently stand and stare at him at work. Nelson, in his testimony, denied that he engaged in surveillance of union activity or that he varied his routine during the organizational campaign. As indicated, substantially uncontroverted testimony indicates that at Warren, supervisors engaged in a campaign of conspicuously observing prounion employees, and of observing union distribution outside the plant. In light of this evidence, it is more likely than not that the Company engaged in the same kind of activity at IDC. I credit the testimony of Hockenberry and LaCava. I find that the Company, by its supervisors, engaged in a campaign of harassment against Hockenberry and LaCava by conspicuously and closely observing them at work. The Company thereby violated Section 8(a)(1) and (3) at IDC.[7] However, I find that Carter and Nelson did not act unlawfully by watching LaCava when he distributed literature in front of the plant, as their actions were not characterized by behavior that was "out of the ordinary." *Metal Industries*, 251 NLRB 1523 (1980).

It is undisputed that beginning some time during the period from July through September 1980, the Company increased the amount of supervision on the night shift at Warren. However, the Company's motivation for doing this is disputed. Assistant Vice President Stark testified that the Company was receiving complaints from the female employees about drinking and use of marijuana among mechanics on the night shift. According to Stark, he suggested to his then supervisor, Richard Kerven (who has since retired), that salaried supervisors, who normally worked days, should on a rotating basis return at night in order to help the night-shift supervisors. Kerven agreed, and the practice was instituted. According to Stark, this practice was still in effect at the time of the present hearing. Stark testified that as a result of the increased supervision, the Company learned that Mechanic Supervisor Martin was permitting mechanics to go home early, and consequently discharged him. Stark denied that supervision was increased for the purpose of spying on union activity. Vivian Newton, Barbara Wilson, and Diane Savugot testified, in sum, that the additional supervisors usually remained until 8 p.m., and did not appear to do anything except stare at the operators and talk to other supervisors.

I do not credit Stark's explanation. According to Stark, the problems developed because there were only two supervisors on the night shift. However, there were, in fact, at least five. Additionaliy, Stark did not pinpoint any alleged problems except those involving the mechanics. Therefore, it would seem that the problems could be resolved by adding another mechanic supervisor. Instead, the Company used some eight or nine additional supervisors, who covered the entire night-shift operation, and spent much of their time staring at the operators. The timing of this arrangement also coincided with other company actions, including surveillance, which were designed to harass and intimidate employees and thereby discourage them from engaging in union activity. I find that the Company increased supervision on the night shift at Warren for the same reason, and thereby violated Section 8(a)(1) of the Act.

5. Restrictions on employee union solicitation and distribution and employee conversation and movement

a. *Company policy and practice*

The consolidated complaint, as amended, alleges that since about September 1980, the Company discriminatorily instituted, maintained, and enforced a policy prohibiting union solicitation, prohibiting employees from talking about the Union, and prohibiting employees from conducting union business on company time. The Company does not have any written rule or policy that expressly restricts talking, solicitation, or distribution on company time or premises. However, the employee handbook, which has been in effect since 1979 and is distributed to each employee, does refer to "visiting." The handbook instructs the employees as follows:

> DON'T WASTE OTHER PEOPLE'S TIME
>
> In other words, don't visit with your neighbors. Visiting not only stops your production but also the work of others. Visiting is a highly contagious disease. Don't start it. Non-business "visiting" during working hours can affect your advancement and even your job itself.

Assistant Vice President for Personnel Richard Zimmerman testified, in sum, that the term "visiting" covers ex-

[7] This is one of several allegations in the present case involving Hockenberry, who was the leading union activist at IDC. By letter dated January 19, 1982, the Acting Regional Director declined to proceed on certain aspects of the charge in Case 6–CA–14697, including the Union's contention that Hockenberry was constructively suspended from employment by virtue of the Company's harassment and attempt to restrict her union activity. The Acting Regional Director administratively determined that Hockenberry did not report to work for personal reasons and that "Hockenberry denies that the Employer engaged in such harassment or that she was instructed by the Employer to curtail her union activities." On appeal, the General Counsel sustained the Regional Director's action. The charge, which was filed on July 7, 1981, alleged that the Company violated Sec. 8(a)(1) "[o]n or about June 4, 1981 and at other times immediately preceeding and thereafter." However, the present allegations involving Hockenberry occurred well before June 4, 1981. Therefore the partial dismissal of Case 6–CA–14697 does not preclude litigation of the allegations of the consolidated complaint involving Hockenberry, and the Acting Regional Director's letter cannot be viewed as an administrative determination that Hockenberry made statements that were inconsistent with the present allegations.

cessive talking on the job, and possibly also solicitation. According to Zimmerman, the Company does not prohibit talking on the job. However, if others are busy, the employees should "hold down on the talking." Otherwise the talking becomes "excessive visiting," and the employee will be so informed. Zimmerman testified that the Company does not interfere with talking unless it is excessive or interferes with production. With respect to solicitation, Zimmerman testified that the Company's policy depends on the type of solicitation involved. The first type consists of collections on behalf of an employee or his or her family by reason of death, illness, or retirement. The second type consists of commercial or any other form of solicitation by company personnel (e.g., sale of cosmetics or raffle tickets and also includes union solicitation). According to Zimmerman, the first type of solicitation does not take much time and normally consists only of passing an envelope from one employee to another. However, Zimmerman admitted that it might be necessary for the solicitor to explain the purpose of the solicitation, and for employees to get money from their purses (which may be kept on the work floor). Zimmerman testified that the second type is permitted only before and after work and during breaks and lunch periods. According to Zimmerman, the Company's policies are enforced by its supervisors, persistent violations will result first in oral, and then in a series of written warnings, and excessive visitation will be noted on an employee's annual evaluation.

Zimmerman's testimony concerning the Company's alleged practices was contradicted by employee witnesses for the General Counsel. Employees Freeda Carr, Nancy Race, Cindy Dorotics Rossman, Donna Fehlman, Vivian Newton, and Barbara Wilson testified in sum that commercial solicitation was conducted on working time. Race testified that Supervisor Wilbur Mineweiser solicited orders for Christmas decorations from employees who were engaged at work, and Carr testified that Supervisor Randy Chase sold raffle tickets to employees at work. Mineweiser was not presented as a witness, and Chase, although presented as a company witness, did not deny Carr's testimony. I credit the testimony of the employees. I find in light of Zimmerman's testimony concerning the Company's alleged policy, and the testimony of the employees concerning its actual practices, that the Company instituted and maintained a policy that discriminatorily restricted union solicitation while permitting various forms of commercial, charitable, and other solicitation. The Company thereby violated Section 8(a)(1) of the Act. *St. Vincent's Hospital*, 265 NLRB 38, 40 (1982). The policy as defined by Zimmerman was further discriminatory in that the policy could be interpreted as permitting on-the-job conversations between employees, while prohibiting such conversations concerning the Union, on the grounds that they constituted "solicitation" on behalf of the Union. As will be discussed, the evidence further indicates that the Company in fact enforced its policies in a discriminatory manner, by prohibiting various forms of employee expression on behalf of the Union, while permitting other comparable forms of expression, including opposition to the Union.

b. *Restrictions on employee conversation and movement*

The consolidated complaint alleges (par. 8(a)) that around July 1980, Supervisors Pauline Stec and Rick Arthur unlawfully prohibited employee Vivian Newton from talking to machine operators and other employees. Newton testified that in September, Stec told her in the presence of two other employees who were helping her to stock the machines, that she should not "talk to the operators" or "bother the operators." According to Newton, one of her helpers (Candy Remey) was also talking to an operator, but Stec said nothing to Remey. However, in her investigatory affidavit Newton said that Stec told her not to talk to the operators because it was slowing up production. Newton was the only witness to testify concerning this alleged incident. I am not persuaded that the General Counsel has made out a case of union-related discrimination on the basis of this incident. Newton's testimony did not indicate that she was talking about the Union, or that Stec had reason to believe that she was discussing the Union. Newton did not indicate whether the operator or operators were actually engaged in production. Therefore it is possible that Stec was in fact concerned that Newton's conversation was affecting production work. However, Newton's uncontroverted testimony concerning another incident involving Stec presents a different situation. Newton testified that one day in July, she was in the breakroom with two other employees during the 5-minute cleanup period at the end of the work shift. Supervisor Stec came into the breakroom and asked one of the employees for his union card, which he was holding and apparently had just signed. Newton said that he was allowed to sign the card. Stec replied that they were not allowed to sign anything between 5:30 and 10:30 p.m., but she would check with her superior. Stec did not confiscate the card, but she never withdrew her statement. The cleanup period was a time when the employees were not expected to be at work, and indeed, was a form of breaktime. I find that the Company, by Stec, violated Section 8(a)(1) of the Act by telling the employees that they were not permitted to engage in union activity at times when they were properly not engaged in their work tasks.

Employee Frances Work testified without contradiction or corroboration that after she began wearing a union T-shirt, Supervisor Rulander told her that the operators were not allowed to leave their machines when in working order, in order to talk to employees across the aisle or at the next machine. Work testified that until then she occasionally left her work area to talk, but nothing was said. According to Work, she saw another employee, Joan Russ, who was not wearing union insignia, leave her work area. Work inquired of Rulander, who said that Russ had questions pertaining to her work. I credit the testimony of Work, but I am not persuaded that the General Counsel has made out a case of discriminatory conduct on the basis of this incident. Work did not claim that Rulander told her she could never leave her machine to talk to other employees. Rather, she simply testified that he told her not to leave when her machine was in working order. If the machine was in

working order, then Rulander could reasonably expect and direct that Work be available for production. Work did not claim that Rulander previously permitted her to leave her machine when there was work to be done. Work also did not claim that Joan Russ had no work to do, or that she left her area to engage in personal conversation. Therefore, I am recommending that the pertinent allegation of the complaint (par. 8(d)) be dismissed.

c. *Prohibiting display of signs*

Forklift operator Donna Fehlman Wilcox,[8] who worked at IDC, testified that in the second week of October, she saw David Shaffer, another forklift operator, with an antiunion sign on his heister which said that "only idiots and crazy bastards would want a union." She testified that she saw Shaffer operating the vehicle in this manner both in the morning and afternoon. Fehlman and another employee then decided to put a prounion sign on Fehlman's heister, and they did so the next morning. However, within a few minutes Finishing Area Supervisor Kerry Gern told Fehlman that there would be no more signs because the practice was hazardous and the heisters were company property. Thereafter, Fehlman did not see any signs. Fehlman testified that the sign, which was taped to the front of the heister, did not interfere with its operation. The Company did not, either at that time or in the present hearing, offer any explanation regarding why such signs would constitute a safety problem. Stock Replenishment Supervisor Randall Chase testified that one morning, about 1-1/2 hours after starting time, Supervisor Charles Walters, who reported to him, said that Shaffer had an antiunion sign on his heister. According to Chase, he informed Vice President Carter, who instructed him that there could be no signs, either pro- or antiunion. Carter also testified that he instructed Chase that the sign should be removed. Carter admitted that he was informed when Shaffer first brought the sign into the plant, although he testified that he did not know what Shaffer intended to do with it. Carter and Gern each testified that Gern reported to Carter about the Fehlman sign, and Carter instructed him that it should be removed. However, in his investigatory affidavit, Gern indicated (as did Fehlman in her testimony), that Gern ordered Fehlman to remove the sign immediately on observing it. Neither Supervisor Walters nor employee Shaffer was presented as a witnesses. In light of the Company's failure to produce Walters, the supervisor who allegedly actually saw the Shaffer sign, I credit Fehlman. I find that the Company tolerated the display of antiunion signs on its equipment, and objected to such conduct only after prounion employees sought to display their own signs. I find that the signs presented no safety hazard, and that the Company's assertion in this regard was a pretext. The Company could not prohibit the signs simply because they were taped onto company property. The display of such signs does not constitute solicitation or distribution, but is a form of expression that is protected by the Act. Therefore, the Company violated the Act by prohibiting the display of both pro- and antiunion signs. *Montgomery Ward & Co.*, 220 NLRB 373, 389 (1975), enfd. 554 F.2d 996 (10th Cir. 1977). Moreover, as indicated, the Company enforced its alleged policy in a discriminatory manner, by tolerating the display of an antiunion sign until prounion employees attempted to display their own sign.

[8] I shall refer to her as Fehlman, which was her name at the time of the events in question, in order to avoid confusion with Maintenance Supervisor Frank Wilcox, who also worked at IDC.

d. *Breakrooms*

The Company maintains breakrooms at Warren and a cafeteria at IDC, which are used by both employees and supervisory personnel. These are nonwork areas. At IDC there are lunch periods from noon to 12:30 p.m. and from 12:30 to 1 p.m. There was also a lunchbreak for the second shift. There is no general prohibition on personal literature in these locations, and in fact, such items as sales catalogues, notices of items for sale, and raffle tickets have been placed in the breakrooms and cafeteria. Barbara Wilson and Diane Savugot testified, in sum, that in September, shortly before the beginning of the evening shift, they placed copies of union literature on breakroom tables. Employees took some copies. A few minutes after the work bell rang, Supervisor Stec picked up the remaining copies and placed them in her pocket. The employees testified that they had not previously seen supervisors remove literature from the breakroom. Alan LaCava testified that at IDC, he saw supervisors pick up union literature that was left on tables after the first lunchbreak, although normally the tables were not cleaned until both midday lunchbreaks were completed. Vice President Carter, whose knowledge was limited to IDC, was the only company witness to testify concerning this matter. Carter testified that leaflets were left "helter-skelter" on tables, that the employee cleanup person would remove the leaflets, that this was not a supervisor's job, and that no special effort was made to remove union literature. If supervisors did not normally clean the tables, then it is evident from the uncontradicted testimony of the employees that the supervisors were performing a special and unusual function when they removed union literature from the breakroom and cafeteria, and that this function was unrelated to normal cleanup work. I credit the employees' testimony, and I find that the supervisors engaged in this unusual conduct as part of a company effort to minimize, wherever possible, communication between the Union and the employees. The Company thereby violated Section 8(a)(1) of the Act by confiscating union literature. *Photo-Sonics, Inc.*, 254 NLRB 567 (1981), enfd. 678 F.2d 121 (9th Cir. 1982).

e. *Denial of use of bulletin boards*

The complaint alleges (par. 7(j)) that about October 1980, the Company, by Supervisors Moore and Guthrie, at the Warren plant, denied the Union permission to post literature on the company bulletin board and removed literature from the company bulletin board while permitting other nonwork literature to be posted. In order to properly evaluate this allegation, it is necessary initially to consider the Company's asserted policy regarding em-

ployee use of bulletin boards. The Company has no written policy in this regard. Assistant Vice President Zimmerman testified that employees may use the plant bulletin boards to post personal notices, such as thank you cards and items for sale, but may not use the boards to post controversial notices, including pro- or antiunion literature or items derogatory or critical of the Company. Zimmerman testified that the procedure for posting notices differs at Warren from that at IDC. According to Zimmerman, at Warren the receptionist must first initial or date the proposed notice. If the receptionist has any problem, she will check with Zimmerman. The receptionist will take down any unapproved notices. Approved notices normally may remain up for a week. At IDC, prior approval is not required. However, according to Zimmerman, Vice President Carter and Assistant Plant Manager Nelson regularly police the boards. The employees were never generally informed of these alleged policies, although Zimmerman testified that an employee would be informed concerning the reason his or her notice was removed. Zimmerman testified that the Company uses the boards for legally required notices, notices relating to the company savings plan, and notification of merchandise available at the company store, but did not post any campaign literature on the boards.

Employees Barbara Wilson and Diane Savugot testified, in sum, that in September or October they posted two notices on a bulletin board at Warren. One purported to be the pay scale for company executives, and the other purported to be a company list of do's and don'ts for its supervisors with respect to the organizational campaign. They did so without obtaining prior permission. Within a few minutes Supervisors Moore and Guthrie removed the notices. Moore testified that on one occasion he removed posted union literature because it was not dated or initialed, and that no one ever asked him for permission to post union literature on the bulletin boards. However, Wilson testified that in October she asked Supervisor Stec to initial a union notice concerning alleged lack of employee seniority rights. According to Wilson, Stec answered: "You know we can't put stuff like this on the board"; adding that she never initialed anything, but would leave the notice for the receptionist or someone else. Wilson heard nothing more about the matter. Wilson testified that prior to the organizational campaign she often saw uninitialed notices on the bulletin boards, and Supervisor Moore admitted in his testimony that employees sometimes posted notices without permission. The Warren receptionist was not presented as a witness, although the Company presented testimony by the receptionist at IDC. No evidence was presented that would indicate that Company ever permitted or tolerated union notices on bulletin boards at Warren. With respect to IDC, Vice President Carter testified that he saw both pro- and antiunion literature on bulletin boards, that he saw union literature three times, that he removed the literature the first time, but that he never removed antiunion literature. Carter gave no explanation for this apparent change in practice.

I find that the Company violated Section 8(a)(1) by denying employee access to the bulletin boards at Warren for the purpose of posting union literature. Having made its bulletin boards available for personal use by its employees, the Company could not lawfully exclude the posting of notices that fell within the ambit of union or concerted activity, on the grounds that it considered such notices to be "controversial" or otherwise distasteful. *G. H. Base & Co.*, 258 NLRB 140, 142 (1981); *Container Corp. of America*, 244 NLRB 318 (1979). The notices that the union adherents sought to post at Warren, including the executive pay scales, fell within the ambit of protected activity. See *Virginia Apparel Corp.*, 264 NLRB 207, 210 (1982), enfd. in pertinent part mem. 720 F.2d 673 (4th Cir. 1983). In light of Zimmerman's testimony concerning the Company's policy, and in light of what Supervisor Stec told Wilson, it is evident that the Company would not in any event have granted permission for the posting of union literature. Moreover, until the organizational campaign, the Company tolerated the posting of notices at both Warren and IDC without prior permission. Therefore, I find that the Company removed union notices at Warren and IDC, and denied permission for posting at Warren, because of the nature of the notices, and not because the employees failed to seek requisite permission. The Company's conduct was unlawful for the additional reason that notwithstanding its ostensible policy concerning "controversial" material, the Company precluded the posting of union notices at Warren, and at least for a time, at IDC, while permitting antiunion notices at IDC.

f. *Written warning to Vivian Newton*

In late September, the Company sent letters to some 25 employees, asserting that the Company was in possession of union authorization cards ostensibly signed by the employees. On October 1, when Vivian Newton reported to work, employee Barbara Ransom told her that prounion employees were in trouble because they allegedly forged union cards, and that some of the employees whose cards were allegedly forged were going to see Personnel Director Richard Zimmerman. Ransom mentioned the name of employee Chris Nuhfer. Newton then went over to Nuhfer and asked her about the matter. Newton testified that both of these conversations took place just before starting time (5:30 p.m.), and that she spoke to Nuhfer in the breakroom. About 5:50 p.m., Newton telephoned union organizer Joe Picarreto from a pay phone, which was located near Assistant Vice President Stark's office. Stark saw Newton on the telephone, but did nothing at this time. Newton then went over to Nuhfer, who was at her machine, and asked if she could see Nuhfer's card. Nuhfer said that she wanted to talk to Zimmerman first. Newton testified that during this period she was caught up in her work and had nothing to do. About 6:30 p.m. Newton was summoned to Zimmerman's office. Zimmerman, Stark, and Mailing Supervisor Moore were present. Stark told Newton that they received complaints from several employees that Newton was conducting union business on company worktime. (In fact, only Nuhfer complained to the Company.) Newton denied the accusation, saying that she was only talking to employees, but Zimmerman responded that they had witnesses. The supervisors gave Newton a writ-

ten "employee warning record," prepared by Stark, which was placed in Newton's personnel file. The warning for "misconduct" stated that: "It has been reported that Vivian Newton has been conducting union organizing business while on Company time rather than doing her work. Continuance of union organizing business on company time may result in dismissal." However, shortly after the interview Stark struck out the phrase "rather than doing her work," because, according to Stark, Newton was doing her work and normally did perform her job functions.

Nuhfer was not presented as a witness in this proceeding. Stark testified that Nuhfer complained to him that while she was at work, Newton approached her and was "badgering" her to give her a letter and authorization card, and that Newton said the union organizer told her to ask for them. Stark testified that he reported the matter to Zimmerman, and that Company Secretary Robert Blair instructed them to give Newton a written warning because she "was engaged in union business during Company work time and badgering an employee at their work station, when the employee was supposed to be working."

The General Counsel correctly points out (Br. 30) that as a general rule, in the absence of a formal and valid no-solicitation rule, an employer may discipline an employee for solicitation only if the solicitation resulted in actual work interference. *Midwest Stock Exchange*, 244 NLRB 1108, 1116 (1979), enfd. in pertinent part 635 F.2d 1255, 1270 (7th Cir. 1980). In the present case, the Company could reasonably believe, on the basis of Nuhfer's complaint, that Newton was interfering with her work. Nevertheless, I find that the Company violated Section 8(a)(1) and (3) of the Act by issuing the written warning to Newton. First, the Company did not give Newton a warning for interfering with Nuhfer's work. Indeed, Assistant Vice President Stark admitted in his testimony that he attempted to conceal Nuhfer's identity by telling Newton that he received complaints from several employees. Rather, as the warning plainly indicated on its face, Newton was given a warning and threatened with discharge for "conducting union organizing business while on Company time." The Company did not make clear to Newton, either through the language of the warning or the accompanying statements by the company officials, that Newton had the right to discuss union matters with her fellow employees during periods of the workday when they were properly not engaged in their work tasks (not limited to formal break periods). The term "company time," like the term "company working hours," is so broad as to encompass periods from the beginning to the end of work shifts, including lunch and break periods and other times when employees are properly not engaged in their work tasks. See *Campbell Soup Co.*, 159 NLRB 74, 82 (1966), enfd. as modified 380 F.2d 372, 373 (5th Cir. 1967), cited with approval in *Our Way, Inc.*, 268 NLRB 394 fn. 3 (1983). Therefore the warning was overly broad and unlawful. Second, the warning was discriminatory and therefore unlawful because it was given pursuant to a policy that tolerated "badgering" by antiunion employees while severely disciplining lesser conduct by union adherents. In December, union adherent Joan Hockenberry complained to Finishing Area Supervisor Kerry Gern that employee Paul Williams intentionally stacked pallets in such a manner as to block a sign posted by Hockenberry that read "Merry Christmas from Local 1." Gern reported the matter to Vice President Carter. However, although Williams was engaging in antiunion activity in the guise of performing a work function, he was not disciplined. Instead, Gern advised Williams "not to be so obvious." Gern characterized Hockenberry as a troublemaker and suggested to Carter that Hockenberry "might lose control and help us" because (as testified by Carter), Hockenberry was "thin-skinned." The same could be said of Nuhfer. As indicated, this was not the only instance in which the Company tolerated antiunion activity while suppressing comparable forms of union activity. Additionally, as previously discussed the Company tolerated commercial and other forms of solicitation even when such conduct interrupted employees engaged at work. I find that the Company gave Newton a written warning because she was engaged in union, as distinguished from some other form of activity. Therefore the Company violated Section 8(a)(1) and (3) by disciplining Newton.

g. *Transfer of Joan Hockenberry*

Joan Hockenberry was the leading union adherent at IDC. She was closely identified with the Union. As indicated, the Company even regarded her personality as a potential campaign issue. Hockenberry had a practice of wearing union slogans and notices of union meetings on the back of her shirt. However, beginning on Tuesday, October 2, Hockenberry wore a sign which declared that the Company was "unfair" and "discriminates." The sign referred to the situation of Freeda Carr and Nancy Race, who had just quit their jobs after being transferred to the returns department, and were now seeking reinstatement. As will be discussed, the matter of Carr and Race soon became a major issue in the organizational and election campaigns. At this time Hockenberry worked on the multiple packing line in the finishing area. She was on the day shift, and Kerry Gern was her immediate supervisor. There were 32 to 34 employees on the multiple packing line. They were seated on both sides of a conveyor belt, in an open area, and generally in view of each other. Hockenberry began wearing the "unfair . . . discriminates" sign after the lunchbreak. Hockenberry testified that about one-half hour later, Gern told her to go to the sportcoat line, which was some 50 to 60 feet away. There were about 12 employees on the sportcoat line. Hockenberry testified that the employees could not see her back. The same would also normally be true of the multiple packing line, as the employees were seated in rows facing each other. However there was less opportunity for employees to move about the sportcoat line. That line was located in a closed area, and it was necessary for Hockenberry to crawl under the conveyor in order to leave her seat. Hockenberry testified that in the same week she was also assigned to the nylon line, where the employees could not see each other without turning around. There were six employees on the nylon line. Like the sportcoat line, this line was located in a

closed area, and it was difficult for Hockenberry to leave her seat. The next week Hockenberry stopped wearing the "unfair . . . discriminates" sign, and she returned to the multiple packing line. However, Hockenberry admitted that as of Friday, October 10, she was posted to work on the multiple packing line the following week, although on October 10 she was still wearing the sign.

Supervisor Gern testified that he normally rotated employees in the finishing area, usually every third week, and that each Friday he prepared a schedule for the following week. Gern denied that he transferred Hockenberry because of her sign. However, Gern failed to explain why Hockenberry was suddenly switched to the sportcoat line in midweek, and why she was transferred to yet another line during the same week. I find that the Company, by Gern, transferred Hockenberry from the multiple packing line in order to minimize employee communication concerning the Race-Carr matter, and to prevent possible galvanizing of employee sentiment for Carr and Race during the crucial period immediately following their departure. As will be discussed, on the same day that Hockenberry began wearing her sign, the Company caused the arrest of union organizers who sought to distribute union literature concerning the Carr-Race matter to employees at IDC. I find that the Company violated Section 8(a)(1) and (3) of the Act by discriminatorily transferring Hockenberry from the multiple packing line to the sportcoat and nylon lines.

6. Company threats of reprisal and solicitation to inform on union activities

In October, the Company sent a two-page letter to its employees, signed by President Jack Blair, concerning the union organizational campaign. The second page, captioned "Our Labor Relations Policy," began with the statement: "We firmly believe that our employees, our customers and the company have nothing to gain through union representation, and, in fact, have much to lose." The General Counsel contends that by such statement, the Company threatened its employees with unspecified reprisals if they joined or selected the Union as their bargaining representative. The standards governing the legality of such statements are set forth in *Greensboro Hosiery Mills*, 162 NLRB 1275, 1276 (1967), enf. denied in pertinent part 398 F.2d 414, 417 (4th Cir. 1968). (The court of appeals accepted those standards, but disagreed with the Board on their application to the facts in *Greensboro*.) Applying the *Greensboro* standards to the facts of the present case, I find that the statement, when viewed in the context of the letter and the Company's contemporaneous conduct, constituted a threat of reprisal if the employees designated or selected the Union as their bargaining representative. The first page of the letter centered on a list of alleged costs and obligations incurred through union membership. If the letter said nothing more, then the statement at issue might reasonably be construed as a reference to these obligations. However, on the second page, immediately following the statement, the Company set forth its purported personnel policies as a "non-union organization." An employee could reasonably infer from "our labor relations policy" that if the employees chose union representation, the Company would no longer be so magnanimous in dealing with its employees (e.g., it would no longer treat the employees as individuals, it would not recognize and reward individual effort and contribution, it would not permit employees to deal directly with management, and it would not assure its employees of equal opportunity). Second, as has been and will be discussed, the letter was sent to the employees in the context of numerous unfair labor practices, including acts of discrimination against union adherents. These acts included, as found, infra, the Company's discriminatory refusal to reinstate Freeda Carr and Nancy Race. The Company's discriminatory pattern of conduct was apparent to the employees by the time they received this letter. In sum, the letter plainly inferred that if the employees chose union representation, the Company's discriminatory policy toward union adherents would become its standard policy in dealing with all its employees. Therefore, I find that the Company violated Section 8(a)(1) of the Act by threatening its employees that they had "much to lose" if they chose union representation.

Personnel Director Zimmerman testified that the Company distributed to some of its supervisors, a memorandum captioned "DO'S and DONT'S for NPC Supervisors." The memorandum stated in pertinent part that supervisors "CAN . . . tell employees no one has the right to threaten or pressure them. The Company should be informed of any such threats or pressure and will take all necessary steps to prevent it." The General Counsel contends that the Company, by its supervisors, unlawfully solicited employees to report on the union activities of fellow employees. The General Counsel would be correct if in fact any supervisor actually told an employee to report instances of union "pressure." See *Union Carbide Corp.*, 259 NLRB 974, 978 (1982); *J. H. Block & Co.*, 247 NLRB 262 (1980). The difficulty with the General Counsel's contention is that the present record fails to indicate that any supervisor actually did so. Under questioning by the General Counsel, Zimmerman testified that pursuant to the "Do's and Don'ts," supervisors "would have" so informed the employees. However, it does not follow from the admission that any supervisors actually did so. Therefore, I am recommending that the pertinent allegation of the complaint (par. 7(*x*)) be dismissed.

7. Refusal to reinstate Freeda Carr and Nancy Race

The consolidated complaint, as amended, alleges that since about October 6, 1980, the Company has violated Section 8(a)(1), (3), and (4) of the Act by refusing to reinstate Freeda Carr and Nancy Race because of their union and concerted activities and because of the charge filed on their behalf in Case 6–CA–13933.

At the beginning of October 1980, Carr and Race were working in the housewares department at IDC. Rick Arthur was their immediate supervisor. Carr had been continuously employed by the Company since 1972. She worked at several jobs, and at one time was a supervisor. Since September 1979 she had been working as order giveout girl in housewares, where her duties included training of new employees. Her personnel file in-

dicates that she progressed in her work performance over the years, and was rated as an above-average employee in all respects except attendance, for which she was rated average. Nancy Race Nee Poole began working for the Company in June 1978. She worked as an order filler in housewares. By July 1979 Race had received three warning notices for unsatisfactory attendance. However, much of her attendance problem was related to her pregnancy. In May 1980 Race returned from maternity leave. Thereafter, her attendance improved substantially, and she received no further warnings. Race was rated as an average or above-average employee in all respects except attendance.

Carr and Race were not leading union adherents prior to their separation from employment, but they did actively support the Union. They each signed a union card and wore union T-shirts and pins to work. Carr solicited other employees to sign cards. Both Carr and Race made their prounion views known to Supervisor Arthur. By October 1, top management at IDC (specifically, Vice President John Carter and Assistant Plant Manager Carl Nelson) were aware of what they regarded as friction among the housewares department employees, and they specifically viewed Carr, Race, and Donna Fehlman as part of a prounion clique within the department, with Carr as the leader of the clique. Management was also aware that Supervisor Arthur was himself a principal source of controversy within the department, primarily because of his lack of tact in dealing with the female employees under his supervision (Arthur subsequently went on sick leave, and returned to the Company in a nonsupervisory capacity). On October 1 and 2 Carter and Nelson met individually with the department employees. Immediately following this series of meetings, Carter informed Carr that he would give Arthur "another chance" but would transfer Carr to the returns department, where she had worked when she began at IDC. Carter then assembled a meeting of all department employees except Carr, and informed them that Elaine Fox (an outspoken antiunion employee) was replacing Carr as giveout girl. Carter then loudly and repeatedly asked Nancy Race what was her problem. Race had said nothing up to this point. She initially remained silent, but then asserted that she did not have to answer. Carter disagreed, whereupon Race told him that he could shove the job up his "ass." Carter invited Race to leave the meeting, and she did. After the meeting, Carter asked Race if she quit. Race indicated that she did not, but that Carter could fire her if he wanted. Carter said that he would if she did not get along with the other employees. The next morning (Friday, October 3), Race was summoned to the conference room, where Carter and Nelson gave her a written warning notice for "misconduct" based on her outburst at the October 2 meeting, and informed her that she would be working in returns. Carr and Race viewed returns as unpleasant work, because it involved handling of used, and sometimes unclean clothing. Race reported to returns, but that same morning, after consulting with her husband, she informed Carter that she was quitting. In the meantime Carr, who had taken the day off, came to IDC and met with Carter and Nelson to ask if they would reconsider their decision. They refused. Carr said she was quitting, and would use her accumulated leave time as 2 weeks' notice. Carter urged her to reconsider, but she insisted that she was leaving because she felt she had been treated unfairly. At no time did Carter or any other company official tell her that she failed to give adequate notice, or that she could not use her accumulated leave time for notice purposes.

Vice President Carter testified that he decided to transfer Carr and Race because in his opinion Carr and to a lesser extent Race were causing a split between Supervisor Arthur and the employees. The evidence fails to indicate whether Carr and Race consulted with each other before they decided to quit. However, shortly thereafter they decided to enlist the Union's help in order to regain their jobs. On Monday morning, October 6, they met with union organizer Dan Glather at the Holiday Inn in Warren. Glather advised them to request reinstatement. He telephoned Carter and informed him that Carr and Race wanted to return to work in the returns department. Carter told Glather that he would have to speak to the Company's attorney. Glather attempted to speak to Assistant Vice President Zimmerman, but Zimmerman refused to accept the call. That same day, the Union's attorney sent a telegram to Zimmerman, which was received on October 8. The telegram stated that Carr and Race were ready, willing, and able to return to work "at their most recent assignments," and requested that the Company contact them to arrange for a time to resume work. The Company did not respond to the telegram. On the afternoon of October 6, and again on October 7, several union organizers, accompanied by Carr, Race, and a former employee, attempted to distribute union literature and cards at the IDC premises. The literature included a handbill signed by Carr and Race, which protested their transfer "without regard to seniority." (The Company's responses to these efforts are alleged as unfair labor practices, and will be discussed under the next heading of this decision.) As found, Joan Hockenberry also attempted to publicize the Carr-Race matter inside the plant.

On October 13 Carr and Cindy Durotics Rosman, who quit her job in housewares on October 10, met with Assistant Vice President Zimmerman and Personnel Assistant Rodney Henry. Much of the meeting was taken up with a discussion of Supervisor Arthur. However, one aspect of the meeting is sharply disputed. Carr and Durotics testified in sum that Carr asked about getting her job back, whereupon Zimmerman answered that she would have to fill out a new application in order to be considered. Zimmerman and Henry testified, in sum, that Carr asked if there was work available at Warren, whereupon Zimmerman answered no, but that she could go across the hall (i.e., to the personnel office) and update her application. Carr did not go to the personnel office until February 27. Carr testified that she did not go because she did not think she should have to return as a new employee. On October 15 the Union filed its charge in Case 6–CA–13933, alleging among other things that the Company violated Section 8(a)(1) and (3) by discriminatorily transferring Carr and Race, thereby constructively discharging them, and by refusing to reem-

ploy them, even in returns. Within the next 3 days, two letters crossed in the mail. On October 16 or 17, Carr sent a letter to Zimmerman, which he received on October 18.[9] Carr reasserted her request, as set forth in the Union's telegram, to continue working "at the assignment last given to me in returns." However, she restated her position that her transfer was unfair, and reserved her right to take other legal means to get back her job. However, by letter dated October 16, Zimmerman informed Carr as follows:

> Re: Our meeting of October 13, 1980
>
> Please be advised that as of this date we received a charge through the National Labor Relations Board which appears to encompass the circumstances of your resignation. I have determined that your case is better left in the hands of the National Labor Relations Board for investigation and resolution.

There was no further communication between Carr and Zimmerman.

I credit the testimony of Zimmerman and Henry concerning the October 13 meeting. It is unlikely that Zimmerman would have advised Carr to fill out a new application, because even applicants who had never worked for the Company were not required to follow this procedure. Rather Zimmerman, Henry, or another personnel assistant filled out the application. Zimmerman's version of the meeting reflected the Company's usual procedure for former company employees who were reapplying for work. Under this procedure, the former employees would in an informal manner, usually by telephone or in person, indicate their availability for reemployment and indicate any changes in name, address, telephone number, employment history, and physical capabilities. The information would be entered in their personnel file, which would then be placed in an active file together with the applications of new job applicants and the files of other former employees seeking reemployment. However, for reasons that will be discussed, I find that Zimmerman injected an unnecessary obstacle by telling Carr to follow this procedure, and that absent a discriminatory motive, Zimmerman would have promptly accepted Carr's offer to work in returns. I further find that after Zimmerman sent his October 16 letter to Carr, such procedure would have amounted to an exercise in futility, because Zimmerman made clear that by reason of the pending unfair labor practice charge, the Company would not reemploy Carr unless it was ordered to do so by the Board.

Thereafter the Union pursued various legal avenues on behalf of Carr, in addition to the unfair labor practice charge on behalf of Carr and Race, and suffered repeated rebuffs in the process. With the Union's assistance, Carr filed a claim for unemployment compensation, and also filed a complaint with the Pennsylvania Human Relations Commission, alleging sexual harassment. On February 24, following a hearing, a referee of the Pennsylvania Unemployment Compensation Board of Review held that Carr was ineligible for compensation because there was no necessary or compelling reason for her to quit.[10] Immediately on receiving the referee's decision, Carr went to the Company's personnel office and informed Personnel Assistant Henry that she was reapplying for work. Henry then pulled her personnel folder and placed it in the active file with those of other applicants. There were no changes with regard to pertinent information. Carr indicated a preference for clerical work, but did not rule out any job or either plant. Thereafter Carr called in about her application. On July 15, 1981, the sexual harassment charge was administratively dismissed for lack of probable cause. In the meantime, on January 30, the Regional Director declined to proceed on the Carr-Race matter; however, on January 29, 1982, the General Counsel granted the Union's appeal with respect to the Company's refusal to reinstate the employees. Meanwhile, during the election campaign the Carr-Race matter became a company issue as well as a union issue. In a series of captive audience speeches that he delivered to assembled employees shortly before the election, Company Vice President Robert Blair repeatedly hammered home the theme that the Union demonstrated its ineptitude by failing to get Carr and Race reinstated to their jobs. In the following or similar language, Blair told the employees:

> Now they have also, these union organizers, have also been going around telling certain people, people that used to work at the company and no longer work here, they will, we'll show them, we're going to get you your job back here. Just watch us. We're going to get you your job back here. And they've said to certain individuals, you worried about your unemployment comp? Well, don't worry about it. We'll see that you get unemployment comp. They've said, we're going to file a flock of charges against the company in front of various state agencies like the Pennsylvania Human Relations Commission. And they did, they filed charges against us in front of the Pennsylvania Human Relations Commission. Well, the fact of the matter is not one single person that they said they'd get their job back is back here working. Not one single person that they said—don't worry we'll get you unemployment comp—got unemployment comp.

Although Blair did not mention names, Assistant Vice President Zimmerman testified that he was referring to Carr and Race.[11]

[9] The letter is dated October 10, and Carr testified that she mailed it the next day. However, the letter was postmarked October 17.

[10] The referee found that Carr was instructed to complete an application for employment in order to be considered for reemployment. For the reasons previously discussed, I do not agree with this finding. The referee noted Carr's assertion that the Company disapproved of her union activities. However, the referee did not consider the question presented in this case, namely, whether the Company refused to reinstate Carr because of her union and concerted activities or because of the pending unfair labor practice charge.

[11] The foregoing quotation is taken from a transcript of a company tape recording. Both the Company and the Union tape recorded captive audience meetings during the week of June 1, 1981. Generally the company transcripts are more accurate with respect to the statements of com-

Continued

The Company never offered reemployment to either Carr or Race. Assistant Vice President Zimmerman testified that the Company did not offer reemployment to Carr because (1) she did not give notice to the Company that she was leaving, and (2) her reason for leaving (i.e., her transfer to another job) was not a good reason. Zimmerman testified that the Company did not offer reemployment to Race because (1) she never reapplied, (2) she had a poor attendance record, and (3) she told Carter to shove the job up his "ass." In fact, as indicated, Zimmerman informed Carr by his letter of October 16 that the Company would not consider her request for reemployment because of the pending unfair labor practice charge. Neither Carr nor Race was ever given any other reason. The October 16 letter constituted an admission that the Company was refusing to consider Carr for reemployment because the Union had filed a charge on her behalf. Therefore the letter evidenced that the Company was violating Section 8(a)(4) of the Act. See *NLRB v. Syracuse Stamping Co.*, 208 F.2d 77, 79–80 (2d Cir. 1953). The letter further evidences that the reasons advanced by Zimmerman for refusing to reemploy Carr simply constituted a rationalization for a decision that the Company made when it received the charge. As the language of the letter was sufficiently broad to also encompass the situation of Nancy Race, the inference is warranted, and I so find, that the charge was also at least a factor in the Company's refusal to consider Race for reemployment.

The evidence further indicates that the reasons advanced by Zimmerman, both as to Carr and Race, lacked any credible factual basis, or did not normally constitute grounds for refusing to consider an applicant for reemployment, or both. The Company contends that Carr did not apply for reemployment until February 27, and that Race never reapplied. In fact, as Zimmerman was well aware, both Carr and Race applied for work by telephone and by telegram on October 6, and Carr further applied in person on October 13 and by letter on October 16 or 17. Neither Carter nor Zimmerman, in his testimony, gave any explanation for their refusal to accept organizer Glather's call as a good-faith request for reemployment. If the company officials believed that such request should have come personally from Carr and Race, then it would have been a simple matter for either official to request that the employees be placed on the telephone. But for the fact that the initial caller was a union organizer, Carter or Zimmerman probably would have done this. Zimmerman testified that he did not regard the October 6 telegram as a valid reapplication because he never received such a request by telegram, and because the telegram did not come from Carr and Race, and that he did not consider Carr's letter as a valid request. Zimmerman gave no explanation for the latter assertion. In fact, the Company had no established manner for submission of requests for reemployment. Rather, such requests could be and were often received in an informal manner (e.g., by telephone call). Moreover, on October 13 Carr came in person to request reemployment. Although Carr inquired about the Warren plant, Zimmerman was aware, by reason of Glather's call, the Union's telegram, and Carr's subsequent letter, that Carr was willing to work in returns. As indicated, Zimmerman told Carr to go to the personnel office to update her application. Had she done so, she would have ended up talking to either of the same officials who were present in the conference room (i.e., Zimmerman or Henry). In view of the short time that had elapsed since Carr quit her job, it was obvious that there was no need for Carr to update her application. Indeed, the Company's own records indicate that absent a discriminatory motive, the Company would have immediately returned Carr and Race to their jobs on their request to return, without telling them to update their application or otherwise go on a waiting list.[18] The situation of Mary Lou Rigby, which is documented in a series of memos in her personnel file (G.C. Exh. 178) is illustrative. Rigby began working for the Company in order handling in September 1972. In February 1974 Rigby was assigned to work as giveout in returns. Rigby complained loud and long about the transfer, and then informed the Company that she was quitting. Her resignation was accepted. The file memo indicates management's view that Rigby's attitude was "completely negative," that she had "a history of job changing," and that "It's best she leaves NPC." However, prior to the effective date of her resignation, Rigby changed her mind. Rigby thereafter retained her job, without being asked to reapply or update her application. Thereafter Rigby worked for the Company until September 1979, when she quit her job in order to obtain a better job with National Forge Company. During much of the intervening period Rigby's attendance was rated as unsatisfactory. She was frequently absent or tardy. By 1979 Zimmerman was personnel director and Rodney Henry was personnel assistant. Nevertheless, having had the benefit of the foregoing information in Rigby's personnel file, they recommended her without qualification for future reemployment (Rigby was given a "Yes" rating, which will be explained, infra).

In sum, the Rigby file demonstrates that absent a discriminatory motive, the Company will excuse an employee who quits (for whatever reason), but shortly thereafter changes his or her mind, and will not require the employee to reapply and wait for reemployment. Therefore, Freeda Carr was correct in concluding that by directing her to the personnel office to update her application, Zimmerman was, for discriminatory reasons, avoiding an offer of reemployment by placing her on a waiting list with other applicants. The Rigby file further demonstrates that the Company does not view employee dissatisfaction with job assignments as a bar to reemployment, even when such dissatisfaction becomes a habit, or when the employee quits as a result of a transfer. As will

pany officials, whereas the union transcripts tend to more accurately reflect questions or statements by employees. The difference probably reflects the location of the recording devices.

[18] Some of the evidence discussed here was adduced at the reopened hearing on April 27, 1983. To the extent relevant, such evidence may be considered with respect to the matter of Carr and Race, just as evidence adduced in the original hearing may be considered with respect to the additional alleged discriminatees. See *Air Express International Corp.*, 245 NLRB 478, 483 fn. 10 (1979), enfd. as modified 659 F.2d 610 (5th Cir. 1981).

be discussed, the Rigby file is also evidentiary with respect to other alleged discriminatees in the present case.

Zimmerman testified that Carr failed to give adequate notice of quitting because the Company "appreciate[s]," but does not require, 2 weeks' notice, and that accumulated vacation time cannot be used for notice purposes. According to Zimmerman, the reason for this policy is to give the Company sufficient time to obtain a replacement. Interestingly, the Company does not contend that it refused to rehire Race because she failed to give adequate notice. The Company's employee handbook is silent with respect to notice of quitting. However, alleged discriminatee Barbara Morgan testified without contradiction that Supervisor Pauline Stec told her that she could use accumulated leave time for notice purposes. As indicated, Vice President Carter did not object when Carr made the same request. I credit the testimony of Morgan, and I find that the Company has no consistent policy with respect to notice. Rather, the Company will accept accumulated leave time as notice unless the Company informs the employee otherwise. In Carr's situation, the matter of notice was plainly a sham, because Carr did not lose even 1 day from work before she requested reemployment. Carr quit on Friday, October 3, which was her day off, and immediately notified the Company, thru organizer Glather, on Monday morning, October 6, that she was willing to accept her assignment in returns. Moreover, the Company's records indicate that failure to give notice, even in an extreme situation, does not constitute a bar to reemployment of an otherwise qualified employee. Chris Nuhfer, who complained to management about Vivian Newton's union activity, failed to return from pregnancy leave in early 1979, and her name was removed from the personnel roster. She was rehired in December 1979. She stopped coming to work after April 29, 1981, and on June 10, 1981, her name was removed from the personnel roster. On June 3, 1980, she was given a written warning for unsatisfactory attendance. Nevertheless, Nuhfer was rated as recommended for reemployment, and she was rehired in the mailing department on August 24, 1981. The personnel files of Kathy Reist and Debra Frank indicate that they gave no notice before they quit, but instead, gave notice after they stopped working. Nevertheless, both employees were recommended for reemployment, and Proctor was subsequently twice rehired (the second time, after having refused work at IDC in lieu of a layoff). Similarly Nancy Naser, who had a poor attendance record throughout her career at the Company, was rehired after having quit her job without notice.

Approximately 30 percent of the Company's work force consists of reemployed employees who formerly worked for the Company. It is not unusual for employees to work two, three, or even four separate times for the Company. The Company's records indicate that employees leave for a variety of reasons (e.g., family responsibilities, relocation, and better employment). When an employee leaves, the personnel office evaluates the employee's eligibility for future reemployment, and the rating is entered on the employee's personnel file. However, the employee is normally not notified of such rating. Personnel Assistant Henry normally makes the evaluation, subject to review and revision by Assistant Vice President Zimmerman. The ratings are as follows. "Yes" means that the employee is eligible for rehire. "Yes?" means that there is a small problem, but the employee could be eligible for reemployment. "No?" means that there is a more serious problem, but the employee could still be eligible. "No" means that it is unlikely that the employee would be rehired. The ratings are sometimes accompanied by an explanation, qualification, or other notation. The overwhelming majority of rehired employees received a "Yes" rating when they left. It is unusual for the Company to rehire an employee with a "No" or "No?" rating. Zimmerman testified that over a 3-year period, only two employees were rehired with a "No" rating, and that one of them was rehired as a result of a personal appeal by her husband, who was then working for the Company, and who pleaded financial hardship. In sum, a "Yes?" rating places the applicant at a disadvantage when competing with other applicants, a "No?" rating makes reemployment unlikely, and a "No" precludes consideration for reemployment. The Company's records indicate that poor attendance is usually the indicated reason for a qualified or unfavorable recommendation.

Freeda Carr's personnel file indicates that she was rated as follows: "Yes? See REZ, JMC CHN" (i.e., see official Zimmerman, Carter, or Nelson). No other explanation was given. It is evident that Personnel Assistant Henry was hard put to explain any qualified rating for this longtime and valued employee. Notwithstanding the "Yes?" rating, Zimmerman, as indicated, testified that the Company did not offer her reemployment because of the alleged lack of notice and inadequate reason for leaving. Nancy Race's personnel file indicates a rating of "No. Attendance." However, Race's attendance record was better than that of other employees who were given a "Yes" or "Yes?" rating on their departure. For example, Edith Falconer Fehlman was given a "Yes" rating, although she had seven absences, totaling 103 days during a 1-year period. Race's absences were caused substantially by pregnancy, which, as testified by Zimmerman, constituted a mitigating factor. Moreover, Race's attendance record improved to an acceptable level following her return from maternity leave. As for Race's emotional outburst on October 2, the evidence indicates that Vice President Zimmerman testified that in considering former employees for reemployment, the Company looks at those factors that reflect stability of employment (e.g., attendance and continuity of employment). If so, then it is difficult to see why Zimmerman would attach much significance to one emotional outburst. The Company's records indicate that normally it does not. Employee Laura Zaffino's file indicated that she assaulted a fellow employee, splitting her lip. Zaffino also demonstrated a repeated reluctance to follow the instructions of her supervisors. On leaving the Company, Zaffino was given a "Yes?" rating.

I find that the reasons advanced by the Company for refusing to rehire Carr and Race, except for that advanced by Zimmerman in his letter to Carr, were pretextual. The Company refused, and continued to refuse, to

rehire Carr and Race because they actively sought the Union's assistance in regaining their jobs, which assistance included the filing of an unfair labor practice charge in Case 6–CA–13933. Indeed, Company Vice President Blair came close to conceding as much in his speeches to the employees in June 1981. Blair made clear that he regarded the Union's inability to obtain reinstatement for the employees as an issue in the campaign. By so doing, the Company boxed itself into a position whereby even if it were inclined to reinstate Carr and Race, it could not do so without appearing to give the Union a victory. Compare, in the context of an 8(a)(5) violation, *General Electric Co.*, 150 NLRB 192, 196 (1964), enfd. 418 F.2d 736, 755 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970).

It is undisputed that on and after October 6 there was work available for Carr and Race in the returns departments. Pursuant to a department request on October 6, the Company, during the period from October 13 to 20, hired nine new employees for work in returns. Most worked as returns inspectors. Personnel Assistant Henry testified that the Company continued to hire employees after February 27, 1981 (when the Company formally acknowledged Carr's reapplication) and that Carr would have been qualified for some of the positions. I find that but for the actions of Carr and Race in seeking union assistance, the Company would have reinstated them when, acting through organizer Glather, they requested reinstatement on October 6. Therefore, the Company violated Section 8(a)(1), (3), and (4) of the Act, and Carr and Race are entitled to reinstatement and backpay from that date. I further find that the Company's discriminatory actions with request to Carr and Race may properly be considered as evidence with respect to the other alleged discriminatees.

8. Denial of access by nonemployee organizers to IDC premises

On the afternoon of October 6, union organizers Dan Glather and Frank LaCotta, accompanied by Freeda Carr, Nancy Race, and former employee Chris Branstrom, entered on the premises of IDC for the purpose of distributing union literature and talking to employees as they left the plant. Vice President Carter told Glather that this was private property, and he requested that they leave. Glather asserted that they were exercising their rights under the Act to communicate with the employees. Carter responded that if they returned the next day the Company would contact "the authorities" and have them removed. The next day (October 7) union organizers Glather, Joe Picarretto, and James Gilmartin, accompanied by Carr, Race, and Branstrom, again went to the IDC premises. They were confronted by a state trooper who was present at the Company's request. The trooper told them that if they did not leave they would be arrested. The group temporarily left. However, the three professional organizers returned to the premises (while the others waited on a public road), and they proceeded to distribute union literature to employees leaving the plant. The trooper again threatened them with arrest, but they persisted. The trooper asked Company Maintenance Supervisor Frank Wilcox if he wanted them arrested. Wilcox said that he did. However, the trooper's supervisor advised him to "continue the arrest by summons." The organizers left after they finished distributing their literature. Within a few days the organizers were served by mail with a summons, prepared by the trooper, charging them with criminal trespass by entering the Company's property and refusing to leave on request. The matter did not go to trial, because the district attorney and the Union's attorney worked out an agreement whereby the charges were dropped against Glather and Picaretto, Gilmartin pleaded guilty to disorderly conduct and paid a fine, and the Union agreed that it would not return to the Company's property unless it could prove through Board processes that it had a right to be there. The district attorney took the position that the Union's alleged statutory right was a matter for the Board, and not the state courts. The Company did not object to all charges being dropped, but the district attorney insisted on the guilty plea by Gilmartin, because of his alleged disrespectful behavior toward the state trooper. By letter dated February 26, 1981 (during the pendency of the election petition in Case 6–RC–8922), the Union requested permission from Carter "to hand bill the Irvine employees to give our side of Freeda's case or in liu [sic] of your permission we would formally request a current list of the names and addresses of the Irvine employees." The Company did not respond to the letter.

The consolidated complaint alleges (pars. 7(k), (l), and (o) that the Company violated Section 8(a)(1) on October 6 by threatening union organizers with arrest because they distributed union literature on company property, on October 7 by causing their arrest for the same reason, and on February 26 by refusing to permit the Union to handbill at IDC. The first two allegations are factually inaccurate. The Company threatened to call the police and have the organizers removed, but did not threaten to have them arrested. The Company caused the organizers to be evicted, and caused criminal proceedings against them, but they were not arrested (i.e., placed in police custody). However, what is significant is that the Company refused to permit the Union to distribute literature and communicate with employees on the IDC premises, and threatened to and did initiate police action to expel and keep nonemployee union organizers from its premises. (The Company's actions with respect to Carr and Race will be discussed at a later point in this decision.) In sum, the issue presented by all three allegations is whether the organizers had a statutorily protected right to distribute literature and communicate with employees on the IDC premises, and consequently whether the Company violated the Act by interfering with the Union's exercise of that right. Therefore, although paragraph 7(o) alleges a violation during the pendency of the election petition, I shall consider all three allegations together at this point.

The General Counsel and the Company agree, and correctly so, that the governing standards are set forth in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112–113 (1956). In *Babcock & Wilcox*, the Supreme Court held as follows:

> . . . an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit.
>
> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.
>
> . . . .
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> The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property.

I have studied numerous case decisions involving application of the *Babcock & Wilcox* standards, including *Babcock & Wilcox* itself. These decisions tend to reflect certain distinct currents in the developing body of law. First, as the Supreme Court itself has recognized, the courts, including the Supreme Court, have demonstrated great reluctance to compromise employer property rights by finding that an employer violated the Act by excluding nonemployee organizers from its premises. See *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978). I am unaware of any court decision affirming such a finding by the Board under *Babcock & Wilcox* standards, except in situations where the employees lived on the employer's premises. Even in such situations, the courts have sometimes declined to find a violation. See *NLRB v. Tamiment, Inc.*, 451 F.2d 794 (3d Cir. 1971); *NLRB v. Kutsher's Hotel & Country Club*, 427 F.2d 200 (2d Cir. 1970). However, the courts have indicated a greater willingness to grant temporary union access as a remedy for serious unfair labor practices. See *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983); *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886, 889 (6th Cir. 1969). Both the Board and courts have tended to attach significance to a union's efforts, or lack of effort, to communicate with the employees by other means. See *Tamiment, Inc.*, supra at 798–799; *Lee Wards*, 199 NLRB 543, 545–546 (1972). Generally, Board decisions in this area do not tend to attach the same weight to employer property rights, vis-a-vis Section 7 rights, as the court decisions. However, it is evident from the history of Board litigation that the whole question of union access to employer property has been a highly controversial one, with the result sometimes depending as much on the makeup of the Board as the facts involved in particular cases. See and compare *Monogram Models*, 192 NLRB 705 (1971) (majority and dissenting opinions); *Hutzler Bros. Co.*, 241 NLRB 914 (1979), enf. denied 630 F.2d 1012 (4th Cir. 1980); *Ameron Automotive Centers*, 265 NLRB 511 (1982) (majority and dissenting opinions).

In the present case, unlike many others, the evidence indicates that the Union made extensive efforts to communicate with IDC employees by alternative means. For this if no other reason, careful consideration must be given to the feasibility of such means, including the Union's efforts and relative success or lack of success in reaching the employees. As will be discussed, the present case involves other factors that make it somewhat sui generis; specifically, (1) the large number of employees involved, coupled with continuing turnover among the employees; (2) the Company's extensive and unlawful interference with employee organizational activity; and (3) denial of access to alternative means away from the Company's premises (i.e., radio, newspapers, and meeting locations).

The first question to be considered is whether the Union could have communicated with the IDC employees at IDC entrances or exits without entering onto company property. A comparison of the Warren and IDC locations is in order. The Warren plant is located in downtown Warren; its entrances, exits, and parking lots are immediately adjacent to the public sidewalks. There is no contention that the location of the Warren plant poses any obstacle to union communication with employees in the plant area, although as found, supra, the Company engaged in unlawful surveillance of union distribution at Warren. However, IDC is located on a large, company-owned tract of land in a semirural area, adjacent to a highway (U.S. Route 62). No employees walk to work at IDC. The plant building, a roadway in front of the plant (known as the "Main Road"), dirt roads on either side of the plant, a walkway from the front entrance to the employee parking lot, the lot itself, the grounds around the plant, and the access roads to and from Route 62 are all located on company property. The access roads form a cloverleaf-type intersection with Route 62. The speed limit on Route 62 is 55 miles per hour. Much testimony and documentary evidence, including photographs, diagrams, and maps, were introduced concerning the physical situation at IDC. In addition, with the concurrence of the parties I personally visited the IDC premises, and I did so between 3:55 and 4:30 p.m. on October 20, 1982, a rainy afternoon when employees were leaving at the end of their workday (4 p.m.). On consideration of the evidence, including but not limited to my own observations, I find that there was no feasible way in which union organizers could communicate with employees at

or near the IDC premises, without actually entering onto company property. The only suggestion offered by the Company is that the union organizers could have stood on the grassy right-of-way adjacent to Route 62 at points where the access roads intersect with Route 62. The evidence is inconclusive regarding the width of the right-of-way. I agree with the testimony of organizers Glather and Gilmartin, in sum, that any attempt to distribute union literature and talk to employees at these locations would have been dangerous and impractical. Vehicles leaving the plant approach Route 62 at a high rate of speed; indeed, they move at a steadily increasing rate of speed from the time they leave the employee parking lot. If they did not, there would be a backup. An organizer who attempted to distribute literature at the intersections with Route 62 would not only risk injury to himself (particularly at times of bad weather or poor visibility) but might cause a backup or collision between vehicles if a driver stopped to receive literature or ask questions. Many of the drivers were not employees, but individuals who came to the plant to drop off or pick up employees (e.g., spouses) and therefore might not be personally interested in stopping to talk to union organizers. Additionally, since October 1981 some employees have traveled to and from work by bus. As of the present hearing, approximately 25 percent of the IDC employees commuted in this manner. The buses dropped off and picked up their passengers at the front entrance to the plant. Therefore, there is no way that the organizers could distribute literature or talk to these employees in the vicinity of IDC without entering onto plant premises.[13] In these circumstances, the Union cannot be faulted for failing to attempt distribution on the right-of-way. There is no question that the Company would not in any circumstance permit union organizers to enter onto its premises to distribute literature or otherwise communicate with employees. As found, the Union formally requested such permission, but the Company failed to respond. Assistant Vice President Zimmerman testified in sum, that the Company does not permit outsiders to make solicitations on its property, and that such property includes the access roads and land adjacent thereto, as well as land on both sides of Route 62.

The next question presented concerns the feasibility of alternative means of communication away from the IDC premises. I shall first consider the use of the media (radio, television, and newspapers) and meeting locations. There are no television stations in the Warren area. The nearest stations are in Erie, Pennsylvania, and Buffalo, New York. Organizers Glather and Gilmartin testified in sum that the media was unsatisfactory for their purposes because they lacked personal contact with the employees, the Union could not determine which employees it was reaching, and the media could not be used expeditiously (i.e., radio time and newspaper space must be reserved). Additionally, radio and television were too expensive. Nevertheless, the Union attempted to use the local media, but was rebuffed in the process.[14] There is one radio station and one newspaper in Warren. There is also an advertising periodical. The newspaper and the advertising periodical refused to accept the Union's ads, ostensibly because they regarded the matter as one between the Company and its employees and not for public display. The radio station discontinued the Union's ads in January, ostensibly because of complaints from within the community. The Union used a country and western radio station in Jamestown, New York, although it was more expensive than the Warren station, and few company employees lived in the Jamestown area.

The Union held regular weekly meetings in a motel meeting room in Warren.[15] The Union also held meetings in employees' homes. There is no allegation that the Company interfered with these meetings by surveillance or in any other manner. However, the Union encountered difficulty when it attempted to rent an auditorium for a mass rally shortly before the election. There were few locations in the Warren area that were adequate for such purpose. The Union initially attempted to rent a semipublicly owned theatre, but learned that the requisite procedure was time consuming, and that if permission was eventually denied, the Union might be left with nothing. Eventually through the area Combined Labor Council, the Union was able to obtain a school auditorium the movie "Norma Rae," and an appearance by Crystal Sutton, the real Norma Rae. However, under conditions added to the rental agreement, the council was not permitted to use the auditorium as a "place of rally" or for the distribution of union literature. The Warren newspaper refused to accept union notices of the presentation. The day before the presentation, a news article referred to the presentation, but gave the wrong time.

This brings me to the alternative means of communication on which the Supreme Court in *Babcock & Wilcox* placed the greatest emphasis; namely, the use of home visits, mailings, and telephone calls.[16] Unlike the methods discussed above, these methods presuppose that the Union knows the names and addresses or telephone numbers of the employees. In the present case, compilation

[13] The violations alleged in this case are continuing in nature (i.e., the Company refused and continues to refuse to permit union access to its premises). Therefore, developments since February 1981 may properly be considered in determining the feasibility of alternative means of contact.

[14] With respect to the charge in Case 6–CA–14403, the Regional Director administratively determined that there was insufficient evidence to proceed on allegations that the Company unlawfully prevented union access to the media by causing the local newspaper and radio station to cease or refrain from carrying the Union's advertisements. The General Counsel denied the Union's appeal, and thereby precluded litigation of such allegations in the present case. However, the refusal of the media to carry union ads, regardless of causation, may properly be considered in this case, because the *Babcock & Wilcox* standards are not limited to consideration of factors within the employer's control.

[15] I do not credit the testimony of organizer Gilmartin that these were simply organizing committee meetings. The Union informed employees through its mailings and by word-of-mouth that these were regular meetings that were open to all employees. In any event, the Union could have used the motel for general meetings if it wished, subject to limitations of space.

[16] In *Babcock & Wilcox*, the Court also referred the Union's ability to meet with employees on the public streets. In the case of IDC, that would not be a viable alternative. There are no public sidewalks near IDC, the employees eat and take their breaks on the Company's premises, and come from and return by vehicle to their homes, which are scattered over a large, semirural area.

of such information was no easy task. By the fall of 1980, the Union with the assistance of its employee organizing committee, compiled a list of the names of approximately 1200 employees, and the addresses of approximately 800 of those employees. The Union utilized its lists for house calls and mailing literature. However, the Union did not obtain a complete and accurate list of names and addresses until it received the Company's *Excelsior* list following the direction of election. In the meantime, the Union was constantly confronted with the need to maintain and update its lists. This was no modest task, in light of the large number of employees involved, and constant employee turnover.[17] Organizer Glather testified in sum that about 25 percent of the Union's mailings went to a wrong address or were sent to individuals who no longer worked for the Company. As found below, when members of the employee organizing committee attempted to assist the Union by copying names from timecards, the Company unlawfully disciplined them. In compiling lists of employees, the Union was heavily dependent on its employee committee. The predominantly female work force included many women whose telephone numbers and automobiles were listed and registered in their husbands' names. Therefore, telephone directories and auto registration records did not provide an adequate basis for obtaining employee names, addresses, or telephone numbers. The Union did not have any paid organizers within the plant. In these circumstances, it is significant, in considering the feasibility of alternative means of communication, that the Company countered the Union's organizational campaign with unlawful acts and conduct, which were directed at restricting communication by union adherents, and isolating and intimidating those employees. The Company thereby engaged in conduct that tended to increase the Union's need for communication by nonemployee organizers, while restricting the ability of prounion employees to assist the organizers (e.g., by furnishing them with the names and addresses of employees).[18] The Union's inability to maintain a complete and accurate list of names and addresses or telephone numbers of employees limited the effectiveness of home visits, mailings, and telephone calls.[19] The Union encountered additional frustrations when it went out into the field to make house calls.[20] During the lengthy campaign the Union made some 1000 house calls. However, the house calls were inadequate for establishing and maintaining contact with many of the employees. The employees' homes were scattered over a 40-mile radius from Warren, in a predominantly rural and hilly area of northwestern Pennsylvania and adjacent New York State. Most of the employees lived in Warren County. However, only about one-half lived in Warren, and many of these had rural addresses. The Company's *Excelsior* list indicates that nearly one-third of the employees gave rural delivery or box number addresses. Many employees were not at home when an organizer called. Some of the female employees were unwilling to accept visits from the male organizers while their husbands were at work or otherwise away from home. Moreover, even when home visits were effective to establish initial contact, the large number of employees, and the large area involved, precluded the use of house visits as a means of conveying the Union's position throughout the campaign. In contrast, it would have been relatively easy and inexpensive for the Union to convey its position (e.g., as it unsuccessfully sought to do with regard to the separation from employment of Carr and Race), by distributing literature and talking to employees as they left work at IDC. Indeed, the situs of employment would seem to be the logical place for such communication.

The General Counsel contends (Br. 76–78) that in part the Union is entitled to access to the IDC premises because, to a limited extent, the Company has permitted or tolerated the presence of nonemployees on IDC premises for nonbusiness-related reasons (e.g., former employees sometimes came to visit their friends). The General Counsel witnesses testified that food vendors sometimes came onto the premises, although Vice President Carter testified that such vending was not permitted. However, the General Counsel's argument misconstrues the *Bab-*

[17] At the representation case hearing in February, Assistant Vice President Zimmerman testified that the Company had an annual employee turnover rate of 50 percent. However, Zimmerman's testimony indicates that he included in this figure transfers between departments and plants. Figures introduced in evidence in the present hearing indicate that from February 1, 1980, through April 30, 1981, the Company hired about 190 employees within the election unit (i.e., excluding temporary help and retail outlet employees), including 102 at IDC; from May 1, 1981, through October 12, 1982, hired about 484 unit employees including about 155 at IDC. This would indicate an average annual turnover rate, excluding transfers, of between 15 and 20 percent. Zimmerman testified that over a 2-year period, approximately 250 employees transferred between departments, but not more than 25 transferred between Warren and IDC.

[18] Organizer Glather testified in sum that as the Company increasingly engaged in unlawful conduct, the Union lost the active support of its committee members, particularly at IDC, until it reached a point where Joan Hockenberry, who was herself a controversial personality, was the only employee who was actively and openly engaging in union activity at IDC. It is not necessary or proper for me to probe the employees' mental processes by determining whether, and if so why, the Union lost support among its committee members. Rather, for purposes of determining the feasibility of alternative means of communication, the question presented is whether the Company engaged in unlawful conduct that tends to coerce and restrain employees in the exercise of their Sec. 7 rights, and thereby reduce the opportunities for communication between the Union and the employees. See and compare *Emerson Electric Co.*, 247 NLRB 1365–1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981); *Michigan Products*, 236 NLRB 1143, 1147–1148 (1978). As has been and will be discussed, I find that the Company did engage in such conduct.

[19] In *Babcock & Wilcox*, supra, 351 U.S. at 107 fn. 1, the Court noted that the union there had been able to contact a substantial minority of the employer's employees. However, *Babcock & Wilcox*, unlike the present case, involved an organizational campaign in its incipient stages. In the present case, the campaign was long underway, and the Union was attempting to establish and maintain itself as the representative of the employees in a unit that was much larger than that originally contemplated. Therefore, it was not enough for the Union to be able to reach a substantial number of employees. Rather, the Union would be seriously inhibited if as here, it was unable to communicate with or even locate or identify substantially less than all the employees.

[20] The municipality of Warren has a so-called Green River Ordinance, which prohibits door-to-door solicitation. No evidence was introduced that would indicate that the ordinance has been interpreted or enforced in such a manner as to prohibit union solicitation. With respect to the charge in Case 6–CA–14403, the Regional Director declined to proceed on an allegation that the Company unlawfully told employees to notify local law enforcement agencies if they did not want union home visits. The General Counsel denied the Union's appeal from this decision, thereby precluding litigation of this matter in the present case. I adhere to my ruling at the hearing in this regard.

cock & Wilcox standards. As indicated, the Supreme Court held that an employer may exclude nonemployee organizers if other channels of communication are available and adequate and the employer "does not discriminate against the Union by allowing other *distribution*" (emphasis added). The Court said nothing about the extent to which the employer opened his premises to the public for reasons other than such distribution. In *Ameron Automotive Centers*, 265 NLRB 511, 512 fn. 10 (1982), the Board held in essence, that an employer did not engage in discriminatory conduct under *Babcock & Wilcox*, by excluding organizers while permitting commercial vending on its premises. In the present case, the evidence fails to indicate that the Company permitted any other kind of solicitation or distribution. Moreover, Supreme Court decisions since *Babcock & Wilcox* involving retail establishments that are generally open to the public in a very real sense make clear that a union has no more right of access to the premises of such establishments than it does to those of nonretail firms that are not generally open to the public. See *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547–548 (1972); *Hudgens v. NLRB*, 424 U.S. 507, 521–523 (1976). However, I agree with the General Counsel's argument that the Union's ability to conduct regular meetings at the motel was not an adequate alternative to access to the IDC premises. Attendance at union meetings presupposes an interest in unionization on the part of the attending employees, and the Union, under *Babcock & Wilcox* standards was entitled to a reasonable opportunity to generate such interest. *Hutzler Bros.*, supra, 241 NLRB 914 fn. 2. Moreover, many of the IDC employees were dependent on other persons for their transportation to and from work. Therefore they may not have been able to attend union meetings in Warren.

On consideration of the evidence in this case, I find under *Babcock & Wilcox* standards, that notwithstanding conscientious efforts, the Union did not have a viable alternative to communication with IDC employees by entering IDC premises to distribute literature and talk to the employees. Therefore, the Company violated Section 8(a)(1) by excluding the organizers from its premises. As indicated, I am mindful of judicial reluctance to require such access. However, I am also mindful of the Supreme Court's admonition that this is not a problem of "always open and always closed doors," and that there should be an accommodation between organizational and property rights. As discussed, the courts have indicated greater willingness to require temporary access as a remedy for serious unfair labor practices. In the present case, the name of the game was communication. Propaganda on both sides was intensive. In finding that the Company unlawfully excluded union organizers from the IDC premises, I have attached great significance to the fact that the Company frustrated alternative means of communication by its own unfair labor practices directed against the employees. In these circumstances, I find that temporary union access to the IDC premises, coupled with company compliance with the recommended Order in this case, should provide an adequate remedy without unduly compromising the Company's property rights. Therefore, I am recommending that the Company be ordered to grant such access for a period of 6 months. I find that union access during this period, coupled with company compliance with the remedial order including provisions discussed above, would enable the Union to develop adequate alternative means of communication, and would allow sufficient time for establishment of conditions under which the employees can make an informed choice in a second election.

B. *Alleged Violations of Section 8(a)(1), (3), and (4) and Objections to Employer Conduct During the Critical Period from October 27, 1980, to June 9, 1981*

1. Restrictions on employee talk

The complaint alleges (par. 8(b)) that about January 12, the Company by Finishing Area Supervisor Gern discriminatorily prohibited Joan Hockenberry from talking to employees during worktime. Hockenberry testified that on that date, she was working on the multiple packing line when the box boy came to her and asked questions about the Union. Hockenberry answered his questions while continuing to work. After the box boy left, Supervisor Gerns came to her and said that he did not want "anymore of that union arguing going on during working time." Hockenberry explained that she was not arguing, but was answering questions. Gerns responded that this was a warning, and the next time she would get a written warning. Gern initially testified that he did not recall the incident. Gern subsequently admitted that he might have told Hockenberry to stop talking about the Union on working time. Thereafter, Gern attempted to back away from this admission, asserting that he simply told Hockenberry to stop talking.

I credit the testimony of Hockenberry, and I find that Gern discriminatorily and in disregard of the Company's usual policy gave Hockenberry a verbal warning because she was talking about the Union. First, Hockenberry's testimony indicates that the box boy initiated the conversation, and that Hockenberry did not stop work while talking. If the box boy was neglecting his own duties, or was interfering with Hockenberry's work, then absent a discriminatory motive Gern probably would have reprimanded the box boy. Instead, Gern reprimanded Hockenberry, who had done nothing wrong. Moreover, absent a discriminatory motive, the subject matter of the conversation would be irrelevant. Nevertheless Gern pointedly, falsely, and in a disparaging manner accused Hockenberry of "union arguing" during working time. Therefore, the Company violated Section 8(a)(1) and (3) by discriminatorily prohibiting Hockenberry from talking about the Union under circumstances in which company policy permitted other forms of conversation. *Fluid Packaging Co.*, 247 NLRB 1469 (1980), enfd. 649 F.2d 860 (3d Cir. 1981). The incident further tends to indicate that as suggested by the testimony of Assistant Vice President Zimmerman, the Company was treating prounion conversation as union "solicitation," which, unlike other forms of conversation and solicitation, was strictly

limited to lunch and formal break periods, and times before and after the employees' work shift.[21]

2. Denial of access to timecard racks and warnings to Joan Hockenberry, Sheila Mack, and Dawn Dickson

The complaint alleges (pars. 10(e), (f), and (g)) that in January and February the Company discriminatorily issued warnings to employees Joan Hockenberry, Sheila Mack, and Dawn Dickson. The incidents involved actual or apparent copying of names from timecards. Mack and Dickson worked at Warren and Hockenberry at IDC. Organizer Glather testified that he asked the three employees to get the names of employees from timecards, as part of a union effort to compile an accurate and complete list of employees for contact purposes. Mack and Dickson testified in sum that in late January, pursuant to Glather's request, they stood at the timecard rack during their lunch break. Mack read off names and Dickson wrote them down. They did not touch any cards other than their own. After they returned to work, Supervisor Mary Bloom approached each of them. Bloom accused each employee of tampering with the timecards, asserting that they could not do this. Mack and Dickson each protested that they did not touch the cards. Bloom did not indicate that this would excuse their conduct. However, no further disciplinary action was taken against them. Bloom, who was retired at the time of the present hearing, was not called as a witness, and the testimony of Mack and Dickson stands uncontradicted. However, Supervisor Gern testified concerning another incident involving Joan Hockenberry, which occurred at IDC about the same time that Mack and Dickson were warned at Warren. According to Gern, Supervisor Randall Chase reported to him that he saw Hockenberry standing in front of the timecard rack, lifting her head up and down, and writing. Gern reported the matter to Vice President Carter, who instructed him to give Hockenberry an oral warning, which he did. According to Gern, they did not discuss the reason for Hockenberry's conduct, but he suspected that she was doing it for the Union. Gern asked Hockenberry if she was writing down names. Hockenberry said she was not. Gern accepted the denial, but warned her that the cards were company property, and the information on the cards was not for anyone else's use.

On February 19 Gern received another report about Hockenberry. Supervisor Mark Wilson told Gern that he saw Hockenberry standing at the timecard rack with paper in hand, looking at the board, and writing down names. Gern summoned Hockenberry to the breakroom where, in the presence of Wilson, he gave her a written warning notice for "misconduct," which was placed in her personnel file. The warning implied, on the basis of Wilson's report, but did not directly state, that Hockenberry was copying names from the timecards. Hockenberry denied that she copied names, but Gern insisted, on the basis of Wilson's report, that she was observed engaging in such conduct. The next day, at Hockenberry's request, she met with Vice President Carter. Hockenberry again denied that she was copying names, and asserted that she was giving directions. Carter indicated that he did not believe her, and stated that the warning would stand.

Neither Hockenberry nor Supervisor Chase testified concerning the January incident. Hockenberry testified that she did not receive any warnings about the timecards prior to February 19. Supervisor Wilson was not presented as a witness. Hockenberry testified that prior to February 19 she copied names from the timecards for the Union, but that she was not doing this on February 19. According to Hockenberry, she was standing near the rack, holding her timecard and writing directions to an employee's house for the benefit of another employee who was making house calls on behalf of the Union. It is undisputed that whatever Hockenberry was doing, occurred prior to the start of the work shift (i.e., on nonworking time). Vice President Carter testified that the Company has a policy of not releasing names and addresses of employees, and that Hockenberry received a written warning because Supervisor Wilson saw her copying names. Assistant Vice President Zimmerman testified that the Company does not give out names, addresses, and phone numbers of employees for privacy reasons and because such information is sometimes sought to compile lists (e.g., for fundraising). Zimmerman also testified that new employees are instructed that they cannot tamper with other employees' timecards (e.g., by signing another employee's card). However, the evidence fails to indicate that employees are normally informed that they cannot look at other employees' timecards, or copy information from the cards.

I find, as admitted by Mack and Dickson, that they were engaged in copying names of employees from timecards for union organizational purposes. I further find that they were warned against engaging in such activity. Although Supervisor Bloom referred to tampering with cards, it is evident from the testimony of Zimmerman, Carter, and Gern that the Company regarded copying of names as tampering. It is also evident from the testimony of Gern, that by late January the Company had reason to believe that union adherents were engaging in such activity for organizational purposes. Regarding the January incident involving Joan Hockenberry, in the absence of direct testimony the evidence is inconclusive as to just what she was doing on that occasion. As Gern accepted her denial, I am proceeding on the premise that she was not then copying names, but was warned that she could be disciplined for engaging in such activity even if it involved union activity. Regarding the February 19 incident, Hockenberry was the only eyewitness to testify as to what she was actually doing. Gern's testimony is hearsay regarding the incident. Therefore, I credit Hockenberry, and I find that she was writing directions for the purpose of facilitating union visits.

I find that Mack and Dickson were engaged in protected concerted activity under Section 7 of the Act, and

[21] The consolidated complaint alleges (par. 7(v)) that in early June 1981, the Company permitted employees to sell antiunion buttons while preventing communication about the Union. No evidence was presented in support of this allegation. Therefore, I am recommending that the allegation be dismissed.

specifically, that they did not attempt to copy information from private or confidential records. The timecards were located in open areas where they could be and were regularly viewed by employees arriving at work or leaving work. The only pertinent information on the cards consisted of employee names. They did not even indicate addresses. The timecards were used to record employee attendance at work, and to that extent were used to compute pay. Therefore, new employees were informed, as part of their orientation, that they could not sign other employees' cards. However, until the incidents described above, the Company did not inform its employees that they could not look at the cards or copy the names of employees. The employees had a legitimate reason to copy names (i.e., to facilitate lawful organizational activity), and the evidence fails to indicate that they sought the names for any improper purpose. Therefore, the activity was protected under Section 7. See *Ridgely Mfg. Co.*, 207 NLRB 83 (1973), enfd. 510 F.2d 185 (D.C. Cir. 1975); *Gray Flooring*, 212 NLRB 668 (1974). I do not agree with the Company's argument (Br. 79) that the Board policy set forth in *Excelsior Underwear*, 156 NLRB 1236 (1966), precludes such finding. *Ridgely* and *Gray Flooring*, supra, were both decided after *Excelsior*. In *Excelsior*, the Board held: "A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect)." (Id. at 1243.) That rationale is applicable to the present case. Moreover, the Board emphasized that the policy enunciated in *Excelsior* constituted an exercise of its authority to establish rules governing the conduct of Board elections, and did not preclude any finding, in an appropriate proceeding, that an employer commits an unfair labor practice by failing or refusing to make available the names and addresses of its employees (156 NLRB at 1245–1246).

I further find that the Company unlawfully interfered with Section 7 rights, and thereby violated Section 8(a)(1) and (3) of the Act, by giving oral warnings to Hockenberry, Mack, and Dickson and a written warning to Hockenberry. As discussed, the Company had reason to believe that the employees were engaged in union activity. Nevertheless the Company took the position that they had no right to copy names, regardless of the purpose. Therefore, it would have been futile for the employees to tell the Company that they were engaged in union activity. It is evident that this would not have changed the Company's course of action. The oral warning to Hockenberry was unlawful because regardless of what she was then doing, Gern in essence warned her that she could not engage in protected concerted activity, i.e., copying names for the Union. As for the written warning, Hockenberry's testimony indicates that she was engaged in undisputedly protected activity, i.e., giving directions for a union house call. Therefore, the warning was unlawful, either as interference with such activity, or as discipline imposed by the Company under the mistaken belief that she was engaged in other, albeit also protected activity. See *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964).

3. Surveillance

The complaint alleges (par. 7(p)) that about March 16 the Company by its supervisors engaged in surveillance of the union activities of its employees at IDC. The evidence indicates that on March 18 several supervisors watched from the window of the IDC reception area while employees Joan Hockenberry, Freeda Carr, Donna Fehlman, and Kay Davis distributed union literature in front of the plant. As the evidence indicates that the supervisors simply watched the distribution without engaging in any unusual conduct that might be viewed as coercive, I am recommending that this allegation be dismissed. See *Metal Industries*, 251 NLRB 1523 (1980).

4. No-trespassing policy against employees

On March 19, the day after the handbilling described above, Assistant Vice President Zimmerman sent a letter to Freeda Carr, advising her that "as a individual who no longer enjoys employee status" with the Company, "you are not permitted to enter upon New Process Company property without permission." Zimmerman asserted that should she do so, "we will be obliged to resort to legal recourse." The General Counsel contends that the Company thereby violated Section 8(a)(1) of the Act.

As found, the Company discriminatorily refused to reinstate Carr on and after October 6. Therefore Carr enjoyed the status of an employee under the Act, including the rights of an off-duty employee. Specifically, Carr was entitled, under Section 7 of the Act, to engage in union solicitation and distribution at parking lots, gates, and other outside nonworking areas of the Company's premises. *Tri-County Medical Center*, 222 NLRB 1089 (1976). Therefore, the Company violated Section 8(a)(1) by refusing to permit Carr to engage in such activity on its premises, and by threatening her with legal recourse if she engaged in such activity. The Company could not properly rely on the Regional Director's administrative refusal (on January 30) to proceed on her case. Rather, her status as an employee, and her rights as an employee (e.g., her right to vote in the election and her entitlement to reinstatement and backpay) are dependent, retroactively, on the ultimate merits of her case. Moreover, even after the General Counsel administratively determined that a complaint should issue based on the Company's refusal to reinstate Carr and Race, Zimmerman did not withdraw his letter or otherwise inform Carr that she could engage in union activity on outside nonworking areas. Assuming arguendo, that Carr's case did not have merit, then she would be entitled to the rights of a nonemployee organizer as discussed above.

5. Company speeches and other statements to employees

a. *Statements alleged as unfair labor practices*

In mid-November, Finishing Area Supervisor Gern assembled and spoke to small groups of employees about the Union. Joan Hockenberry asked to and did attend

one of these meetings. According to Hockenberry, Gern said that if the Union came in, the Company would bargain for a contract, but did not have to start at the current rate, and "could start at the bottom." Gern testified that he did not say that the Company would bargain from scratch, and that he did not think he said that the Company would bargain from the bottom. According to Gern, he answered employee questions by referring to a booklet entitled "What every union free supervisor should know about unions." In pertinent part, the booklet stated in question-and-answer form as follows:

> Q. Is it possible that an agreemen between a union and an employer could call for less in wages and benefits than employees had before?
>
> A. Yes. An employer is under no obligation to agree to a union's proposals or to grant concessions to the union. The employer is only required to bargain in good faith. And bargaining can be a "two way street." Employees' wages and benefits can go up, but they can just as easily go down.

I credit the testimony of Gern that he read the above-quoted excerpt from his booklet. Hockenberry testified that he had a booklet in front of him when he was speaking. However, I credit the testimony of Hockenberry that Gern said that bargaining could start from the bottom. As indicated, Gern was somewhat equivocal about whether he made such a statement. In his investigatory affidavit to the Board, Gern stated that he did not remember saying that the Company would start bargaining at the bottom. Gern's testimony indicates that although he referred to the booklet, he did not limit his statements to the booklet text, e.g., when referring to the selection of union stewards.

Under Board law, employer statements to the effect that bargaining can start at the bottom, may or may not be unlawful, depending on the surrounding circumstances. "Such statements are objectionable when, in context, they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore. On the other hand, such statements are not objectionable when additional communication to the employees dispels any implication that wages and/or benefits will be reduced during the course of bargaining and establishes that any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining. *White Stag Mfg. Co.*, 219 NLRB 1246, 1246-1251 (1975) (Member Fanning, dissenting); *Computer Peripherals*, 215 NLRB 293, 293-294 (1974) (Member Fanning, dissenting); *C & K Coal Co.*, 195 NLRB 1038, 1038-1039 (1972). The totality of all the circumstances must be viewed to determine the effect of the statements on the employees." *Plastronics, Inc.*, 233 NLRB 155, 156 (1977).

Applying the foregoing standard to the instant matter, I find that Gern did not unlawfully threaten the employees with loss of benefits. Gern told the employees that the Company could start at the bottom. However, by reading the quoted language in his booklet, Gern lawfully indicated that any losses would occur as a result of the normal give and take of collective bargaining (i.e., in the words of the booklet, that bargaining can be a "two-way street"). Therefore, I am recommending that the pertinent allegation of the consolidated complaint (par. 7(n)) be dismissed.

In mid-April, Assistant Vice President for Mailing George Stark assembled and addressed the department employees in small groups. Stark, who took charge of the department in January, testified that he conducted the meetings to answer the many employee questions about the Company's review system, raises, benefits, and other matters, which he found difficult to answer individually. Laurie Conklin Hockenberry, Joan's daughter-in-law, attended one of the meetings. Hockenberry testified that in response to employee complaints that typists were paid at a higher level, Stark said that the Company would like to raise the level of the machine operators, but could not at that time because it would be an unfair labor practice. (In her affidavit, she said that Stark said the Union might call this an unfair labor practice.) Stark testified that in response to the employee complaints, he said that he favored an in-depth review of the situation, but that such review and its results might be construed as an unfair labor practice. Stark testified that he did not believe he said that he would like to raise the level of machine operators. Stark explained that under company policy there could not by any general upgrading without an in-depth review. In fact, no such review was conducted even after the election.

I credit the testimony of Stark concerning his statement to the employees. Stark may have also expressed his personal opinion that the operators should get a raise. However, it is unlikely that Stark would have suggested that the Company favored such a move, because he was in no position to make such a statement in the absence of a complete study. The mailing department employees were not scheduled to receive either a general raise in grade level or a review of their situation prior to the election. Stark did not state or infer that the Union was preventing the employees from receiving a general increase in pay. He did not even promise that the employees would receive either a raise or a review of their situation after the election. I find that Stark correctly stated the applicable law, and that he did not, as alleged in the complaint, threaten the employees "with a loss of benefits because they selected, supported or joined the Union." *Uarco, Inc.*, 169 NLRB 1153, 1154 (1968); *Xidex Corp.*, 238 NLRB 1208, 1215-1216 (1978). Therefore, I am recommending that the pertinent allegation of the consolidated complaint (par. 7(r)) be dismissed.

During the week of June 1, company officials addressed captive audience meetings of employees who were assembled in groups of 20 to 25 at each meeting. The General Counsel contends that during the course of these meetings, Company Officials Robert and Steve Blair violated Section 8(a)(1) by telling employees that if they selected a union to represent them (1) they would always have to go through a shop steward to speak to a supervisor, and (2) that the Union would seek a closed shop and all employees in the bargaining unit would be

required to join the Union. In support of these contentions, the General Counsel relies (Br. 26) on the Company's transcripts of its tapes of these meetings (previously discussed regarding the matter of Carr and Race).

I have examined and considered both the alleged unlawful statements and the context in which these statements were made. With reference to the first alleged statement, the Company correctly points out (Br. 43), that in each instance the speaker (Company Vice President Robert Blair) expressed his opinion of what the Union allegedly wanted; in sum, to come between the employees and management through the functions of a shop steward. However, the difficulty with the Company's premise is that Blair did not confine himself to this line of argument. Rather, Blair went on to suggest that if the Union came in, the employees would *in fact* be precluded from communicating with management except through a steward or business agent. The following transcript excerpt is illustrative (G.C. Exh. 31A at 8):

> The unions hate meetings like this, they just hate them. They want to turn management against the employees and they want to turn the employees against management. They'd like to have someone in here right now standing between us so we can't talk to you and you can't talk to us. They want to put somebody like a shop steward right in between us, or a business agent. *If we wanted to talk to you, we'd have to talk to the steward and the steward would talk to you. And if you wanted to talk to us, and your supervisor and your department head or copersonnel, you'd have to go to the shop steward, the shop steward would come to us.* They want to have somebody doing your thinking and your talking for you. We hope you won't let them do that; we hope you won't let them get control of your lives. We hope you don't need anybody to do your thinking and your talking for you. [Emphasis added.]

The plain implication of the above language, which was similarly stated by Blair in his other speeches, was that if the employees voted for union representation, the Union's alleged wish would become fact, and the employees would be deprived of direct access to management, contrary to Section 9(a) of the Act and the Company's existing open door policy. The Company thereby violated Section 8(a)(1) by threatening to deprive the employees of an existing open door policy. *Cardio Data Systems Corp.*, 264 NLRB 37, 38 (1982); *Tipton Electric Co.*, 242 NLRB 202, 205–206 (1979), enfd. 621 F.2d 890 (8th Cir. 1980).[22]

Regarding the closed shop allegation, the transcripts indicate that Vice President Blair repeatedly used the terms "closed shop" and "union shop" interchangeably. Thus, Blair asserted in the following or similar language:

> . . . there's some things that they [the Union] want first that right away they want a union shop and that simply means that's a closed shop, a union shop. That means that all employees in the bargaining unit, in the voting unit, would have to, would have to join the union whether they wanted to or now [sic]. That's what a closed shop is and unions want that.

The Company contends (Br. 47 at fn. 35), that such references were innocuous, and that in fact Blair defined both a "closed shop" and "union shop" in terms of a union shop as permitted under Section 8(a)(3) of the Act. However, the transcripts indicate otherwise. The transcripts indicate that Blair categorically equated lack of union membership for *any* reason with loss of employment, and that the employees would be subject to such conditions if they selected the Union as their representative. Thus Blair stated in the following or similar language (G.C. Exh. 30A at 12–13):

> We have here the UFCW International constitution and I'd like to quote from it. I have a copy in case you'd like to take a look at it later. I've taken some of the more important aspects out of it. Here we go: "Members may be disciplined for violating provisions of either the local or international bylaws, failure to pay dues, fines, assessments, fees, advocating withdrawal, disrupting meetings, mishandling funds, interfering with an officer in the performance of his duties, crossing a UFCW picket line, crossing other union picket lines sanctioned by UFCW. Any member found guilty may be censured, fined, suspended, expelled. *Now if you're suspended, expelled—particularly if you're expelled—that means also that you lose your job,* if, *in the contract, a union shop clause is negotiated. And we don't know of a contract that we've seen that does not have a union shop clause in it. And the Company can have nothing to do with getting your job back.* [Emphasis added.]

The above language goes substantially beyond the kind of misstatement of law that the Board has held to constitute objectional conduct for election purposes, but not an unfair labor practice. See *Daniel Construction Co.*, 257 NLRB 1276 (1981). Rather, the evidence indicates that Blair threatened the employees that if the Union came in, the Company would negotiate a contract that would cause them to lose their jobs if they lost their union

[22] The company officials spoke at both Warren and IDC. The complaint, in its present form, alleges that the unlawful statements concerning union representation and closed shop were made at Warren. During the hearing, I denied the General Counsel's belated motion to amend pars. 7(t) and (u) of the complaint for a second time, this time to allege that the unlawful statements were also made at IDC. I anticipated that the General Counsel would present its evidence in the form of disputed testimony, and that it would be unfair to confront the Company with a new allegation at this point in the hearing. However, I ruled that the speeches at IDC could be used as evidence in support of the Union's objections to the election. In retrospect, it is apparent that the General Counsel was relying on the Company's transcripts, that the evidence was undisputed, and therefore that the Company would not have been prejudiced by the proposed amendment. Blair made substantially the same speech at IDC as he did at Warren, asserting that: "We have to talk to them through the stewards or the business agent and they'll talk to you. They want to get between us. We hope you won't let us, we hope you won't let them do that to you. We hope you'll vote no." I find that the Company thereby threatened its employees with loss of access to management if they selected the Union as their representative, and thereby, as alleged in Union Objection 2, interfered with the conduct of the election. See *Hahn Property Management Corp.*, 263 NLRB 586 (1982).

membership for any reason whatsoever, and not simply because of failure to pay dues and initiation fees under a valid union-security agreement. In *K-F Products*, 170 NLRB 366, 367 (1968), the Board held that such statements constitute objectionable misrepresentations. *K-F Products* was a representation case, and the Board was not called on to decide whether such statements are also violative of Section 8(a)(1). However, in other cases the Board has held statements of comparable or even lesser gravity to constitute unfair labor practices. Thus, in *H. A. Kuhle Co.*, 205 NLRB 88, 104–105 (1973), the Board held that an employer violated the Act by telling his employees that a checkoff clause "includes assessments the union may authorize." And in *M. O'Neill Co.*, 211 NLRB 150, 151 (1974), enfd. sub nom. *Retail Clerks Local 698 v. NLRB*, 514 F.2d 894 (D.C. Cir. 1975), the Board held that an employer violated Section 8(a)(1) by telling an employee that a union contract would require a health examination that he could not pass. I find that the Company, by Blair, violated Section 8(a)(1) by threatening its employees with loss of job security under unlawful conditions if they selected the Union as their representative and that such threats also constitute objectionable conduct.

b. *Statements not covered by the complaint, but alleged by the Union as objectionable conduct*

As previously discussed, the Union's objections to the election are so broadly worded to encompass virtually every form of potentially objectionable conduct. During the hearing, I directed union counsel to specifically define conduct alleged to be objectionable, to the extent that such alleged con .uct was not already identified in the consolidated complaint or otherwise identified with specificity in the record of this proceeding. Union counsel did so in statements at the close of the General Counsel-Union case and at the close of the original hearing. These allegations consisted of numerous alleged unlawful or otherwise improper statements in company speeches and letters. I informed the parties that this statement was intended for informational purposes (i.e., to inform Respondent and the administrative law judge of the specific allegations), and that I did not regard the statement as a substitute for full legal argument, including citation of case authorities. Nevertheless, although the allegations are numerous, and in many instances novel (and, I might add, ingenious), the Union presented no further argument on the merits of its objections, either by way of oral argument or in its posthearing brief.[23]

Before proceeding to the specific allegations, two pertinent Board policies should be restated. The first, previously discussed, is that the Board dismisses as a matter of form, objections to an election that are mere reiterations of unfair labor practice charges that have been dismissed. The second concerns current Board policy on misrepresentations during an election campaign. In *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982), the Board held as follows:

> In sum, we rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is. As was the case in *Shopping Kart*, we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice.

The Board further held that: "In accordance with our usual practice, we shall apply our new policy not only 'to the case in which the issue arises,' but also 'to all pending cases in whatever stage.'" *Midland* overruled *General Knit of California*, 239 NLRB 619 (1978), which overruled *Shopping Kart Food Market*, 228 NLRB 1311 (1977), which overruled *Hollywood Ceramics Co.*, 140 NLRB 221 (1962). It is possible that by the time the present litigation has completed its course, *Hollywood Ceramics* will once again be revived as Board policy. In the meantime, I do not have discretion to choose between the "sound rule announced in *Shopping Kart*" (majority opinion in *Midland*) and the "flexible and balanced *Hollywood Ceramics* standard" (dissenting opinion). Rather, it is my obligation to apply the latest pronouncement of Board policy as set forth in *Midland*. That policy, in sum, precludes noncoercive misrepresentation as a ground for objecting to the conduct of an election, except under limited circumstances that are not present in the instant case.[24]

Most of the stated objections concern statements made by company officials at the captive audience meetings in early June. The Union contends that the expression "God forbid if the Union wins the elections" belied the Company's assertion that it would bargain in good faith with the Union and contained an implicit threat of reprisal. I do not agree. The above expression was immediately followed by an assertion that if the Union won the

[23] This fact tends to demonstrate the wisdom of the Board's policy set forth in *Times Square Stores*, supra. Sound administrative practice is not effectuated when novel propositions of law are presented in litigation without benefit of consideration or briefing by the General Counsel. It could well be argued that none of the statements made in the captive audience speeches in June 1981 should be considered under this heading, because the speeches themseleves were the subject of the charge in Case 6-CA-14697. However, I have given the Union the benefit of the doubt, and have considered those allegations not expresly covered by the Region's dismissal letters.

[24] Under Board policy as set forth in *General Knit* and *Hollywood Ceramics*, "[A]n election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." 140 NLRB at 224. In the present case, the Union might well have argued that under that standard, a substantial misrepresentation would be objectionable regardless of its timing, because at least in part by reason of the Company's unlawful conduct, the Union lacked the means to make an effect reply. However, the present case is controlled by *Midland*.

election the Company would bargain in good faith. I find that the speaker used a figure of speech that expressed the Company's strong opposition to unionization without conveying a threat of reprisal or promise of benefit and therefore did not engage in objectionable conduct. Compare *Valiant Moving & Storage*, 204 NLRB 1058, 1066 (1973), in which the Board held that an employer did not act unlawfully by asserting: "I'll be damned if a union gets in there. . . . You can't have a union in this shop."

The Union further contends that the Company unlawfully conveyed the impression that "if the Company had to bargain with the Union, the employees would be, in effect, stuck with certain provisions of these local supermarket contracts [Quality and Super-Duper] that would detract from benefits that the employees already had at NPC." With respect to the charge in Case 6–CA–14697, the Acting Regional Director administratively determined that "a review of the plain language used by Employer spokesmen fails to establish that the employees were, in fact, promised increased wages and/or benefits or that the employees were threatened with lower wages or a loss of jobs if they selected the Union to act as their representative." The General Counsel denied the Union's appeal from this determination, and thereby precluded litigation of the present allegation as a basis for objecting to the conduct of the election. However, for reasons that will be discussed, I find that the statements regarding area supermarkets are evidentiary with respect to the matter of the additional alleged discriminatees in Case 6–CA–15995. The General Counsel's disposition of the charge in Case 6–CA–14697 also precludes litigation of the Union's assertions that the Company (1) unlawfully stated that "every single decision that the [Board] has issued on these charges has been in favor of the Company and against the Union," and (2) unlawfully accused union representatives of forging authorization cards. If the Union is contending that the Company thereby engaged in something less than unfair labor practice conduct (i.e., misrepresentation), then such contention would be precluded under current Board policy. Moreover, the statements in question would not even constitute misrepresentation under *Hollywood Ceramics*. As of June 1981 the statement regarding disposition of charges was at least arguably true, depending on one's own concept of "decision." Concerning the matter of forged cards, there has never been any adjudication of this matter, and the Union failed in this proceeding to prove that the accusation was false. The Union cannot rely on the Acting Regional Director's administrative dismissal (sustained by the General Counsel) of the Company's charge in Case 6–CB–6241, as proof of falsity, because the facts are in dispute, and therefore there must be an evidentiary hearing on the matter before the Company can be found guilty of improper or unlawful conduct. See *NLRB v. Lawrence Typographical Union Local 570 (Kansas Color Press)*, 376 F.2d 643, 648–649 (10th Cir. 1967). The General Counsel's administrative disposition of a charge may be used as a shield, but not as a sword.

The Union contends that the Company engaged in misrepresentation and an implied threat by asserting that "if the Union gets in here, it's going to cost you money." For the reasons discussed above, I find that the General Counsel's disposition of the charge in Case 6–CA–14697 precludes litigation of this statement as a threat, and *Midland* precludes a finding of misrepresentation. The Union further contends that the Company unlawfully solicited employee grievances when the speaker, at the conclusion of his opening remarks, asked the employees if they had any questions. The Union similarly contends that the Company unlawfully solicited grievances when the speaker, in response to an employee's complaints, told the employee that if she had such problems, she should call him on the phone and they would look into it. These contentions misconstrue applicable Board law. Solicitation of grievances is not per se unlawful; rather, such solicitation is unlawful to the extent that it carries an express or implied promise to correct the grievances to discourage support for the Union. *Uarco, Inc.*, 216 NLRB 1 (1974). An employer does not violate the Act by reminding its employees of benefits that they already enjoy. Rather, this is legitimate campaign propaganda. In the context of the disputed statements, it is evident that the speaker was engaging in just such propaganda. The speaker simply answered questions about existing working conditions. With regard to his response to the employee's complaints, the speaker made clear that this was the Company's usual way of dealing with such problems, asserting "that's what we're going to continue to do." The speaker also indicated that he was not making any promises, asserting that "It may not be resolved in the manner that you want it to be resolved, but we're going to look into it." Therefore, I find no merit in these objections.

The Union further contends that the Company interfered with the election by its assertions, previously discussed in connection with the matter of Freeda Carr and Nancy Race, that the Union had been unable to obtain reinstatement of these employees. This contention is also precluded from litigation by the General Counsel's refusal to proceed by way of complaint on the basis of company statements to the effect that the Board had ruled in favor of the Company on the Union's charges. However, for the reasons previously discussed, the Company's statements are evidentiary with respect to the merits of the Company's refusal to reinstate Carr and Race. The Union also contends that the Company improperly misrepresented the Union's dues structure and history regarding fines. This contention is precluded from litigation by the Regional Director's refusal to proceed on the Union's charge in Case 6–CA–14615, containing those allegations, which refusal was sustained by the General Counsel; and is further precluded by current Board policy under *Midland*, supra.

The Union's next two contentions are interrelated. The Union contends that the Company interfered with the election when its offficial read aloud a letter from a named antiunion employee, and then praised the employee as "very sweet" and courageous. The Union contends that the Company also interfered with the election by a letter to its employees, dated May 11, in which it referred to prospective union stewards as "easily deceived and usually ill-informed . . . . [U]nlike the majority of NPC employees." The Union contends that the Compa-

ny thereby demonstrated a tendency to vilify and demean prounion employees while lauding or rewarding antiunion employees. The Union argues that "the Employer is prohibited from favoring one group against another group whether it's pro- or anti-union." The argument is only partially correct. The Act prohibits an employer from favoring one group over another with regards to hire or tenure or terms and conditions of employment, or to discriminatorily restrict activity by either group. As found in this decision, the Company did in fact unlawfully discriminate against union adherents. However, the Act does not prohibit an employer from expressing its opinion concerning the pro- or antiunion activities of its employees, provided that it does so in a restrained manner, without harrassment or abusive language or actions that could properly be characterized as coercive, and without express or implied threats of reprisal or promises of benefit. Indeed, in some cases the Board has declined to find that an employer acted unlawfully by referring to union adherents in arguably abusive terms (e.g., by referring to them as "clowns," "trash," or "dumb-dumb"). See respectively *Hospital Products*, 245 NLRB 703, 707 (1979); *Serv-U-Stores*, 225 NLRB 37 fn. 7 (1976); *Montgomery Ward & Co.*, 187 NLRB 956, 964 (1971). In contrast, the Company's language was moderate and restrained. I find that the Company did not exceed the limits of permissible propaganda, and that the objection is without merit.

The Union further contends that the Company interfered with the election (1) when the speaker allegedly adopted by reference, a statement in the employee's letter that, "if I belonged to the Union now, I could be heavily fined for just writing this," and (2) when the speaker asserted that an employee could be fined or expelled from the Union for filing a decertification petition. I agree that the statements were objectionable, because in the context in which they were made, they constituted unlawful threats of loss of job security. The statements were partially incorrect as a matter of law. A union may expel, but cannot fine a member for filing a decertification petition. *Molders Local 125 (Blackhawk Tanning)*, 178 NLRB 208 (1969), enfd. 442 F.2d 92 (7th Cir. 1971). A union also cannot impose "heavy" (i.e., unreasonable) fines on its members for engaging in antiunion activity, such as the employee's letter (assuming that it can impose any fine at all, which is questionable). See *Scofield v. NLRB*, 394 U.S. 423, 430 (1969); *Operating Engineers Local 965 (Elcon Pipelines)*, 247 NLRB 203, 210 (1980). The company official did not disavow any or all of the employee's letter. Rather, he read the letter with expressed approval, thereby indicating to the assembled employees that the Company endorsed the statements contained therein. As previously discussed, the Company made these statements in the context of the same series of speeches in which the Company conveyed the message that any collective-bargaining contract would provide for closed shop conditions under which loss of union membership for any reason would result in loss of employment. In context, I find that the Company unlawfully threatened its employees with fines and loss of job security if they voted for the Union, and thereby interfered with the conduct of the election.

The Union further contends that the Company unlawfully suggested that the employees form an independent union. I do not agree. In one instance, the suggestion was made by union adherent Joan Hockenberry, who asked the company official what the Company's policy would be if employees tried to form an independent union. The official's response, in sum, was that the Company was willing to "sit down and discuss anything that affects the employees of the company with the employees," but did not feel "obligated to sit down and discuss unionization, with some outsiders from Utica, New York." This was a lawful statement of the Company's position. It is not unlawful for an employer to state that it opposes one union or one kind of union, rather than all unions. The second and third allegedly unlawful statements had nothing to do with independent unions, but simply purported to be descriptions of the Company's existing policy for dealing with employee grievances. The Union contends that the Company unlawfully threatened that wages would be frozen according to classifications if the Union were successful and were to negotiate a contract. This contention is precluded by the General Counsel's refusal to proceed in Case 6–CA–14697 on allegations that the Company threatened lower wages. The General Counsel's disposition of Case 6–CA–14697, in which the General Counsel declined to proceed on allegations that the Company threatened plant closure and loss of jobs, precludes litigation of the Union's contention that the Company threatened plant closure in the captive audience speeches. The disposition of Case 6–CA–14697 also precludes allegations that the Company promised increased wages or benefits. The remaining objections as set forth in union counsel's statements on the record, comprise allegations that are substantially similar to those discussed above in this section. Except to the extent indicated, I am recommending that the Union's objections be overruled as being without merit, or precluded from litigation under Board policy. As indicated, I have recommended that most of the Union's allegations regarding the captive audience meetings and company letters be overruled. However, the speeches and letters are significant among other reasons, because they demonstrate that the Company was engaging in a barrage of propaganda covering the entire spectrum of issues important to the employees, at a time when the Union, by reason of the Company's unlawful conduct, was deprived of effective means of presenting its own arguments to all the employees.

6. Denial of union access to company premises

As discussed, the consolidated complaint alleges that the Company violated Section 8(a)(1) by refusing to grant the Union's request of February 26 to handbill at IDC. For the reasons previously discussed, I find that the Company violated the Act, and I further find that the Company thereby interfered with the conduct of the election.

By letter dated May 7 to the Company, the Union requested an opportunity to respond to alleged "captive audience" addresses by Assistant Vice President Stark at Warren in April and by Supervisor Gern at IDC in No-

vember. The Union indicated that its request also applied to any future such meetings. The Company did not respond to the letter. As discussed supra, Gern and Stark did address groups of employees in November and April, respectively, at which they stated the Company's position with regard to matters relevant to the election campaign.

The General Counsel contends that the Company violated Section 8(a)(1) by refusing to accede to the Union's request. I agree. In *Montgomery Ward & Co.*, 145 NLRB 846 (1964), enfd. as modified 339 F.2d 889 (6th Cir. 1965), the Board held in sum that an employer violates Section 8(a)(1) during a union organizational campaign and while maintaining or enforcing an unlawful no-solicitation rule, by making antiunion speeches to employees during working hours on employer premises without according, on reasonable request, the union against whom the speeches are directed, a similar opportunity to address the employees.[25] For the reasons previously discussed, I have found that the Company maintained and enforced a policy that discriminatorily and unlawfully restricted employee solicitation on behalf of the Union. I do not agree with the Company's argument (Br. 40) that this allegation should be dismissed at least in part because the meetings conducted by Stark and Gern were not true "captive audience meetings" as alleged in the complaint. The Company correctly points out that employees were not required to attend the November meetings, and that although employees were summoned to the April meetings, Stark discussed a variety of matters. However, the *Montgomery Ward* rule applies to any antiunion speeches during working time on employer premises. The November meetings were conducted for antiunion speeches by Gern (albeit informal and to small groups of employees), and the April meetings featured antiunion statements on matters of substantial interest to the employees. I find that the *Montgomery Ward* rationale applies to those meetings. Moreover, the Union made clear that its request also applied to any future meetings. There is no question that the meetings conducted by company officials in early June were "captive audience meetings" in the strictest sense of that term. I find that the Company violated Section 8(a)(1) by failing to grant the Union's request under the unlawful conditions that prevailed during the election campaign. Therefore, the Company also unlawfully interfered with the conduct of the election.

C. *The Complaint in Case 6–CA–15995: Refusal to Recommend for Rehire, and to Rehire, Pamela Damon, Debra Nuhfer, Rhonda Gross, Barbara Morgan, Floyd Monticue, and Rebecca Stuart Walton*

The General Counsel contends and the complaint in Case 6–CA–15995 alleges in sum, that the Company violated Section 8(a)(1) and (3) by refusing to recommend for reemployment, i.e., giving less than a "Yes" recommendation, to Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca (Bower) Stuart Walton on their voluntary separation from employment, and by refusing to rehire them when they subsequently applied for reemployment. The complaint further alleges that the Company violated Section 8(a)(4) insofar as the Company's actions were also allegedly based on the fact that Damon and Gross were subpoenaed to testify as witnesses for the Union in the representation hearing in February 1981. Morgan was allegedly denied employment in January 1981. The remaining alleged discriminatees all applied for reemployment after the election in June 1981. I find that Morgan's case may properly be considered as grounds for setting aside the election under Union Objection 4 (discrimination against union supporters). However, as the General Counsel is alleging, in sum, a pattern of unlawful conduct, it is necessary to consider all six cases together.

During the hearing on the consolidated complaint, the Company presented in evidence a list of names in its active file of former employees who reapplied for work during the period from October 1, 1981, through September 30, 1982. The General Counsel contends that this list includes the names of eight former employees who were identified as union committee members during their employment (Freeda Carr, the six alleged discriminatees in Case 6–CA–15995, and Donald Saporito), that all but Saporito were given less than a "Yes" rating, that the Company knew that Saporito was not an active committee member, that in contrast, nearly 40 percent of the employees on the entire list received "Yes" ratings, and that therefore the list reflects a pattern of discrimination against applicants who were active union adherents during their former employment. However, the General Counsel's reliance on this list begs the question. The Company would not know at the time each employee quit, whether that employee would eventually apply for reemployment. Therefore, any analysis must take into consideration the ratings given to all former employees who were identified as committee members, regardless of whether they subsequently applied for reemployment. The Company's records indicate that several committee members were given "Yes" ratings, including Martha Asp, Sheila Mack, and Fran Peterson, who were identified by organizer Dan Glather in his testimony, as being active union adherents. In contrast, several committee members who were allegedly *not* active union adherents were given less than favorable ratings. The General Counsel's contention is also based on a presumption that the Company knew precisely which committee members were not active union adherents. Although there is evidence of knowledge in specific cases, the evidence is insufficient to establish a general presumption. Moreover, the evidence is not always consistent with the General Counsel's theory even where knowledge is shown. Thus, Alan LaCava was given a less than favorable rating, although the Company knew that he had abandoned his early support for the Union. Therefore, it is necessary to examine the evidence with respect to the individual cases in order to determine whether, as alleged by the General Counsel, there was a pattern of discrimination.

[25] The Board's decision also applied to denial of access under a "broad privileged no-solicitation rule." However, that aspect of the Board's decision applies only to retail stores, as there is no broad, privileged rule applicable to nonretail businesses.

Barbara Morgan began her employment with the Company in October 1978. She worked in the mailing department at Warren, on the second shift. Morgan was generally rated as an average employee. Her attendance record declined somewhat after her first year, but was nevertheless rated as average. Morgan joined the Union in the summer of 1980, and was active on its behalf. She wore union insignia to work and once distributed union literature outside the plant. As found, Morgan was one of the union adherents who were subjected to harassment by Supervisor McWilliams when they wore union T-shirts to work. She was also one of the prounion mailing department operators who were segregated at their workplace. By letter to the Company dated August 21, the Union identified Morgan, Debra Nuhfer, Rhonda Gross, and another employee as members of its committee.

Morgan quit her job on September 25, 1980, in order to take other full-time employment. Morgan testified without contradiction that Supervisor Pauline Stec told her that she could use her accumulated 2 weeks' vacation time as notice. Morgan was rated for reemployment as: "Yes? No Notice Given." As discussed, Personnel Assistant Rodney Henry normally made these evaluations. However, Henry was not called as a witness at the reopened hearing. Assistant Vice President Zimmerman was the Company's only witness. Nevertheless, with respect to all six alleged discriminatees, Zimmerman failed to explain who made the evaluation, or the reason or reasons for the evaluation, or why the employee was not rehired. Instead, Zimmerman substantially confined his testimony to a recitation of what he regarded as "negative reemployment considerations" in each individual's personnel record. With respect to Morgan, Zimmerman was able to point out only one negative consideration, namely, her alleged failure to give notice before quitting her job. For the reasons discussed in connection with Freeda Carr, I find that this alleged consideration was false, and that in fact Morgan gave acceptable notice. Morgan's personnel record reflected the type of reliable worker that, according to Zimmerman, the Company normally sought. Morgan worked continuously for the Company for nearly 2 years, and she had an acceptable attendance record. At the least, she made an effort to give notice before she quit, in contrast to other employees, e.g., Chris Nuhfer, who simply stopped coming to work without giving any notice whatsoever, but were nevertheless recommended without qualification for reemployment. I find that absent a discriminatory motive, Morgan would have been given a "Yes" rating.

Morgan testified without contradiction that in December 1980 she telephoned Zimmerman and asked if she could get her job back, indicating that she would take "either shift or any job he had open." Zimmerman told her that she would have to come in and update her application, although the Company normally permitted former employees to update their applications by telephone. Zimmerman also told Morgan that the Company was not hiring, although in fact the Company was hiring temporary help in December. Morgan went to the personnel office to update her application and she subsequently called several times to indicate her continuing interest, but she was always told that they were not hiring. The Company's records indicate that she initially applied on December 19. Notwithstanding her asserted willingness to accept any job on any shift, the Company's records indicate only that she was interested in the second shift in the mailing department at Warren. Morgan was never told of any problem with her record. I credit the testimony of Morgan, and I find that the manner in which the Company, and particularly Zimmerman, dealt with her reapplication tends to indicate an unwillingness to accept her for reemployment. The Company's records indicate that the Company hired some 51 permanent employees during the period from January 5 through February 16, 1981, including 8 in the mailing department (day shift).

Debra Nuhfer began working for the Company in June 1976, and she continued in the Company's employ until she quit in January 1981. She worked in the mailing department. Nuhfer was generally rated as an average or slightly above-average employee. In 1978 her attendance was rated as below average, and in May 1979 and February 1980 she was given warnings for excessive absenteeism. However, in 1979 and 1980 her attendance was rated as average, and attendance was not listed as a weak point in her annual evaluations. In the summer of 1980 Nuhfer joined and became active in the Union. Nuhfer joined the organizing committee, attended union meetings, and wore union insignia at work. Her last day of work was January 16, 1981. She had been working part time for Quality Markets. Nuhfer testified that 2 weeks before she quit work, she told Supervisors Stec and Littlefield that she was quitting her job to work full time for Quality, because she was unhappy with her pay scale and would probably make more money at Quality. Thereafter, Nuhfer was summoned to a meeting with Stec and Assistant Vice President for Mailing George Stark, who asked her what they could do to help her remain with the Company. Nuhfer adhered to her decision. She complained that she was making less money than employees in other departments, and that her brother-in-law was making more money as a stock boy, although she had more seniority. Nuhfer was given a reemployment rating of "No. see REZ." Therefore, pursuant to company policy, Nuhfer was effectively precluded from reemployment with the Company. The notation "see REZ" indicates that Zimmerman personally made the decision to give her a negative rating. Nevertheless Zimmerman in his testimony simply referred to the "negative reemployment considerations" in her personnel file. Zimmerman testified that these considerations were (1) that her reason for leaving (i.e., "unhappy with rate of pay") was "not acceptable," and (2) that she failed to give notice. Zimmerman also noted the two attendance warnings in her file. Zimmerman's assertion regarding lack of notice was patently false. The personnel file does not contain any statement that Nuhfer left without giving notice. Zimmerman based his assertion on the fact that the file contains a memo from Stark, dated January 14, indicating that Nuhfer would be quitting on January 16. However, Nuhfer testified credibly and without contradiction that she gave 2 weeks' notice to Stec and Litt-

lefield. Zimmerman admitted that the dates of such memoranda do not necessarily indicate the date of notice, because they may be written several days after notice is given. Moreover, entries in Nuhfer's personnel file tend to corroborate Nuhfer's testimony. The file contains a memo, dated January 2, which lists her grievances and states, that "She feels if nothing can be done she will give her notice and look elsewhere. Last night would be the 16th." The file also contains a memo from Stark to Stec dated January 6, consisting of a point-by-point rejection of Nuhfer's complaints.

Assuming that the Company were evaluating Nuhfer in a nondiscriminatory manner, it is difficult to see why her professed reasons for leaving the Company, either standing alone or in conjunction with other factors, would warrant a recommendation against reemployment. The Company's personnel records indicate that other employees who expressed dissatisfaction with their working conditions and/or left to obtain better employment elsewhere were given either "Yes" or "Yes?" ratings for reemployment purposes. Thus, Thomas Nansen, who "never seemed happy at NPC," and Judith Donnell, who was "not very happy with our line of work," and left to work in a restaurant, were each given "Yes?" ratings. Sandra Katzbauer, who quit to become a Tupperware manager, and William Brunecz and Dan Johnson, who each left for a "better job," were all given unqualified "Yes" ratings. (Johnson's file contains a memo indicating that he was quitting and his "last night is tonight.") See also my discussion of Mary Lou Rigby in connection with the matter of Freeda Carr, above. However, in the context of the organizational and election campaigns, including the Company's vehement and often unlawful opposition to unionization, the Company's motivation for its treatment of Nuhfer becomes apparent. Nuhfer was in effect, voicing the Union's position on issues that the Company regarded as crucial. The employees at Quality Markets were covered by a collective-bargaining contract with the Union. During the campaign the Company repeatedly argued that the terms and conditions of employment at Quality were unfavorable in comparison to those at the Company. Plainly the Company did not wish to hear or let it be known that an employee left the Company to make more money at Quality. Nuhfer's complaints about pay inequity also echoed the Union's position. Therefore, Assistant Vice President Stark attempted to mollify Nuhfer and persuade her to remain. However, once she left the damage was done. I find that the Company effectively precluded Nuhfer from reemployment by giving her a "No" rating in reprisal for what it regarded as her outspoken support for the Union. I further find, in light of her lengthy and generally satisfactory work record, that absent a discriminatory motivation the Company would have recommended her without qualification for reemployment.

On September 10, 1982, Nuhfer telephoned the personnel office to request reemployment. She spoke to Personnel Assistant Donna Farone. Nuhfer did not request any specific department or shift. She said that she would "even" work nights, not that she would only work nights. Nevertheless, the Company's records indicate that Nuhfer was "Int. in Nights—clerical or mailing." Farone discussed the reason Nuhfer left, but failed to disclose that this was a bar to her reemployment. Farone said that they were not hiring then. This was false. During September 1982 the Company hired a substantial number of employees to work nights in the mailing department. Specifically, the Company hired six employees on September 7, six on September 13, five on September 20, and four on September 27.

Rhonda Trawick Gross began working for the Company in July 1973. In September 1973 she left to return to high school. In January 1975 she returned to the Company and worked in the order handling department at Warren. In April 1977 she went on pregnancy leave, and she returned to work in January 1978, when she commenced working in the mailing department. Thereafter, Gross remained continuously in the Company's employ until February 12, 1982. Gross was initially regarded as a slow worker, but she progressed to the point where she was rated as average or above average in all categories, including average in quantity of work. Her annual evaluation for the year 1981, prepared in October of that year, described her as a fast and good worker, but indicated that her attendance needed improving. In fact, Gross' attendance record had gradually improved over the years, although it declined during 1981, when she had 14 absences totaling 16-1/2 days, including 4 days at the representation hearing. Her file does not contain any attendance warnings.

Gross joined the Union and its organizing committee, and by October 1980 she was actively engaged in the Union's campaign. She wore union insignia to work, attended union meetings, talked in favor of the Union to other employees, and distributed union literature at the Warren plant on three or four occasions during the period from October to January. Gross was present at the representation proceeding in February pursuant to union subpoena, but she was not called to testify. In February 1982 Gross was pregnant. However, instead of taking pregnancy leave, Gross informed the Company that she was quitting because of the pregnancy and because her husband had a good job. She was rated for rehire as follows: "No. See REZ. Not Happy Here." Gross' personnel file fails to disclose any basis for concluding that she was not happy in her job. On the contrary, her last annual evaluation indicated that she was above average in personality. In view of the notation on her file, it is evident that Zimmerman personally made the decision to recommend against reemployment, that he would know why the Company regarded her as "not happy here," and that this was at least the principal reason for his recommendation. Nevertheless, Zimmerman failed to explain the notation. Instead, Zimmerman testified, in sum, that the "negative employment considerations" were "the stability factor; the fact that she has already worked for us before at prior times, and the attendance factor." Both asserted grounds were patently false. Gross' record reflected the kind of stability and steady progress that the Company normally desired in its employees. Gross quit her employment on two occasions. The first time was in September 1973, when she returned to school. Perhaps I am being naive, but I con-

sider it unlikely that the Company would regard as unstable or unreliable, a 17-year old person who left work at the end of summer in order to complete her high school education. Although Gross left work in 1979, she did so by taking pregnancy leave; and the Company's records indicate that the Company does not regard such leave as a quit. Thereafter, Gross worked continuously for over 4 years. As Zimmerman conceded in his testimony, it is quite common for employees to work more than once for the Company, and also common for employees among the predominantly female work force to leave for personal reasons (e.g., marriage, family responsibility, or relocation). Zimmerman further conceded that the Company does not regard such departures as indicating that the employee is "not happy here." The Company's records are replete with the names of employees who were recommended for reemployment, notwithstanding that they worked as many as three or four times for the Company, or who were given a "Yes" or "Yes?" recommendation, notwithstanding that such multiple employment was accompanied by other ostensibly negative factors such as a poor attendance record. For example, Carol Leach was given a "Yes" rating, notwithstanding that her personnel file indicated that she quit three times (possibly without timely notice on each occasion) in addition to two pregnancy leaves, and that she was described as a "good worker but attendance could have been better." Janice Muscaro, who quit her employment six times over a period of slightly more than 6 years, was also given a "Yes" rating. Mary Sherwood also received a "Yes" rating, notwithstanding that she quit three times and had an attendance record comparable to that of Gross. As for Gross' allegedly poor attendance record, the Company's records indicate that where attendance is regarded as a problem, the personnel office will normally make an appropriate notation with the recommendation on reemployment, regardless of the recommendation itself. However, in the case of Gross the only notation concerns her alleged unhappiness. Moreover, Gross' attendance record, even when considered with her employment history, was equal to or better than that of numerous other employees who received "yes" or "Yes?" ratings. I find in light of (1) the Company's vehement opposition to unionization, (2) its pattern of discriminatory conduct, including its refusal to rehire or recommend for rehire, Freeda Carr, Nancy Race, Barbara Morgan, and Debra Nuhfer, (3) Zimmerman's failure to explain the notation that Gross was "not happy here," and (4) the demonstrably false explanation given by Zimmerman for her negative rating; that Zimmerman gave her the negative rating because of her active support for the Union, which Zimmerman translated as reflecting a lack of happiness with the Company. I further find, in light of Gross' employment history and the comparable records of other employees, that absent a discriminatory motive, Zimmerman would have recommended her without qualification for reemployment.

Gross testified that in August 1982 she came to the personnel office and asked Personnel Assistant Farone about a job. Farone answered that there was no opening, whereon Gross responded that she would take anything they had. The Company's records indicate that on October 15, 1982 (by telephone), Gross said she was interested in part-time employment, and that she again expressed interest on November 8 and December 30, 1982. Farone did not testify in this proceeding. I credit Gross. As discussed, supra, the Company hired a substantial number of employees in the mailing department in September 1982. Zimmerman testified (apparently in reliance on the October 15 date), that since October 15, 1982, the Company has not hired anyone in the mailing department, except for one electronics technician. However, Zimmerman admitted that the Company has hired employees in merchandise handling (i.e., at IDC), and that these positions did not require any more training than that required for order handling or mailing.

Rebecca (Bower) Stewart Walton began working at IDC in February 1975 as an order filler in merchandise handling. In August 1975 she was denied leave for the purpose of taking an extended vacation. Instead she quit her job. She was recommended for rehire, and was rehired and returned to work in October 1975. Walton went on pregnancy leave in September 1976 and returned to work in February 1979. Thereafter, she remained continuously in the Company's employ until June 19, 1981. During her employment she worked both at IDC and Warren. She was generally rated as an above-average employee. Her file fails to disclose any criticism of her attendance. Walton testified that she joined the Union and its organizing committee in February 1980, and that she frequently wore union insignia to work. The record fails to indicate that the Union ever notified the Company that Walton was a member of its committee. However, Walton served as a union observer at the June 9 election. Shortly after the election the Company requested volunteers for temporary layoff. Walton volunteered, and was laid off on June 19. About October she was recalled to work. However, in the interim Walton had remarried and her husband was transferred to Erie, Pennsylvania. Walton so informed the Company, and said she could not return to work. Walton's rating for reemployment was: "No? Doubt if she would be happy here." As with Rhonda Gross, her personnel file fails to disclose any basis for this conclusion, and Zimmerman failed to explain the notation in his testimony. Rather, her personnel file indicates that she was regarded as an employee who "can be depended upon to get the job done quickly, neatly and accurately," and a "fast learner who is willing to help out where needed" and who "works well with others." Zimmerman was able to come up with only one "negative reemployment consideration," namely, her "stability . . . because of the three prior quits." In fact, Walton quit only twice, as the third absence was an extended pregnancy leave. Walton's personnel file indicates that she was a longtime employee with a good work and attendance record, who was scrupulous in keeping the Company informed of planned departures from work. Her record for "stability" compared favorably with that of numerous other employees who received "yes" ratings. For example, Michelle Booth, Barbara Boutelle, Pamela Grettenberger, Georgia Leonard, and Sheryl Dipierro were all given "yes" ratings, notwithstanding a demonstrated proclivity to repeatedly

quit their employment for a variety of reasons. Walton's negative rating, when considered with that of other active union adherents, tends to indicate a pattern of evaluation for such employees. Thus, during the election campaign Debra Nuhfer was ostensibly disqualified because she was unhappy with her rate of pay. Shortly after the election, the Company disqualified Walton because it doubted that "she would be happy here." Eight months after the election, the Company disqualified Rhonda Gross because she was "not happy here." It is evident that the Company equated active support for the Union with lack of happiness with nonunion conditions at the Company, and used this equation as an excuse for disqualifying the employees from future employment. I find that the Company gave Walton an adverse rating in reprisal for her active union support, as manifested most recently by her service as a union observer, and thereby rendered reemployment unlikely. I further find in light of her own record and comparable records of other employees that absent a discriminatory motive the Company would have recommended her without qualification for reemployment.

Walton testified that in June 1982 on returning to her home area of Youngsville, Pennsylvania, she telephoned the personnel office about reemployment. According to Walton, a woman (probably Farone) told her that she did not have to come to the plant to update her application, that her card would be placed in the active file, but that the Company was not then hiring. Walton said that she would work either shift or plant, but preferred IDC. Walton testified that she called several times thereafter, but was always told that they were not hiring, except on one occasion in early 1983, when Personnel Assistant Henry told her that the Company was obligated to first hire temporary employees who worked during the holiday season. No other evidence was adduced in this proceeding that would indicate that the Company had such a policy. The Company's records indicate that Walton inquired about reemployment on August 31, September 22, and December 6, 1982, and on March 7, 1983, and that she indicated willingness to work at either plant, including part time, but preferred IDC. I credit the testimony of Walton. However, as the complaint alleges that she was denied reemployment about August 31, 1982, I shall use that date as the date of her initial request. As discussed, supra, the Company has hired employees at both Warren and IDC since that date.

By letter dated October 1, 1980, the Union notified the Company that Pamela Damon and Floyd Monticue were members of its organizing committee. Damon began working in the mailing department in January 1977. In May 1977 she quit because she was moving to Corry, Pennsylvania. In March 1979 she was rehired and returned to work as an order filler at IDC. In September 1979 she received a warning memorandum for unsatisfactory attendance. In November 1979 she quit in order to take another job in Corry. At that time Damon was given a recommendation for rehire, subject to review of her attendance. In February 1980 Damon was rehired with her promise that she would make a good attendance record. However, her subsequent attendance record was still rated as deficient. In her annual evaluation for 1980, prepared in January 1981, Damon was rated as below average in attendance, and the evaluation indicated that her "attendance could improve." During the evaluation year she had 11 absences totaling 14 days. Otherwise she was generally rated as an above-average employee. Damon testified that she joined the Union and the organizing committee in September 1980. In December she was subpoenaed by the Union for a representation hearing on December 11 (on the first union petition). She was present at the hearing but was not called to testify. She was again subpoenaed by the Union for the representation hearing in February 1981. She was present throughout the hearing and testified as a union witness. In September 1981 Damon again wished to leave her employment. Damon's husband had obtained a temporary second job that promised training for a new skill, and she wished to remain home rather than hire a babysitter. Damon testified that she gave 2 weeks' notice to her supervisor, Ernie Dollinger. However, Dollinger suggested that she apply for a leave of absence. By memo dated September 1, 1981, Damon formally requested a leave of absence from September 7 to November 1, 1981. Vice President Carter and Assistant Vice President Zimmerman rejected the request, indicating that Damon would have to quit and then reapply when she was available. Damon followed this course. She left work on September 4. She was given a "No" rating, with the comment: "Has worked 3 times in 4 years—unstable. Also attendance should have been better."

Damon testified that beginning in November 1981 she contacted the personnel office, spoke to Donna Farone, and requested reemployment. She asked for temporary work during the Christmas season, but was told that the Company already hired its temporary help. Damon expressed a preference for IDC on any shift. Damon testified that in August Zimmerman told her that the Company had a lot of applicants and was not then hiring. The Company's records indicate that Damon inquired about reemployment on November 23, 1981, and August 20, 1982.

Zimmerman testified that the negative reemployment considerations in Damon's file were (1) stability, in that she worked three times for the Company, (2) poor attendance record, and (3) failure to give notice when she quit in September 1981. Zimmerman based this last assertion on a file memo, dated September 3, indicating that Damon's last day of work would be September 4. As discussed above, Zimmerman admitted that such memos are not a reliable indication of lack of notice. Moreover, Damon testified that she gave 2 weeks' notice and Zimmerman knew by reason of her request for leave that she had to leave work. I credit Damon, and I find that Zimmerman knew that she gave advance notice of her departure.

Damon's situation presents a closer case than those discussed above. Unlike those cases, Damon's does not involve evidence in the form of overt discriminatory words or actions against the employee, unexplained evaluations that tend to indicate discriminatory motive, or alleged negative considerations that totally or substantially lack any factual basis. However, Damon's evaluation,

when viewed in the context of those of employees with comparable records, tends to indicate that the Company was applying a double or even triple standard, by holding active union adherents to a higher standard, and antiunion employees to a lower standard, than that normally followed in evaluating departing employees. The case of Chris Nuhfer has already been discussed in connection with Freeda Carr. During the evaluation period from July 1980 to July 1981, Nuhfer had 14 absences totaling 29 days (i.e., a worse record than that of Damon), and she was also rated as below average in attendance. Nevertheless, Nuhfer was recommended for rehire when her name was removed from the personnel roster. Typically, employees with records comparable to that of Damon are given "Yes?" (i.e., qualified recommendations for reemployment), although some (heretofore discussed) were recommended without qualification. The records of Ruth Ann Walter, Donna Hice, Linda Wilhelm, Sandra Morse, Normajean Driscoll, and Katherine Correlli (all given "Yes?" ratings) are illustrative. I find that but for her activities on behalf of the Union, including her testimony at the representation hearing, Damon probably would have received a "Yes?" rating. Since November 23, 1981, the Company has hired very few former employees who have less than a "Yes" rating. With respect to positions at IDC for which Damon would be qualified, the Company's records indicate that on August 3, 1982, the Company hired Elyane Blaire, a former employee with a "No?" rating, for the day shift in merchandise handling. At Warren, the Company on August 20, 1982, hired Laurie Crossley, a former employee with a "Yes?" rating, for the day shift in merchandise handling, and on August 25, 1982, hired Amy Paden, a former employee with a "No" rating, for the night shift in mailing.

Floyd Monticue began his employment with the Company in May 1977, and he continued to work for the Company until he quit on May 15, 1981. He worked as a mechanic in the mailing department. Monticue testified that he joined the organizing committee and wore union paraphernalia. Monticue also testified that Supervisor Pauline Stec accused him of wasting time in the parking lot by talking to Rhonda Gross about the Union, and questioned him about why he supported the Union. However, in his investigatory affidavits Monticue stated that no one from the Company ever spoke to him about his support for the Union, that Stec never told him that he was not supposed to speak to Gross because she was a union supporter, and that he joined the Union after the incident involving Gross. Therefore, I do not credit Monticue's testimony concerning his alleged conversation with Stec, and I find that although the Company was on notice that Monticue was a member of the organizing committee, no one from the Company ever spoke to him about his union activity.

Monticue testified that he quit his job on May 15, 1981, because the "pressure was too great." Monticue went to work for National Forge Company in Irvine, Pennsylvania. His new job paid substantially more than he was earning at the Company. The Company's records indicate that Monticue quit in order to work at National Forge. Monticue was given a "No" rating, unaccompanied by any explanatory notations. Monticue testified that he was laid off at National Forge in January 1982, recalled in May 1982, and laid off again in July 1982. Monticue further testified that probably in the winter of 1982–1983 he initially contacted the Company about reemployment. According to Monticue, he told Zimmerman that he was laid off and looking for work, and would take anything, but that Zimmerman said there was nothing, and the personnel office subsequently told him they were not hiring. The Company's records indicate that Monticue inquired about reemployment on September 15, November 10, and December 7, 1982, and on February 1, 1983, and that he expressed willingness to work in either building on any shift, but preferred maintenance or janitorial work.

Assistant Vice President Zimmerman testified that the negative reemployment considerations reflected in Monticue's file were (1) an incident of reported violence between Monticue and then mechanic Charles Martin in October 1978, (2) a workmen's compensation claim by Monticue in September 1977, which was subsequently denied, and which, on the basis of the Company's investigation, did not involve any injury at work, (3) a probability that Monticue would return to National Forge if he were recalled from layoff, and (4) a poor attendance record. The fourth alleged consideration is contradicted by Monticue's personnel file. Monticue's attendance was evaluated as average for the period from May 11, 1980, to May 11, 1981, when he had seven absences totaling 14 days (including 5 days hospitalization and 4 days when his home burned), and as above average for the period from May 11, 1979, to May 11, 1980, when he had four absences totaling 28 days (including 25 days for surgery). Monticue's file fails to indicate any attendance warnings. On the contrary, until 1981 his attendance was always rated as above average, superior, or outstanding. Zimmerman testified that the Company expects that an average employee will have 5 or 6 absences per year, and that 10 to 12 incidents of "call-in absences" would be regarded as excessive, but that a prolonged absence (e.g., for pregnancy) would not be held against the individual. Therefore, even by this professed standard, Monticue's attendance record would be regarded as acceptable. The third alleged consideration, based on Monticue's layoff in July 1982, plainly had nothing to do with his evaluation in May 1981.[26] Moreover, as previously discussed in connection with Debra Nuhfer, the Company does not reject applicants for reemployment because they left the Company to obtain better jobs elsewhere. For example, Ernest Carlson, who quit the Company in September 1981 to work for National Forge, was given a "Yes" rating for reemployment. The first and second alleged considerations are demonstrably pretextual, when viewed in light of Monticue's overall record and evaluations of employees who engaged in similar alleged misconduct. Both matters occurred early in Monticue's employment. He filed the compensation claim while still a probationary employee. Therefore, it is probable that the Company would have terminated Monticue if it believed that he

[26] The Company's assertion (Addendum Br. 10) that Monticue "twice" quit the Company in order to obtain a higher paying job is unsupported by the record. Monticue quit his job only once.

committed a serious offense. Instead the Company gave him a raise and made him a permanent employee. The second incident, which did not involve injury to either employee, occurred in October 1978. Notwithstanding both incidents, which were documented in his file, the Company in January 1980 placed Monticue in charge of a group of mechanics on the night shift, in effect as an assistant foreman to Supervisor Randy McWilliams. Monticue subsequently asked to be taken off this job. If the Company refused to recommend Monticue for reemployment because it viewed him as an individual who could not control his temper or who would knowingly cheat the Company, then it is unlikely that given the same information, it would have promoted him to a position of responsibility over other employees.[27] Moreover, the Company's negative recommendation on Monticue contrasts with its treatment of personnel who were involved in comparable or more serious incidents. See the discussion of Laura Zaffino in connection with the case of Nancy Race, above. See also the discussion of the Company's failure to discipline Supervisor Randy McWilliams for his assaults on prounion employees. Additionally, in June 1980 the Company gave former employee Shawn Jukes a "Yes?" rating for reemployment, notwithstanding that her personnel file indicated that she (1) apparently forged a dental appointment slip in order to get time off from work, (2) had an attendance record that was rated as unsatisfactory, and (3) suffered from poor health that limited her ability to perform her job.

As discussed, I find that two of the four asserted negative considerations lacked any credible factual basis, and that all of them were pretextual.[28] It is evident that the Company regarded Monticue as a competent and reliable employee. I find, in light of Monticue's overall employment record, the false and pretextual reasons advanced by Zimmerman for his negative rating, the comparable records of other employees, and the discriminatory pattern of conduct that is evidenced by the Company's treatment of the other alleged discriminatees, that but for his union activity, Monticue would have been rated as eligible for reemployment. As discussed, the Company has hired employees since September 15, 1982, in positions for which Monticue would be qualified.

In sum, the evidence indicates that for discriminatory reasons, the Company effectively precluded Damon, Gross, Nuhfer, Walton, and Monticue from consideration for reemployment by recommending against their employment. The Company's course of conduct with respect to Barbara Morgan, including an unwarranted qualified rating, further indicates that the Company was, for discriminatory reasons, also refusing to consider her application for reemployment. I am not persuaded that there is no basis for finding discrimination because some union adherents were recommended for reemployment or because the Company did not discriminate against union adherents in every conceivable manner (e.g., by denying them pay raises, transfers, or promotions). The evidence indicates that most of the active committee members who quit their jobs were given qualified or unfavorable ratings for reemployment. With respect to the six alleged discriminatees in Case 6–CA–15995, the evidence indicates that the Company knew that they were active on behalf of the Union and that the professed "negative reemployment considerations" in their files were for the most part demonstrably false or otherwise pretextual. Two of the personnel files (Gross and Walton) contain unexplained entries that indicate that their negative ratings were based on their active support for the Union. As discussed, the Company is a large employer in a predominantly rural area, with a work force that includes many employees who have worked more than once for the Company. It is evident that the prospect of reemployment is an important consideration for the employees, and that the discriminatory denial of reemployment, or consideration for reemployment, is conduct that would tend to intimidate not only active union adherents, but also any employees who might otherwise be inclined to become active on behalf of the Union.

I agree with the Company that on the basis of the evidence in this proceeding, it is not possible to determine whether in fact, and if so when, the Company would have rehired the six discriminatees. As found, the Company discriminatorily refused to consider them for reemployment, thereby depriving them of an opportunity to compete with other applicants. Where, as here, a respondent employer or union has engaged in misconduct that might have prevented an employee from obtaining or regaining a job, but the evidence is inconclusive on this point, the Board will normally resolve the doubt against the wrongdoer rather than against the wronged employee. Therefore the Board will find that the employee was discriminatorily denied employment, and will direct that the employee be offered employment with backpay from the time that a job became available for which the employee was qualified. *Yong Hinkle Corp.*, 244 NLRB 264, 268 (1979); *Alexander's Restaurant & Lounge*, 228 NLRB 165, 179 (1977), enfd. 586 F.2d 1300 (9th Cir. 1978); *Madison South Convalescent Center*, 260 NLRB 816, 832 (1982); *Associated Truck Lines*, 239 NLRB 917, 921 (1978), enfd. as modified 653 F.2d 241 (6th Cir. 1981).

I find that the Company discriminatorily refused to recommend for rehire, and to rehire, Morgan, Gross, Nuhfer, Walton, Damon (as qualified herein), and Monticue, because of their known and active support for the Union. The Company thereby violated Section 8(a)(1) and (3) of the Act. As that support included the presence of Damon and Gross as prospective union witnesses in the representation proceedings, and Damon's testimony on behalf of the Union, I find that the Company also violated Section 8(a)(4). *NLRB v. AA Electric Co.*, 405 U.S. 117, 124–125 (1972); *Royal Mfg. Co.*, 177 NLRB 264, 266 (1969). The General Counsel submits (Br. 95) that the dates of rehire should be left for determination at the

[27] In his May 1981 evaluation, the Company criticized Monticue as being antagonistic toward other employees. Nevertheless, Monticue was rated as above average in personality.

[28] In view of the foregoing findings, I find it unnecessary to decide whether by reason of Federal of state law, the Company was precluded from taking any adverse action against Monticue by reason of the fact that he filed a workmen's compensation claim that the Company considered to be false. See *Firestone Textile Co. v. Meadows*, 114 LRRM 3559, 3561 (D.C. Ky. 1983).

compliance stage of this proceeding. However, the evidence adduced in this proceeding affords an adequate basis for determining when, after their respective reapplications, positions became available for which the discriminatees were qualified. I find that the discriminatees were entitled to reemployment and are entitled to backpay as follows: Barbara Morgan, who initially reapplied on December 19, 1980, was entitled to employment as of December 29, 1980, when the Company hired employees for merchandise handling. (Although most were hired as temporary help, the Company hired a substantial number of permanent employees in January 1981.) Debra Nuhfer, who initially reapplied on September 10, 1982, was entitled to reemployment as of September 13, 1982, when the Company hired six employees in the mailing department. Rhonda Gross, who initially reapplied some time in August 1982, was entitled to employment as of September 7, 1982, when the Company hired six employees in the mailing department. Rebecca Walton, who for reasons discussed is regarded as having initially reapplied on August 31, 1982, was also entitled to employment on September 7, 1982. (Walton expressed a preference for IDC, but did not exclude work in the mailing department.) Pamela Damon, who initially applied for reemployment on November 23, 1981, but whose record fell short of the Company's normal standard for a "Yes" rating, was entitled to employment as of August 3, 1982, when the Company hired a former employee with a "No" rating for merchandise handling. Floyd Monticue, who initially reapplied on September 15, 1982, was entitled to employment as of September 20, 1982, when the Company hired five employees in the mailing department. (Monticue expressed a preference for maintenance or janitorial work, but did not exclude any other kind of work.)

V. CONCLUDING FINDINGS AND RECOMMENDATIONS WITH RESPECT TO THE OBJECTIONS TO THE ELECTION; AND THE UNION'S REQUEST FOR A REMEDIAL BARGAINING ORDER

The Union objected to the election on the grounds that the Company engaged in the following enumerated alleged misconduct.

1. Conducted or aided in illegal pool of the employees concerning their sympathies in the election.
2. Threatened reprisals and intimidated and coerced employees concerning union activities.
3. Granted, promised, and/or withheld raises, bonuses, and other rewards.
4. Discriminated against supporters of the Union.
5. Discriminated against employees who have testified on behalf of the Union.
6. Engaged in surveillance of union supporters and other employees.
7. Misrepresented material facts concerning the nature, organization, and operations of the Petitioner and other matters.
8. Generally vilified the Union, its officers, and agents.
9. Solicited the grievances of employees and promised to remedy them.
10. Solicited antiunion support from individual employees.
11. (withdrawn)
12. Discharged or refused to rehire Freeda Carr and Nancy Race on account of their union activities.
13. Prevented union access to its property in order to communicate with employees, and denied employees the use of company bulletin boards for union materials, and interfered with the Union's use of the media.
14. Mischaracterized the Labor Board and its processes.
15. Instilled in employees the fear of plant closure if the Union won.
16. Conducted captive audience meetings while maintaining rules against distribution and solicitation, and denied union representatives an opportunity to respond.
17. And in other ways has interfered with the free choice of employees in selecting a collective-bargaining agent.

Objection 1 is overruled for failure of proof of such conduct during the critical period. Objection 2, which is broad enough to cover any violation of Section 8(a)(1) of the Act, is sustained by reason of the Company's threats to deprive its employees of access to management, and of loss of job security under closed shop conditions, and is further sustained to the extent specifically found under other objections. Objection 3 is overruled for the reasons set forth in section IV,B,5,b of this decision. Objection 4 is sustained by reason of the following unlawful conduct during the critical period: discriminatory prohibition (directed to Hockenberry) against talking about the Union; denial of access to the timecards, the oral warnings to Hockenberry, Mack, and Dixon, and the written warning to Hockenberry; denial of access by Freeda Carr to IDC premises; and refusal to rehire Barbara Morgan.[39] Objection 5 is overruled for failure of proof of such conduct during the critical period. Objection 6 is overruled for failure of proof of such conduct during the critical period, as discussed in section IV,B,3 above. Objection 7 is overruled for the reasons discussed above. Objection 8 is overruled for failure of proof of any such conduct that would constitute grounds for setting aside an election under appropriate Board law. Insofar as such vilification would rise to the level of threats, they are covered under Objection 2. Objection 9 is overruled for failure of proof, as discussed in section IV,B,5,b, above. Objection 10 is overruled in accordance with my ruling at the hearing. (See Tr. 698, 702, 704.) Objection 12 is overruled, as the objection is predicated on events that occurred prior to the critical period. Objection 13 contains three allegations. The first is sustained by reason of the Company's unlawful refusal to grant the Union's request for access in February 1981. The second is overruled as based on events that occurred prior to the critical period. The third allegation is precluded by the General Counsel's refusal to proceed on such allegations by way of complaint. Objections 14 and 15 are overruled for the reasons discussed in section IV,B,5,b. Objection 16 is sustained for the reasons discussed in section IV,B,6, supra. Objec-

[39] During the critical period the Company discriminatorily refused to recommend Debra Nuhfer and Floyd Monticue for reemployment. However, these actions were not communicated to the discriminatees or to any other employees.

tion 17 is overruled for failure of proof of any other unlawful or improper conduct that would constitute grounds for setting aside the election.

In sum, I am recommending that Union Objections 2, 4, and the first part of 13 and 16 be sustained, and that the remaining objections be overruled. The objectionable conduct included unfair labor practices that tend to seriously impede the right of employees to communicate with, and to receive communication from, the Union. The conduct also included discriminatory personnel actions, including denial of employment, against active union adherents. The objectionable conduct also included threats of loss of job security and denial of access to management, which threats were communicated by top company officials in a series of captive audience meetings at both the Warren and IDC plants. These unfair labor practices occurred against a background of other unlawful conduct that occurred or commenced prior to the filing of the first election petition and that involved violations of comparable gravity, the effect of which continued throughout the critical period. These earlier violations lend "meaning and dimension" to the unlawful conduct during the critical period. *Dresser Industries*, 242 NLRB 74 (1979). Conduct violative of Section 8(a)(1) is, all the more, conduct that interferes with the exercise of a free and untrammeled choice in the election. Therefore, the Board will normally direct a new election whenever an unfair labor practice occurs during the critical period, unless the violations are such that it is virtually impossible to conclude that they have affected the results of the election. *Enola Super Thrift*, 233 NLRB 409 (1977). The Company's unfair labor practices constitute the kind of conduct that warrants setting aside an election. Therefore, I am recommending that the election be set aside on the basis of Union Objections 2, 4, 13, and 16.

The Union requests (Br. 6–11) a remedial bargaining order instead of a new election. The Union initially made this request at the close of the original hearing.[30] In *United Dairy Farmers Assn.*, 257 NLRB 772 (1981), following a remand from the United States Court of Appeals for the Third Circuit, the Board reversed prior policy by (1) granting a remedial bargaining order in a case involving "outrageous" and "pervasive" unfair labor practices, notwithstanding that the union involved never obtained a card majority, and (2) granting the order at the request of the charging party, without any allegation in the complaint that the employer violated Section 8(a)(5) of the Act. The two circuit courts with potential venue over the present case are in disagreement as to the applicable law. In *United Dairy Farmers Assn. v. NLRB*, 633 F.2d 1054, 1069 (3d Cir. 1980), the court held that the Board had authority to issue remedial bargaining orders in such cases. However, in *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983), the only other case in which the Board issued a nonmajority remedial bargaining order, the Court of Appeals for the District of Columbia Circuit held that the Board lacked such authority. I am proceeding on the premises that the Board's decision on remand in *United Dairy Farmers* constitutes Board policy that is binding on me. In evaluating the propriety of a bargaining order in the present case, I have taken into consideration the Company's entire course of conduct, and not simply those unfair labor practices that were committed during the critical period prior to the election. Nevertheless, and regardless of whether the present case be regarded as a class I *Gissel*[31] case (i.e., an "exceptional" case marked by "outrageous" and "pervasive" unfair labor practices), or a class II case (i.e., a "less extraordinary" case "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes"), I find that a bargaining order is not warranted. It is evident that from the beginning of its campaign, the Union was pessimistic about its ability to obtain majority status in the unit ultimately found appropriate by the Regional Director. Even before the Company began its campaign of unlawful activity, the Union sought to organize a relatively small unit, and it eventually agreed only with reluctance, to an election in a large unit that included most of the personnel at both plants. The Union lost the election by an overwhelming vote (231 to 1049). There is an administrative presumption that the Union obtained authorization cards or other showing of support from at least 30 percent of the employees in the appropriate unit. However, the Union's private demonstration does not constitute evidence in an unfair labor practice proceeding. The only evidence in this proceeding of the extent of the Union's support at any time consists of the 231 votes that it received in the election. In *United Dairy Farmers*, supra at fn. 22, the Board held that a close election was not a condition of a bargaining order, but the Board did not exclude the result of the election as a factor for consideration. Moreover, many of the violations in the present case involved interference with communication between the Union and the employees. It is anticipated that removal of these barriers by an appropriate remedial order, would enable the employees to make an informed choice in a rerun election campaign. However, a bargaining order would in the present circumstances defeat the purposes of the Act by imposing on the employees a representative that never demonstrated either majority or near majority support, or even the probability of such support. Therefore, I am recommending that a new election be directed at such time as the Regional Director deems appropriate.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

[30] This fact is another illustration of the questionable wisdom of practices that would permit a charging party to inject a major issue into litigation without the benefit of briefing or even a statement of position by the General Counsel. By waiting until the close of the hearing to make its request, the Union effectively precluded the other parties and the administrative law judge from adducing evidence that might be relevant to the propriety of a bargaining order, albeit not relevant to the specific allegations of the complaint and the objections to the election.

[31] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613–615 (1969).

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Company has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By refusing to reinstate Freeda Carr and Nancy Race, by refusing to recommend for reemployment and to rehire Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca Stuart Walton, by discriminatorily transferring Joan Hockenberry, by issuing written warnings to Vivian Newton and Joan Hockenberry and oral warnings to Hockenberry, Sheila Mack, and Dawn Dickson because of their union activity, and by imposing more rigorous and onerous terms and conditions of employment on union adherents among its employees, by segregating them at work, conspicuously and closely observing and scrutinizing them at work, and discriminatorily prohibiting them from talking at work, thereby discouraging membership in the Union, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. By refusing to reinstate Carr and Race because they filed charges under the Act, and by refusing to recommend for reemployment and to rehire Pamela Damon and Rhonda Gross because they gave testimony under the Act, the Company has violated and is violating Section 8(a)(4) of the Act.

6. Union Objections 2, 4, and the first part of 13 and 16 in Case 6–RC–8922 have been sustained by the evidence, and the Company thereby interfered with the Board election on June 9, 1981. Objections 1, 3, 5–10, 12, and the second and third parts of 13–15 and 17 are without merit or precluded by law or Board policy from consideration as objectionable conduct.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed numerous violations of Section 8(a)(1), (3), and (4) of the Act, I shall recommend that it be required to cease and desist therefrom, to post appropriate notices, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company discriminatorily refused to reinstate Freeda Carr and Nancy Race on their offer to return to work in the returns departments, I shall recommend that the Company be ordered to offer each of them immediate and full reinstatement to their former jobs, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and benefits they may have suffered from October 6, 1980, when they initially requested to return to work, until the date of the Company's offer of reinstatement. Having found that the Company discriminatorily refused to rehire Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuffer, Floyd Monticue, and Rebecca Stuart Walton, I shall recommend that the Company be ordered to offer each of them immediate and full employment, in a nondiscriminatory manner, to positions for which they are qualified, without prejudice to their seniority or other rights and privileges to which they would be entitled, absent the discrimination against them. I shall further recommend that the Company be ordered to make each of them whole for any loss of earnings and benefits from the date of the Company's discriminatory refusal to rehire them, as determined in this decision, until the date of the Company's offer of reemployment. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner and amount prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[32] It will also be recommended that the Company be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay due. I shall further recommend that the Company be ordered to remove from its files the negative or qualified reemployment recommendations for each of the above-named employees, to revoke, and remove from its files the written warnings that were given to Vivian Newton in October 1980 and to Joan Hockenberry in February 1981, and any reference to the oral warnings that were given in January 1981, to Hockenberry, Sheila Mack, and Dawn Dickson, and to give written notice of such expunction to each of them, and to inform each of them that its unlawful conduct will not be used as a basis for future personnel actions against them. See *Sterling Sugars*, 261 NLRB 472 (1982).

With regard to remedies involving union access to employees, I am, for the reasons discussed above, recommending that the Company be ordered to permit access by union organizers to outside nonworking areas of the IDC premises for a period of 6 months from the effective date of the order in this case. I am also recommending that the Company be ordered to make available to the Union a list of the names, addresses, and telephone numbers of all employees currently employed, and to keep such list current for a period of 6 months. This provision is without prejudice to the Union's rights under *Excelsior Underwear*, supra, in the event of a rerun election. These provisions, coupled with company compliance with the prohibitive and other provisions of the order in this proceeding, should enable the Union to develop adequate means of communication with the employees in an atmosphere free of coercive employer conduct. I am not persuaded that the policies of the Act would be effectuated by granting these remedies for a longer period of time or by granting other extraordinary remedies involving access by nonemployee union representatives. The Company does not have a prior history of unfair labor practice conduct, and the unlawful conduct in the present case does not equate in severity or intensity with that involved in cases in which the Board granted such extraordinary relief. Additionally, I am not persuaded that it would effectuate the purposes of the Act by in effect placing the Board's imprimatur on another long, drawn-out organizational campaign. The unit

[32] See generally *Isis Plumbing Co.*, 138 NLRB 716, 717–721 (1962).

is defined. The Union correctly asserts (Br. 12) that the present case involves a relatively large unit. However, the Board has conducted elections in far larger units. Compare, e.g., *Newport News Shipbuilding*, 239 NLRB 82 (1978).

The Union also requests reimbursement for its organizational expenses (Br. 14–18). Here again, the present case fails to meet the conditions that are required for such an extraordinary remedy. In determining the propriety of reimbursement, the Board will consider (1) whether the employer's defenses to the complaint were "patently frivolous," and (2) whether there is a "demonstrable 'nexus' between extraordinary expenses for such purposes and the unlawful conduct." *Conair Corp.*, 261 NLRB 1189, 1287–1288 (1982), enfd. in pertinent part 721 F.2d 1355 (D.C. Cir. 1983); *J. P. Stevens & Co.*, 244 NLRB 407, 457, 458 (1979). The present case involves difficult questions of fact, law, and policy, and the Company's defenses cannot accurately be characterized as frivolous. The Union has also failed to prove a substantial nexus between extraordinary organizational expenses and the Company's unlawful conduct, to the extent that it should be reimbursed for its expenses. Indeed, the Union's arguments in its brief are based in large part on assertions of fact that are not evidenced in the present record, and therefore must be disregarded. Moreover, the Union's position is characterized by contradictions that cast serious doubt on whether such a nexus can be proven. Thus, the Union argues (Br. 2) that as a result of the Company's unfair labor practices, which began as early as June or July 1980 "[T]he signing of authorization cards was reduced to a trickle"; but then asserts (Br. 4) that when the Regional Director directed an election in a "virtually 'wall-to-wall unit,'" the Union was able to produce signed authorization cards from 30 percent of the total number of eligible employees. In sum, the Union is conceding that renewed organizational activity was dictated by the Regional Director's ruling, rather than by the Company's unlawful conduct. The Union also places great emphasis on employer conduct that was directed at inhibiting organizational activity by prounion employees. However, with respect to the issue of access to the IDC premises, the Union, through the testimony of its organizers Glather and Gilmartin, also emphasized the need for personal contact between the employees and the organizers. In sum, even if the members of the employee committee were not subjected to employer interference, the Union would nevertheless find it necessary to make extensive use of its organizing staff. Glather also testified, in sum, that certain employer conduct affected the Union's efforts and consequent expenses. However, his assertion was based to a substantial extent on matters that were not alleged or not proven as unfair labor practices in this proceeding. Thus, Glather testified that the conduct included the "discharge" of Carr and Race, and the Company's assertions regarding the Union's history and policy on fines and dues. Glather also testified that at IDC, the Union's committee dissolved because (1) an employee's T-shirt was torn off her back, (2) two employees were discharged for wearing union T-shirts, and (3) Joan Hockenberry was ostracized and moved around. Except for Hockenberry's temporary transfer in October 1980, none of these assertions are based on any alleged unfair labor practices in this proceeding. An organizational campaign among a large complement of employees may require substantial expense and utilization of professional organizers, but the Union must be willing to undertake that effort if it is seriously interested in organizing the employees. An employer cannot be expected to subsidize the Union's campaign. Therefore I am recommending that the Union's request for reimbursement be denied.

However, on consideration of the facts in this case, I find that the unfair labor practices proven here are sufficiently broad in scope and intensive in nature as to demonstrate that the Company has a general disregard or hostility to the Act. These unfair labor practices, extended over a long period of time, were committed, approved, or condoned by high management officials and involved not only discrimination and harassment of employees who sought to exercise their Section 7 rights, but also discrimination against employees who sought redress through Board proceedings. In particular, the Company's discriminatory treatment of prounion employees, even after the election, tends to indicate a vindictive course of conduct. Therefore, I shall recommend that the Company be ordered to cease and desist from infringing in any manner on the rights guaranteed in Section 7 of the Act. See *Delta Faucet Co.*, 251 NLRB 394, 407 (1980).

[Recommended Order omitted from publication.]

Florence J. Hicks d/b/a Ebon Research Systems *and* American Federation of Government Employees, Local 3430, AFL–CIO. Cases 6–CA–15463, 6–CA–15766, and 6–RC–9248

July 29, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On December 21, 1983, Administrative Law Judge Donald R. Holley issued the attached original decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

On July 24, 1986, the Board issued an order remanding this proceeding to the judge for further consideration consistent with *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986). On March 23, 1987, after a reopening of the record, the judge issued the attached supplemental decision asserting jurisdiction over the Respondent. The Respondent filed exceptions and a supporting brief. The General Counsel filed a reply brief and motion to strike, in whole or in part, the Respondent's exceptions and supporting brief, and the Charging Party filed cross-exceptions and a supporting brief and an answering brief to the Respondent's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] in both decisions, as modified, and to adopt the recommended Order as modified.

The Respondent is a research consulting firm that obtains most of its work through subcontracts with the Small Business Administration (SBA). As set forth in the judge's decisions, during 1981 and 1982[4] the Respondent, as a minority subcontractor for the SBA, performed services for the National Institute of Occupational Safety and Health (NIOSH) at its Morgantown, West Virginia facility, pursuant to four contracts with U.S. Government agencies.[5]

In late March or early April, Cindy Moore, one of the Respondent's technicians, approached Michael Zulkoski, a NIOSH maintenance employee and the president of the Union, to ascertain whether the Union could represent the Respondent's technicians. Zulkoski replied affirmatively and gave Moore authorization cards that she distributed among technicians. On April 7, a majority of the Respondent's employees gave Zulkoski signed cards. On April 14, the Respondent's project coordinator Ed McCabe overheard a conversation concerning unionization of the Respondent's employees. He, thereafter, unlawfully interrogated employees both individually and as a group concerning, inter alia, who had solicited them.[6] Employee Long told McCabe that Moore had solicited him.

[1] The General Counsel's motion included a request that the Board strike exhibits attached to the Respondent's brief in support of its exceptions to the judge's supplemental decision. The General Counsel contends that "Exhibits" 1, 2, 7, and 8 were not presented as evidence at the reopened hearing or subjected to cross-examination, have not been shown to constitute newly discovered evidence, and should not be made a part of the record in this proceeding. We find merit in the General Counsel's contention and grant the motion to strike such material.

[2] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[3] The judge relied on *T.R.W., Inc.*, 257 NLRB 442 (1981), in finding that the Respondent promulgated and distributed an unlawfully overbroad no-solicitation rule. In *Our Way, Inc.*, 268 NLRB 394 (1983), which issued subsequent to the judge's decision, the Board overruled *T.R.W.* We rely on *Our Way* to reach the same result. We note that the Respondent's rule fails to distinguish adequately between duty time and duty hours and does not state with sufficient clarity that employees may solicit on their own time.

[4] All dates refer to 1982 unless otherwise indicated.

[5] These contracts are subject to the Service Contract Act. The fact that an employer is a contractor subject to the terms of the Service Contract Act does not mean, however, that the Board will decline to assert jurisdiction over that employer. See *Dynaelectron Corp.*, 286 NLRB 302 (1987).

In its exceptions to the judge's supplemental decision, the Respondent also disputes the judge's finding in his supplemental decision that none of these contracts contain provisions controlling the maximum wages and fringe benefits it can award to its employees, specifically citing references in one of the contracts to maximun total compensation for each hour a librarian and library aide worked. We reject this argument because there is no evidence that the exempt entity can disallow the payment of higher wages than the hourly maximum provided for in the contract. See *Old Dominion Security*, 289 NLRB 81, 82 (1988). To the contrary, a Government contract procurement specialist testified that under any one of the contracts the Respondent could set wages higher than contract compensation rates, which might be paid, for example, out of corporate profits. Further, as salaries, expenses, overhead, and profit compose the compensation rates under the library contract, with no provisions as to their allocation, it is apparent that the Respondent has some measure of control in determining benefit amounts even within the specified hourly rates. See *Community Interactions—Bucks County*, 286 NLRB 1029, 1030 (1988). Accordingly, we conclude, in agreement with the judge, that the Respondent's discretion in determining its employees' wages and benefits under any one of the four contracts, including the library contract, combined with its broad independent authority in labor matters other than employee remuneration, demonstrates that it retains sufficient control over its employees' terms and conditions of employment to engage in meaningful collective bargaining.

[6] In agreement with the judge, we conclude that McCabe unlawfully polled employees concerning union membership and activities on April 14. We note, in addition, that McCabe's individual questioning of employees on that same date constituted unlawful interrogations under the standards enunciated in *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), which issued subsequent to the judge's decision.

On April 9, Moore experienced discomfort while working in the pathology lab under a ventilation hood designed to remove gaseous fumes from the work area. NIOSH employees working in the area noticed an excessive buildup of formaldehyde fumes. NIOSH employee Tucker advised Moore to leave the room if the fumes persisted. Moore testified that Tucker suggested she "might call maintenance." Shortly thereafter, Moore telephoned the NIOSH maintenance office to report the defective hood. Moore requested that Mike Zulkoski be dispatched because he was familiar with that hood's problems.[7] Zulkoski was absent from work on April 9.

Approximately 3 hours after Moore reported the defective hood, NIOSH facility engineer Louis Smith dispatched NIOSH maintenance employee Jack Riley to examine the hood's fan system, which was located on the roof of the lab. After ascertaining that the fan was by then working properly, Riley proceeded towards the pathology lab where he asked Moore what her problem was. Moore responded that she had no problem and had asked for Mike.[8] Riley testified that he reported to Smith that the fan was running properly and Moore wanted to see Mike. Smith testified that Riley reported the fan was fine and that Moore said that she only wanted to see Zulkoski. Although Moore testified that she told Riley there had been a problem that cleared up, Riley did not mention this in his report to Smith. Smith testified that he deduced from Riley's report that Moore must have made a false report.

On April 14, Smith informed Supervisor Charlotte Dalton, the administrative officer of the Morgantown NIOSH facility, that his office had received a false report of a defective hood. Also about April 14, Dalton informed McCabe about the incident and expressed her concern that Ebon do something about it, but she did not suggest that Moore be discharged. On either April 14 or 15, McCabe discussed the hood incident with Hicks and investigated the report by consulting NIOSH employees Smith and Riley.

On April 16, Hicks telephoned Moore at work to discuss the hood incident. Technician Bryant was with Moore in the lab during this conversation. Moore testified that she tried to explain to Hicks that she had not filed a false report and felt that Hicks misunderstood her statements. Hicks rejected Moore's explanation and stated she would note the incident in Moore's personnel file as unprofessional conduct and additional disciplinary action would be taken.

Hicks again telephoned Moore shortly before midnight on April 16, and informed Moore of her termination. Hicks confirmed the discharge by mailgram and letter of April 16. The letter stated in pertinent part that Moore had reported a malfunctioning hood, that Riley had thoroughly examined the roof and exhaust system and told Moore no defect was found, that Moore had telephonically informed Hicks she was aware the hood was functioning normally, and that other individuals had told Hicks that Moore had told Riley she knew there was nothing wrong with the hood. The letter concluded that on the basis of Moore's report to Hicks and other facts uncovered after "careful investigation," Hicks had determined that the best interest of all parties required Moore's immediate termination.

On April 23, Hicks met with the Respondent's employees to discuss Moore's termination and the union situation. Employees asked why Hicks had discharged Moore. Hicks replied that Moore had been fired for making a false safety report and indicated that Moore admitted during their initial telephone conversation that she had made a false report. Hicks told employees that Moore purportedly said, "Yes, I knew the hood was working when I made the phone call." At that point, Bryant informed Hicks that he was present with Moore during this telephone conversation and that Moore never admitted making a false report.

The judge credited the testimony of NIOSH employees Riley, Lewis, and Dalton and concluded that they held an honest but mistaken belief that Moore had actually made a false report on April 9. Without also specifically crediting Hicks, the judge reasoned that she also might have formed an honest but mistaken belief that Moore had made a false report if she had simply adopted the opinions of her subordinates. He then concluded that notwithstanding the Respondent's honest but mistaken belief that Moore had engaged in misconduct, the Respondent had violated Section 8(a)(1) by discharging her.[9] The Respondent excepts to the judge's finding that the discharge violated Section 8(a)(1). The General Counsel excepts to the judge's failure to resolve the allegation that the discharge also violated Section 8(a)(3). For the following reasons, we find that Moore's alleged false report was

[7] NIOSH facility engineer Louis Smith described the hood as a "classic nonfunctioner."

[8] Moore testified she was surprised that Riley was dispatched instead of Zulkoski, who usually checked the hood.

[9] The judge found it unnecessary to resolve the allegation that the discharge also violated Sec. 8(a)(3).

utilized by Hicks as a pretext and that Moore's discharge violated Section 8(a)(3) of the Act.[10]

Initially, we find that the General Counsel has met the burden under *Wright Line*[11] of a prima facie showing that union activity was a motivating factor for the Respondent's discharge of Moore. In this regard, we affirm the judge's finding that the Respondent's supervisors communicated their knowledge of Moore's solicitation activities to Hicks, which occurred on the same day that Hicks chose to act on that knowledge in other ways, such as by letters to employees containing the no-solicitation rule we have found above to be unlawful. Additionally, we emphasize the timing of Moore's discharge almost immediately after the Respondent gained knowledge of her union activity. Finally, we find that the Respondent's unlawful conduct, including antiunion statements accompanied by threat of discharge or job loss, provides the requisite proof of union animus. We conclude that the General Counsel established a prima facie case of Moore's unlawfully motivated discharge.

The Respondent has not shown that it would have discharged Moore even in the absence of her union activity. The preponderance of the evidence belies any honest or mistaken belief by Hicks that Moore admitted filing a false report. Contrary to Hicks' contentions, employee Bryant was present during the pivotal telephone conversation and credibly corroborated Moore's testimony that she never admitted making a false report. Thus, even assuming, as did the judge, that, on the strength of others' opinions and before speaking to Moore, Hicks might have formed an honest but mistaken belief that Moore had made a false report, it is clear that Moore's telephone interview lent no further support to any such belief but that Hicks proceeded to fabricate a scenario by which it did.[12] The fact that the Respondent's action was falsely predicated on Moore's alleged admission of misconduct indicates that the asserted rationale given for Moore's discharge was pretextual. In these circumstances, we find that Moore's discharge violated Section 8(a)(3) of the Act.

[10] In light of our disposition of the 8(a)(3) allegation, we find it unnecessary to decide whether the Respondent's discharge of Moore constituted an independent violation of Sec. 8(a)(1).

[11] 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[12] Furthermore, the credited testimony of employee Janet Lucas is that, at an employee meeting with Hicks following Moore's termination, Bryant confronted Hicks with his knowledge that Moore had made no admission of guilt during her telephone interview but that the conversation then turned to employees' union activity, with Hicks making several threatening statements and expressions of futility in employees seeking union representation, as well as interrogating her audience about the Union. Hicks subsequently declined to reconsider Moore's termination. Hicks' determination to adhere to her position on Moore's admitted guilt notwithstanding an employee's contradiction of that assertion based on first-hand knowledge, as well as her use of the occasion of an employee appeal concerning the discharge to air antiunion views, is consistent with our finding of an unlawful motive.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge in his original decision as modified below and orders that the Respondent, Florence J. Hicks d/b/a Ebon Research Systems, Morgantown, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(e).

"(e) Discharging employees because of their union activity."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Remove from its files any reference to the unlawful discharge of Cindy Moore and notify her in writing that this has been done and that the discharge will not be used against her in any way."

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that Case 6–RC–9248 is severed and remanded to the Regional Director for Region 6 for further proceedings consistent with this Decision and Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees concerning their union activities or the union activities of other employees.

WE WILL NOT threaten employees by informing them they may lose their jobs if they elect to have union representation.

WE WILL NOT discourage membership in American Federation of Government Employees, Local 3430, AFL–CIO, or in any other labor organization, by informing employees they are scapegoats and continued support of the above-named Union will cause them to be replaced by Government employees and/or prevent their Employer from obtaining long-term contracts.

WE WILL NOT promulgate and enforce an unlawfully broad no-solicitation rule that prohibits employees from engaging in union-related solicitation

during periods when they are properly not engaged in performing their work tasks (e.g., meal and break periods).

WE WILL NOT discharge employees because of their union activity.

WE WILL NOT inform employees that discharge action will not be reconsidered because of Board requirements or because a petition for an election is pending before the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole Cindy Moore for any loss of pay she suffered as a result of the discrimination practiced against her, with interest.

WE WILL notify Cindy Moore that we have removed from our files any reference to Moore's discharge and that the discharge will not be used against her in any way.

FLORENCE J. HICKS D/B/A EBON RESEARCH SYSTEMS

Domenic A. Bellisario, Esq., for the General Counsel.
Claude Roxborough, Esq., of Washington, D.C., for the Respondent.
W. Harry Muller, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On original and amended charges filed by American Federation of Government Employees, Local 3430, AFL–CIO (Charging Party or the Union) in Cases 6–CA–15463 and 6–CA–15766,[1] the Regional Director for Region 6 of the National Labor Relations Board (the Board) issued order consolidating cases, consolidated complaint and notice of hearing on November 19, 1982, which alleged, inter alia, that Florence J. Hicks d/b/a Ebon Research Systems (the Respondent or Ebon) had engaged in conduct that violates Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed a timely answer denying it had engaged in the unlawful conduct alleged in the complaint. Thereafter, the Union filed the petition in Case 6–RC–9248 and an election was conducted among certain of Respondent's employees. The Union lost and filed objections to the election. By Order dated March 7, 1983, Case 6–RC–9248 was consolidated with the above-described unfair labor practice cases for hearing as the objections are coextensive with the allegations set forth in the complaint.

The trial in this matter held in Morgantown, West Virginia, during the period April 5–8, 1983. All parties appeared and were afforded full opportunity to participate. On the entire record, including the posthearing briefs filed by the parties, and from my observation of the demeanor of the witnesses when they gave testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a sole proprietorship, with its principal office located in Rockville, Maryland, with a place of business located in Morgantown, West Virginia, is engaged in the business of providing research assistance and other services to, inter alia, agencies of the United States. Its gross revenue for the performance of such services throughout the United States exceeds $1 million annually, and it admits that during the 12-month period ending April 30, 1982, it provided services valued in excess of $50,000 to the United States Government within the State of West Virginia. Its Morgantown, West Virginia operation is the only operation immediately involved in the instant case.

During the hearing in Case 6–RC–9248, and during the instant trial, Respondent contended the Board should not assert jurisdiction over its operation because the Federal agencies utilizing its services exercise substantial control over its collective-bargaining matters and such agencies and respondent are joint employers of the employees hired by Respondent to enable it to furnish services to Federal agencies. After exhaustive analysis of the evidence offered by Respondent in support of its contention, the Regional Director concluded the contention was without merit and found that Respondent is an employer within the meaning of Section 2(2) of the Act and jurisdiction over its operations should be asserted. By telegraphic Order dated November 4, 1982, the Board denied Respondent's Request for Review of the Regional Director's Decision and Direction of Election. In the circumstances described, I find that doctrine of res judicata precludes Respondent from relegating the jurisdictional issue described in the instant case.[2] I find, as alleged, that Respondent is an employer whose operations affect commerce within the meaning of Section 2(2), (6), and (7) of the Act and that assertion of jurisdiction over its operations is warranted.

II. STATUS OF LABOR ORGANIZATION

Respondent admits and I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a research consulting firm that provides research assistance to agencies of the United States Government and to States, colleges, and other entities. It obtains the vast majority of its work through subcontracts

[1] The original charge was filed in case 6–CA–15463 on May 6, 1982. It was amended on May 26, 1982. The original charge in Case 6–CA–15766 was filed on September 7, 1982. It was amended on November 18, 1982.

[2] See *Wayne County Neighborhood Legal Services*, 249 NLRB 1260, 1262–1263 (1980), and cases cited therein.

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with the Small Business Administration (SBA) which recognizes it as a majority contractor. Mechanically, SBA receives requests for services from various agencies or business concerns and it then notifies minority contractors who are qualified to perform the work of the need for services. On indicating their interest in subcontracting the particular work involved, the minority contractors are furnished with requests for proposals that outline the tasks to be performed and they submit contract proposals directly to the agency or entity that needs the services. The requesting agency or entity then selects a contractor, they complete negotiations, and SBA thereafter awards the contract.

At all times material in this case, Dr. Florence Hicks has been the executive director and owner of Respondent. She testified that she hires and fires all employees utilized by Respondent at all locations. She is assisted by Dr. Lee Richmond, the director of Respondent's health division. Richmond testified that he, inter alia, prepares all technical contract proposals for Respondent, provides supervision of all employees employed at locations within his jurisdiction, and participates in the interview of employees at the various locations where Respondent has obtained contracts.[3]

Since 1981, Respondent, as a subcontractor for SBA, has performed services for the National Institute of Occupational Safety and Health (NIOSH) at its Appalachian Laboratory for Occupational Safety and Health facility located in Morgantown, West Virginia (the facility or ALOSH). NIOSH conducts certain respiratory studies at the facility using small animals such as rats and rabbits. Pursuant to one of its contracts, Respondent provided research animal support services at the facility that involved housing and caring for the animals used in experiments, and providing employees who assisted NIOSH personnel in the actual conduct of experiments.

During 1981 and the first 6 months of 1982, Respondent accomplished the above-described animal-related services by utilizing five animal care technicians and a project coordinator. The technicians each spent 1 day each week in the animal quarters where they cleaned cages, fed and watered the animals, disposed of animals, and performed other functions related to animal care. During the remaining 4 days of the workweek, they assisted NIOSH scientific personnel who were conducting experiments by performing preparatory lab work that required limited skill, i.e., dissecting animals and placing designated portions of tissue in cassettes that were subsequently utilized by NIOSH personnel.

The project coordinator hired by Respondent to provide immediate supervision of the animal care technicians was Ed McCabe. Although McCabe is the only onsite Respondent employee who exerted authority over the technicians, Respondent contends in this proceeding that it is not responsible for McCabe's acts because he is not a supervisor in the statutory sense.[4] I find the contention to be without merit for the reasons set forth, infra.

B. *The Union Campaign*

In late March or early April, Cindy Moore, one of the technicians employed by Respondent at the Morgantown facility, spoke with Michael Zulkoski, a NIOSH maintenance employee at the facility who is also the president of the Union, to ascertain whether the Union could represent Respondent's technicians. After ascertaining his Union could represent nongovernmental employees employed by a contractor at a Government facility, Zulkoski gave Moore application for membership cards, which she thereafter distributed among all the technicians except Maureen Sullivan, who was described to be a close personal friend of McCabe. Subsequently, on April 7, employees Moore, Janet Lucas, Karen Abercrombie, and Mark Bryant met with Zulkoski at a Pizza Hut during their lunch hour and all gave Zulkoski executed membership application cards.[5] Thereafter, on April 14, the above-named employees decided to tell technician Maureen Sullivan that they had joined the Union to obtain representation. A short time after Sullivan was made aware of the employees' interest in the Union, McCabe, who had overheard a conversation concerning Ebon employees and the Union, approached Sullivan indicating he had heard something he could not believe. McCabe then asked Sullivan if it was true that the technicians were joining the Union. Sullivan replied she had just learned from the other technicians that they were trying to join the Union. When McCabe interrogated Sullivan further by asking her why they were joining and how it came about, the employee indicated she knew little because she had just learned of it herself. After talking to Sullivan, McCabe approached employee Robert Long, told him he heard about the organizing effort, and asked if it was true. Long said yes. McCabe went on to ask which union was involved, who solicited him, and whether there were any local problems that prompted the employee to seek union representation. Long told McCabe that Moore had solicited him and that the employees joined for better benefits. McCabe continued to interrogate other employees on an individual basis along the same lines. Employee Mark Bryant responded to his questions by informing him the employees were instructed not to speak to him on an individual basis. McCabe then approached employee Karen Abercrombie (Brooke) who refused to answer his questions unless in the presence of other employees.

After approaching all the technicians except Moore and Lucas, McCabe telephoned Richmond at his Rockville, Maryland office to inform him that Respondent's employees were seeking union representation.[6] According to McCabe, Richmond told him he was unable to contract Hicks at the time; that McCabe should learn

[3] It is admitted, and I find, that Hicks and Richmond are, and have been at all times material, supervisors and agents of Respondent within the meaning of Sec. 2(11) and (13) of the Act.

[4] Respondent contended, during processing of the representation case, that McCabe was a supervisor. He did not vote in the election held in that case.

[5] Employee Robert Long executed a card the same day, but the record fails to reveal whether he attended the Pizza Hut meeting.

[6] During the call, McCabe also informed Richmond that Moore had made what he considered to be a false report of a hood malfunction in a laboratory on April 9. That situation is discussed, infra.

more from the employees about their union activities and keep him informed.

McCabe's conversation with Richmond prompted him to immediately schedule a meeting with the animal technicians. He admitted during his testimony that he asked the same questions he had previously asked when interrogating the employees individually. Employees Bryant, Moore, and Long described the meeting during their testimony. Long and Moore recalled that McCabe opened the meeting by stating that Dr. Hicks had called him and she was surprised they had joined the Union[7] The employees testified without contradiction that McCabe then asked: if they had joined the Union; who all was involved; whether it was because of him; and whether they could not run their complaints through him or through proper channels. The employees replied that all except Sullivan were involved; that they had joined for better benefits and pay rather than anything personal; and that they could not go through proper channels with complaints because that was no longer effective. When his meeting with the employees ended, McCabe reported what he had learned to Richmond. The latter instructed McCabe to keep him informed.

While Hicks testified she did not learn of the employees' interest in the Union or Moore's role in the organization campaign until April 22, the record belied such claim.[8] Thus, on April 16, Hicks sent a letter placed in the record as General Counsel's Exhibit 8 to Thomas Shamblee, a NIOSH official stationed in Atlanta, Georgia. In this letter, Hicks stated:[9]

> Dear Mr. Shamblee:
>
> I am writing to inform you of my concern for the potential disruption of the activities being performed by Ebon Research Systems staff at the Appalachian Laboratory of Occupational Safety and Health in Morgantown, West Virginia, resulting from actions of American Federation of Government Employees Local 3430 members during duty hours. As you are aware, Ebon was contracted to provide laboratory assistance and animal care in support of the activities of the National Institute of Occupational Safety and Health. However, recent events threaten the continuance of the high quality performance of my employees.
>
> Specifically, I am concerned about Local 3430 members approaching my employees during work hours for the express purpose of discussing Union affairs and soliciting memberships. This type of activity is not only adverse to acceptable Union conduct, but is an illegal use of compensated Government time. I have advised my employees that under no circumstances are they to divert any duty hours to any activities other than their specific assignments. I have also cautioned them that it is their responsibility to report any attempts of Federal Government employees to engage them in any activities during duty hours not in keeping with their job responsibilities.
>
> Because of the adverse affect Local 3430 might have on the performance of the Ebon contract, I contacted the national office of the Federal Labor Relations Authority at 1325 Massachusetts Ave, N.W., Washington, D.C. Attorney Donna Ditullio at the Authority informed me that it was her understanding that all AFGE Unions are prohibited from soliciting members other than full-time Federal employees as a result of the Constitution and By-Laws promulgated by the national body. In response to the recommendation of Attorney Ditullio, I contacted Administration staff and staff of the Organization Office of the Federal Labor Relations Authority. After much discussion, I was informed that non-Federal employees hired by a private firm to perform work not previously performed by Federal employees with the same job description and titles are not eligible for membership in AFGE unions. Consequently, I am requesting that Local 3430 members refrain from soliciting my employees at any time in keeping with their charter.
>
> I would appreciate very much your investigation of the situation. Most importantly, I would hope that the Union members are informed to cease soliciting activities and disrupting the work of my employees. Any steps taken to resolve these issues are welcomed. I am thanking you in advance for your efforts.

On April 16, Hicks also sent a letter to each of her employees. The letters were identical. A copy was placed in the record as General Counsel's Exhibit 7. It states:

> I am writing to apprise you of new developments, the status of the Ebon contract, and concerns that have recently come to my attention.
>
> Firstly, I am pleased to announce the award of a new contract from the U.S. Department of Agriculture that will add one animal care technician and one supervisory technician to the Ebon staff. This contract is for one year and will provide resources to conduct additional experiments at the Appalachian Laboratory for Occupational Safety and Health. Because my first priority is continued employment of our existing staff, the two positions will be filled

[7] Hicks testified she did not become aware her employees were engaged in union activity until McCabe informed her of it during a June 22 telephone conversation. McCabe and Richmond corroborated her testimony. The record reveals, however, that Hicks authored two letters, discussed infra, on April 16 which clearly reveal she was then fully aware her employees were engaged in union activity. Long, in particular, was an impressive witness whose testimony had the "ring of truth." Finally, I note that Respondent states in its brief (p. 7) that Hicks telephoned the (Rockville) office and also talked to NIOSH officials Dalton and Lewis during the afternoon on April 14. In the circumstances, I credit the employees' assertion that McCabe informed them at the meeting that he had just talked to Hicks.

[8] On April 16, Zulkoski told McCabe the Union would claim Ebon was retaliating against Moore for her union activities if it disciplined her over the Hood matter. McCabe indicated in his pretrial statement that he informed Hicks of Zulkoski's remarks at 11:45 p.m. on April 16. Hicks mistakenly placed her conversation with McCabe as having occurred on April 22, almost a week later.

[9] Hicks testified she contacted the Board's New York office, the Union's International office, and the Federal Labor Relations Authority before writing letters on April 16 to ascertain whether the Union could represent nongovernmental employees. Such conversations were probably conducted on April 15.

with two-month temporary employees to enable existing employees to be considered for the positions when the first year of the present contract is complete.

With respect to the present contract, actions have been initiated for a contract extension. Continuation of the present contract beyond the month of June, 1982, is contingent upon: (1) the needs of ALOSH, (2) availability of Federal funds, and (3) the performance records and accomplishments of the present staff. During recent contract negotiations, I have asked for additional monies for salary raises and staff development activities. I am hopeful that funds will be available for both.

Relative to your specific position, your continued employment is also dependent upon the three factors previously mentioned. All employees successfully completed the probationary period; however, in order to be considered for any position following the completion of the first year of the contract, you must receive an acceptable performance evaluation from your immediate supervisor. Every employee will be evaluated on or before May 30, 1982. Your written evaluation will be discussed privately with you and you will have the opportunity to certify by your signature that you were given the results.

Lastly, it has come to my attention that some Ebon employees may be using duty time to engage in activities not related to their work assignment. Let me caution that under no circumstances are you to direct any duty hours to any activities other than your specific job responsibilities. Moreover, it is your responsibility to report to your immediate supervisor any attempts of any one to engage you in non-job related activities during duty time. As an Ebon employee, you are expected to exhibit a high level of job performance and professional conduct at all times. The success of the contract is directly related to your performance as an individual.

Let me take this opportunity to thank you for your contribution in providing a high standard of overall contract performance. I fully anticipate that the results of your work will unltimately provide a healthier environment for our nation's workers.

I will keep you informed through your immediate supervisor of the developments regarding the present contract extension.

C. *The Hood Incident*

During the 4 days of each week that she worked in a lab, Moore normally assisted NIOSH histopathology technician Marilyn Gamble. On April 9, Moore reported for work at 8 a.m. in the pathology lab located in room 281-A of the facility. She was to work alone that day as Gamble and NIOSH research biologist James Tucker were leaving for Florida that morning. While Moore performed her work, which involved dissecting the lungs of rats and placing strips of lung tissue in a cassette filled with formalin,[10] Gamble filled jars with formaldehyde in preparation for her trip. At approximately 9 a.m., Moore, who was working under a hood that was supposed to remove gaseous fumes from the work area, experienced discomfort as the formaldehyde fumes were burning her nose and eyes. Tucker and Gamble both testified they noticed the buildup of formaldehyde fumes as they removed equipment from the room. After checking to ascertain if any vessel was leaking formaldehyde, Tucker advised Moore to leave the room if the formaldehyde persisted. Shortly thereafter, Moore left room 281-A and telephoned the NIOSH maintenance section to report that the hood in room 281-A was malfunctioning. Moore suggested that Mike Zulkoski, the maintenance employee who had responded to such calls in the past, be dispatched to check the hood.[11]

Some 2 to 3 hours after Moore had reported the hood in room 281-A was malfunctioning, Louis Smith, the facility engineer, instructed NIOSH maintenance employee Jack Riley to check out the fan system to the hood of room 281-A and report the results to him.[12] Riley proceeded to check the reported malfunction by going to the roof to check the fan that drew fumes from the hood. After ascertaining that the fan was working properly, Riley proceeded towards the lab in room 281-A and encountered Moore, who had just finished lunch but had not resumed work, in the hall outside room 281-A. Riley asked Moore what her problem was. Moore replied she did not have any problem; that she wanted to see Mike. Riley responded: "You little turkey, I was out in the rain and got wet."[13]

After leaving Moore, Riley reported to Lewis that the fan to the hood in room 281-A was functioning normally; that the heavier of the two girls in room 281-A had told him she just wanted to talk to Mike. Thereafter, on Wednesday, April 14, Lewis informed Charlotte Dalton, the administrative officer of the Morgantown NIOSH facility, that his office had received a false report of a hood malfunction. On April 14, Lewis supplied Dalton with the information given him by Riley. Dalton testified she considered the situation to be serious and she contacted NIOSH's Atlanta office, which advised her the employee making the false report should be admonished.[14] On learning that the employee who allegedly

[10] Formalin is a preservative consisting of formaldehyde and a buffer.

[11] Gamble testified she had called NIOSH maintenance on two prior occasions to report the buildup of formaldehyde fumes in room 281-A. Janet Lucas, a Respondent animal care technologist who regularly worked in the same lab with NIOSH biologist Tucker, testified she had to take 2 hours of sick leave in February 1982 because of irritation and swelling caused by formalin fumes she had breathed while working in room 281-A the previous day. Finally, Moore testified she had called to report that the hood in question was malfunctioning on two prior occasions.

[12] Employee Zulkoski was absent from work on April 9. While Smith testified Moore's call was received during the afternoon and that he dispatched Riley to check it around 2:30 p.m., it is clear, and I find, Moore called maintenance around 9 a.m. and Riley responded during the lunch hour.

[13] Moore testified she informed Riley a problem had been experienced with the hood earlier but it had cleared up. While Moore may have made such a statement when he later described the incident to others, including his Supervisor Lewis and McCabe.

[14] Dalton indicated she was under the impression that NIOSH employee had made a false report at the time.

made the false report worked for Respondent rather than NIOSH, Dalton reported the situation to one Purvis Major, a NIOSH employee who had been designated as the project officer who was to oversee Respondent's performance of its contract to furnish NIOSH the animal-related services described above. Dalton summoned McCabe, Moore's immediate supervisor, to her office. She then informed McCabe that on April 9 Moore had called maintenance to report a malfunctioning hood and had requested that Mike Zulkoski be sent up; that Supervisor Smith had assigned Jack Riley to check out the hood because Zulkoski was off that day; that Riley had checked out the exhaust fan and found it was okay; that when Riley arrived outside the lab, Moore told him there was nothing wrong with the hood—that she just wanted to talk or speak with Zulkoski; that she (Dalton) was concerned about fraudulent reports and although she could not get involved with their employees, she felt something should be done by Ebon regarding this incident.[15]

After talking to Dalton, McCabe testified he investigated the situation by talking to Smith and Riley. After Smith told him the hood was working properly on the occasion in question, he spoke with Riley. According to McCabe, Riley told him he had found the fan on the roof was working okay and, when he started for the lab, he met Moore and on advising her that everything checked out, she responded something to the effect that the hood was working and she had expected or wanted Mike.

On either April 14 or 15 McCabe discussed the hood incident with Hicks, asking whether he should obtain Moore's version of the incident. Hicks informed him she would speak with Moore.

On April 16, Hicks telephoned Moore at work and accused her of having filed a false report on April 9 that the exhaust hood at which she was working had malfunctioned. Bryant was present with Moore during this conversation. Moore explained that she had not made a false report. Rather, she reported to the NIOSH maintenance department that the hood was not functioning properly when she noticed a buildup of formaldehyde fumes, but that by the time the maintenance appeared hours later, the fumes had dissipated and everything seemed all right. Hicks rejected Moore's explanation and told her she would be noting the incident in Moore's record because she considered the conduct to be unprofessional. That night about midnight, Hicks telephoned Moore at home and informed Moore that she was fired. Hick's oral communication to Moore regarding her termination was confirmed by a mailgram sent the night of April 16 and, subsequently, by letter dated April 16. The letter, which was placed in the record as General Counsel's Exhibit 9, is substantially identical to the mailgram. It states:

> Dear Ms. Moore:
>
> It came to my attention on april 15, 1982, that you reported a malfunctioning hood in the Pathology Laboratory and requested that a Federal employee correct the situation. Upon thorough examination of the roof and exhaust system by Jack Riley, he told you there was no malfunction found. I was informed directly by you that you were aware of the fact the hood was functioning normally. Also, others told me that you reported to Jack Riley that you knew there was nothing wrong with the hood.
>
> I consider the potential of actual formaldehyde intoxication threat a very serious hazard to both animals and humans and should not be falsely reported. Additionally, to cause a Federal employee to leave his work site to explore a malfunctioning hood where it does not exist shows the lack of professional integrity and is disruptive to the operation of the Lab. Because of this incident, I seriously question your professional competence to perform as an Ebon employee on this Federal contract.
>
> On the basis of your report to me and other facts I uncovered upon careful investigation, I find it in the best interest of the Federal Government and Ebon Research Systems, employees at ALOSH, and the animals, that I terminate your employment effective April 30, 1982. Furthermore, for the protection of the animals and the safety of the employees, you are not to work Monday, April 19, 1982, through Friday, April 30, 1982. Because of my concern for your level of professional judgment and the nature of your ethical conduct, I feel it is necessary to terminate you without delay in order to maintain the high standards of performance of Ebon Research Systems. You will be paid your full salary during your two-week termination, notification period.
>
> Sincerely,
>
> /s/_____
>
> Florence J. Hicks, PH.D.
> Executive Director

D. *The April 23 Meeting*

When Respondent's employees learned that Moore had been fired, they requested that Hicks meet with them to discuss Moore's termination and the union situation. A meeting was subsequently scheduled for April 23.

Hicks, and employees Janet Lucas, Robert Long, and Mark Bryant each described what occurred at the meeting during their testimony. Lucas' description was the most complete. Thus, she testified the employees asked Hicks at the beginning of the meeting why she had fired Cindy Moore. Hicks replied Moore had been fired for making a false safety report. Hicks then indicated Moore had admitted during a telephone conversation with her that she had made a false report. At the point, Bryant interjected that he had been with Moore when Hicks telephoned and that Hicks was incorrect in stating Moore admitted making a false report because Moore had not admitted any wrongdoing. Lucas recalled that the conversation then turned to the Union and that either Hicks or McCabe asked the employees how involved were they with the Union; had they actually joined yet?

[15] Dalton testified she did not suggest that Moore be terminated.

When the employees remained passive, Hicks showed employees her SBA contract, indicating that it prohibited the payment of moneys that were to be used for lobbying to obtain passage of legislation. She then displayed the Union's constitution and bylaws, indicating that one of the purposes of the Union was to engage in lobbying. Hicks then told employees she would be violating her contract if she paid them for their services and some of the payment was used to pay for the lobby activities conducted by the Union. Hicks then observed that it was her opinion that the Union was making scapegoats of them because she would have to terminate them to avoid violating her contract and the NIOSH employees would end up performing the work then performed by Respondent employees.[18] After Hicks informed the technicians she could not pay them if they joined the Union, employee Bryant asked how they should go about it if they chose not to go ahead. Hicks informed the employees they could prepare a letter in which each would indicate their preference, seal the letter, and that she would deliver it to the NLRB unopened. At the conclusion of the meeting, employee Long requested that McCabe be asked to leave the meeting. After he left, Long informed Hicks that McCabe had physically abused the female technologists. Lucas added that on one occasion McCabe became angry when working in the surgery room with her and Long, and he had thrown a pair of scissors. At some point near the conclusion of the meeting, Hicks informed the employees what while she had been attempting to obtain a 3-year contract, she was not even sure she could get a 1-year contract now as their attempt to join the Union had shaken up administration at the ALOSH facility so bad.

E. *Respondent's Refusal to Rehire Moore*

By letter dated April 23, Moore urged Hicks to reconsider her decision to terminate her, indicating that she had simply followed appropriate procedure when she reported a real safety problem on April 9. By letter dated April 27, Hicks notified Moore, inter alia:

> I regret to inform you that your request cannot be reconsidered because of policies of the National Labor Relations Board that advise me that I cannot perform any personnel acts that may influence the employees in making a free choice relative to a union election.

Respondent's 1981–1982 contract to provide animal care and research support at the ALOSH facility expired on June 10, 1982. Consequently, on May 26, Hicks sent each of the technicians then employed a letter informing them they would be terminated effective June 10. Thereafter, by letter dated June 28, Respondent notified all of its former technicians, including Moore, that it had obtained a new contract and had openings for positions on another 1-year contract effective August 1. The former employees were invited to submit resumes to McCabe so he could schedule interviews for qualified employees.

When performing its 1981–1982 animal research support contract at the ALOSH facility, Respondent's technicians, such as Moore, were assigned to work in the laboratory 4 days a week with a specific NIOSH employee. When he appeared as a Respondent witness, Fredrick Ames, the administrative officer for the division of respiratory disease studies of NIOSH, testified that when the contract was renegotiated during mid-1982 he indicated his agency was dissatisfied with the situation in which the technicians worked with only one person because NIOSH personnel felt they were placed in a position in which they supervised contract personnel. During his testimony, Richmond testified that Respondent sought to meet the NIOSH complaint by proposing that the technicians be assigned to assist NIOSH personnel on a rotating basis during the term of the 1982–1983 animal research support contract. Richmond further indicated that assignment of technicians on a rotating basis would necessitate that they possessed a bachelor's degree in biology, animal or veterinary science, agriculture, or similar credentials in a related field to enable them to perform adequately in the various laboratories, i.e., immunology lab, biochemistry lab, pathology lab, or in the physiology lab.

When it submitted its technical proposal for the 1982–1983 research animal support contract, Respondent, in addition to upgrading the educational requirements for Ebon employees who would be working with NIOSH personnel in the laboratories, indicated it proposed to fulfill its contract obligations by hiring four animal care research laboratory technicians and two animal care husbandry technicians. The proposal indicated employees in the former classification would devote most of their time to assisting in animal experimentation and might also be required to assist in animal husbandry duties, particularly on holidays and weekends. The proposal further indicated that the duties of the animal husbandry technicians would be limited to animal care.

On August 2, Moore visited the ALOSH facility, submitted her resume to McCabe, and requested an interview. McCabe commented, "Well, we'll carry this farce about as far as it will go," and accepted Moore's resume and scheduled her for interview with Hicks the following day. When Moore subsequently met with Hicks, she indicated she wished to be interviewed for the research technician position. Hicks informed her she was not qualified for the position because she did not have a bachelor's degree, and asked whether she would be interested in an animal care husbandry technician's position. Moore indicated she was interested in only the research technician position and inquired whether Hicks would consider her for such a position if an insufficient number of qualified applicants applied. Hicks terminated the interview by indicating she did not feel Respondent would experience a situation where insufficient qualified applicants applied.

[18] Hicks denied stating she would have to terminate employees to avoid violating her contract. I credit the employees who uniformly testified she made the statement.

F. *Edwin McCabe's Status*

During the pendency of the representation case, Respondent took the position that Project Coordinator McCabe was a supervisor who was not eligible to vote in the election. Here, it claims it is not responsible for McCabe's act as he is not a supervisor in the statutory sense.

Review of the instant record reveals that Respondent has repeatedly informed its animal care technicians that McCabe, who admittedly is the only on-site Respondent employee who exerts authority over the technicians, is their immediate supervisor. Thus, in a letter from Hicks to Moore dated October 8, 1981, and placed in the record as General Counsel's Exhibit 19, Hicks states, inter alia:

> Mr. Edwin McCabe is responsible for ensuring that all of the needs of the animal care facility are being met, and he is in charge of scheduling your work hours. *He is your direct supervisor and is authorized to speak on our behalf* [emphasis supplied].

Similarly, in the letter sent by Hicks to the ALOSH facility employees on April 16, which is set forth supra, Hicks indicated that to be considered for rehire when performance of the second animal care contract commenced, it would be necessary for them to receive a favorable exit evaluation that would be accomplished by their immediate supervisor (McCabe).

While McCabe and Richmond claimed during their testimony that McCabe is not authorized to take any action at the Morgantown facility that requires the exercise of independent judgment until he has telephoned Richmond and obtained his approval, McCabe candidly stated in a pretrial statement placed in the record as General Counsel's Exhibit 19 that:

> I am the only Ebon supervisory person at this project 99% of the time. Employees get authorization from me for all leave request as well as other matters concerning their working conditions. As a rule, I do not check with my superiors on these matters unless it's a very unusual problem.

With further regard to the question of whether McCabe exercises independent judgment in matters affecting Ebon at the Morgantown facility, the record reveals that when McCabe was informed Moore may have falsely reported a hood malfunction, McCabe investigated the matter by consulting with NIOSH personnel before he made any mention of the matter to either Hicks or Richmond.

In sum, it is clear that McCabe is the only Respondent figure with authority over the animal care technicians at the ALOSH facility 99 percent of the time. He schedules the hours and places of work of the technicians, reviews the time records they maintain to verify the amount of time, including compensatory time they claim, and he reports their work-related transgressions to Richmond or Hicks. Add to the above the undisputed fact that he conducts weekly meetings with employees, conducts exit evaluations, which must be favorable if the employee is to be eligible for rehire, and participates in the applicant interview process by determining whether the resumes of applicants justify scheduling an interview of the applicant(s) by Hicks or Richmond, and it is clear that there is more than enough evidence in the record to show that McCabe possesses several of the indicia of statutory supervisory authority set forth in Section 2(11) of the Act.

In sum, I conclude that Richmond and McCabe intentionally tailored their testimony concerning the extent of the project coordinator's authority to meet the needs of Respondent's case. I find their testimony is not worthy of credit.

I find for the reasons stated that McCabe has at all times material been a supervisor and an agent of Respondent within the meaning of Section 2(11) and (13) of the Act.[17]

Analysis and Conclusions

I. THE ALLEGED INDEPENDENT 8(A)(1) VIOLATIONS

A. *By Edwin McCabe*

Paragraph 7 of the complaint alleges that Respondent, through McCabe, violated Section 8(a)(1) on April 14, 1982, by: interrogating employees about their union membership and activities and the membership and union activities of others; creating the impression that the union activities of employees were under surveillance; and soliciting their grievance and promising them better benefits and improved working conditions. The paragraph also alleges that on April 22, McCabe threatened to discharge employees if they remained in the Union.

Respondent contends that McCabe acted lawfully when he interrogated employees on April 14 because he announced to them that he was attempting to learn whether a rumor that they were organizing was true and he conducted the interrogation in a noncoercive manner. With respect to the grievance solicitation allegation, it contends that activity was lawful because McCabe did nothing other than continuing the policy of conducting weekly meetings and discussing problems. Finally, Respondent claims the surveillance and threat to discharge allegations are not supported by any credible evidence.

In the normal circumstances, an employer cannot question or poll employees to ascertain their union sentiments as such conduct is inherently coercive. Controlling law in polling situations is set forth in *Struksnes Construction Co.*, 165 NLRB 1062, 1063 (1967), in which the Board stated:

> Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3)

[17] Assuming, arguendo, that McCabe was actually required to obtain Richmond's approval before taking action that would affect the animal care technicians, it is clear that Richmond instructed McCabe on April 14 to investigate the union situation by discussing it with Respondent's employees. In such circumstances, Respondent is responsible for his acts.

assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

Patently, the interrogation accomplished by McCabe during his discussions with individuals and subsequently with all the technicians at the April 14 meeting fails to meet the criteria set forth in *Struksnes*. I find, as alleged, that by interrogating employees concerning their union membership, activities, and sympathies, and the union membership, activities, and sympathies of others, Respondent violated Section 8(a)(1) of the Act.

The General Counsel claims that McCabe created the impression that the union activities of the technicians were under surveillance by Respondent by telling them: (1) that he had heard a rumor they were organizing; and (2) by commenting at the April 14 meeting that he had received a call from Hicks and she was surprised to hear they were involved with the Union and wanted to know if it was true. In support of his claim, he cited *World Wide Press*, 234 NLRB 346 (1979), and *Engineered Apparel*, 243 NLRB 66 (1979). In both of the cited cases, employer representatives asked employees questions concerning union meetings that suggested that such representatives have some knowledge of what had occurred or who had attended such meetings. Here, McCabe made no comment that would cause employees to conclude their meetings or other union activities were being observed and reported to Respondent. I find that the General Counsel has offered insufficient evidence to prove the surveillance allegation and recommend that paragraph 7(b) of the complaint be dismissed.

Respondent failed to controvert employee Bryant's testimony that reveals that during the April 14 meeting McCabe, when asking why the employees had joined the Union, inquired whether the employees could not run their complaints through normal channels. The General Counsel contends that by making the comment McCabe was soliciting the employees' grievances or complaints and impliedly promising to remedy them. Noting that the record fails to reveal that any employee attending the meeting voiced any complaints and the fact that it was not shown that McCabe made any express comments to urge the employees to voice their grievances or complaints, I find that the record fails to reveal that employee complaints or grievances were seriously solicited by McCabe during the April 14 meeting. Accordingly, I recommend that paragraph 7(c) of the complaint be dismissed.[18]

The General Counsel sought to prove that McCabe threatened employees during the April 23 meeting by causing employee Long to testify that McCabe asked them during the meeting if they were aware of the consequence of joining the Union and the fact that the NIOSH employees planned to make them scapegoats. Long's testimony was not contradicted and, as found, supra, Hicks made similar comments during the April 23 meeting after observing she could not pay employees who joined the Union because it engaged in lobbying activities and her SBA contract prohibited Ebon from providing funds for the lobby activity. Viewing McCabe's comments in context, I conclude the employees attending the meeting could have reasonably concluded that McCabe, by making the scapegoat comment, was telling them they would be discharged if they joined the Union. I find the comment was threatening as alleged and that through McCabe's described actions Respondent violated Section 8(a)(1) as alleged.

B. *By Dr. Hicks*

Paragraph 8 of the complaint alleges that during the April 23 meeting Respondent violated Section 8(a)(1) as Hicks allegedly: (1) threatened employees with discharge if they joined the Union; (2) solicited employees to express their union sympathies; and (3) threatened employees that Respondent's service contracts would be terminated if employees joined the Union.

Having found, supra, that during the course of the April 23 meeting Hicks or McCabe asked the employees how involved they were with the Union and had they actually joined yet, I find that, by posing such questions to the employees, Respondent unlawfully solicited employees to express their union sympathies and thereby violated Section 8(a)(1) of the Act as alleged.

Similarly, having found, supra, that Hicks told Respondent's employees on April 23 that she could not pay them if they joined the Union and it was her opinion that the Union was making scapegoats of them because she would have to terminate them to avoid violating her contract and the NIOSH employees would end up performing the work then performed by Ebon employees, I find that Respondent threatened employees with discharge if they joined the Union in violation of Section 8(a)(1) of the Act.

While the General Counsel contends that Hicks told employees during the April 23 meeting that Respondent's service contracts would be terminated if they joined the Union, it appears, as noted, supra, that instead she told them she had been attempting to obtain a new 3-year animal care contract and she was not sure she could even get a 1-year contract now as their attempt to join the Union had shaken up administration at the ALOSH facility so bad. It is clear that Hick's comments were of such a nature as to inhibit the employees in the exercise of their right to join or remain members of the Union. Through the comments, I find that Respondent threatened, coerced, and restrained its employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

C. *The No-Solicitation Rule*

Paragraphs 7(a) and 9 of the complaint allege that Respondent promulgated and published an unlawful no-solicitation rule when it sent copies of the April 16 letter from Hicks to employees. The pertinent part of the letter, which is set forth completely supra, is:

[18] No evidence was offered to support the allegation that the employees were promised increased benefits and improved terms and conditions of employment.

> Lastly, it has come to my attention that some Ebon employees may be using duty time to engage in activities not related to their work assignment. Let me caution you that under no circumstances are you to direct any duty hours to any activities other than your specific job responsibilities. Moreover, it is your responsibility to report to your immediate supervisor any attempts of any one to engage you in non-job related activities during duty time. As an Ebon employee, you are expected to exhibit a high level of job performance and professional conduct at all times. The success of the contract is directly related to your performance as an individual.

During her appearance on the witness stand, Hicks claimed the portion of the letter quoted above had nothing to do with the Union. I find this testimony to be illogical and unbelievable as she expressly informed NIOSH official Shamblee on April 16—the same day her letters to employees were sent—inter alia:

> I would appreciate very much your investigation of the situation. Most importantly, I would hope that the Union members are informed to cease soliciting activities and disrupting the work of my employees. Any steps taken to resolve these issues are welcomed. I am thanking you in advance for your efforts.

It is clear, and I find, that Hicks intended, when using the work "activities" and the term "non-job related activities" in her April 16 letter to employees, to warn employees that they were not to engage in union activities during "duty hours" or "duty time."

In *Walton Mfg. Co.*, 126 NLRB 697, 698 (1960), the Board set forth the general rule to be observed in situations involving promulgation and enforcement of no-solicitation and no-distribution rules applicable to working time."

> No-Solicitation or no-distribution rules which prohibit union solicitation or distribution of union literature by employees during working time are presumptively valid as to their promulgation, in the absence of evidence that the rule adopted for a discriminatory purpose; and are presumptively valid as to their enforcement, in the absence of evidence that the rule was unfairly applied.

Subsequently, in *Stoddard-Quirk Co.*, 138 NLRB 615 (1962), the Board held unlawful a rule, the reach of which prohibited employees from distributing union literature in nonwork areas during their nonworking time. Most recently, in *T.R.W., Inc.*, 257 NLRB 442 (1981), a case involving the legality of a no-solicitation rule, the Board stated at 443:

> We, however, see no inherent meaningful distinction between the terms "working hours" and "working time" when used in no-solicitation rules. Both terms are, without more, ambiguous, and the risk of such ambiguity must be borne by the promulgator of the rule. Either term is reasonably susceptible to an interpretation by employees that they are prohibited from engaging in protected activity during periods of the workday when they are properly not engaged in performing their work tasks (e.g., meal and break periods). As such, either term tends unlawfully to interfere with and restrict employees in the exercise of their Section 7 organizational rights.
>
> . . . .
>
> In view of the foregoing, we hold that rules prohibiting employees from engaging in solicitation during "work time" or "working time," without further clarification, are, like rules prohibiting such activity during "working hours," presumptively invalid.

In the instant case it is clear that Hicks, without expressly prohibiting her employees from engaging in "union" activity during duty hours, accomplished the same object by using general words and terms. Moreover, it is clear that she composed the letter and sent it to employees immediately after learning they were showing interest in union representation. I find the rule she promulgated was unlawfully broad as it prohibited union solicitation during periods of the workday when employees are properly not performing their work tasks. Having concluded that Hicks sought by promulgating the rule at the very outset of the union organization campaign to limit the union activities of Respondent's employees any time they were on ALOSH premises, I find the rule was adopted for an unlawful purpose. In sum I find, as alleged, that by promulgating and distributing the rule, Respondent violated Section 8(a)(1) of the Act.

D. *Respondent's Rejection of Moore's Request for Reconsideration*

The complaint alleges that by informing discharged employee Moore that Respondent would not reconsider its discharge decision because of the pending union campaign, Respondent violated Section 8(a)(1) of the Act.

As noted, supra, Hicks notified Moore by letter dated April 23 that she would not reconsider her decision to discharge Moore "because of policies of the National Labor Relations Board that advise me that I cannot perform any personnel acts that may influence the employees in making a free choice relative to a union election."

The General Counsel contends in his brief (p. 31) that Respondent violated Section 8(a)(1) by telling Moore it would not reconsider its discharge decision because of the union campaign and Board procedures because such a statement conveys that a benefit is being denied because employees engaged in protected activities and that somehow the Board condones or requires the denial of this benefit. I agree and find that by giving the quoted reason for failing to reconsider its discharge decision, Respondent violated Section 8(a)(1) of the Act as alleged.

II. THE ALLEGED DISCRIMINATION AGAINST MOORE

A. *The Termination*

The complaint alleges that Respondent violated Section 8(a)(3) of the Act by terminating Cindy Moore because she engaged in union activities and by altering the job requirements of the research technician position to permit it to refuse her rehire when it commenced performance of its second animal support contract in mid-1982. With respect to the discharge, the General Counsel contends, in the alternative, that Moore was discharged for engaging in protected concerted activity in violation of Section 8(a)(1) of the Act.

Respondent defends its decision to terminate Moore by contending it had no knowledge of her union activities on April 16; that the sole reason for her discharge was in honest belief that she had made a false safety report. It defends its refusal to rehire her in a research technician position at the commencement of performance of its second animal support contract by contending that NIOSH's desire that the technicians be capable of working in all of its research laboratories compelled it to elevate the job requirements to a level that rendered Moore unqualified.

In the instant case, Respondent admits it terminated Moore on April 16, 1982, because she reported to NIOSH maintenance on April 9 that the ventilation hood in room 281-A of the facility was malfunctioning. General Counsel's witnesses Gamble and Tucker, both employed by NIOSH, testified they noted the buildup of formaldehyde fumes in the lab during the morning of April 9, and Tucker indicated he advised Moore to leave the lab if the buildup persisted. Additionally, Tucker indicated Moore advised him she had or was going to call maintenance regarding the problem. Witness Gamble and Moore credibly testified that they had previously reported the hood in question had malfunctioned, and witness Lucas testified her exposure to formaldehyde fumes when working under the hood had required her to take several hours of sick leave in February 1982.

In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), the U.S. Supreme Court held that employees who concertedly protest working conditions at their place of employment are engaged in protected concerted activity within the meaning of Section 7 of the Act, and if they are discharged for engaging in such activity the employer violates Section 8(a)(1) of the Act. Under Board law, "An individual's actions may be considered to be concerted in nature if they relate to conditions of employment that are matters of concern to all affected employees."[19] In such instance, it is immaterial that the individual had not been delegated by other employees to act on their behalf and had not informed any other employee that he was doing so "so long as there is evidence that fellow employees share the acting employee's concern and interest in common complaints."[20]

Here, the evidence clearly reveals that when Moore called NIOSH maintenance on April 9 to report that the hood in room 281-A was malfunctioning, she was pursuing a matter of common concern to other employees and those employees did not disavow her action. It is clear, and I find, that by reporting the hood malfunction on April 9, Moore engaged in protected concerted activity.

It does not automatically follow from the foregoing, however, that Respondent violated Section 8(a)(1) by terminating Moore. While the General Counsel urges me to discount the testimony given by NIOSH employees Riley, Lewis, and Dalton, I found them to be credible witnesses and concluded on hearing their testimony that they had formed an honest but mistaken belief that Moore had actually made a false report on April 9. Assuming that Hicks simply accepted their honest opinion, her position is one in which she terminated Moore with an honest but mistaken belief that she made a false report on April 9. On many occasions the Board has considered analogous situations in strike situations where employers have terminated strikers in the honest but mistaken belief that they engaged in serious strike misconduct. It has uniformly held that the employer violates the Act if it is established that the employee did not in fact engage in the misconduct the employer honestly felt they had engaged in.

For the reasons set forth, I find that by discharging Cindy Moore on April 16, 1982, Respondent violated Section 8(a)(1) of the Act as alleged. Having found the discharge violates Section 8(a)(1), I find it unnecessary to extend this decision by resolving the 8(a)(3) issue.[21]

B. *The August 3 Refusal to Reemploy Moore*

Paragraphs 12 and 13 of the complaint allege, and the General Counsel contends, that Respondent increased the job requirements and qualifications of the research technician position on or about August 2, 1982, to enable it to refuse to reemploy Moore when it began performance of the 1982–1983 animal support contract. I find the contention to be without merit.

The record reveals that during the course of the 1981–1982 animal support contract Moore assisted NIOSH scientist Marilyn Gamble with experiments in the pathology lab 4 days a week. As found, supra, NIOSH official Ames testified he indicated dissatisfaction with the permanent assignment of Ebon employees to NIOSH personnel and when the 1982–1983 contact was entered into it provided that the Ebon research technicians would perform laboratory work 5 days a week and would be rotated to the various labs, i.e., immunology lab, biochemistry lab, pathology lab, and the physiology lab. Respondent claims it elevated the educational requirements of the research technicians to be used to perform the 1982–1983 contact by requiring a bachelor's degree in biology, animal or veterinary science, agriculture, or similar credentials in a related field to enable them to perform adequately in the four laboratories named above.

Having accepted Ames' testimony, I conclude that his objection to the permanent assignment of Ebon's research technicians to a single NIOSH scientist justified

[19] *Air Surrey Corp.*, 229 NLRB 1064 (1977).
[20] *Diagnostic Center Hospital Corp.*, 228 NLRB 1215 (1977).

[21] I note, however, that I would impute McCabe and Richmond's knowledge of Moore's solicitation activities to Hicks as I do not credit her claim that she did not learn of Moore's activities until after she discharged her.

Richmond's decision to assign the research technicians to all four labs on a rotating basis during the term of the 1982–1983 animal support contract. As the technicians were to be performing work that patently required greater familiarization with the different scientific areas, I similarly conclude that this decision to elevate the educational qualifications for the position was warranted.

Moving to Moore's situation, I note that her resume, which was placed in the record as Respondent's Exhibit 5, reveals she is a high school graduate, studied in college 1 year, and performed several animal care jobs prior to her employment by Respondent. While her educational and work background, including her year of employment with Respondent, appears to have qualified her to perform the animal care functions and the pathology lab functions that Respondent was obligated to perform at the ALOSH facility during the term of its 1982–1983 animal support contract, the General Counsel offered no evidence to show she could capably and knowledgeably perform as a research technician in the immunology, biochemistry, or physiology labs.

In sum, it is undisputed that when Moore was interviewed by Hicks on August 3 she indicated she was applying for a research technician's position and she was not interested in one of the two animal care positions that were available. I conclude the record fails to reveal that Moore met the qualifications for the research technician position and, consequently, that Respondent did not violate the Act as alleged by refusing to consider her for the position.

III. THE REPRESENTATION CASE

The objections filed by the Union in Case 6–RC–9248, which were consolidated with the unfair labor practice cases for hearing before me are:

1. The Employer, acting through the project coordinator, did: "(d) On or about April 22, 1982, threatened employees with discharge if they joined the union."

2. Employer, acting through the executive director:

> (a) By letter dated April 16, 1982, promulgated and since said date has maintained a rule prohibiting employees from engaging in any non-job related activities during duty hours and requiring employees to report to Employer any violations of said rule.
>
> (b) On or about April 23, 1982, at the Employer's Morgantown, West Virginia, facility, threatened employees with discharge if they joined the union.
>
> (c) On or about April 23, 1982, at the Employer's Morgantown, West Virginia, facility, solicited employees to express their union sympathies.
>
> (d) On or about April 23, 1982, at the Employer's Morgantown, West Virginia, facility, threatened employees that Employer's service contract would be terminated if employees joined the Union.
>
> (e) By letter dated April 27, 1982, informed discharged employee Cindy L. Moore (herein called Moore) that Employer would not reconsider its discharge decision because of the pending union campaign.

3. Employer promulgated the rule described above in subparagraph 2(a) in order to discourage its employees from joining, supporting, or assisting the union, and engaging in concerted activities for the purpose of collective bargaining or other mutual aid and protection.

6. On or about August 2, 1982, the Employer increased the job requirements and qualifications of its employees.

7. On or about August 2, 1982, the Employer changed job requirements and refused to rehire Moore.

9. By the acts of the employer described herein, the Employer did invalidate the election.

As Objections 1(d), 2(a)–(e), and 3 are coextensive with paragraphs 7(d), 8(a)–(e), and 9 of the complaint, and I have found that Respondent violated Section 8(a)(1) by engaging in the conduct alleged in the referenced paragraphs of the complaint, I sustain the above-indicated objections. As Objections 6 and 7 are coextensive with paragraphs 12 and 13 of the complaint, and I have found the General Counsel failed to prove the violations alleged therein, Objections 6 and 7 are found to be without merit and are overruled. Objection 9 is conclusionary in nature and is disposed of by the comments set forth below.

Having found that objections 1(d) 2(a)–(e), and 3 are meritorious, I further conclude that by engaging in such objectionable conduct Respondent interfered with the laboratory conditions necessary to ensure that the employees could exercise a free and untrammeled choice in the election held on January 5, 1983. Accordingly, I recommend that the January 5, 1983 election be set aside and that the Board order that a second election be held in Case 6–RC–9248.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the unlawful acts described in section III, above, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. Respondent has not violated the Act except to the extent specifically indicated in section III, above.

THE REMEDY

Having found that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Respondent will be required to make whole employee Cindy Moore for any loss of earnings she suffered as a result of the discrimination practiced against her with backpay to be computed on a quarterly basis, making deductions for interim earnings, with interest to be paid in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*,

231 NLRB 651 (1977).[22] As the record reveals all animal care technicians at the Morgantown, West Virginia ALOSH facility were terminated effective June 10, 1982, and I have found that Cindy Moore was not unlawfully refused reemployment by Respondent on or about August 2, 1982, the backpay period will run from May 1 through June 9, 1982.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Florence J. Hicks d/b/a Ebon Research Systems, Morgantown, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union activities or the union activities of other employees.

(b) Threatening employees by informing them they may lose their jobs if they elect to have union representation.

(c) Discouraging membership in America Federation of Government Employees, Local 3430, AFL–CIO, or in other labor organization, by informing employes they are scapegoats and continued support of the above-named Union will cause them to be replaced by government employees and/or prevent their employer from obtaining long-term contracts.

(d) Promulgating and enforcing an unlawful broad no-solicitation rule that prohibits employees from engaging in union-related solicitation during periods when they are properly not engaged in performing their work tasks (e.g., meal and break periods).

(e) Discouraging employees from protesting unsafe work conditions by terminating or otherwise disciplining employees because they report unsafe conditions to NIOSH.

(f) Informing employees that discharge action will not be reconsidered because of Board requirements or because a petition for an election is pending before the Board.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole employee Cindy Moore for any loss of pay she suffered as a result of the discrimination practiced against her in the manner set forth in the remedy section above.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Morgantown, West Virginia ALOSH facility copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[22] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Michael Poprik, Esq., for the General Counsel.
Claude Roxborough, Esq., of Washington, D.C., for the Respondent.
W. Harry Muller, Esq., Washington, D.C., for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On 24 July 1986, the Boad remanded this case to me "for further consideration consistent with the Decisions and Orders in *Res-Care, Inc.*,[1] and *Long Stretch Youth Home*,[2] . . . including if necessary, a reopening of the record on the jurisdictional issue."

On 30 October 1986, further hearing was held in the case in Morgantown, West Virginia. During that resumed hearing, the General Counsel introduced documentary evidence and adduced testimony through one witness. Respondent offered no additional evidence.

Subsequent to the close of the hearing, on 23 December 1986, Respondent filed a posthearing brief. Thereafter, the General Counsel and the Charging Party filed motions to strike designated portions of Respondent's brief and reply briefs. Additionally, the General Counsel filed a motion to correct the record in designated respects.[3] On 2 February 1987, Respondent filed opposition to the General Counsel's motion to strike portions of its brief, and on 13 February 1987, it filed opposition to the Charging Party's motion to strike portions of its brief.[4]

[1] 280 NLRB 670 (1986).

[2] 280 NLRB 678 (1986).

[3] The motion to correct the record was unopposed. It is granted.

[4] Although the motions to strike portions of Respondent's brief appear to be partially meritorious, I find it unnecessary to extend this decision by discussing them and ruling on them as my findings are based on record evidence.

On the entire record, and from my observation of the witnesses who appeared to give testimony, I make the following

FINDINGS OF FACT

Respondent, a sole proprietorship, with its principal office located in Washington, D.C.,[5] with a place of business in Morgantown, West Virginia, is engaged in the business of providing research assistance and other services to, inter alia, agencies of the United States. Its gross revenue for the performance of such services throughout the United States exceeds $1 million annually, and it admits that during the 12-month period ending 30 April 1982, it provided services valued in excess of $50,000 to the United States Government within the State of West Virginia. Its Morgantown, West Virginia operation is the only operation immediately involved in the instant case.

On the above facts, I find that Respondent meets the Board's monetary standards for assertion of jurisidiction over nonretail enterprises.

The Division of Respiratory Disease Studies, Laboratory Investigations Branch of the National Institute for Occupational Safety and Health (NIOSH) conducts a variety of pulmonary research experiments and projects at its Appalachian Laboratory for Occupational Safety and Health (the facility) which is located in Morgantown, West Virginia. The experiments are accomplished by exposing small animals such as rats and rabbits to aerosols such as mineral dusts, metals, organic dusts, and cotton dust. Thereafter the effect of the exposures on various organs of the animals is analyzed by NIOSH scientists.

During calendar years 1981 and 1982, Respondent performed services at the facility pursuant to four contracts with U.S. Government agencies. Two of the contracts required Respondent to perform specified animal care and/or husbandry and animal research support functions for NIOSH.[6] Those contracts were between the Small Business Administrative (SBA) and Respondent, and were assigned by SBA to NIOSH when negotiations had been completed. A third contract required Respondent to furnish two lab technicians who were to assist NIOSH scientists in the conduct of experiments involving the exposure of animals to cotton dusts. That contract was between the United States Department of Agriculture (USDA) and Respondent, and it was valued at approximately $40,000.[7] The fourth and final contract required Respondent to man the library at the facility with a librarian and a library aide. It, like the animal husbandry and animal research support contracts, was between SBA and Respondent, but was assigned to NIOSH for administration and payment.[8]

Respondent contends that various U.S. Government agencies exercise such pervasive control over the terms and conditions of employment of its employees working at the above-described facility that it is unable to engage in meaningful collective-bargaining with a labor organization. It contends that application of the principles enunciated by the Board in *Res-Care, Inc.*, supra, should cause me to find that the Board will not assert jurisdiction over its Morgantown, West Virginia operations.

Counsel for the General Counsel and the Charging Party contend Respondent retains sufficient control over the terms and conditions of employees to permit it to bargain meaningfully with a labor organization. The scope and degree of control exercised by the exempt entities over Respondent's labor relations and the controls over essential terms and conditions of employment retained by Respondent are sumarized below.

Status of Contractor

The animal care and animal research support contracts and the library contract specifically provide that Respondent was to perform its services independently, rather than as an agent of the Government.

Wage and Fringe Benefits

While Dr. Hicks, Respondent's executive director, testified that Respondent proposed wage rates for the employees who would be performing the services required by the above-described contracts, and NIOSH and USDA agreed with Respondent's proposals, the 1981 and 1982 contractors in evidence do not indicate the wages to be paid to employees in various job classifications. The record does suggest, however, that the fixed fee library contract contained reference to the total compensation to be paid to Respondent for each hour the librarian and the library aide worked, as the information sent to Respondent by NIOSH when it was invited to submit a bid for the work reveals that during performance of the contract commencing 10 October 1980 and ending 30 September 1981, Respondent was to be paid a fixed fee, with amounts payable to be calculated by reimbursing Respondent $7.96 for librarian hours worked, and $4.98 for library aide hours worked.[9] The document further provided:

> The rate, or rates, set forth covers all expenses including report preparation, salaries, overhead, general and administrative expenses, and profit, excluding costs for travel and per diem which are reimbursable in accordance with Article XXIV—Travel and Per Diem.

While no wage rates for employees performing services pursuant to the animal care and animal research support contracts (NIOSH through SBA), and no rates for

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[5] At the time the original unfair labor practice hearing was held, its principal office was located in Rockville, Maryland.

[6] See G.C. Exhs. 12 and 30. The contracts were No. 210-81-2117, a cost reimbursement contract, effective from 11 June 1981 to 10 June 1982, which was valued at $123,037, and No. 210-82-2104, a cost reimbursement contract effective from 1 August 1982 to 31 July 1983, which was valued at $178,208.

[7] The contract, No. USDA 53-7B30-1-379, was not placed in evidence.

[8] A document sent by NIOSH to Respondent when the latter was invited to bid work appears in the record as G.C. Exh. 28(a). Excerpts of the contract, No. 12-80-0006, are attached to G.C. Exh. 29. It was effective from 1 October 1981 to September 1982, and was valued at $57,000. The record reveals Respondent provided the same library services during calendar years 1979 and 1980 for $50,000 per year.

[9] The representation case record reveals the library aide was given a wage increase by Respondent.

the technicians who were to provide services pursuant to the USDA contract are set forth in those contracts, Dr. Hicks claimed during her testimony in the representation case that the U.S. Department of Labor (DOL) issued wage determinations that were applicable to those contracts. She further testified that the wage determinations set forth the minimum and maximum rates that could be paid to employees in the various job classifications. Such alleged wage determinations were not placed in either the representation case record or the record in the instant case. In the absence of documentary support, I find Dr. Hicks' claim that DOL issued wage determinations that set maximum rates for employees in job classifications to be suspect and accord it no weight. A copy of the Service Contract Act, as amended,[10] was placed in evidence as General Counsel's Exhibit 34. Inspection of that act reveals that wage determinations issued by DOL set forth "minimum," "prevailing rates," or rates set forth in collective-bargaining agreements.

With respect to fringe benefits, the record reveals Respondent's employees performing work at the Morgantown facility receive sick leave, annual leave, and holiday benefits that conform to those received by NIOSH employees. Additionally, they receive accident and health benefits pursuant to Respondent's own plan, which is based to some extent on seniority. While none of the contracts described above indicate the specific fringe benefits employees performing work pursuant to the contracts will receive, I note the 1981–1982 animal care and animal research support contract between NIOSH (through SBA) and Respondent was renegotiated on 27 July 1982 and the new agreement indicated Respondent would be reimbursed at the provisional rate of 23 percent of total direct labor dollars for fringe benefits during the period 1 August 1982 through 30 September 1983.[11] Dr. Hicks testified she satisfied [illegible] fringe benefit requirement imposed by the Service Contract Act by proposing to pay stated fringe benefits that the contracting officer approved. According to Hicks, the contracting officer was obligated to assure that the fringe benefit payments proposed by Respondent met the requirements of DOL.[12]

While the record fails to fully reveal the extent to which involved exempt entities control the wages and fringe benefits received by Respondent's employees who perform work at the Morgantown NIOSH facility, it does reveal that the contracts described above specifically make the general conditions set forth in HEW Document 3/16 (Rev. 7/76), entitled "General Provisions for Negotiated Cost—Plus—Fixed Fee Type Contract,"[13] applicable to the contracts. Insofar as is here relevant, that document requires Respondent to pay contract employees time and one-half their hourly rate for time worked in excess of 8 hours in a workday or for time worked in excess of 40 hours in a regular workweek. Additionally, it provides a mechanism for renegotiation of the contractor's labor cost increases during the term of the contract.[14]

Leaving the matter of direct exempt entity control of wages and fringe benefits, I note the above-mentioned contracts contain certain indirect provisions that regulate, to some extent, the moneys Respondent must pay its employees at the facility. Thus the animal care and animal research support contracts require that Respondent supply sufficient services "commencing at 8:00 a.m., on all Federal holidays, Saturdays, and Sundays, in order to satisfactorily accomplish regular animal husbandry activities and/or technical support project support as required to meet various task goals."[15] Such contracts further indicate emergency services outside those hours should be provided pursuant to an "on call" system. Similarly, the library contract(s) specifically provides personnel assigned by the contractor will work only on a straight time (8 hours per day) basis, and that when such personnel are on unauthorized vacation or sick leave a replacement with comparable qualifications will be provided by the contractor.[16]

While Respondent's agreement to provide the services set forth in the above-described contracts for stated amounts place some rather obvious restrictions on its ability to grant contract employees increased remuneration during the term of the agreements, it is uncontradicted that Respondent is not precluded from increasing the wage or fringe benefits of its employees by any of the contracts. Dr. Hicks admitted during her testimony that she could utilize profits to increase wages or benefits. Moreover, as indicated by General Counsel Robert Edgill, whose qualifications include 10 years of negotiating, implementing, and monitoring services contracts as a Government employee, machinery is provided to permit renegotiation of contracts when direct labor costs increase during the term of a service contract.

Control Employees

The contracts between Respondent and the Government entities involved in this case each contain general provisions relating to contract employees such as: the hours during which they are to work; detailed descriptions of the work to be performed; qualifications employees should possess; the areas of the Morgantown facility in which they will perform their duties; and indication that NIOSH will issue them passes and a requirement that they abide by NIOSH safety rules; and indication that the Government will provide support functions such as mail handling, security, communications, and xeroxing. Additionally, the animal care and animal research support contracts indicate, inter alia, that contract employees will abide by certain NIH guidelines and the Animal Welfare Act when caring for animals; that cage washing and sanitation will be accomplished in accordance with standard written procedures; that all wearing

[10] 41 U.S.C. § 351 et seq.

[11] See G.C. Exh. 30, p. 36.

[12] The record fails to reveal such fringe benefit provision was included in the contract because DOL had issued a wage determination applicable to the contract.

[13] Now HHS-316 (Rev. 7/76).

[14] See G.C. Exh. 32, pp. 1, 2 (Limitations of Cost), and 30 (Contract work Hours and Safety Standards Act—Overtime Compensation).

[15] See for example G.C. Exh. 12, p. 6.

[16] See G.C. Exh. 28(a), p. 4. The contract also permits the librarian's testimony in the representation case reveals the employees exercised that option.

apparel, cleaning agents, laundry, and special safety equipment will be selected in consultation with the NIOSH project officer; that all supplies will be furnished by the Government; that NIOSH must approve the use of all insecticides and rodent entrapment devices, approve the site for use of incineration equipement for the disposal of animal carcasses; and that Government employees will dispose of all animal carcasses contaminated with hazardous materials.

In addition, the contracts involved herein provide that NIOSH has the authority to provide "technical direction" to Respondent's employees who perform work at the facility. Technical direction is defined in the 1981–1982 animal care and research animal care contract to include the following:

> a. Direction to the Contractor which redirect the contract effort, shift work emphasis between work areas or tasks, require pursuit of certain lines of inquiry, fill in details or otherwise serve to accomplish contractual statement of work.
>
> b. Provisions of information to the Contractor which assists in the interpretation of drawings, specifications or technical portions of the work description.
>
> c. Review and, where required by the contract, approval of technical reports, drawings, specifications and technical information to be delivered by the Contractor to the Government under the contract.

Witness Fredrick Ames, the administrator of the NIOSH Division of Respiratory Disease Studies at the facility, clearly indicated during his testimony that the authority to give technical direction did not confer supervisory authority on NIOSH personnel who worked with Respondent personnel. He characterized as illegal attempts by NIOSH personnel to supervise contract personnel, indicating NIOSH personnel were constantly told not to engage in such activity.

While NIOSH, by virtue of contractual provisions, exercised the above-described control over Respondent's employees working at the Morgantown facility, the record reveals Respondent retained marked control over those employees. Thus, Dr. Hicks testified that while NIOSH indicated the work to be performed and enlightened her regarding the skills and education required, she, frequently assisted by Dr. Lee Richmond, director of Respondent's Health Division, interviewed applicants and decided which applicants interviews, Respondent was not obligated to follow any suggestions such individuals made, and was free to hire those applicants it desired to hire.

The record reveals the Respondent personnel working under the animal-related contracts received their day-to-day supervision from Ed McCabe, Respondent's project coordinator. The library aide was supervised by Collen Harrington, the librarian. Both McCabe and Harrington reported to Hicks, frequently through Richmond. While the library functions dictated the work to be performed by the library aide, McCabe prepared work schedules for the animal research technicians. The technicians who performed work pursuant to the USDA contract worked with the same team of scientists constantly, but the technicians working under the original SBA (NIOSH) contract worked 1 day each week in the animal care quarters and the remaining 4 days in a laboratory. Mechnically, NIOSH personnel submitted requisitions for assistance to McCabe indicating the assistance they needed and the timeframe involved, and McCabe then scheduled employees to fill the requests. In event NIOSH personnel were not satisfied with the performance of Respondent personnel, McCabe was notified and he, Richmond, or Hicks handled the problem. Hicks testified any complaints voiced by NIOSH concerning her personnel were independently investigated before action was taken. She alone retained and exercised the authority to fire Respondent personnel.

While the record reveals NIOSH personnel, principally Major Purvis, the project officer, reviewed the performance of Respondent contract personnel to ascertain whether Respondent was fulfilling its contractual obligations, the record reveals Respondent evaluated the performance of its employees at the end of their probationary period, once each year, and it conducted exit interviews and evaluations at the end of each contract period if employees were terminated at that time. If NIOSH was not satisfied with Respondent's performance of its contractual obligations, its recourse was to terminate the contract.

The record reveals none of the contracts described herein preclude Respondent from entering collective-bargaining agreements. In addition, they pose no limitations in the common areas of collective-bargaining such as use of seniority systems, grievance procedures, retirement plans, profit sharing, and health insurance.

The Service Contract Act

During the resumption hearing, the General Counsel placed the Service Contract Act in evidence. Respondent does not dispute the contention that the contracts involved herein, which are all for amounts exceeding $2500, subject it to the provisions of that Act. The General Counsel contends the following provisions of the Act are relevant.

Section 351(a)(1) which states:

> (a) Every contract (and any bid specification therefor entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees shall contain the following:
>
> (1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service em-

ployees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.

Section 351(a)(2) states:

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or different payments in cash under rules and regulations established by the Secretary.

Section 353(c) states:

(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, that in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

Analysis and Conclusions

In *Res-Care, Inc.*, supra, the Board reaffirmed the test set forth in *National Transportation Service*, 240 NLRB 565 (1979), for determining whether it would assert jurisdiction over an employer with close ties to an exempt Government entity, stating 280 NLRB at 672:

the inquiry would be whether the employer itself met the definition of an "employer" in Section 2(2) of the Act and, if so, whether the employer retained sufficient control over the employment conditions of its employees to enable it to engage in "effective" or "meaningful" bargaining with a labor organization.

Thereafter, the Board indicated that *National Transportation* and its progeny failed to set forth a clear explanation of the elements of effective or meaningful bargaining, noting the decisions failed, in particular, to define (a) those areas of an employer's labor relations that are sufficiently important that the employer cannot bargain meaningfully if the exempt entity removes or severely restricts the employer's discretion, and (b) the circumstances under which the Government entity will be deemed to have removed or severely restricted such discretion. It then stated that, in applying the above-quoted test, it would examine closely the control over essential terms and conditions of employment retained by the employer as well as the scope and degree of control exercised by the exempt entity over the employer's labor relations to determine whether the employer in issue is capable of engaging in meaningful collective bargaining.

The facts set forth supra, reveal that Respondent's control over its employees in matters other than their remuneration is marked. Thus, Respondent has the right to hire, fire, transfer, reprimand, supervise, and evaluate its employees independent of significant interference from any Government entity. Moreover, it is free to determine the policies it will follow with respect to collective-bargaining subjects such as establishment of grievance procedures, seniority plans, pension or profit-sharing plans, life insurance plans, and health insurance plans. Indeed, it is free to decide whether it will oppose or accept its employees' desire to have a labor organization represent them in bargaining. While NIOSH dictates that employees will work stated hours, will work in specified areas, will comply with facility's safety regulations, and will otherwise conduct themselves in a fashion that will permit it to achieve its objectives, it exercises only technical direction over the employees when they are actually performing their contract services. I find Respondent exercises virtually complete control over the day-to-day activities of its employees, and it retains marked control over labor policies it will pursue.

In the instant case, unlike the situation before the Board in *Res-Care, Inc.*, supra, or *Long Stretch Youth Home*, supra, the Respondent-Employer was signatory to contracts with Government entities that were subject to the Service Contract Act. Employers subject to that Act are required to pay employees the prevailing wage and benefits received by workers in the area where performance of the contract work is to be accomplished. In the absence of issuance by DOL of a wage determination applicable to a given contract, the employer must pay its employees the statutory minimum wage. Patently, the Service Contract Act encourages covered employers to

determine the wage and benefits their employees will receive through collective bargaining with a labor organization, as the Act affords the employer and his employees protection from unfair competition when a given contract is open for rebidding.

As noted above, the record in the instant case fails to reveal whether DOL issued wage determinations applicable to the four contracts described. It does reveal, however, that Respondent exercised considerable discretion in determining the wages and fringe benefits that its employees would receive. Thus Hicks' testimony reveals Respondent made initial determinations with respect to those matters and her decisions were then reflected in proposals that were accepted by the SBA and USDA contracting officers. Significantly, the record fails to reveal that any of the contracts thereafter entered by Respondent placed any upper limit on the wages or fringe benefits Respondent could award to its employees.

As contended by Respondent, the fact that it agreed to perform stated services for a stated dollar amount places a very real limitation on its ability to grant wage or fringe benefit increases to its employees during the term of any given contract. This is particularly true with respect to the USDA contract and the library contract as both indicate Respondent would furnish two employees to supply the services called for by the contracts. Additionally, the library contract indicates the rate per librarian and library aide hours worked at which Respondent will be reimbursed. Respondent was not so limited with respect to the animal care and animal research support contracts, however, as it was not contractually obligated to employ a specified number of employees by those contracts. Here, as in *Res-Care*, it is clear that to obtain more contract money for employee remuneration Respondent was required to convince the appropriate contract officer that approval of a request for more money was in the interest of the Government.

The General Counsel and counsel for Charging Party both cite *Zapex Corp. v. NLRB*, 621 F.2d 328 (9th Cir. 1980), and *NLRB v. Pope Mfg. Corp.*, 573 F.2d 898 (5th Cir. 1978), in their briefs. In both cases, the Board, with court approval, asserted jurisdiction over employers performing services for fixed amounts under contracts subject to the Service Contract Act. My review of those cases causes me to conclude the Board will not refuse to assert jurisdiction over an employer who contracts to perform work for a U.S. Government entity merely because it agrees to perform stated services for a stated dollar amount, and it is required by law to pay its employees certain minimum wages and a stated level of fringe benefits.

In sum, the record reveals Respondent is exclusively responsible for the formulation of labor policies and procedures regarding hiring, firing, supervising, evaluating, scheduling, and disciplining of employees performing work at the Morgantown facility. Further, its contracts with Government entities place no restrictions on its ability to negotiate with a labor organization concerning bargaining subjects such as pensions, grievance procedures, seniority, or other similar matters related to the terms and conditions of employment of employees. While Respondent's contracts, like the employer's contract in *Res-Care*, restrict its ability to increase employee remuneration because Respondent has agreed to provide stated services for a stated dollar amount, Respondent's situation differs from that of the employer in *Res-Care* as none of its contracts except the library contract make any reference to the wages to be paid to its employees, and none of the contracts contain any provisions that control the maximum wages or fringe benefits it can award its employees. While the instant employer's contracts are subject to the Service Contract Act, that act does not restrict Respondent's ability to engage in collective bargaining. Indeed, it encourages such action and affords subject employers protection from competitors once arm's-length bargaining has occurred. In the circumstances described, I find that while Government entities exert substantial control over the wages and fringe benefits to be received by Respondent's employees, that control is not pervasive within the meaning and intendment of *Res-Care*.[17]

In my view, Respondent can engage in meaningful collective bargaining with a labor organization with respect to the terms and conditions of employment of its employees. Accordingly, I find it would effectuate the policies of the Act to assert jurisdiction over Respondent's operations.[18]

[17] At fn. 22 of *Res-Care*, supra, the Board indicated that DOL's approval of Res-Care's budget, when considered in conjunction with the wage ranges and benefit levels approved, by DOL, constituted the direct limits on employee compensation that constitute control of employee relations, and not the fact that DOL placed an effective ceiling on such expenditures by limiting Res-Care's total budget. Here, only the contract price constitutes a contractual limit on the compensation Respondent's employees can receive. Neither the contracts nor the law (Service Contract Act) restrict the maximum wage or benefit levels that Respondent can utilize. Such factors clearly distinguish this case from *Res-Care*, supra.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings and conclusions herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Consolidated Freightways *and* Charles Hennessey.
Case 33–CA–4364

July 29, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On January 5, 1981, the Board issued a Decision and Order[1] finding that the Respondent has discharged Charles Hennessey in violation of Section 8(a)(1) of the National Labor Relations Act. Thereafter, the Respondent filed a petition for review and the Board filed a cross-application for enforcement with the United States Court of Appeals for the District of Columbia.

On December 11, 1981, the court remanded the case to the Board to reconsider requiring the Respondent to reinstate Hennessey with backpay.[2] The court held that the Board has failed to consider the significance of Hennessey's motives for refusing reinstatement.

On March 23, 1982, the Board notified the parties that it had decided to accept the court's remand and that they could file a statement of position. Statements have been filed by the General Counsel and the Respondent.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision of the court in light of the statements of position and makes the following findings:

The background facts, as more fully set out in the judge's decision, may be briefly summarized. The Respondent discharged employee Hennessey for his refusal to drive a tractor-trailer. Based on credited testimony, the judge concluded that Hennessey refused to operate the tractor because it was dangerous and was in violation of safety statutes. Further, the judge found that under the collective-bargaining agreement, Hennessey's refusal constituted protected concerted activity for the purposes of mutual aid and protection and his termination was in violation of Section 8(a)(1).

Approximately three weeks after his discharge, Hennessey filed a grievance, which was arbitrated pursuant to the collective-bargaining agreement. The arbitrator awarded Hennessey his former job back with full seniority and paid up health and welfare and benefits, but no backpay. The award also ordered that a final warning letter be placed in Hennessey's personnel file. The day the arbitration award was announced, the Respondent offered Hennessey reinstatement on its terms. Hennessey rejected the offer.

The judge found that the Respondent's offer of reinstatement made in accordance with the arbitration award was not valid because the award required that a warning letter be placed in Hennessey's file. The judge, therefore, ordered the Respondent to offer Hennessey reinstatement with backpay.

The Respondent excepted, contending that its offer of reinstatement was adequate because neither the warning letter nor the lack of backpay made the offer conditional. In adopting the judge's decision, the Board, to clarify any ambiguity, stated that the refusal to include accrued backpay in the otherwise valid offer of reinstatement does not render the offer invalid.

In support of its argument that the warning letter did not make the offer invalid, the Respondent submits that at the time the Respondent's offer was made, Hennessey was not aware that the offer was conditioned on a warning letter being placed in his file.[3] Rather, according to Hennessey's undisputed testimony, his rejection was based on the failure of the reinstatement offer to include backpay. The Respondent contends that because Hennessey did not view the warning letter as an impediment to his return to work, the presence of the warning letter should not void an otherwise valid offer of reinstatement.

The Board agreed with the judge that the Respondent's offer of reinstatement was invalid because placing the warning letter in Hennessey's personnel file as a prerequisite to his reinstatement rendered the offer conditional and therefore inadequate.

On remand, the court has instructed us to explain our rationale for not inquiring into the reasons Hennessey rejected the Respondent's offer and to reconcile our position with *Research Designing Service*, 141 NLRB 211 (1963); *L. Ronney & Sons Furniture Mfg. Co.*, 97 NLRB 891 (1951), enfd. as modified 206 F.2d 730 (9th Cir. 1953), cert. denied 346 U.S. 937 (1954), and the line of cases holding that the Board will look to the reason the discriminatee rejects an offer of reinstatement to determine if the offer is valid.

Initially, it is clear that the reinstatement obligation is satisfied only by a valid offer of reinstatement. As stated in *Lipman Bros.*, 164 NLRB 850

[1] 253 NLRB 988 (1982).
[2] 669 F.2d 790 (1981).

[3] We note that Hennessey was present during the arbitral proceedings. Hennessey however,testified that he had no recollection of being told about the condition.

(1967), "An employer's offer of reinstatement must be firm, clear, and unconditional." Until such time as a valid offer of reinstatement has been made the discriminatee does not have to make a choice. *Lyman Steel Co.*, 246 NLRB 712 (1979); *Heinrich Motors*, 166 NLRB 783 (1967), enfd. 403 F.2d 145 (2d Cir. 1968); Leeding Sales Co., 155 NLRB 755 (1965).

As stated in *Craw & Sons*, 244 NLRB 241 (1979):

> However, where the offer of reinstatement has been conditional and has not satisfied the Board's and the court's order of reinstatement, the discriminatees are under no obligation to reply to or to accept such conditional offer of reinstatement.

See also *W. C. McQuaide, Inc.*, 239 NLRB 671 (1978), enfd. 617 F.2d 349 (3d Cir. 1980); *Murray Products*, 228 NLRB 268 (1977), enfd. 584 F.2d 934 (9th Cir. 1978).

In the instant case, the offer made by the Respondent was clearly conditional on its face. Hennessey was offered reinstatement pursuant to the arbitrator's award, which required that a warning letter be placed in his file. This clearly renders the offer invalid because "a Board order for reinstatement of a discriminatee is designed to place that individual in the same position the individual would have been in had there not been discrimination against him." *Craw & Son*, above at 242. The placement of the warning letter in Hennessey's personnel file would not have returned him to the position he occupied before the discrimination against him. Instead, he could return to work only under the threat of the letter of warning. This condition made the offer of reinstatement by the Respondent invalid.[4] Hennessey was under no obligation to respond to the offer and we will not look into his motivation or reasons for his refusal. We will not allow a discriminatee's response to an offer invalid on its face to "retroactively validate [an offer] which [was] deficient when made." *Murray Products*, 584 F.2d at 942. If, and only if, an offer of reinstatement is fully valid on its face, then an examination of a discriminatee's reasons for declining the offer must be undertaken.

Those cases cited by the court, i.e., *Research Designing Service* and *L. Ronney*, supra, are distinguishable from the instant case. In *Research Designing*, the judge found that certain offers of reinstatement were invalid because it became apparent after several employees accepted the employer's offers and began working that the offers were in effect conditioned on their working as new employees insofar as seniority and vacation pay were concerned. Because these proved invalid, the judge not only gave a remedy to the employees who had accepted reinstatement, but also declined to cut off the backpay of two other employees who had refused reinstatement offers at the outset for reasons unrelated to the invalid conditions. 141 NLRB at 230. The Board reversed concerning the two employees, holding that their refusal of reinstatement for reasons other than the invalid conditions warranted terminating the respondent's liability for reinstatement and backpay when the offers were refused. Id. at 216–217. Although the Board spoke in terms of the two employees' lack of awareness of the invalid conditions, the reinstatement offer, when made, apparently had no invalid conditions attached—unlike the circumstance in the present case, in which reinstatement was expressly premised on the terms of the arbitration award, and which contains the invalid condition.[5]

Regarding *L. Ronney*, we cannot determine, from the Board's decision, whether the offer of reinstatement (to employee Clinton) was valid on its face. The decision speaks of a letter sent to Clinton, but does not reveal whether it contained the invalid condition (a requirement that the reinstated employee join an illegally assisted union). 97 NLRB at 892. In any event, assuming in arguing that *L. Ronney* indicates that the Board will examine a discriminatee's reasons for declining a reinstatement offer even when the only offer made is invalid on its face, we overrule it and other similar cases[6] and adhere to the rule of *Craw & Son*, supra,

[4] In finding the offer was invalid on its face, it is appropriate to focus on the terms of the offer as required by the arbitration award. Thus, it is not relevant that Hennessey could not recall being informed of the condition at the time the arbitration award was announced.

As explained below, in our discussion of the issue whether the arbitrator's award could properly be deferred to, the letter of warning itself constitutes an interference with Sec. 7 rights. This is so because it operates as a penalty for the exercise of the right to invoke the protections of a collective-bargaining agreement. See *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). It can hardly be contended that a reinstatement offer that includes what amounts to an independent violation of the Act is a valid offer.

[5] *Hribar Trucking*, 166 NLRB 745, 756 fn. 19 (1967), modified on other grounds 406 F.2d 854 (7th Cir. 1969); *Eastern Die Co.*, 142 NLRB 601 (1963), enfd. 340 F.2d 607 (1st Cir. 1965), cert. denied 381 U.S. 951 (1965); and *Ekco Products Co.*, 117 NLRB 137 (1957), cited by the court in remanding this case, follow the analysis of *Research Designing*. In our view, critical to all four cases is the fact that the respondents made facially valid offers of reinstatement. The Board looked to the discriminatees' reasons for rejecting those offers to distinguish employees who never learned that illegal conditions were attached to the offer on implementation from employees who tested the facially valid offers only to discover that they were not, in fact, valid. The Board tolled backpay for the former, who never uncovered the unlawful conditions, but not the latter.

[6] See, e.g., *Atlantic Maintenance Co.*, 134 NLRB 1328, 1329 (1961), enfd. 305 F.2d 604 (3d Cir. 1962), in which the Board found an unlawfully conditioned offer of reinstatement did not toll backpay, but noted, in dictum, that it had not been clearly established that the discriminatees would have rejected a valid offer of employment.

that a reinstatement offer invalid on its face obviates the obligations on the part of a discriminatee to respond and that a discriminatee's refusal of the offer, on whatever ground, will not relieve the respondent employer of its obligation to make a valid offer in order to toll the running of backpay.

Our requirement that an employer must first extend a facially valid offer of reinstatement before we examine a discriminatee's reasons for declining the offer is fully consistent with the purposes and policies of the Act. The reason is clear; it is the Respondent who acted unlawfully in discharging Hennessey. The equities of the situation fall with Hennessey, the wrongfully discharged employee. It is thus incumbent on the Respondent to extend to the injured employee a facially valid offer of reinstatement before the burden shifts to the injured employee to accept or reject the offer. Anything short of this is inconsistent with the statutory policy that a transgressor should bear the burden of the consequences stemming from its illegal acts. See *Sheet Metal Workers Local 355 (Zinsco Electrical Products)*, 254 NLRB 773 (1981), enfd. in part, remanded in part 716 F.2d 1249 (9th Cir. 1983).[7] Because, as noted above, we would require that a discriminatee respond to a facially valid offer and, in those circumstances, would place on him the burden of showing that any refusal of the offer was based on invalid conditions that came to his attention, we believe that our overall policy respecting responses to reinstatement offers establishes a proper balance between the vindication of Section 7 rights and a discriminatee's duty to mitigate damages.

In footnote 15 of its decision, the court indicated that it need not reach the issue whether the Respondent's good-faith reliance on the arbitrator's award was sufficient, in itself, to toll its backpay liability. The court noted that resolution of this issue depends on whether the Board could properly further the strong national policy in favor of private settlement of labor disputes without abdicating its responsibility to remedy violations of national labor law. The Board has established under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), *Olin Corp.*, 268 NLRB 573 (1984), and their progeny, a policy of deferring to a decision of an arbitrator when (1) the unfair labor practice was presented and considered by the arbitrator; (2) the arbitral proceedings were fair and regular; (3) all parties agreed to be bound; and (4) the decision is not repugnant to the purposes and policies of the Act. The judge in his decision found that the award "fails to remedy the alleged unfair labor practices so as to warrant the Board's deference to such Board.

Thus, the Board found here that the arbitrator's award was repugnant to the Act and deferral was not appropriate. If we nonetheless find that the Respondent's backpay obligation was tolled because it complied with the repugnant award, we would, in substantial effect, be deferring to the award.

Certainly, there may be circumstances that the Board will defer to an arbitrator's award that does not include the same remedy as the Board would require to remedy an unfair labor practice.[8] To defer here to the arbitrator's remedy however, would permit the Respondent to discipline an employee for activity found by us and the arbitrator to be protected; clearly not an "interpretation consistent with Board policy."[9]

In any event, in this case we have an arbitrator's award that did not warrant deferral. Accordingly, to determine whether the Respondent in these circumstances has tolled its backpay obligation, it is proper to judge the Respondent's offer by the standard the Board normally uses. An award to which deferral was not warranted is completely void.

Here again, the offer was conditional on its face and thus was not a valid offer to reinstatement. Therefore, the burden of the loss must fall on the Respondent rather than the unlawfully discharged employee. See *Safeway Trails, Inc.*, 233 NLRB 1078 (1977), enfd. 641 F.2d 930 (D.C. Cir. 1979), cert. denied 103 LRRM 2668 (1980). Therefore, as Hennessey did not receive, as we require, a facially valid offer of reinstatement, he is entitled to full backpay as set forth in the remedy section of our original decision.[10]

[7] In urging that an unlawfully discharge employee's motive for rejecting an offer of reinstatement should be examined, the Respondent argues that the Board has done so in the past. In support of this petition, the Respondent, in its brief, relies on *Alcan Cable West*, 214 NLRB 236 (1974). Although it is correct that the judge, in his decision in *Alcan*, examined the unlawfully discharged employee's reason for rejecting the employer's offer of reinstatement, the Board did not rely on that finding. Rather, the Board found that the employee in question was never offered substantially equivalent employment. Thus, contrary to what the Respondent portrays as the Board's holding in *Alcan*, the Board clearly did not rely on the judge's examination of the discharged employee's reason for rejecting the offer of reinstatement. *Alcan*, 214 NLRB at 237 fn. 3.

[8] See, e.g., *Combustion Engineering*, 272 NLRB 215 (1984). There the Board noted, "The arbitrator's remedy, though perhaps different from what the Board would have ordered de novo, is reasonably based and is susceptible to an interpretation consistent with Board policy." Id. at 217.

[9] Hypothetically, suppose an arbitrator awarded an employee reinstatement on the condition that the employee not engage in any protected concerted activities? The award would clearly be repugnant to the Act. Surely, an employer's reliance on an offer of reinstatement made pursuant to such an award could not serve to toll an employer's backpay obligation.

[10] In fn. 16 of its remand, the court noted the Board's willingness in *Abilities & Goodwill, Inc.*, 241 NLRB 327 fn. 5 (1979), and *Marlene Industries Corp.*, 255 NLRB 1446, 1449 fn. 12 (1981), to consider whether an employee would have rejected a valid offer even in the absence of such an offer. Both cases treat the backpay and reinstatement rights of dis-

Continued

charged *strikers*. *Abilities & Goodwill*, overruling precedent, determined that discriminatorily discharged strikers should be treated as other dischargees, running the backpay period from the date of the discharge to the date of the respondent's valid offer of reinstatement without requiring the strikers to request reinstatement. In recognition of their status as strikers prior to their discharge, the Board expressly observed that the respondent could reduce or avoid its backpay liability by establishing that the discriminatee would not have accepted the offer if made, or by any other evidence demonstrating a willful loss of earnings. Although participation in an unfair labor practice strike does not automatically defeat the right to backpay, it can affect the amount recoverable if the employer can sustain the burden of showing willful loss in that the strike hampered the efforts of the discriminatee to mitigate damages by seeking new employment. *Bon Hennings Logging Co.*, 132 NLRB 97, 99 (1961), enfd. 308 F.2d 548, 558 (9th Cir. 1962); *Ra-Rich Mfg. Corp.*, 120 NLRB 503, 505 (1958), enfd. 276 F.2d 451 (2d Cir. 1960). The willful loss of earning doctrine, available in all backpay determinations, ensures that only actual losses are compensated. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). To the extent these cases also allow an inquiry into a discharged striker's desire for reinstatement prior to receipt of a valid offer, the Board, we think, may properly differentiate in its treatment of backpay between discriminatees whose rights were violated while they were on the job and discriminatees who were withholding their services at the time of their discriminatory discharge.

ORDER

The National Labor Relations Board affirms its Decision and Order at 243 NLRB 988 and orders that the Respondent, Consolidated Freightways, Peru, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

M & B Contracting Corporation *and* Robert Williamsen *and* William Tyynismaa. Cases 7–CA–14386, 7–CA–14580, and 7–CA–14575

July 29, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On June 29, 1983, Administrative Law Judge Leonard M. Wagman issued the attached backpay decision[1] and on July 13, 1983, granted without opposition from the Respondent the General Counsel's motion to correct the decision by adding to Appendix B, Schedule B-2, the attached document that reflects the manner in which the backpay of Tyynismaa was computed for the first and second quarters of 1980. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Supplemental Decision and Order.

The judge properly found that Tyynismaa is entitled to recover the sum of $46,738.54 plus interest to make him whole for the loss of earning he suffered by reason of the discrimination against him. The judge also properly found that Tyynismaa and Williamsen were respectively entitled to pension fund contributions of $4121 and $3673 plus interest for each amount.

However, the judge rejected a settlement agreement executed by Williamsen in consideration of the Respondent's payment of $10,000 to him as full resolution of his backpay claim, and found instead that Williamsen was entitled to $30,108.11 plus interest, less the $10,000 already paid him, to make him whole for the loss of earnings he suffered by reason of the discrimination against him. We disagree for the reasons given below.

For purposes of evaluating non-Board settlements of backpay and other remedial orders, *American Pacific Concrete Pipe Co.*, 290 NLRB 134 (1988), incorporated from *Independent Stave Co.*, 287 NLRB 740 (1987), the following factors that the Board had taken into account in approving a non-Board settlement of an unfair labor practice complaint: (1) whether the charging party(ies), the respondent(s), and any individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the state of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements. The Board in *Independent Stave* was also careful to stress that the foregoing list was not exhaustive, leaving the door open to the consideration of other factors that parties in future cases might urge as relevant.

However, at the time of the hearing in the instant case, in February 1983, the governing law was stated in *Michael M. Schaefer*, 261 NLRB 272, 273 (1982), enfd. 697 F.2d 558 (3d Cir. 1983), cert. denied 464 U.S. 945 (1983), a decision that was not overruled until *American Pacific*. Under that rule an individual could not compromise "*any* backpay which might be due him (or her)," because reimbursement of the amount owed was regarded as a "public right which only the Board or the Regional Director may settle" (emphasis added). It is, therefore, not surprising that, on the objection of counsel for the General Counsel, the judge here limited the purpose for which the settlement agreement was being admitted, accepting it only as evidence of the amount that had actually been paid to Williamsen, which could be offset against the amount finally determined to be due. Although there was some questioning of Williamsen by the Respondent's counsel, by the counsel for the General Counsel, and by the judge concerning Williamsen's reasons for accepting the settlement and the circumstances surrounding his acceptance, counsel for the General Counsel had no particular incentive to explore the subject thoroughly.

Thus, there was no occasion to introduce what if any evidence existed about the factors set forth above, including particularily whether there was any fraud, duress, or coercion in securing the settlement agreement.

Given the particular facts, here, the current record does not afford us sufficient evidence by which to assess the appropriateness of the settle-

[1] The Board with court approval found in 1979 that the Respondent terminated William Tyynismaa and Robert Williamsen in violation of the Act and directed that the Respondent make them whole for any loss of earnings they may have suffered as a result of its unfair labor practices. 245 NLRB 1215 (1979), enfd. 653 F.2d 245 (6th Cir. 1981).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

ment. Therefore, we remand this portion of the case for a further hearing. Accordingly, we shall substitute the following Order for the judge's supplemental Order.

ORDER

The National Labor Relations Board orders that the Respondent, M & B Contracting Corporation, Novi, Michigan, its officers, agents, successors, and assigns, shall pay to the following employess the sums shown below plus interest thereon accrued to the date of payment, computed in the manner prescribed in *New Horizons for the Retarded*,[3] minus any tax withholding required by Federal or state law.

William Tyynismaa

Backpay—$46,738.54
Pension Contributions—$4,121.00

Robert Williamsen

Pension Contributions—$3,673.00

IT IS FURTHER ORDERED that the portion of this proceeding relating to the settlement of Williamsen's backpay claim is remanded to Administrative Law Judge Leonard M. Wagman for the purpose of reopening the record in order that the parties may present relevant evidence regarding the settlement in light of our decision. Thereafter, the judge shall prepare and serve on the parties a second supplemental decision containing findings of fact, conclusions of law, and a recommended Order in light of the Board's remand. Following service of such second supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER JOHANSEN, dissenting in part.

Contrary to my colleagues, I would accept the settlement reached by employee Williamsen and the Respondent. In my view, the record adequately establishes that Williamsen agreed to a reasonable settlement in circumstances free of any fraud, coercion, or duress. Accordingly, the settlement should be upheld. See *American Pacific Concrete Pipe Co.*, 290 NLRB 134 (1988).

[3] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Any interest applicable to pension fund contributions shall be paid in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

George Mesritz, Esq., for the General Counsel.
Gregory S. Muzingo, Esq. (Butzel, Long, Gust, Klein & Van Zile), of Detroit, Michigan, for the Respondent.

SUPPLEMENTAL DECISION

LEONARD M. WAGMAN, Administrative Law Judge. This supplemental proceeding to determine the amounts of backpay due, respectively, to Robert Williamsen and William Tyynismaa, who were unlawfully terminated by Respondent M & B Contracting Corporation[1] was heard by me on February 7, 1983, at Detroit, Michigan, on the General Counsel's backpay specification issued on December 3, 1982, and thereafter amended at the hearing and the Respondent's answer. Following the hearing, Respondent and the General Counsel filed briefs.

On the record before me, and from my observation of the demeanor of the witnesses, and after careful consideration of the briefs, I make the following

FINDINGS OF FACT

I. THE ISSUES

On consideration of the amended specification and the Respondent's answer, I find that the issues presented by the pleadings are: (1) whether the calendar quarter expenses and net interim earnings set forth for Williamsen, in schedule D-1, and for Tyynismaa, in schedule D-2 are true; (2) whether the net interim earnings by calendar quarters deducted from calendar quarter gross pay to yield calendar quarter net backpay for discriminatee Williamsen in schedule E-1 and for discriminatee Tyynismaa in schedule E-2 and the expenses shown for each were true; (3) whether Tyynismaa would have been disabled from working for Respondent during the third and fourth quarters of 1978; (4) whether the Respondent was obligated to make fringe benefit contributions on behalf of Williamsen and Tyynismaa during the backpay period; and (5) whether Robert Williamsen was entitled to $30,124.11 in backpay and $3673 in fringe benefit funds, and whether William Tyynismaa was entitled to $47,149.02 in backpay and $4121 in fringe benefit funds.

II. THE BACKPAY SPECIFICATION

A. *The Facts*

On December 3, 1982, the Regional Director for Region 7 issued and duly served on the Respondent a backpay specification and notice of hearing alleging the amount of backpay due employees Williamsen and Tyynismaa, respectively, and further the amounts that Respondent was obligated to pay on behalf of Williamsen and Tyynismaa to the Central States Southeast and Southwest Areas Pension Fund, pursuant to collective-bargaining agreements in effect during the backpay periods. At the hearing, the General Counsel amended

[1] The Board with court approval found that the Respondent terminated Williamsen and Tyynismaa in violation of the National Labor Relations Act and directed that Respondent make the two whole for any loss of earnings they may have suffered as a result of its unfair labor practices. *M & B Contracting Corp.*, 245 NLRB 1215 (1979), enfd. 653 F.2d 245 (6th Cir. 1981).

schedule D-1 of the specification by removing a claim for $16 in expenses that resulted in a total of $1809.03 as total interim earnings for Williamsen for the second quarter of 1978. The General Counsel also amended schedule D-2 of the specification by eliminating expenses claimed by William Tyynismaa amounting to $410.48 and revising Tyynismaa's total interim earnings for the second quarter of 1978 to $4308.41. After making these amendments, the General Counsel rested his case. In its answer regarding the expenses and interim earnings claimed for Williamsen and Tyynismaa in the specification, Respondent asserted that it "is without sufficient information to form a belief as to the truth or falsity of said interim earnings and expenses."

The specification asserted that although Tyynismaa was unable to work for his interim employer during the third and fourth quarters of 1978, he would have not been disabled from employment by Respondent during the same period. In its answer, the Respondent asserted that Tyynismaa's disability would have prevented him from working for Respondent during the third and fourth quarters of 1978.

The Company also contended that it had no obligation to make any fringe benefit contributions on behalf of either Williamsen or Tyynismaa during the backpay period. Finally, the Respondent in its answer challenged the accuracy of the stated interim earnings and expenses "as well as the periods of time that the discriminatees were unavailable for work and/or did not diligently seek to mitigate their losses."

At the hearing, the Company did not present any evidence in support of its allegations regarding the backpay claim of Robert Williamsen. Instead, the Company showed that Robert Williamsen on December 3, 1982, executed a settlement agreement under which he received $10,000 from Respondent in return for his agreement to release the Company from any further claims growing out of his unlawful discharge as found by the Board in the instant cases.

In support of contentions made for the first time in its brief, Respondent argued that Tyynismaa was not entitled to backpay because of his questionable credibility and the inaccuracy of his reports to the Regional Director of his interim earnings. In support of this position, Respondent, at the hearing, introduced Tyynismaa's testimony and related documents. Tyynismaa's testimony showed only that he had no detailed recollection of his interim earnings. He attempted to explain the approximation that he had furnished to Board Agent Berman in a letter dated January 1980, when he attempted to provide data relating to his interim earnings. Respondent's examination of Tyynismaa also demonstrated that he could not explain several deductions in his income tax returns as prepared by his accountant. However, Tyynismaa's testimony showed that during the tax year 1979, one of the years under scrutiny, he and his wife kept informal records that he did not review and that he turned over to his accountant for preparation of their joint tax return. The extent of the inaccuracies in Tyynismaa's estimate of his interim earnings was demonstrated by his assertion in his letter to Board employee Berman that in both the third and fourth quarter of 1979, his estimated gross interim earnings were $40,000. His testimony and his income tax return for that year indicate that in fact his income for those two quarters was substantially less than $80,000. However, as he pointed out, he believed that he was not entitled to backpay for those two quarters, and thus had no interest in being accurate.

Collective-bargaining agreements in effect between September 1977 and August 1980 required the Company to make weekly contributions to the Central States Southeast and Southwest Areas Pension Fund on behalf of Williamsen and Tyynismaa between September 1977 and August 1978, thus a weekly contribution of $28 per employee. For the period between September 1978 and August 1979, that obligation rose to $31, and between September 1979 and August 1980, it was $37.

B. *Analysis and Conclusions*

Respondent contended that Tyynismaa was not entitled to recover any backpay on the ground that he was unable to account for his interim earnings credibly. Respondent further contended that the settlement agreement between itself and Williamsen was entitled to acceptance by the Board as complete resolution of Williamsen's backpay claim under the specification. Finally, the Respondent denied that it was obligated to make any fringe benefit contributions on behalf of either Williamsen or Tyynismaa during the backpay period presented here. I find no merit in these contentions.

The "finding of an unfair labor practice . . . is presumptive proof that some back pay is owed." *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). The General Counsel's burden in a backpay proceeding is simply to show the gross backpay due the claimant. *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962). Once that is done in the backpay specification, the employer has the burden of establishing affirmative defenses that would mitigate liability including wilfull loss of earnings and interim earnings to be deducted from the backpay award. *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963); *Southern Household Products*, 203 NLRB 881 fn. 2 (1973); *Heinrich Motors*, 166 NLRB 783 (1967).

Here, the Respondent failed to sustain its burden of establishing the infirmities that its answer attributed to the specification. Respondent presented no evidence to rebut the Regional Director's backpay and fringe benefit determinations regarding Williamsen. Nor has Respondent sustained its burden of showing that the Regional Director's determinations regarding the backpay and fringe amounts due William Tyynismaa were inaccurate.

Respondent contended that Tyynismaa should not receive any backpay on the ground that he willfully concealed interim earnings from the Regional Director. I find this contention lacking in substantiation.

Respondent argued that the Board's decision in *Great Plains Beef Co.*, 255 NLRB 1410, 1415 (1981), required denial of backpay to Tyynismaa. There, the Board declined to award backpay to employee Ferman D. Trotter on the ground that he willfully concealed interim earnings from the Regional Director. Respondent has made no such showing in the instant case, regarding Tyynis-

maa. Here, all that Tyynismaa's testimony showed was that he was not an informative witness. His testimony did not show that he withheld information regarding any interim employment from the Regional Director or that he otherwise attempted to conceal his earnings.

In sum, the Company has failed to present sufficient evidence to sustain the affirmative defenses challenging the specification.

Board policy does not support Respondent's contention that Williamsen and Tyynismaa were not entitled to weekly pension contributions as provided in the collective-bargaining agreement that covered them during the backpay period. For the Board has recognized that its backpay orders include such contributions. *Carpenters Local 347 (Newton Associates)*, 231 NLRB 688, 690 (1977).

In agreement with the General Counsel, I conclude that under Board policy, I cannot accept Respondent's agreement with Williamsen as a complete settlement of the latter's backpay claim. Thus, as the Board stated in *Michael M. Schaefer*, 261 NLRB 272, 273 (1982):

> It is well settled that an individual may not waive, bargain away, or compromise any backpay which might be due him (or her) since it is not a private right which attaches to the discriminatee, but is, indeed, a public right which only the Board or the Regional Director may settle.

This quoted policy requires that I reject the settlement agreement executed by Robert Williamsen in consideration of the payment of $10,000 by Respondent to him as full resolution of his backpay claim. However, the $10,000 that Williamsen received will be deducted from the total amount due him under the instant order. I therefore find that Robert Williamsen is entitled to recover the sum of $30,108.11 plus interest to make him whole for the loss of earnings he suffered by reason of the discrimination against him.[2] I also find that Williamsen is entitled to pension fund contributions totaling $3673 plus interest.[3]

I further find that William Tyynismaa is entitled to recover the sum of $46,738.54 plus interest to make him whole for the loss of earnings he suffered by reason of the discrimination against him.[4]

I also find that Tyynismaa was entitled to pension fund contributions totaling $4,121 plus interest.[5]

[Recommended Order omitted from publication.]

Attachment A

William Tyynismaa—Average Backpay Computation

Yr./Qtr.	*Dates*	*Employee*	*Weeks Worked*	*Total Hrs. Worked*	*Total Pay*	*Avg. Hrs./ Day for 6-Day Wk.*	*Avg. Hrs./ Week*	*Avg. Pay/ Day for 6-Day Wk.*	*Avg. Pay/ Week*	*Avg. Hrs./ Day*	*Avg. Hrs./ Wk.*	*Avg. Pay/ Day*	*Avg. Pay/ Wk.*	*Avg. Wks. Worked*
1980/1	12/23-3/22	#1.....	11 1/1-2/23 & 3/3-3/22	411.5	$4,588.50		37.41		$417.14					
1980/1	2/23-3/22	#2.....	13 12/23 3/22	470.25	5,346.03	—	36.17	—	411.23	—	36.79	—	$414.19	12
							73.58		$828.37					
1980/2	3/23-6/21	#2.....	2 3/23-3/29 & 4/13-4/19	62	622.52	—	31	—	331.26	—	31	—	331.26	2

[2] App. A, Schedules A through E-1, shows the manner in which Williamsen's backpay was computed.

[3] App. A, Schedules F-1, shows Williamsen's entitlement to pension fund contributions.

[4] App. B, Schedules B-2 through E-2, shows the manner in which Tyynismaa's backpay was computed.

[5] See App. B, Schedule F-2, shows Tyynismaa's entitlement to pension contributions.

APPENDIX A

M & B Contracting Corporation Cases 7-CA-14386, 7-CA-14575, and 7-CA-14850

Robert Williamsen—Overtime Pay—Schedule A

Yr./Qtr.	Pay Period	OT Hrs.*	OT Pay Rate**	Overtime Pay
1977/3	Sept. 7-10	17.34	$14.12	$244.84
1977/3	Sept. 12-17	22	14.12	310.64
1977/3	Sept. 19-24	22	14.12	310.64
1977/3	Sept. 26-Oct. 1	22	14.12	310.64
		83.34		$1176.76

* Based on average 22 overtime hours /6-day week 2.33 overtime hours Monday-Friday 10.35 overtime hours, Saturday.
** 1-1/2 times regular pay rate of 9.41/hour.

Robert Williamsen—Avg. Backpay Computation—Schedule B-1

Yr./Qtr.	Dates	Employee	Weeks Worked	Total Hrs. Worked*	Total Pay	Avg. Hrs./ Day for 6-Day Wk.	Avg. Hrs./ Week	Avg. Pay/ Day for 6-Day Wk.	Avg. Pay/ Week	Avg. Hrs./ Day	Avg. Hrs./ Wk.	Avg. Pay/ Day	Avg. Pay/ Wk.	Avg. Wks. Worked
1978/4	9/25-12/23	#1	13 9/25-12/23	552.5	$6,040.12	—	42.50	—	$464.62					
1978/4	9/25-12/23	#2	13 9/25-12/23	582.5	6,546.85		44.81	—	503.60	—	43.66	—	$484.11	1
							87.31		$968.22					
1979/1	12/24-3/24	#1 Quit 2/22.	6.67 12/24-1/13 & 1/28-2/22	205	2,125.74	—	30.73	—	322.75					
1979/1	12/24-3/24	#2	11 12/24-1/13 & 1/28-3/24	347.25	3,630.31	—	31.57	—	330.03		31.15	—	326.39	1
							62.3		$652.78					
1979/2	3/25-6/23	#1 re-hired 4/24.	8.83 4/24-6/23	459.75	5,416.86	—	52.07	—	613.46					
1979/2	#C. 3/25-6/23	#2	13 3/25-6/23	585.25	6,923.82	—	45.02		532.61	—	48.55	—	573.04	
							97.09		$1,146.07					
1978/1	12/26-3/26	#1	1 2/6-2/12	56.75	516.46	9.46	—	86.08	—	9.46	—	86.08	—	
1978/1	12/26-3/26	#1	6 2/13-3/26	361.25	3,586.05	—	60.21	—	597.68	—	—	—	—	

APPENDIX A—Continued

M & B Contracting Corporation Cases 7-CA-14386, 7-CA-14575, and 7-CA-14850

Robert Williamsen—Overtime Pay—Schedule A

—Continued

Robert Williamsen—Avg. Backpay Computation—Schedule B-1

Yr./Qtr.	Dates	Employee	Weeks Worked	Total Hrs. Worked*	Total Pay	Avg. Hrs./ Day for 6-Day Wk.	Avg. Hrs./ Week	Avg. Pay/ Day for 6-Day Wk.	Avg. Pay/ Week	Avg. Hrs./ Day	Avg. Hrs./ Wk.	Avg. Pay/ Day	Avg. Pay/ Wk.	Avg. Wks. Worked
1978/1		#2. hired 2/17.	5.67 2/17-5/26	258.5	2,827.26	—	45.59	—	498.63	—	52.9	—	548.16	
		.....					105.80		$1,096.31					
1978/2	3/27-6/25	#1.	12 3/27-4/2 & 4/10-6/25	681.25	6,980.23	—	56.77	—	581.69	—	—	—	—	
1978/2	P3/27-6/25	#2.	11 4/10-6/25	707.5	7,225.98	—	64.32	—	656.91	—	60.55	—	619.30	
		.....					121.09		$1,238.60					
1978/3	6/26-9/24	#1.	13 6/26-9/24	710.5	7,932.32	—	54.65	—	610.18	—	—	—	—	
1978/3	6/26-9/24	#2.	13 6/26-9/24	825.25	9,495.21	—	65.56	—	730.40	—	60.11	—	670.29	
		.....					120.21		$1,340.58					
1979/3	6/24-9/29	#1.	14 6/24-9/29	651.5	7,581.38	—	46.54	—	541.53					
1979/3	6/24-9/29	#2.	14 6/24-9/29	710.25	8,396.17	—	50.73	—	599.73	—	48.64	—	570.63	
		.....					97.27		$1,141.26					
1979/4	9/30-12/22	#1.	12 9/30-12/22	580	7,022.40	—	48.33	—	585.20					
1979/4/	9/30-12/22	#2.	12 9/30-12/22	651.25	8,037.72	—	54.27	—	699.81	—	51.30	—	627.51	
		.....					102.6		$1,255.01					
1980/1	12/23-3/22	#1.	11 1/1-2/23 & 3/3-3/22	411.5	4,588.50	—	37.41	—	417.14					
1980/1	12/23-3/22	#2.	13 12/23-3/22	470.25	5,346.03	—	36.17	—	411.23	—	36.79	—	414.15	
		.....					73.58		$828.37					
1980/2	3/23-6/21	#2.	2 3/23-3/29 & 4/13-4/19	62	662.52	—	31	—	331.26	—	31	—	331.26	

* Excludes vacation pay & hours.

Robert Williamsen—Gross Backpay—Schedule C-1

Yr./Qtr.	No. of Wks.	Avg. Pay/Day	Avg. Pay/Wk	Gross Backpay
1978/1	5 days (Feb. 7–11)	$88.06	—	$ 430.30
1978/1	6 days (Feb. 13–Mar. 26)	—	$548.16	3,288.96
				3,719.26
1978/2	11.5	—	619.30	7,121.95
1978/2	48 hrs. vacation pay @ 9; 41/hr.	—	451.68	451.68
		—		7,573.63
1978/3	13	—	670.29	8,713.77
1978/4	13	—	484.11	6,293.43
1979/1	11	—	326.39	3,590.29
1979/2	13	—	573.04	7,449.52
1979/2	48 hrs. vacation pay @10.16/hr.	—	487.68	487.68
				7,937.20
1979/3	14	—	570.63	7,988.82
1979/4	12	—	627.51	7,530.12
1980/1	12	—	414.19	4,970.28
1980/2	2	—	331.26	662.52
1980/2	96 hrs. vacation	—	1,021.44	1,021.44
	Total			$1,683.96

APPENDIX B

Robert Williamsen—Net Interim Earnings—Schedule D-1

Yr./Qtr.	Interim Employer	Net Interim Earnings*
1978/1	N/A	0
1978/2	Construction Restoration, Inc. 34326 Goddard Road Romulus, MI 48174	$1,609.53
	ARS Day School, 19300 Ford Road, Dearborn, MI 48128	199.50
	Gross Interim Earnings	$1,809.03
	Total	$1,809.03
1978/3	Construction Restoration, Inc., 34326 Goddard Road, Romulus, MI 48174	1,073.02
	Hayball Trucking, Inc., 12550 Farmington Road, Livonia, MI 48150	3,082.98

APPENDIX B—Continued

Robert Williamsen—Net Interim Earnings—Schedule D-1

Yr./Qtr.	Interim Employer	Net Interim Earnings*
	Total	$ 4,156.00
1978/4	Hayball Trucking, Inc., 12550 Farmington Road, Livonia, MI 48150	$4,624.47
	Total	$4,624.47
1979/1	N/A	0
1979/2	Electra Construction, Inc., P.O. Box 207, 13560 Nine Mile Road, South Lyon, MI 48178	$6,496.04
	Total	$6,496.04
1979/3	Manzo & Sakalian, Inc., 4904 Triwood, Milford, MI 48042	6,191.41
	Hayball Trucking, Inc., 12250 Farmington Road, Livonia, MI 48150	1,998.35
	Total	$8,189.76
1979/4	Hayball Trucking, Inc., 12250 Farmington Road, Livonia, MI 48150	$5,995.05
	Total	$5,995.05
1980/1	N/A	0
1980/2	N/A	0

* Gross interim earnings—expenses—net interim earnings. (See 1978/2.)

Robert Williamsen—Backpay—Schedule E-1

Yr./Qtr.	Gross Backpay	Interim Earnings	Net Backpay
1978/1	$3,719.26	0	$3,719.26
1978/2	7,573.63	1,809.03	5,764.60
1978/3	8,713.77	4,156.00	4,557.77
1978/4	6,293.43	4,624.47	1,668.96
1979/1	3,590.29	0	3,590.29
1979/2	7,937.20	6,496.04	1,441.16
1979/3	7,988.82	8,189.76	0
1979/4	7,530.12	5,995.05	1,535.07
1980/1	4,970.28	0	4,970.28
1980/2	1,683.96	0	1,683.96
			$28,931.35

Robert Williamsen—Fringe Benefits—Schedule F-1

Yr./Qtr.	No. of Wks.	Pension Weekly Contribution
		9/77 - 8/78 -$28 9/78 - 8/79 -$31 9/79 - 8/80 -$37
1978/1	7	$196
1978/2	13	364
1978/3	13	
	10 wks. 280	
	3 wks. 93	373
1978/4	13	403
1979/1	13	403
1979/2	13	403
1979/3	14	
	10 wks. 310	
	4 wks. 148	458
1979/4	12	444
1980/1	13	481
1980/2	4	148
		$3673

William Tynnismaa—Interim Earnings—Schedule D-2

Ytr./Qtr.	Interim Employer	Net Interim Earnings
1978/3	Disability Insurance	$1,280
	Total	$1,280
1978/4	Disability Insurance	$2,080
	Total	$2,080
1979/1	Unknown	$1,820
	Total	$1,820
1979/2	Unkown	$1,820

—Continued

William Tynnismaa—Interim Earnings—Schedule D-2

Ytr./Qtr.	Interim Employer	Net Interim Earnings
	Total	$1,820
1979/3	Self-employed/Corrigan Moving & Storage 2000 Westwood Dearborn, MI 48124	$2,609.48
	Total	$2,609.48
1980/1	Self-employed/Potter Moving & Storage Co. (approx.) 1300 North Campbell Rd. P.O. Box 98 Royal Oak, MI 48068	$1,242.41
	Total	$1,242.41
1980/2	Potter Moving & Storage Co. 1300 North Campbell Rd. P.O. Box 98 Royal Oak, MI 48068	0
	Total	0

William Tynnismaa—Backpay—Schedule E-2

Yr./Qtr.	Gross Backpay	Net Interim Earnings	Net Backpay
1977/1	$5,063.53	$1,497.15	$3,566.38
1978/1	6,638.45	1,898.01	4,740.44
1978/2	7.535.99	4,308.21	3,277.78
1978/3	8,713.77	1,280.00	7,433.77
1978/4	6,293.43	2,080.00	4,213.43
1979/1	3,590.29	1,820.00	1,770.29
1979/2	7,937.20	1,820.00	6,117.20
1979/3	7,988.82	2,609.48	5,379.34
1979/4	7,530.12	2,609.48	4,920.64
1980/1	4,970.28	1,242.41	3,727.87
1980/2	1,641.40	—	1,641.40
			$46,738.54

William Tyynismaa—Avg. Backpay Computation—Schedule B-2

Yr./Qtr.	Dates	Employee	Weeks Worked	Total Hrs. Worked	Total Pay	Avg. Hrs./ Day for 6-Day Wk.	Avg. Hrs./ Week	Avg. Pay/ Day for 6-Day Wk.	Avg. Pay/ Week	Avg. Hrs./ Day	Avg. Hrs./ Wk.	Avg. Pay/ Day	Avg. Pay/ Wk.	Avg. Wks. Worked
1977/4	9/25-12/25	#1	1	45	$522.27	7.5	—	87.05	—	7.5	—	87.05	—	1
	10/17-10/23													
1977/4	9/25-12/25	#1	9	507	4,889.41	—	56.33	—	543.27	—	56.33	—	$543.27	9
	10/24-12/25													

—Continued

William Tyynismaa—Avg. Backpay Computation—Schedule B-2

Yr./Qtr.	Dates	Employee	Weeks Worked	Total Hrs. Worked	Total Pay	Avg. Hrs./ Day for 6-Day Wk.	Avg. Hrs./ Week	Avg. Pay/ Day for 6-Day Wk.	Avg. Pay/ Week	Avg. Hrs./ Day	Avg. Hrs./ Wk.	Avg. Pay/ Day	Avg. Pay/ Wk.	Avg. Wks. Worked
1978/1	12/26-3/26	#1	13 (12/26-3/26)	706	6,794.71	—	54.31	—	522.67					13
1978/1	12/26-3/26	#2 Hired 2/17/78.	5.67 (2/17-3/26)	258.5	2,827.26	—	45.59	—	498.63	—	49.95	—	510.65	
							99.9		$1,021.30					
1978[2]	3/27-6/25	#1	12 3/27-4/12 & 4/10-6/25	681.25	6980.23	—	56.77	—	581.69					11.5
1978[2]	3/27-6/25	#2	11 4/10-6/25	707.5	7,225.98	—	64.32	—	656.91	—	60.55	—	619.30	
							121.09		$1,238.60					
1978/3	6/26-9/24	#1	13 6/26-9/24	710.5	7,932.32	—	54.65	—	610.18					13
1978/3	6/26-9/24	#2	13 6/26-9/24	852.25	9,495.21	—	65.56	—	730.40	—	60.11	—	670.29	
							120.21		$1,340.58					
1978/4	9/25-12/23	#1	13 9/25-12/23	552.5	6,040.12	—	42.5	—	464.62					13
1978/4	9/25-12/23	#2	13 9/25-12/23	582.5	6,546.85	—	44.81	—	503.60	—	43.66	—	484.11	
							87.31		$968.22					
1979/1	12/24 3/24	#1 Quit 2/22.	6.67 12/24-1/13 & 1/28-P2/22	205	2,152.74	—	30.73	—	322.75					11
1979/1	12/24 3/24	#2	11 12/24-1/13 & 1/28-3/24	347.25	3,630.31	—	31.57	—	330.03	—	81.15	—	326.39	
							62.30		$652.78					
1979[2]	3/25-6/23	#1 Re-hired 4/24.	8.83 4/24-6/23	459.75	5,416.86	—	52.07	—	613.46					
1979[2]	3/25-6/23	#2	13 3/25-6/23	585.25	6,923.92	—	45.02	—	532.61	—	48.55	—	573.04	
							97.09		$1,146.07					

—Continued

William Tyynismaa—Avg. Backpay Computation—Schedule B-2

Yr./Qtr.	Dates	Employee	Weeks Worked	Total Hrs. Worked	Total Pay	Avg. Hrs./ Day for 6-Day Wk.	Avg. Hrs./ Week	Avg. Pay/ Day for 6-Day Wk.	Avg. Pay/ Week	Avg. Hrs./ Day	Avg. Hrs./ Wk.	Avg. Pay/ Day	Avg. Pay/ Wk.	Avg. Wks. Worked
1979/3	6/24-9/29	#1 ...	14	651.5	7,581.38	—	46.54	—	541.53					
1979/3	6/24-9/29	#2 ...	14	710.25	8,396.17	—	50.73	—	599.73	—	48.64	—	570.63	14
		.....					97.27		$1,141.26					
1979/4	9/30-12/22	#1 ...	12	580	7,022.40	—	48.33	—	585.20					
1979/4	9/30-12/22	#2 ...	12	651.25	8,037.72	—	54.27	—	669.81	—	51.3	—	627.51	12
		.....					102.6		$1,255.01					

* Exlcudes vacation pay and hours.

William Tyynismaa—Gross Backpay—Schedule C-2

Yr./Qtr.	No. of Wks.	Avg. Pay/Day	Avg. Pay/Wk.	Gross Backpay	
1977/4	2 days (Oct.21 + 22)	87.05	—	$ 147.10	
1977/4	9 (10/24-12/25)	—	543.27	4,889.43	
	.....				$5,063.53
1978/1	13	—	510.65		6,638.45
1978/2	11.5	—	619.30	7,121.95	
1978/2	44 hrs. vacation pay @ 9.41/hr.	—	414.04	414.04	
	.....	—			7,535.93
1978/3	13	—	670.29		8,713.77
1978/4	13	—	484.11		6,293.43
1979/1	11	—	326.39		3,590.29
1979/2	13	—	573.04	7,449.52	
1979/2	48 hrs. vacation pay @ 10.16/hr.	—	487.68	487.68	
	.....				7,937.20
1979/3	14	—	570.63		7,988.82
1979/4	12	—	627.51		7,530.12
1980/1	12	—	414.19		4,970.28
1980/2	2	—	331.26	622.52	
1980/2	96 hrs. vacation pay @ 10.64/hr.	978.88	978.88	1,641.40	
	.....				$67,903.28

William Tyynismaa—Interim Earnings—Schedule D-2

Yr./Qtr.	Interim Employer	Net Interim Earnings
1977/4	Eisenhour Construction Co., Inc P.O. Box 1450 East Lansing, MI 48823	$ 931.41
	Rose Moving and Storage 25125 Ford Rd. Dearborn, MI 48128	565.74
	Total	$1,497.15
1978/1	Rose Moving and Storage 25125 Ford Rd. Dearborn, MI 48128	$1,898.01
	Total	$1,898.01
1978/2*	Rose Moving and Storage 25125 Ford Rd. Dearborn, MI 48128	$1,898.01
	Mayflower Moving & Storage P.O. Box 1078 9998 N. Michigan Rd. Indianapolis, Indiana 48206	$1,464.47
	Gene Farr Indianapolis, Indiana	$625.00
	Dan's Trucking & Leasing, Inc, P.O. Box 93 Allen Park, MI 48101	$80.64
	Great Lakes Aggregates 30945 Five Mile Livonia, MI 48154	$56.29
	Eisenhour Construction Co., Inc, P.O. Box 1450 East Lansing, MI 48823	$33.80
	William Sowle	$150.00

—Continued

William Tyynismaa—Interim Earnings—Schedule D-2

Yr./Qtr.	Interim Employer	Net Interim Earnings
	Saginaw, MI Gross Interim Earnings	$4,308.21
	Total	$4,308.21

* Gross interim earnings - expenses - Net interim earnings. (See 1978/2.)

William Tyynismaa—Fringe Benefit—Schedule F-2

Yr./Qtr.	No. of Weeks		Pension Weekly Contribution
		.....	9/77-8/78-$28
		.....	9/78-8/79-$31
		.....	9/79-8/80-$37
1977/4	10	.....	$280
1978/1	13	.....	364
1978/2	13	10 wks 280	364
1978/3	13	3 wks 93	373
1978/4	13	.....	403
1979/1	13	.....	403
1979/2	13	10 wks 310	403
1979/3	14	4 wks 148	458
1979/4	12	.....	444
1980/1	13	.....	481
1980/2	4	.....	148
		.....	$4,121

San Antonio Control Systems Inc. *and* International Brotherhood of Electrical Workers, AFL–CIO, Local Union No. 60 *and* South Texas Chapter, National Electrical Contractors Association, Party to the Contract. Cases 23–CA–10434 and 23–CA–10453

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On June 8, 1987, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, San Antonio Control Systems Inc., San Antonio, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We adopt the judge's finding that the General Counsel did not establish voluntary recognition under Sec. 9(a) of the Act. In so doing, however, we find it unnecessary to pass on whether there was a sufficient demand for recognition here because there is insufficient evidence concerning majority union support of the Respondent's employees at the time recognition—whether under Sec. 8(f) or Sec. 9(a)—was extended.

[2] The General Counsel excepts to the judge's failure to include a visitatorial clause in the recommended Order. A visitatorial clause authorizes the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Board's Order. Under the circumstances of the case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

Robert S. Breaux and *Guadalupe Ruiz, Esqs.*, for the General Counsel.

John A. Ferguson Jr., Esq. (Harris & Padgett), of San Antonio, Texas, for the Respondent.

Robert C. Moczygemba, of San Antonio, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. The issues litigated here include allegations that the Employer unlawfully refused to bargain and illegally discharged two employees. In a recent decision the Board abandoned its rules concerning the conversion of an 8(f) contract to a 9(a) contract. *John Deklewa & Sons*, 282 NLRB 1375 (1987). That decision has a substantial impact on most of the allegations here, and I dismiss all but one of the refusal to bargain allegations. Finding no prima facie case that Respondent was unlawfully motivated in discharging the two employees, I dismiss that allegation as well.

This case was tried before me in San Antonio, Texas, on 9–12 December 1986 pursuant to the consolidated complaint (complaint) issued 2 September 1986 (as amended 1 October 1986) by the General Counsel of the National Labor Relations Board through the Regional Director for Region 23.[1] The complaint is based on charges filed 8 July 1986 in Case 23–CA–10434, and 1 August 1986 in Case 23–CA–10453, by International Brotherhood of Electrical Workers, AFL–CIO, Local Union No. 60 (Union, IBEW Local 60, or Charging Party) against San Antonio Control Systems Inc. (Respondent or SACS).[2]

In the complaint the General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act on 11 June when Ronald Rice, Respondent's president, told employees that he no longer would pay their fringe benefits as specified in the collective-bargaining agreement (CBA); Section 8(a)(3) by reducing wages of employees on 1 June and on 23 June by terminating employees Charles D. Stewart and Joseph R. Stout; and Section 8(a)(5) by various unilateral actions between 26 May and 1 July, culminating on 1 July, and thereafter, by refusing to furnish data requested by the Union and by refusing to bargain with the Union.

By its answer, Respondent admits certain factual matters, but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel[3] and the Respondent,[4] I make the following

FINDINGS OF FACT

I. JURISDICTION

A Texas corporation headquartered in San Antonio, Texas, SACS, as a subcontractor in the building and construction industry, installs temperature control systems in commercial buildings. During the past 12 months SACS purchased products, goods, and materials valued in excess of $50,000, which items were received from points located outside Texas. Respondent admits, and I find,

[1] All dates are for 1986 unless otherwise indicated.

[2] I show Respondent's name without a comma after Systems because that is the way it appears in the letterhead on the firm's stationery.

[3] Counsel for the General Counsel, Guadalupe Ruiz, attached a proposed order and notice to his brief. By his 10 January 1987 motion for extension of time to file brief, Attorney Ruiz advised that he would be preparing and submitting the General Counsel's brief following the hospitalization of the General Counsel's trial attorney, Robert S. Breaux.

[4] Respondent subsequently filed a motion, dated 9 March 1987, to dismiss the complaint based on the Board's recent decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987). The General Counsel filed a response and opposition dated 12 March 1987.

that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

Based on other commerce allegations in the complaint, Respondent admits, and I find, that the South Texas Chapter, National Electrical Contractors Association (NECA) is an employer within the meaning of Section 2(2), (6), and (7) of the Act. NECA and its member firms comprise an employer association that exists in whole or in part for the purpose of bargaining on behalf of its members with the Union concerning the rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees of NECA's members.

II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that IBEW Local Union No. 60 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Impact of John Deklewa & Sons*

1. Contentions of the parties—Respondent's motion to dismiss

The General Counsel's case regarding the refusal-to-bargain allegations hinges on the contention (Br. at 7–9) that the bargaining unit consisted of two electricians, Joseph R. Stout and Charles D. Steward, as a craft unit separate from Respondent's three other employees.

In February 1982 Respondent signed a "Letter of Assent–B" agreeing to be bound by the terms of the Union's CBA with NECA. Later that month Stout and Steward joined the Union. The most recent CBA was effective from 1 June 1985 to 31 May 1986.

The General Counsel alleges (complaint par. 11) and contends (Br. at 11; Response at 2) that at all material times the Union has been the exclusive representative of the employees in the bargaining unit by virtue of Section 9(a) of the Act. According to the General Counsel's view of the evidence, 9(a) representative status was established "from the beginning" (February 1982) when SACS *voluntarily recognized* the Union based on majority support within the appropriate unit (Br. at 11; Response at 2). Consequently, when the CBA expired on 31 May the usual presumptions applied: (1) majority status rebuttably presumed, and (2) SACS could make no unilateral changes short of an impasse in bargaining or, after withdrawing recognition based on the Union's loss of majority or objective indications, that the Union had lost that status.

Contending that the Respondent has shown neither a valid impasse during the May–July 1986 bargaining sessions nor objective indications that the Union had lost its majority status, the General Counsel argues that the Respondent's unilateral changes after the CBA expired on 31 May are unlawful (Br. at 12–13; Response at 2).

SACS analyzes this case entirely different. First, the bargaining relationship created in February 1982, based on the "Letter of Assent–B," was established under Section 8(f) of the Act—not under Section 9(a).

Second, the bargaining unit alleged has never been an appropriate unit under Section 9(a) because it improperly carves two employees from a total work force of five when all five do essentially the same work, using essentially the same skills. Although Stout and Stewart joined the Union in February 1982, the other three did not. There is no evidence or contention that the Union ever represented, or even sought to represent, these other three.

Although the Respondent's argument on brief has additional ramifications, I will not summarize them because it is obvious that the brief was prepared before counsel had obtained a copy of *John Deklewa & Sons*, 282 NLRB 1375 (1987). After filing its brief, Respondent submitted its four-page 9 March 1987 motion (Motion) to dismiss the complaint based on *Deklewa*. The General Counsel filed a four-page response and opposition (Response) dated 12 March 1987.

Deklewa has a dramatic impact on the analysis to be applied to this case. In that case the Board ruled that it will apply its "new 8(f) principles to this case and to all pending cases in whatever stage." *Deklewa* at 1389.

In *Deklewa* the Board overruled prior case law, abandoned its conversion doctrine, and established a new policy. *System Electric Co.*, 283 NLRB 650 (1987). Under the new policy an 8(f) contract is enforceable under the Act, but such a contract will not bar the processing of valid petitions filed pursuant to Section 9(c) and (e). On expiration of an 8(f) agreement, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship. *Deklewa* at 1378, 1385, 1388.

2. Discussion and conclusions

As mentioned, the General Counsel contends (Br. at 11; Response at 2) that Respondent voluntarily recognized the Union, and specifically relies on the Board's language at footnote 53 in *Deklewa*.

> We do not mean to suggest that the normal presumptions would not flow from voluntary recognition accorded to a union by the employer of a stable work force where that recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card majority. *Island Construction Co.*, 135 NLRB 13 (1962). That is, nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry.

Since *Deklewa*, the General Counsel cannot rely on the conversion doctrine (stable work force plus majority status converts an 8(f) relationship into one protected by 9(a)) to argue that a 9(a) relationship was established and that the usual presumptions apply following expiration of the CBA. Under *Deklewa*, therefore, a showing that SACS voluntarily recognized the Union at the inception of the bargaining relationship is absolutely crucial to the General Counsel's case. Otherwise, the relationship was 8(f) rather than 9(a), the CBA expired on 31 May, and Respondent's subsequent repudiation (in effect) of the

bargaining relationship was lawful—as were the unilateral changes, the refusal to furnish requested data, and the refusal to bargain.

"In light of the legislative history and the traditional prevailing practice in the construction industry, we will require the party asserting the existence of a 9(a) relationship to prove it." *Deklewa* at fn. 41. The General Counsel's theory of proof is voluntary recognition. Although the General Counsel asserts that theory, unfortunately the General Counsel fails to list, describe, or discuss the factors giving rise to that conclusion.

There was no card check in February 1982, or at any time. I agree with SACS that the bargaining relationship established here arose under Section 8(f)—not Section 9(a). Because the conversion doctrine, now abandoned by the Board,[5] is not available to the General Counsel, and because there was no voluntary recognition, as occurs outside the construction industry, discussion of a stable work force and the appropriate bargaining unit becomes academic. I will not undertake that irrelevant exercise. However, I will discuss the background events.

To sum up, I find that the bargaining relationship here was established under Section 8(f) of the Act, and that the General Counsel failed to prove that SACS ever voluntarily recognized the Union so as to create a 9(a) bargaining relationship. Consequently, I will grant Respondent's motion to dismiss the following complaint allegations (along with the appropriate conclusionary paragraphs):

> 1. Paragraphs 16 and 17, which allege the 1 June 1986 unilateral reduction of wages (of Stout and Stewart) and the simultaneous elimination of payments to the benefit trust funds.
>
> 2. Paragraph 18, which alleges Rice's 11 June 1986 telling of Stout and Stewart that SACS would no longer make the fringe benefit contributions called for by the CBA which expired 31 May.
>
> 3. Paragraphs 21, 22, and 23, which allege Respondent's refusal to furnish the Union with the data requested by the Union's letter of 1 July 1986.
>
> 4. Paragraph 24, which alleges that Respondent has failed and refused to bargain with the Union since 1 July 1986.

That leaves three issues to be decided. One is a refusal-to-bargain allegation, paragraph 15, describing a 26 May bypassing and direct dealing. As we will see, I dismiss all allegations except paragraph 15.

The second, paragraph 20, is an 8(a)(3) allegation that the 1 June unilateral changes were unlawfully motivated.

The final issue is the 25 June 1986 termination of Stout and Stewart.

Regarding Stout and Stewart, the complaint appears to allege both a constructive discharge and an actual discharge as alternative theories of events. Regarding the former, the complaint (par. 19) alleges that Respondent "caused the termination of" Stout and Stewart by the unilateral changes (par. 16) and by Rice telling (par. 18) Stout and Stewart on 11 June of the unilateral changes.

As for the actual discharge theory the complaint, in effect, alleges (par. 20, as amended) that Respondent was unlawfully motivated in terminating Stout and Stewart. The General Counsel, on brief, appears to rely exclusively on a constructive discharge theory (Br. at 15–16).[6] When Respondent argued (Motion at 3) that the General Counsel offered no evidence that Stout and Stewart were "discriminatorily discharged," the General Counsel replied (Response at 3–4) by (1) listing five factors reflecting improper motivation and (2) arguing that the Respondent failed to demonstrate that it would have taken the same action even in the absence of the protected conduct of Stout and Stewart.

Deklewa, of course, nullifies the basis for the constructive discharge theory. Because the unilateral changes were lawful, they could not have unlawfully caused a termination. The constructive discharge theory, then, is out. To the extent that paragraph 19 alleges a constructive discharge, I shall dismiss it. We are left with the motivation issue.

For its part, the Respondent argues that it fired Stout and Stewart on 25 June because they willfully failed to call in on Monday, 23 June, and because they engaged in a slowdown after being told on 11 June about the lawful unilateral changes (wage reduction; discontinuation of contributions of union benefit funds) (Br. at 28–29; motion at 3).

These remaining three issues require the usual summary of the facts plus discussion.

B. *Background*

1. Nature of Respondent's business

Ronald E. Rice is president and owner of SACS (2:385).[7] The former president, James Lee, hired Rice in August 1977 to assist with management of the Company and to oversee a large project SACS was starting in Temple, Texas (2:386). Including his 2-year study in electrical engineering in Virginia, Rice's training and work experience since 1961 have been in the electrical field. In 1972 Rice received a master electrician's license from the city of San Antonio, and he keeps that master's license current (2:387–388; 3:584–587). Since 1968, when he worked for Honeywell, Inc. in San Antonio, Rice's experience has included temperature control installation (2:386).

In 1981 Lee and Rice bought out a partner's interest in SACS, and Rice became vice president and half owner of Respondent (2:390). Rice became president of SACS in October 1982 (2:386).

Respondent's business is to install and service temperature control systems (devices that control temperature and humidity) in commercial buildings (2:391). Ordinarily Respondent submits a bid for such work to whoever is the designated mechanical contractor (2:391, 412, 414). This appears to be a consequence of the fact that in job specifications in the construction industry the paragraphs

[5] *Deklewa* at 1377–1378, 1385.

[6] The General Counsel cites constructive discharge cases such as *Marquis Elevator Co.*, 217 NLRB 461 (1975).

[7] References to the 4-volume transcript of testimony are by volume and page.

for automatic (temperature) control systems are set forth in section 15. That section, or division, is for the mechanical contractor, whereas section (or division) 16 is for the electrical contractor (1:178; 2:408–409, 414; 4:805). The reason that is so, as Business Manager Moczygemba testified, is that the mechanical contractor furnishes or designs the chillers and a lot of the equipment. It is easier for the architect or engineer to include that work in the mechanical section of the specifications (4:806). The mechanical contractors then subcontract the temperature control work either to firms such as SACS (2:414; 3:629–631, Rice) or to electrical subcontractors (4:806, Moczygemba). There is some dispute concerning which group gets more of the work, but it is not important that I resolve that matter.

The physical structure of the temperature control systems is described extensively in the testimony. Although the description bears on appropriate unit and majority status questions, it also has some relevance to the termination issue.

One of the major components of the system is the control valve. Water runs through the valve. The mechanical contractor sets the valve in place and attaches the plumbing to the valve. From that point SACS takes over and attaches either electric wire or pneumatic tubes to the control valve (2:393, 395, 3:591).

Pneumatic tubes, or lines, are of two types: copper and polyethylene. The latter is referred to as plastic or poly (2:393). The pneumatic lines are filled with pressurized air supplied by an air compressor. When the air pressure is varied other components are activated and the system performs its temperature control function (2.394, 397, 407, 432–433; 3:592).

Rice testified that several years ago pneumatic jobs consisted completely of copper tubing, and that a lot of skill was required to install such a system (2:397). Moczygemba agrees, and states that the pneumatic work was done principally by pipefitters (1:121). Indeed, among labor organizations, the Plumbers and Pipefitters Union[8] takes jurisdiction over such fitters, or technicians, and has a classification for them, Moczygemba testified, but the IBEW does not (1:26–27).

But copper tubing is being phased out as the industry shifts to the fire-rated polyethylene tubing (1:121; 2:397–398, 404). The poly tubing can be installed exposed (not necessarily in open view) or pulled through electric metallic tubing (EMT), metal conduit, if there is danger the poly could be damaged or cut if exposed (2:398–399). Today, Rice testified, 95 percent of Respondent's pneumatic work uses the poly tubing, with only 5 percent being copper. Copper is used only when the item is to be exposed. To avoid the risk of damage to the tubing in the situation, copper tubing is used (2:404).

For about the last 4 years, Rice testified, roughly 50 percent of Respondent's jobs have been a combination of pneumatic and electric, about 40 percent have been totally electric, and some 10 percent have been totally pneumatic (2:406, 3:590, 592).

[8] United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO. NLRB Style Manual (1983) at 58.

Regarding the electrical wiring jobs, the witnesses distinguish low voltage wiring from power wiring. The former carries the limited energy for the signal or control wiring and, as Rice testified, that is its function (2:439). The power wiring carries the higher current, or "line" voltage, of 120 volts and above. Although the witnesses all seem to rely on the National Electric Code (NEC) for a description of the classes of wiring and the authorized volts a class, they differ in their descriptions. The differences are not material for our purposes. The witnesses generally agree that Class 1, or A, is the higher voltage or power wiring of 120 volts and above, with Class 2, or B, being the low voltage. They agree that Class 2 is authorized for either 24 volts (2:999, Stewart), 30 volts or less (2:438, Rice), or 50 volts or less (1:173, 219, Stout). It is unclear what class they would assign a current of between 50 and 120 volts, or whether there is such a current.

Clearly the bulk of Respondent's electrical work involves low voltage wiring (class 2 or class B). There is a dispute concerning how much of Respondent's electrical work is power wiring. Rice puts the figure at no more than 2 to 3 percent (2:413; 3:682, 694). He testified that he designs his work so that it does not have to carry over 120 volts (2:401). Rice concedes there may be times when his employees hook up the power line to a control panel (2:413). He could recall only two such jobs in the last 18 months (2:435).

Joseph "Ronnie" Stout (one of the dischargees in this case) testified that at least half the jobs he has worked for Respondent involved some power wiring with some of the current being 480 volts and some of the jobs being 100 percent high voltage (1:173, 182–183). Charles Douglas Stewart (the other dischargee) did not estimate an overall percentage of work on jobs that involved "line" or power wiring other than to say it involved "a lot" of them (2:297). He testified that the work involved both classes of wiring and he listed several jobs where the "line" voltage ran as high as 480 (2:278–279, 282, 288, 296–299, 304–305).

I credit Stout and Stewart in the descriptions they gave. They did not specify a percentage of the total work, and their testimony does not necessarily conflict with Rice's figure of no more than 3 percent of the total electrical work being devoted to power wiring. However, Rice appeared to me to be limiting his estimate in order to enhance his prospects in this case. I make no finding regarding a percentage, but I find that it is something more than the 3 percent Rice estimates.

It would seem that the more relevant information is not how much of the total work is devoted to power wiring, but how critical is the power wiring, whatever the percentage, to the job. Indeed, the total work concept seems irrelevant since much of the work is the physical labor installing metal conduit and pulling wire or tubing through the conduit. Some of the jobs have several hundred feet of conduit, and frequently the conduit must be installed in crawl spaces or in other cramped quarters.

Since it is self-evident that power wiring is critical (otherwise there is no line current), the real question is

whether a licensed electrician is required to connect or install whatever power wiring is to be used in the temperature control work. There is no dispute that the electrical contractor's job electricians install the bulk of the power wiring on the jobs. Rice testified that this includes connecting the line voltage wire to the air compressor (2:407–408).

The city of San Antonio, Rice testified, has never required him (or any such contractor) to secure an electrical permit covering any of his temperature control installation projects (2:418; 3:632). Rice appears to say that although the city's electrical inspector does not specifically inspect Respondent's (division 15) temperature control work (3:694),[9] if the electrical inspector observes EMT lines improperly installed (sagging, for example), the inspector can require that such work be corrected so that it conforms to the standards specified in division 16, the electrical section (2:418–419). Rice seems to attribute this to the admitted fact that under the NEC, class 2 (low voltage) wiring must be installed in a neat and workmanlike manner (2:419; 3:589).

By contrast, Harry F. Katz, chairman of the city of San Antonio's Electrical Board, testified that in his opinion installation of low voltage temperature control systems is work covered by San Antonio's electrical code and work for which a permit should be obtained (4:774–777, 785–787). Katz explains that although the Electrical Board does not perform the daily tasks of issuing permits and making inspections, it does set the city's policy. From a policy standpoint, Katz testified, temperature control wiring requires an electrical permit (issued to someone with a master electrician's license) and inspections by the city (4:793–795, 799–800, 803).

In addition to the job needing a permit issued to someone with a master electrician's license, Katz also testified that the actual work must be performed (if not by the master electrician) by a licensed journeyman electrician or by an apprentice working for such a journeyman (4:785). Rice testified that in his opinion a person need to be a licensed journeyman electrician to perform temperature control installations either regarding ability (2:415–416; 3:629) or the requirements of the city's electrical code (2:417–418).

Because the matters pertaining to coverage by the electrical codes are merely tangentially related to the material issues of this case, I need not resolve any of the disputed aspects. To the extent that credibility of the witnesses becomes relevant, I observed Katz to be a highly credible witness, and I would credit him over Rice on any disputed point.

2. Overview of Respondent's relationship with IBEW Local 60

As of early 1982 Respondent's work force consisted of five employees: Joseph Ronnie Stout, Charles Douglas Stewart, Martin H. Broekers III, and two brothers, John and James C. Heil. Both Stout and Stewart are licensed by the city of San Antonio as journeymen electricians, Stout since about 1972 (1:131–132) and Stewart since 1976 (2:234). Stout was hired by Respondent in either July 1977 (1:130) or possibly March 1979 (1:170). Stewart possibly was hired in March 1978 (2:232), but the more likely date appears to be May 1980 since he recalls that James C. Heil was hired about 3 months later (2:286). James Heil was hired in September 1980 (3:723).

Broekers' background experience was in electronics before James Lee hired him in May 1977. Lee trained Broekers on the pneumatics of the work (3:699–700). In 1980 Broekers registered as an apprentice electrician with the city of San Antonio, but he has not taken the test for the journeyman's license (3:707, 717).

Lee hired John Heil in about June 1980. His background experience is fitter work, including some pneumatics, plus some electrical work. At SACS he acquired the additional skills he needed to do Respondent's temperature-control installation work.

James C. Heil, John Heil's brother, was hired by Respondent in September 1980. His experience before coming to work at Respondent was as a pipefitter and welder plus some minor electrical work (3:723, 732–733).

Until 1982 Respondent operated nonunion. In early 1982 Respondent was a successful bidder on a job to a mechanical contractor who held a contractual bargaining relationship with Plumbers and Pipefitters Local 142. The mechanical contractor informed Respondent that SACS had to use a union pipefitter on the job in order to avoid conflict with the union plumbers and fitters the mechanical contractor was hiring to do the plumbing work (2:440, 452).

Rice and Lee could see a boom in the construction of commercial buildings in the San Antonio area. To participate more in that boom, Rice and Lee decided to obtain contracts with the pneumatic union (Plumbers and Pipefitters Local 142) and the electrical union (IBEW Local 60) so that the mechanical contractors would subcontract the temperature control work to SACS (2:441, 452).

Rice contacted IBEW Local 60 and Lee contacted Plumbers and Pipe Fitters Local 142 (2:441). From mid-January to early February 1982, Moczygemba discussed the matter with Rice at Respondent's ofice (2:447, 451; 3:637–638).[10]

At some early point in these developments Respondent alerted its five employees to its plans. The employees were advised they could choose to join a union if they so desired (2:441–442). Stout and Stewart elected to join IBEW Local 60. Each was given a test, passed it, and was classified by the Union as a journeyman inside wireman (1:137–138; 2:239).

After Stout and Stewart joined IBEW Local 60, Broekers testified an official of Plumbers and Pipe Fitters Local 142 invited Broekers and the two Heil brothers to join Local 142. They declined because, Broekers testi-

[9] A fact Rice attributes to possible oversight by San Antonio and other cities in addressing coverage of temperature control work in their local codes (2:418; 3:694).

[10] Moczygemba testified that he discussed the matter with both Rice and Lee when he visited Respondent's office (1:24–28). This is a minor point and I find no conflict in any event. Although Moczygemba does not describe a second or third visit, I find, he discussed the matter with both Rice and Lee. On his next visit or two it is unclear whether Lee was present.

fied, there would have been no financial benefit to join.[11] As Broekers explained, he and the Heil brothers were (and are) paid an hourly base rate of $12 plus a profit-sharing bonus (paid annually) amounting to the difference between the (labor cost) figure Rice bids a job for and the actual (labor cost) figure on nonscale jobs. On Government jobs covered by the Davis-Bacon Act, all workers are paid the prevailing (union) scale rate. Thus, those jobs fall outside Respondent's incentive pay plan. Broekers testified that in an average year Respondent's incentive pay brings his earnings up to the equivalent of Government (union) scale (3:718–721).

Rice and Moczygemba describe their conversations a bit differently as it bears on the work force. According to Rice, he simply told Moczygemba that SACS did temperature control installation, that it was not an electrical contractor, and that only Stout and Stewart of his work force wanted to join Local 60. The names of the other three were not mentioned, and their work was not described (2:441–446, 449, 451; 3:638–639).

Moczygemba, whom I credit, testified that his discussion with Rice and Lee centered on the contract and the employees to be covered. Stout and Stewart were named as the only electricians employed by SACS. Moczygemba understood from the conversation that there were two or three other employees, but Rice and Lee assured him that those others were not electricians, that they were fitters and pneumatic employees who did not do electrical work. Rice and Lee informed Moczygemba that SACS had a bargaining relationship with Plumbers and Pipe Fitters Local 142. Moczygemba was aware the Pipe Fitters Union has a classification for pneumatic technicians, whereas the IBEW does not. He was further aware that both unions represent their respective classifications of employees with two other companies, Honeywell and Johnson Control Systems, engaged in temperature control installation work in the San Antonio area (1:25–28, 122).

As a result of their conferences, Moczygemba and Rice signed a "Letter of Assent--B" with an effective date of 22 February 1982 (G.C. Exh. 2). The form reflects that Moczygemba signed on 5 February and Rice on 19 February 1982. Rice confirms that they signed on separate dates (3:637). Under the Letter of Assent--B SACS agreed to comply with the terms and conditions of employment contained in the inside labor agreement (and any amendments) between NECA and IBEW Local 60 until the termination date of 30 June 1982. A provision states that if SACS does not intend to renew the agreement, it "shall so notify the Labor Union in writing at least sixty (60) days prior to the termination date."

In contrast to Respondent's written agreement with the Union, its contractual arrangement with Plumbers and Pipe Fitters Local 142 was nebulous in nature. Neither James Lee, who contacted Local 142, nor any official of Local 142 testified. There is no dispute that as a result of the contract between Respondent and Local 142, a pipefitter, Darrel Mullins, began working with, or for, SACS. The record does not reflect a precise date for either the arrangement with Local 142 or Mullins' first day on the job. The evidence is that Mullins began work shortly after Rice signed the Letter of Assent--B with IBEW Local 60.

On his first day of testimony Rice asserted that Mullins has always (since February 1982) worked as a subcontractor for Respondent and that, apparently, Respondent has never had a contract with Local 142 (2:463–464). The following day Rice testified that Respondent, through James Lee, did enter into a collective-bargaining relationship with Local 142 (3:618), asserted that he did not know whether SACS had a signed document at Respondent's office, stated that the relationship with Local 142 may be based on a handshake, and concluded by testifying he at least believes there was some kind of contractual arrangement between Respondent and Local 142 from February 1982 to 1985 (3:631–622).

At some point in 1985, Rice testified, Rice met with officials of Local 142 and explained that Respondent did not have enough (union) work to keep Mullins busy. The parties orally agreed to terminate whatever arrangement they had. At the same time they decided (apparently so that Respondent could use Mullins at least some of the time) Mullins should form his own company so he could contract with others (3:619–620). From that date in 1985 to the present, Respondent has used Mullins strictly on an independent contractor basis (he works primarily for Respondent), and it pays him a rate higher than the prevailing scale in order to compensate him for some of his overhead expenses (2:463–464; 3:620–621, 627–628, 693).

When Respondent, in February 1982, made its contractual arrangement with Local 142, and signed with IBEW Local 60 to be bound by the NECA contract, Rice admittedly split his work force of five employees (plus Mullins) into two crews, one union and the other nonunion, and told them they would work on separate projects (2:447–448). At times previously they had worked together on some jobs. Except for finishing work they currently were on, Respondent's work force after February 1982 worked as a union crew and a nonunion crew (2:453–454).

The union crew consisted of electricians Stout and Stewart and fitter Mullins. Broekers, John Heil, and Jim Heil formed the nonunion crew (2:448). On the union crew, Rice testified, Stout and Stewart did the electrical work, the "control wiring," and Mullins the pneumatic or fitter work. The nonunion crew did both the pneumatics and electrical work on their jobs (2:450–451, Rice). Broekers testified that after February 1982 he did strictly pneumatics (3:716). James C. Heil testified that he did both pneumatics and control wiring after February 1982 (3:727–728, 731).

At different times, and for brief periods, from 1 June to the end of October 1982, the Union (IBEW Local 60) referred a total of four electricians to assist on Respondent's union crew. There is no evidence of referrals after October 1982.

The union and nonunion crews enjoyed different pay systems. Stout and Stewart were paid the rate called for in the prevailing NECA contract and Respondent made the mandated contributions to the contractual trust

[11] James C. Heil confirms that he declined an invitation to join Local 142 in 1982 (3:735).

funds. The basis of payment to Mullins between 1982 and 1985 is unclear, but presumably it was the scale for Local 142. Respondent paid in to trust funds on behalf of Mullins until the 1985 conversion of his status (3:626). From 1985 forward Respondent paid Mullins a rate higher than union scale, and Respondent paid Mullins the equivalent of the contributions it had been making on his behalf to union trust funds (3:626–627).

By contrast, the nonunion crew was paid $12 an hour plus an incentive bonus equal to the difference between the sum Rice had bid regarding labor cost and the amount of actual labor cost (3:500, 505, 719). Broekers testified that Respondent's incentive bonuses bring the annual pay of the nonunion crew up to about the level of the Davis-Bacon scale (3:720–721). This incentive pay system applies to nonscale jobs; for on Government jobs covered by the Davis-Bacon Act, the prevailing scale rate is paid to the nonunion crew (2:461–463; 3:505) as well as to the union crew (3:575, 678, 680).

In early 1982 Rice and Lee thought they saw a boom in construction of commercial buildings. What they really saw, as all are now painfully aware, was the last spurt before the boom went bust. The only year in which Respondent obtained jobs from unionized mechanical contractors was 1982.

Toward the close of 1982 Respondent began running out of jobs that required a union pipefitter. This resulted, at least in part, not only from the general downturn in the economy leaving less work for the union contractors, but from an influx of nonunion mechanical contractors from Houston and Dallas grabbing some of the available work (3:600–602).

To keep Stout and Stewart working after 1982, Respondent occasionally had to assign them to some of its nonunion jobs, yet SACS continued to pay them to the contractual scale (2:452). Even on these occasional nonunion jobs, however, Respondent admittedly kept its two crews separate. Although there were jobs on which at some point each crew worked, after February 1982 Respondent's union and nonunion crews never worked on the same job at the same time (2:453–454, 456).

For some reason Respondent failed in 1983 to notify the Union that it wanted to cancel (did not wish to renew) the Letter of Assent--B. Nor did it do so in 1984 or 1985. Thus, each year the agreement was automatically renewed and SACS was covered by the NECA contracts over that period (1:94;2:468). The last NECA contract to which Respondent became bound had an effective term of 1 June 1985 to 31 July 1986 (G.C. Exh. 3).

Notwithstanding Respondent's failure to give the appropriate notice that would have canceled any further renewals of the NECA contract, at an early point Rice began seeking relief from the Union from the financial burden created by his having to bid against nonunion competitors based on his own union scale labor costs. By letter dated 23 August 1983 to Moczygemba, Rice requested a $12-an-hour rate for "my journeyman and electricians" when they work on (1) small service jobs, (2) any job not covered by the Davis-Bacon Act, and (3) jobs in which the electrical installation contract is for less than $20,000 (R. Exh. 2). Moczygemba admittedly received the letter (1:92), but he never answered it (2:469). The $12 rate, it will be recalled, was the base rate SACS was paying its nonunion crew (3:505, Rice; 3:719, Broekers). The $12 figure, standing alone, is misleading as to Respondent's nonunion employees. As Broekers explained, the nonunion crew enjoys an incentive bonus plan which, on average, brings their annualized wages up to a level equivalent to the Davis-Bacon scale (3:719–721). The Davis-Bacon scale is the prevailing scale or, in effect, the union scale.

Over a year and a half passed before Rice, by letter dated 5 April 1985, again wrote IBEW Local 60 requesting relief (R. Exh. 3). Again Rice received no reply (2:469). Apparently deciding that he had had enough, Rice sent Moczygemba the following letter of 15 November 1985 (G.C. Exh. 7; 1:35):

> Dear Bob:
>
> I wish to, with regrets, terminate the agreement between San Antonio Control Systems, Inc. and IBEW Local Union #60 as soon as possible, pursuant to Article I sections 1.02 and 1.03.
>
> Two requests for targeted wage rates were submitted in writing, on August 23, 1983 and April 5, 1985, both were denied. Many of our installations are unique pertaining to the electrical requirements. I must be more cost effective in our current marketplace, to first keep my company profitable, and secondly to open up as much work as possible for my employees.
>
> I want to express my respect for Local Union #60 and their continued success in the future.
>
> Sincerely,
> /s/ Ronald E. Rice
> Ronald E. Rice
> President

Although Respondent received no written reply from the Union (468–469), Moczygemba possibly telephoned Rice (1:35). Rice concedes his awareness that around this time the Union offered a market recovery rate (MRA) of $14.25 an hour to its signatory contractors who agreed to sign a 2-year NECA CBA. The MRA is also referred to as the target rate (3:640). The wage rate for journeymen under the March 1985 to May 1986 CBA was scheduled to increase on 2 December 1985 from $15.62 to $15.75 (G.C. Exh. 3 at 10).

Rice elected not to accept the MRA deal because, he felt, it still would not make him competitive with the nonunion contractors (2:467–568; 3:506, 639–640). For some time, Rice testified, Respondent had been losing money on the jobs on which SACS employed its union crew (2:470–471; 3:493, 514).

As the May termination date of the NECA CBA approached, Rice wrote Moczygemba a reminder letter, dated 3 April 1986, as follows (G.C. Exh. 8; 1:35):"As I stated in my letter dated November 15, 1986, I wish to terminate my letter of assent. I understood we are bound to the current agreement until May 31, 1986."

Responding by letter dated 17 April, Moczygemba requested a meeting to negotiate a renewal agreement and asked Rice to contact him concerning a date compatible

with their schedules (G.C. Exh. 9; 1:36). Rice apparently never applied, and Moczygemba wrote again on 8 May reminding Rice that the CBA would expire 31 May and suggesting a meeting date of 19 May at 10 a.m. at Moczygemba's office (G.C. Exh. 10; 1:36). The parties did meet on that date.

C. *The Bargaining Sessions of May–July 1986*

1. Introduction

In order to understand the background events as they bear on the two allegations of unlawful motivation, I will summarize the bargaining sessions. Of course, Respondent's pre-*Deklewa* position that the parties reached an impasse on 5 June is no longer an ultimate issue to be decided.

The parties met four times during May–July 1986: 19 and 29 May, 5 June, and 1 July. The first three meetings, the parties agree, were bargaining sessions. Because Respondent contends (and the General Counsel disputes) that an impasse was reached at the third session, 5 June, it objected at one point to the General Counsel's reference to it as a bargaining session (1:126), and Respondent describes the 1 July meeting as "an attempt to resolve the parties' impasse." (Br. at 26–27.) Whether Respondent makes a valid distinction is questionable. For convenience purposes, I shall refer to all four as bargaining sessions. The first, second, and fourth sessions were short, with the meeting of 5 June being relatively long, lasting at least 2 hours.

2. The session of 19 May 1986

On 19 May the parties met at the Union's office for about an hour. Present were Moczygemba, his assistant Thomas Huckelba, and Rice.

They first talked about ground rules and some minor matters. One of these was the fact that Respondent had been underpaying Stout and Stewart by 13 cents an hour, plus failing to make full payments to these benefit funds (2:473). As Rice credibly explained, the shortage arose from Respondent's failure to increase payments based on the higher wage schedule (from $15.62 to $15.75; G.C. Exh. 3 at 10) that went into effect 2 December 1985. Rice said that if the Union would advise him of the exact amount due he would pay it. The Union did so the following day, by letter of 20 May (R. Exh. 18), and Rice paid the balance due.

Rice testified that the shortage flowed from his idea that his 15 November 1985 letter (giving notice that Respondent would not renew the CBA in May 1986) froze the pay and benefit rates at the current levels. Later in the spring, Huckelba advised him that was incorrect. "I didn't think it was fair" to have to pay the difference, explained Rice (since the other contractors, who had signed the 2-year MRA agreement, were paying only $14.25), "but I wanted to get out from under this contract in the correct manner" so he said, "I will pay it." (2:465–467; 3:518–519.) Moczygemba testified that Rice said he did not want to be a union contractor because he was not competitive, not making enough money, and did not see how he could survive as a union contractor (1:37–38, 95). In Rice's words, "I explained the reasons why I expressed a desire to get out from under the union contract." (2:472.)

Moczygemba handed Rice a complete written proposal for a new CBA (G.C. Exh. 11). Rice said he would take it back to his office and review it. Moczygemba asked Rice to come back with a response. They agreed to meet again on 29 May.

Before passing to the second bargaining session I will briefly mention a chronological development occurring on 20 May, the day after the first bargaining session. On 20 May Rice issued a memorandum in which he summarized the terms and conditions of employment for his nonunion employees (2:474–477). As this memo of 20 May figures in the allegation of direct dealing (complaint par. 15), I will defer further discussion until I reach that topic.

3. The session of 29 May 1986

The same representatives met again, also for about an hour, at the Union's office on 29 May. Again Rice said he could not make it as a union contractor because his union employees were not competitive and Respondent was not making enough money (1:141).

Before the meeting Rice read the Union's contract proposal, and in response he prepared a letter, dated 29 May, which he submitted at the meeting to Moczygemba (2:480–481). In the letter Rice lists several cost increases, a restriction on his ability to offer profit sharing to his employees, a restriction on his ability to own or operate another company (without the terms of the CBA attaching), and concludes with the following (R. Exh. 4): "Considering the increases, restrictions, and labor outlook for the San Antonio area I cannot sign the 1986 agreement."

Rice asked for a reduction in wages, and Moczygemba proposed the MRA rate of $14.25. They could not agree (2:481–482; 3:488). The next meeting was set for 5 June at 10 a.m. in Respondent's office.

4. The session of 5 June 1986

The same three representatives met in Rice's office on 5 June for about 2 hours and went through the Union's contract proposal item by item (1:42, 46–47, 62, 100; 2:482–483; 3:487). Making significant progress, the parties reached agreement on many provisions of a new CBA, but they ended the meeting with minor differences on a few items and substantially apart on two major issues.

Clearly the parties were in serious disagreement regarding two major issues: wage rates and contract duration. Respondent argues that the parties reached impasse on 5 June regarding these two issues (Br. at 25). I agree that if an impasse was reached, it was regarding one or both of these issues.

Respondent additionally contends that the parties seriously disagreed regarding two other issues, arbitration and subcontracting (Br. at 10). That tends to overstate the matter somewhat, for the parties had done little more than exchange their positions regarding those two issues, and the 5 June meeting ended with the understanding that the Union (on these two plus some other issues) was to submit (at the next meeting) revised language in an at-

tempt to meet Rice's objections. I need not summarize the evidence regarding the arbitration and subcontracting provisions.

As I have described, since August 1983 Rice had been requesting an hourly wage rate of $12. Rice brought with him to this third meeting a letter, dated 5 June (G.C. Exh. 12), which he gave to Moczygemba (1:47). In the letter Rice expressed his concerns about three topics, including wages. On wages he wrote that he wanted a wage rate of $12 plus $2.24 for Respondent's contributions to the benefit funds (3:582). He ended his letter by stating:

> My main concern is greeting the jobs my union employees are installing to show a profit. To date they are not. Two things need to be done, get more production from my employees and get their wage rate down to a more competitive level.

Moczygemba reminded Rice that at the last meeting he had offered Respondent the MRA, and he offered it again. He reviewed for Rice the details of the MRA. These included a wage rate of $14.25, plus benefit contributions, with an extension of the CBA to May 1988. Rice persisted at his $12 an hour (1:50, 101–102, 124; 3:681). Moczygemba estimated the benefit contributions under the MRA at no more than $1.80, or a total outlay by an employer of $16.05 (1:124–125). The total cash expense under Respondent's offer, $12 plus $2.24, would be $14.24.

Rice said he was paying his nonunion employees $12 an hour,[12] and that it was important he obtain that rate on any CBA because work was scarce and he had to be as competitive as possible (1:127–128; 3:506).[13] Rice "indicated" that the MRA was not acceptable. Even so, in Moczygemba's opinion, they were not at loggerheads over the wage rate because Rice simply objected to the term (1:102–103).

When the parties reached article X, section 5(a), "wages for all classifications shall be presented at a later date," the Union submitting no written wage proposal. Rice testified that it was "just understood" the rate was the target wage of $14.25 an hour (3:504). Moczygemba testified, without contradiction, that the parties agreed to defer on that item until they made more progress on agreements regarding other topics (1:107).

The duration clause (art. I, sec. 1) provided for a 1-year term beginning 1 June 1986. Rice said he was not interested in either a 1-year or 2-year CBA, but might consider one with a term of 6 months. Because of the hardships the current CBA was imposing on him, Rice said he did not think he could survive under the present CBA (3:488).[14] He said it was important that he hold any new CBA to a term of 6 months. Moczygemba said he wanted a term of 1 year. They moved to the next topic (1:51, 103; 3:486–487).

Although it is not entirely clear, the integrated positions seem to have been as follows. Respondent: $12 an hour with a 1-year CBA or $14.25 for a CBA of 6 months. Union: $14.25 an hour if the CBA was for 2 years, and on a 1-year CBA a wage rate not yet proposed by the Union. Respondent suggests that the Union's proposed wage rate for a 1-year CBA was $15.75 (Br. at 25). That is not so. As Moczygemba testified, the Union deferred presenting its wage rate proposal sending progress on other issues (1:107). The $15.75 rate was the current rate of the CBA, which expired at the end of May 1986 (G.C. Exh. 3 at 10).

The 5 June meeting ended with the parties agreeing to meet again on either 16 or 17 June. However, that date was postponed when Rice could not make it, and a second date was postponed for similar reasons (1:63; 3:508–509). They finally met for the fourth and last time on 1 July.

To keep events in chronological perspective, I shall mention here Respondent's admission that effective with the pay period beginning Sunday, 1 June 1986, it (unilaterally) reduced the hourly pay of Stout and Stewart to $14.25 and discontinued all payments to union benefit funds on nonscale jobs (jobs not covered by the Davis-Bacon Act). On scale jobs it paid direct to them the scale base rate of $15.75, plus benefits of $1.47, for a total of $17.22 (1:9; 3:574–575, 677–680). He did so without consulting an attorney (3:681).

Rice testified that he made the wage-reduction decision on Wednesday, 11 June (3:511). That is Respondent's payday. On their paychecks they received that 11 June, Stout (1:157–159) and Stewart (2:263–265) observed that their checks were for lesser amounts. Stewart called Rice who said that the new nonscale rate was $14.25 and that they were to pay for their own benefits out of that sum (1:159; 2:265, 326; 3:574, 677). Stout (1:159) and Stewart (2:265) promptly reported the matter to Moczygemba.

Rice did not apply his decision prospectively. He made it retroactive to the pay period beginning 1 June as reflected in the amendment to Respondent's answer at the opening of the hearing (1:9). Rice's subsequent testimony on the effective date is a bit ambiguous. At one point he suggests it was effective on 6 or 7 June (2:480). Later he put the effective date as the pay period ending 7 June (3:679). The latter would be the same pay period that began 1 June. The paychecks themselves covered the period beginning 1 June and were for the reduced

[12] It is not entirely clear in the record that Rice referred to his nonunion employees at the bargaining session as distinguished from his testifying at the hearing what he was thinking at the bargaining session. It seems clear, however, that he at least mentioned the $12 rate, and a reading of his testimony suggests that he referred to that as the rate he was paying his nonunion employees.

[13] The $12 is a bit misleading. As we know, Respondent's nonunion employees are eligible for incentive bonuses, which bring their average pay to the equivalent of union scale. Rice advised the Union, however, of the incentive plan when they subsequently reached a provision of the proposed CBA restricting profit sharing (art. II, sec. 16). Rice explained that he had a profit-sharing program with his other employees that worked well. Moczygemba withdrew that provision (1:57–58, 105; 3:499–500).

[14] Frequently, as here, Rice's testimony lapsed into a description of the reason he expressed a position. On the surface it is unclear whether he stated that reason to Moczygemba. At various points (such as 3:494 and 3:506), however, when asked if he so told the Union, Rice answered yes. I find that the reasons he testimonially described were also the reasons he stated to the Union at the bargaining sessions.

amount. In any event, Respondent's amended answer remains unchanged and controls its positions.

Rice testified that, without consulting an attorney, he reduced the wages of Stout and Stewart because (3:680–681):

> I considered that an unfair contract to me; I figured I had bargained in good faith, as long and as hard as I could on June 5. So I thought this was a fair settlement, and a fair way to operate, because I didn't want to live under that unfair contract, as, and me being the only one in town having to live under that unfair contract.

Apparently it was not until he learned of the termination of Stout and Stewart on 25 June that Moczygemba drafted a letter on 26 June to Rice regarding the unilateral changes. Assistant Business Manager Thomas Huckelba and International Representative Henry Villareal hand-carried the letter to Rice that day (1:78–79, 109–110; 3:511–512). In his letter of 26 June to Rice, Moczygemba observes that, notwithstanding its desire to terminate the CBA, Respondent still has an obligation to comply with the terms of the "current agreement" until such time as the parties may bargain to impasse. He warns Rice that current wages, benefits, hours, and working conditions "may not be unilaterally altered by you." Moczygemba concludes his letter by asking Rice, "Please advise as to your intent in this regard." (G.C. Exh. 18.) The record does not show whether Rice replied.

5. The session of 1 July 1986

Moczygemba, Huckelba, and Rice met for the fourth time on 1 July in Rice's office (1:63–64; 110). The meeting lasted 45 minutes to an hour (3:514). The highlights relevant for our needs are as follows.

One of the first topics raised was the termination of Stout and Stewart. Moczygemba asked whether Rice would consider taking them back. "Never," replied Rice. Moczygemba asked Rice about the cutting of wages and cessation of payments to the benefit funds. Rice admitted such, saying he was not about to pay any more fringes because he was no longer bound to the (expired) CBA. Moczygemba said he did not think Rice could do that (1:65, 112).

Because of Rice's references at the 5 June meeting to his union employees, Moczygemba formed the impression that Rice perhaps was operating a double-breasted operation (1:66, 114). Moczygemba therefore prepared a letter requesting data (a listing of 12 items) that would disclose this and also verify whether Rice's claims of "poverty" were true. He presented the letter to Rice at the 1 July meeting (1:66–67, 114; 3:513–514). Because the request for data is no longer relevant, I will omit any summary or reproduction of it.

As the parties reviewed Moczygemba's letter the subject of economics arose. Rice said his nonunion employees were doing the work cheaper than Stout and Stewart could do it (1:66, 72–73, 113). Rice said that the jobs Stout and Stewart did were not profitable, and that his books were open to Moczygemba right then. Moczygemba said he did not have time to examine the books at that visit (3:514). Moczygemba testified that at the 5 June meeting Rice said he had the data on job costs and the Union was welcome to look at it to see how "productive" his union employees were but that Rice did not offer to make the books available on 5 June (1:128).

D. *The Direct Dealing Allegation*

1. The 20 May 1986 memorandum

Rice testified that on 20 May, the day after the initial bargaining session, he prepared a three-page memorandum (G.C. Exh. 17) setting forth company policies applicable to his nonunion employees. Hesitating at first to give copies of the memo to Stout and Stewart, he decided to do so on the thought they might withdraw from the Union at some future date and, therefore, it would be fair to them to know what policies apply to nonunion employees. Beginning that day he distributed copies of his 20 May memo to all employees. Rice concedes that the policies in the memo differ in many respects from the terms of the CBA (2:474–475).

Stout testified that Rice handed him a copy of the 20 May memo. Uncertain of the date Rice gave him the memo, Stout was under the impression it was on Monday (19 May) when he turned in his timesheet. He concedes, however, that on occasion he turned in timesheets on Tuesdays, and that in fact he does not recall which day it was (1:155–156, 186). Although an early Monday time would not necessarily conflict with the 10 a.m. bargaining session Rice attended at the Union's office on 19 May, I find it more likely that Stout received the memo from Rice on 21 May as Rice testified (2:475).

According to Stout, Rice said the memo reflected company policy and the way things were going to be done in the future. He suggested that Rice read the memo, think about it, and see if he could live with the policies, which would be effective "immediately in the future." He asked Stout to take Stewart's copy to him at the jobsite. Stout said he would think about the new policies. He delivered Stewart's copy (1:154–156, 186–187).

Not specifically denying Stout's testimony, Rice testified that he and Stout did not sit down and go over the memorandum, which he handed to Stout on 21 May, and that Stout asked no questions regarding it (2:475–476). In noting that Rice's version is not inconsistent with Stout's, I credit Stout.

Stewart testified that he received two copies of the memo on either Monday or Wednesday of that week. The first copy was one he found in his box at the office, and the other copy was given to him on the job by Stout. Stewart assumes he picked up the first copy on Wednesday, 21 May. Rice was not there at the time. After talking with Stout about it on the job, Stewart telephoned and spoke to Rice (2:260, 319–320).

Rice agrees that Stewart did telephone him about the memo on Wednesday, 21 May. According to Rice, he explained to Stewart his thought that it would be a good idea to put company policies in writing, and that it

would be fair to him and Stout to let them know what the policies would be should they elect to withdraw from the Union at some future date (2:476).

Stewart, whom I credit, testified that when he asked Rice about the memo in the telephone conversation, Rice said it was the new policy of the Company. Stewart asked Rice to confirm that the policy did not apply to Stout and Stewart because they were in the Union. Rice said it did not apply to them until the contract expired, that he would bargain with the Union in good faith, that he wanted to keep everything on the "up and up," and that Stewart and Stout would continue to receive all contractual wages and benefits "until we reach impasse or until I resign."[15] Stewart asked what an impasse was, and Rice explained that it meant "until we agree or can't agree on the contract." (2:261, 320, 323, 326).

As Rice's version is not inconsistent with Stewart's I accept it as a supplement to the other remarks I find that he made. Moreover, Rice's reference to a possible future withdrawal from union membership by Stewart and Stout aids in interpreting the ambiguous "until I resign" testimony of Stewart.

I find no contradiction between the accounts of Stout and Stewart. Rice's comments to Stout appear to have been rather brief. His telephone conversation with Stewart was longer and he described his intentions more specifically. Although Stout at one point recalled Rice as saying the new policy would be effective "immediately in the future," the balance of his testimony is in line with Stewart's that Rice said the policies would apply in the future regarding the union employees.

The differences between the policies in Rice's memorandum of 20 May and those contained in the CBA are several, and they are significant, as Moczygemba described at the hearing (1:123–124). For example, item 3 of the first page asserts that work on nonscale jobs (work not covered by the Davis-Bacon Act) will be paid "as determined by management." Vacation would be 1 week rather than the 2 weeks union members take. Under the CBA the employer pays full costs of the medical insurance, but under the 20 May policies, SACS pays only half. And additional family members would be covered at the employee's cost, whereas under the CBA, Moczygemba testified, without contradiction, all family members are covered at no additional cost.

There is no dispute that before 1 June Respondent applied none of the new policies to its union employees, Stout and Stewart. Rice concedes that in early June he did apply the new pay-rate policy to them (2:479–480). We also know that with the paychecks distributed 11 June, for the pay period effective 1 June, Respondent also ceased making contributions to the benefit funds.

Did Rice's conduct constitute the direct dealing and bypassing of the Union alleged in complaint paragraph 15? Arguing that the answer is an affirmative, the General Counsel points to the testimony of Stout and Stewart that in the fall of 1985 Rice told each of them that he wanted to get out of the Union (Br. at 10). To Stewart, in a casual conversation, Rice said that unions are becoming a thing of the past, that they cost too much money, and that business was too competitive. He told Stewart to think about it, and Stewart said he would. Rice mentioned this on one or two subsequent occasions, but Stewart ignored the subject (2:258–259).

Rice's comments to Stout were a bit more pointed. In addition to telling Stout he was going to get out of the Union, Rice also said that Stout and Stewart were being paid too much and that everyone was going to earn the same pay rate. Rice said he was writing a letter to the Union expressing his desire to get out once the CBA expired. Stout testified that Rice repeated his comments (other than the letter writing) on other occasions into 1986 and up to June 1986 (1:144–145, 148).

Rice did not testify concerning these assertions, no complaint allegation specifically addressed them,[16] and Respondent does not discuss this evidence in its brief. I credit Stout and Stewart. In so crediting them, I consider the evidence as to Rice's comments about wanting to leave the Union relevant (regarding the allegation of par. 15) only as they bear on credibility, for the direct dealing allegation does not turn on Respondent's motivation if Rice in fact bypassed the Union.

2. Conclusion

The evidence shows that Respondent did bypass the Union and deal directly with Stout and Stewart on this subject, including telling Stout to "think about" Respondent's new policies. Even though Respondent's new policies were not to be effective (regarding Stout and Stewart) until after an impasse or unless Stout and Stewart withdrew from union membership, the conduct and remarks of Rice violate Section 8(a)(5) and (1) of the Act as alleged. This is so because even after an impasse an employer cannot implement policies not reasonably comprehended within its preimpasse proposals. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967). As of 21 May Respondent had not presented its 20 May memorandum to the Union, and the only item contained there that Respondent had discussed with the Union was the reduction of wages. Thus, Respondent bypassed the Union.

As for the resignation from union membership, even if it occurred, it would not necessarily mean that Stout or Stewart was no longer a member of the bargaining unit—even if Respondent assigned him to the nonunion crew. By commenting on this topic to Stout and Stewart on 21 May Respondent bypassed the Union and dealt directly with employees represented exclusively by the Union.

For the reasons I have stated, I find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in complaint paragraph 15.

[15] The "until I resign" is ambiguous. Rice could have used the "I" as a way of saying until he ceased dealing with the Union after the CBA expired. Another possibility is that Rice said "until you resign" but the witness, converting the reference to himself to the first person pronoun, inserted the word "I" in midsentence. The matter was not clarified, and the parties do not address it in their briefs. I find the second possibility to be the more likely explanation.

[16] Of course, anything in 1985 would be outside the 6-month limitations period set forth in Sec. 10(b) of the Act.

E. *The Unlawful Motive Allegations*

1. Introduction

As previously discussed, there are two unlawful motive allegations. one is the unilateral reduction in wage rates and elimination of payments to the union trust funds (complaint pars. 16, 20). The second is the termination of Stout and Stewart (complaint pars. 19, 20). To some extent these allegations may be treated together.

Earlier I summarized the evidence showing Rice's desire and efforts to persuade the Union to accept a $12 wage rate, and also his comments to Stout and Stewart that he wanted to go nonunion. Rice had developed something of an antiunion attitude. Even so, it was based on economic costs and restrictions, and not on any personal dislike of the union representatives. More to the point, it did not translate into any dislike of Stout and Stewart. Thus, even as Stout described Rice's comments in the spring of 1986 about a desire to get out of the Union and pay everyone the same rate, Stout conceded that Rice assured Stout that he had a home there as long as he wanted it (1:145).

On some of the occasions of Rice's comments about getting out of the Union, according to Stout, Rice spoke crudely, saying "Fuck the godamn union." (1:215, 221.) One such occasion was in May 1985 when Stout came to pick up his paycheck at lunchtime rather than after work for the day. When Rice asked why Stout came at lunch Stout explained that, under the CBA, SACS was to deliver the paychecks by quitting time, that if Rice wanted to deliver his paycheck Stout would not come to get it, and that Stout was doing this as a service to Rice since Stout did not eat lunch. In the presence of office secretary Barbara Will, Rice said, "Fuck the motherfucking union; pardon my French." (1:221–222.) Will recalls no such remark (2:376) and Rice did not address the matter during his own testimony.

Even if Stout is credited, Rice's angry and crude expression was directed more toward the Union than toward Stout. That seems to be a distinction with a difference, for as mentioned above, as late as the spring of 1986 Rice told Stout he had a home at SACS as long as he wanted one.

2. Material facts

The immediate occasion of the termination of Stout and Stewart centers on their failure to call the office on Monday, 23 June. One of the jobs they had been working on for several days was the U.S. Post Office in downtown San Antonio. The job involved replacing two large water chillers for the building's air conditioning (1:217–218; 2:316; 3:547). Stout testified that for the previous week he and Stewart worked 36 hours each at the post office disconnecting (demoing) some pneumatic lines, tracing the wiring, pulling, tugging, researching, and "just digging into everything that needed digging into." (1:150, 196–198, 217, 220, 223–228.) Stewart gave similar testimony (2:315–319).

On Friday, 20 June, Rice was in Fairfax, Virginia (3:544, 643, 647).[17] Office secretary Barbara Will telephoned Rice either around 11:30 a.m. or that afternoon to report that Edward Talley, project manager for Cold Temp Air Conditioning Co., the mechanical contractor on the post office job, had called to say he did not see Stout and Stewart on the job and Cold Temp wanted the two chillers on line (installed and operating) by the first part of the following week. Will told Rice she had tried to reach the two men but was unsuccessful. Rice told her that if they called in, to tell them it was critical that they be on the job Monday morning (3:543–544, 551, 646–648).

Rice then telephoned the post office and reached the building engineer who informed him that he thought he had seen Respondent's employees (Stout and Stewart) there earlier, but they were not there then. Rice called Will back and repeated his direction to her that she tell Stout and Stewart to be at the post office job on Monday (23 June) because the job was very critical. He told Will that he would arrive in San Antonio about 11:30 a.m. on Monday (3:544–546). This possibly was all in Rice's first conversation with Barbara Will, for on cross-examination he testified that he does not remember calling her back (3:648).

Rice made no effort himself to contact Stout and Stewart that weekend. He did not have Stout's number, and he did not think of leaving a message for Stewart's pager (3:648–649).

About 7 a.m. on Monday morning, 23 June, Stout arrived at the Taco Cabana, a "centrally" located cafe where Stout and Stewart would meet, park one vehicle, and ride together to the jobsites.[18] Stewar did not appear. A few minutes after 8 a.m. Stout telephoned the office but, he testified, the number was busy. About 9 a.m. he left for home without again telephoning the office. He did not go to the office that day. He did not call from his home because that would have incurred a long distance charge (1:160–161, 185, 230).

When giving his address at the hearing, Stout gave a San Antonio address (1:130). Stewart testified that Stout lives close to Leon Springs on the opposite side of San Antonio from him (2:329–330). Leon Springs, as a map reflects, is a community a few miles north of San Antonio on Interstate Highway 10.

Stout testified to a mixture of reasons why he made no further attempts to call the office or, apparently, to go there. First, he had tried once unsuccessfully. Second, it was a long distance call from his home. Third, there were occasions when they (he and Stewart) would go straight to a job on Mondays and they would not call the office all day. Fourth, Rice had instructed him simply to make sure their timesheets reflected whether they were working. Fifth, Stout apparently concedes that he was not eager to call because he was unhappy with Rice. He was unhappy with Rice because of his sarcastic remarks about both the Union and Stout (1:185).

[17] Rice had told Stewart he would be out of town (2:326–327).

[18] Stout testified that the "centrally" located Taco Cabana is located at Wurzbach and Bandera Highway (1:160). As a map reflects, that intersection is on the northwest side of San Antonio near loop 410.

Stout concedes that he was unhappy over his pay cut (1:215). Indeed, in his pretrial affidavit of 10 July Stout states (1:203–204):

> Both Stewart and I were fed up with Rice cutting our wages, refusing to pay fringes, and his comments that the Union was no good.

Stout denies that "what really happened" was that he was so fed up with Rice's cutting the wages that he did no work his last 2 weeks at SACS (1:204).

Stewart testified that he did not go to meet Stout for work on Monday, 23 June, because that day he had to attend to some "personal" business (2:328–329). He concedes, however, that he really did not go to work that day because he was "fed up" with Rice for cutting his wages even though the personal business was an additional reason (2:330–331, 346–347). Finally, on cross-examination Stewart confirmed that in his pretrial affidavit of 31 July (2:284, 320) the reasons he gave were (2:384): "On June 23rd 1986 I was so frustrated and angry at having my wages and fringes cut that I didn't report to work." Stewart testified that neither the secretary (Barbara Will) nor anyone paged him that day (2:267–268).

Barbara Will met Rice at the San Antonio airport on Monday, 23 June, and informed him that Stout and Stewart had not reported to work that morning at the post office job. Rice went immediately to the post office (3:546, 650).

At the post office Rice discovered that some copper lines had been capped, but no other work had been done. In particular there was no conduit installed from the chillers to the remote control panels, and there should have been 35 or 40 feet of conduit to each chiller. Moreover, the capping work he found was work Stout and Stewart had done earlier, in February (3:546–548, 651–652). At the post office Rice spoke with Jerry (surname not identified in the record) of Cold Temp who advised Rice that he had not seen Stout or Stewart at the post office the previous week (3:549–550).

Rice drove to another job at the Collins Gardens Library where Stout and Stewart were to have run about 50 feet of conduit from a control panel to a remote condensing unit on the roof and pull in three wires and terminate. Rice found no evidence of any work (3:550–551, 654–655).

Rice telephoned Cold Temp and requested patience regarding the post office job. He then contacted his nonunion crew and arranged for Broekers and John Heil to meet him at the post office the following morning. He was unable to reach Stewart about 4 p.m. on both the pager and by calling Stewart's home in Big Foot, Texas. Stout recently had moved and Rice did not have his number (3:552–553, 650). Stewart testified that his Big Foot home is about 45 to 50 miles south of downtown San Antonio (2:327–328).

That Monday night Stewart telephoned Stout at home and explained that he had taken care of personal business that day. They agreed to meet the following morning (1:161; 2:329).

On Tuesday morning Stout and Stewart met at the Taco Cabana around 7 a.m. From there they drove to a jobsite at a credit union about three blocks away. Finding the walls there not ready for their work, the two drove (in one vehicle) to the Sequin Library in Sequin, Texas (about 35 miles east of San Antonio), where they arrived about 11 a.m. As that job, too, was not ready for them, they returned to the Taco Cabana around 2 p.m. and from there each went home (1:162–163, Stout; 2:269–270, Stewart). There is no evidence that they attempted to call or go by the office.

That Tuesday, 24 June, Rice spent about an hour with his nonunion crew at the post office lining them up on the work to be done (3:552). They did the job in about 3 to 4 days. The work included installing about 100 feet of conduit to each chiller from a control center on the back wall of the basement (3:710, Broekers; 4:743–748, 758–760, Heil).

On Tuesday Rice decided Stout and Stewart should be terminated (3:562). That evening he finally reached Stewart.[19] Rice asked him where they had been on Monday and Tuesday. Stewart said he had been occupied with his personal business on Monday. Rice said the post office jobs was critical and he asked if they knew to be there. Stewart replied simply that he had personal business on Monday. Rice said he needed to see him and Stout in the office the next morning. Stewart asked whether he should remove his hand tools, and Rice said yes (3:566–567). Stewart contacted Stout and relayed the message to him (1:164; 2:331). They both understood that removal of their tools and personal items from the company pickups meant they were fired (1:164; 2:271).

On Wednesday, 25 June, Stewart and Stout met at the Taco Cabana between 7 and 8 a.m. and discussed the situation. Stewart concedes (2:272), as Rice testified (3:567), that he and Stout did not reach the office until about 11:30 a.m.

At the office, Stout testified, Rice told them he was letting them go for not calling in on Monday and that such complaint was the only reason he gave (1:165–166). Stout concedes, however, that over the last couple of weeks Rice had complained that he was losing money on their jobs, but he contends Rice always made that complaint (1:167, 226).

In addition to telling them they were being discharged for not calling in, Stewart testified (2:272, 276), Rice "implied" that they had not been producing for Rice the previous 2 weeks (2:332). The termination slip Rice gave to each reflects that each was being discharged because he "Did not contact this office Monday 6-23-86."(G.C. Exh. 20.)

Rice testified that he asked them why they did not show up for work on Monday. Stewart replied that he had personal business; Rice does not recall whether Stout responded (3:567). Rice asked them where they had worked the previous week and the number of hours (1:201–202, 216, Stout; 3:567, Rice). They named two

[19] Stewart testified that he telephoned Rice about 9 p.m. to ask why Rice was not paying him (and Stout) the union scale of $15.75. Supposedly he also asked whether Rice had "resigned" from his contract with the Union and Rice said no (2:270, 331). As Stewart had not bothered to call Rice that day, I find it far more likely that the call that night was initiated by Rice. I credit Rice.

jobs, the Sequin Library and the post office. On a yellow sheet of paper (G.C. Exh. 22) Rice recorded their responses as follows regarding 16–20 June (3:567–570):

	M	T	W	T	F	Totals
Stewart						
Sequin Library	4					4
Post Office		8	5	8	8	29
						33
Stout						
Sequin Library	4					4
Post Office		8	8	8	8	32
						36

Rice told them that he was at the (post office) jobsite on Monday, that they knew how critical the job was to get completed, yet when Rice went there on Monday he did not see a "damn thing" either one of them had done other than the small amount of work they had done in February. Stout's only response was that they had been on Rice's payroll working for him. Stout did not say he had installed so many feet of conduit or pulled so much wire, but simply that they had been on his payroll working for him. Rice did not ask them about other jobs because this (post office) job was reason enough to terminate them.

Rice told the two that they had not been working in June, and what they had done to him the past month was pretty bad. He said he thought they were lying to him about the hours for the previous week, but he did not want to argue about it and would pay them for all the hours they were claiming (3:567–572). From there they went outside to check in the trucks. Rice found that the 1986 truck Stewart had been using was filthy from having been used for hunting, with 40 to 50 shotgun cases in the bed, empty beers cans in the cab, and brush marks on the sides (3:572–573).

Stout and Stewart apparently submitted no claim for hours on Monday or Tuesday, 23–24 June, and Stewart so testified (2:274, 347).

3. Discussion

As earlier noted, the General Counsel lists several factors as showing a prima facie case. Aside from denying the existence of a prima facie case, Respondent argues that it demonstrated, by "clear and convincing" evidence (Br. at 28), that Stout and Stewart would have been discharged notwithstanding their union membership because of their slowdown in work.

I find that the General Counsel failed to establish a prima facie case. First, Rice's announced intention to go nonunion never reflected an animus toward Stout or Stewart. Indeed, until June, at least, Stout concedes that Rice told him he had a home at SACS as long as he wanted one. There is nothing to suggest Rice felt any different toward Stewart.

Second, the timing factor (discharges occurring after expiration of the CBA) shows nothing but a chronological sequence of events without any cause-effect relationship. If anything, the timing factor lends support to Respondent's slowdown argument, which I discuss next.

Third, the unilateral reduction of wages lends far more support to Respondent's slowdown (or no work) defense than it does to the complaint's allegations of unlawful motivation. Indeed, the evidence demonstrates, and I find, that the resentment of Stout and Stewart against Rice and the unilateral cuts was the overriding reason Stewart did not show up for work on Monday, 23 June, and for Stout's going home without persisting in telephoning the office from the Taco Cabana. That same resentment, I find, resulted in this halfhearted effort to find work on Tuesday, 24 June, all the while declining to call Respondent's office or to answer the pager Stewart carried.

Fourth, contrary to the General Counsel's contention, in fact there was no established practice about not calling in on Mondays and Stewart admits that he usually called in whenever he missed work (2:266). Moreover, Mondays are when they were either to come to the office to report their time for the previous week or they were to call it in on Mondays (1:184, 190, 195, Stout; 2:311, Stewart).

Fifth, the "shifting" reasons. In the absence of explanation, I presume the General Counsel means that Respondent shifted from the reason stated on the discharge slip and from, to some extent, the testimony of Stout and Stewart that Rice gave no other reasons besides not calling in. In considering only the General Counsel's evidence,[20] however, there is no evidence of shifting. Even when we consider Respondent's evidence we have not shifting, but additional grounds. If I were to reach those grounds, I would credit Rice.

Sixth, the General Counsel argues (Br. at 15):

> Having received complaints from Stout and Stewart regarding their reduced wages, Rice realized that he would have to bring their employment to an immediate conclusion. Accordingly, he seized upon their failure to report to work on June 23, as a reason to terminate them on June 25.

That is a fine theory. Unfortunately, the General Counsel fails to cite the evidentiary underpinnings. What complaints, for example? Stewart telephoned on 11 June and inquired about the difference in the pay rates, but he did not complain. On Tuesday night, 24 June, Stewart testified that he telephoned Rice for the apparent purpose of complaining about the pay reduction. But Stewart never testified that he so complained or what Rice said (2:270, 330). All that Stewart said, so far as the record shows, was to ask Rice whether he had "resigned his contract." Rice supposedly said no, then told Stewart that he and Stout should remove their personal items from the trucks, come to the office (the next day), and talk to Rice (2:270). Even if I were to credit Stewart (which I do not), it is clear that in his version Rice had already decided to fire both employees. I find this sixth ground to be without merit.

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[20] *Hillside Bus Corp.*, 262 NLRB 1254 (1982).

Overall I find that the General Counsel's evidence does not rise to a prima facie case of unlawful motivation regarding either the unilateral changes or the discharge of Stout and Stewart. If I were to reach Respondent's evidence regarding Rice's motivation, I would credit Rice and the other evidence presented by Respondent. Even if I were to find, prima facie, that Respondent was unlawfully motivated in reducing wages and eliminating benefits after the 8(f) contract expired, I still would dismiss the 8(a)(3) allegation because I find that Respondent would have taken that action in any event for economic reasons. I shall dismiss complaint paragraphs 16, 19, and 20.

CONCLUSIONS OF LAW

1. Respondent San Antonio Control Systems Inc. (SACS) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The South Texas Chapter, National Electrical Contractors Association (NECA) is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

3. International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 60 is a labor organization within the meaning of Section 2(5) of the Act.

4. The bargaining relationship created in February 1982 between SACS and IBEW Local 60 was established under Section 8(f) of the Act.

5. After the 8(f) relationship was established between SACS and IBEW Local 60 in February 1982, SACS never voluntarily recognized the Union as the exclusive bargaining representative of its employees in an appropriate unit and, thus, never established a bargaining relationship under Section 9(a) of the Act.

6. When the latest collective-bargaining agreement (CBA) between SACS and the Union (the NECA contract) expired on 31 May 1986, SACS was free to repudiate its 8(f) relationship with the Union and to make unilateral changes in wages, hours, and working conditions regarding its employees previously covered by the NECA contract.

7. Respondent violated Section 8(a)(5) and (1) of the Act on or about 21 May 1986 when it distributed copies of a memorandum dated 20 May 1986 outlining company policies and procedures ostensibly applicable to SACS' unrepresented employees, to its employees represented by IBEW Local 60 and telling them to think about such policies because they would apply to them if they elected, at some future date, to resign their union membership.

8. Respondent SACS did not violate Section 8(a)(5) of the Act in June 1986 when, following expiration of the 8(f) NECA contract on 31 May 1986, it made unilateral changes in wages and benefits for employees previously covered by the NECA CBA.

9. Respondent did not violate Section 8(a)(1) of the Act on 11 June 1986 when it told its employees represented by the Union that SACS was reducing wage rates effective retroactively to 1 June 1986 and would no longer make the fringe benefit contributions called for in the recently expired NECA contract.

10. Respondent did not violate Section 8(a)(5) of the Act by refusing, on and after 1 July 1986, to furnish the Union with data the Union had requested by letter of 1 July 1986.

11. Respondent has not violated Section 8(a)(5) of the Act by failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of certain of its employees.

12. Respondent did not violate Section 8(a)(3) of the Act on 11 June 1986 by unilaterally reducing wage rates of the employees covered by the recently expired 8(f) NECA contract, nor by simultaneously discontinuing fringe benefit payments called for in such expired CBA.

13. The General Counsel failed to establish a prima facie case that Respondent violated Section 8(a)(3) of the Act on 25 June 1986 by discharging employees Joseph Ronnie Stout and Charles Douglas Stewart.

14. The unfair labor practice described in Conclusion of Law 7 affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Although Respondent no longer has a collective-bargaining relationship with IBEW Local 60, I shall order it to notify the Union, and Respondent's employees, that if ever in the future SACS again has a collective-bargaining relationship with IBEW Local 60, or any labor organization, it will not bypass such representative and deal directly with the represented employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, San Antonio Control Systems Inc., San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing the collective-bargaining representative and dealing directly with any of its employees who may in the future be represented by IBEW Local 60 or any other labor organization concerning wages, hours, or other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify IBEW Local 60 in writing that should that union, or any other labor organization, in the future become the exclusive collective-bargaining representative of any of its employees in an appropriate unit, that SACS will not bypass IBEW Local 60, or any such

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

labor organization, and deal directly with such represented employees on wages, hours, or terms and conditions of employment.

(b) Post at its Houston, Texas office copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT bypass IBEW Local 60 or any other labor organization which in the future may represent any of you in an appropriate unit and, in such bypassing, deal directly with you concerning wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify IBEW Local 60 in writing that should that union or any other labor organization in the future represent any of our employees in an appropriate unit, we shall not bypass IBEW Local 60 or such other labor organization and deal directly with you concerning wages, hours, or other terms and conditions of employment.

SAN ANTONIO CONTROL SYSTEMS INC.

KRI Constructors, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local No. 51. Cases 36–CA–4840 and 36–RC–4748

July 29, 1988

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On February 13, 1987, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs, and briefs in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to modify the remedy,[3] and to adopt his recommended Order as modified, and set forth in full below.

The judge found, inter alia, that the Respondent violated Section 8(a)(3) by screening job applicants to determine suspected union sympathizers and refusing to consider those applicants. The judge deferred "the difficult remedial questions of the identity of the discriminatees and the backpay due them to the compliance stage of the proceeding."

Further, the judge extended the remedy to include all job applicants regardless of what positions they sought. The judge stated that the "ambiguity was caused by Respondent's unlawful hiring practices and, therefore, that ambiguity will not be resolved in Respondent's favor."

However, we cannot agree that the remedy should be extended to "include all job applicants regardless of positions." The complaint alleges as discriminatees certain named individuals, referring to welder applicants and pipefitter applicants and to other applicants presently unknown, but known to Respondent KRI. The context and language of this portion of the complaint clearly and logically put the Respondent on notice that at issue was its hiring policies with regard to applicants for pipefitter and welder positions. Moreover, the evidence adduced at trial related to the Respondent's hiring practices regarding welders and pipefitters. The General Counsel did not seek to amend the complaint to include all job applicants. Under the circumstances, the remedy must be limited to applicants for the positions of welder and pipefitter. See generally *Edwin R. O'Neill*, 288 NLRB 1354 fn. 16 (1988), and cases cited there.

ORDER

The National Labor Relations Board orders that the Respondent, KRI Constructors, Inc., Coos Bay, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for employment job applicants for the positions of pipefitter and welder because they are members or sympathizers of the Union or because they worked in establishments which had union contracts.

(b) Discriminating against employees in regard to their rate of pay for the purpose of discouraging support for the Union.

(c) Laying off, discharging, or failing to recall employees for the purpose of discriminating against them for supporting the Union or otherwise discriminating against employees in regard to hire or tenure of employment or any term or condition of employment for engaging in activity on behalf of a labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all employee applicants for the positions of pipefitter and welder for any losses they may have suffered by reason of the discrimi-

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel and the Charging Party except to the judge's failure to provide a make-whole remedy for the employees found by the judge to have been unlawfully laid off or denied recall. We find merit in the exception. The Respondent contends that the judge granted a make-whole remedy only to employees Carney, Elizalde, and Paloma because, according to the Respondent, they are the only employees whom the judge found to have been discriminatorily terminated or laid off. However, contrary to the Respondent, the judge also found that by laying off employees in October and November 1984 in order to discourage union membership or support, the Respondent violated Sec. 8(a)(3) and (1) of the Act. The judge inadvertently failed to provide a make-whole remedy for these employees. Clearly, all employees unlawfully laid off or denied recall are entitled to a make-whole remedy. We shall modify the judge's recommended Order accordingly.

[3] In accordance with our decision *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

In his recommended Order, the judge included a visitatorial clause. In the circumstances of this case, that clause is unwarranted. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

natory refusal to consider them for employment in the manner described in the remedy section of the administrative law judge's decision as modified.

(b) Make whole the employees unlawfully laid off in October and November 1984 for any losses they may have suffered by reason of the discrimination against them in the manner described in the remedy section of the administrative law judge's decision as modified.

(c) Make whole employees Terry Emerson, Eugene Thomas, Thomas Babcock, Dennis Carney, Jorge Elizalde, and Leonard Paloma for any losses suffered by reason of the discrimination against them in the manner described in the remedy section of the administrative law judge's decision as modified.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Remove from its files any reference to the unlawful discharge and layoffs and notify the employees that this has been done and that the discharges and layoffs will not be used against them in any way.

(f) Post at its Coos Bay, Oregon facility copies of the attached notice Marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.[5]

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election in Case 36–RC–4748 is set aside and that the case is severed and remanded to the Regional Director for Region 19 to conduct a second election whenever he deems it appropriate (if the Employer resumes operations at Coos Bay, Oregon).

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to consider for employment job applicants for the positions of pipefitter and welder because they are members or sympathizers of a union or because they worked in establishments which had union contracts.

WE WILL NOT discriminate against employees in regard to their rate of pay for the purpose of discouraging support for the United Association of Journeymen and Apprentices of the Plumbing and pipefitting Industry, Local No. 51, or any other labor organization.

WE WILL NOT lay off, discharge, or fail to recall employees for the purpose of discriminating against them for supporting the Union or otherwise discriminate against employees in regard to hire or tenure of employment or any term or condition of employment for engaging in activity on behalf of a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole all our employee applicants for the positions of pipefitter and welder for any losses they may have suffered by reason of our discriminatory refusal to consider them for employment, with interest.

WE WILL make whole the employees unlawfully laid off in October and November 1984 for any

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[5] If the Respondent does not resume operations at Coos Bay, Oregon, copies of the signed notice shall be mailed by Respondent to the home addresses of all employees employed by the Respondent at Coos Bay, Oregon, from November 1984 to July 1985.

losses they may have suffered by reason of the discrimination against them, with interest.

WE WILL make whole employees Terry Emerson, Eugene Thomas, Thomas Babcock, Dennis Carney, Jorge Elizalde, and Leonard Paloma for any losses suffered by reason of the discrimination against them, with interest.

WE WILL inform employees who were unlawfully discharged or laid off that we have removed from our files any reference to their discharges or layoffs and that the discharges and layoffs will not be used against them in any way.

KRI CONSTRUCTORS, INC.

Dale B. Cubbison, Esq., for the General Counsel.
Lester V. Smith Jr., Esq. (Bullard, Korshoj, Smith & Jernstedt), of Portland, Oregon; *Charles Kelso, Esq. (Fisher & Phillips)*, of Atlanta, Georgia, and *John D. McLachlan, Esq. (Fisher & Phillips)*, of San Francisco, California, for the Respondent.
Francis J. Martorana, Esq. (O'Donoghue & O'Donoghue), of Washington, D.C., and *Paul C. Hays, Esq. (Carney, Buckley, Kasameyer & Hays)*, of Portland, Oregon, for the Union.
Patrick Brophy, Esq., of Dallas, Texas, for ARCO-Alaska, Inc.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard these consolidated cases in trial at Portland, Oregon, on February 25–27, 1986, and in Coos Bay, Oregon, on February 28 and March 3–7, 1986. The cases arose as follows: On October 17, 1984, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local No. 51 (the Union) filed a petition for representation in Case 36–RC–4748 for all employees of KRI Constructors, Inc. (Respondent), performing plumbing and pipefitting work at Coos Bay. On November 14, 15, 20, and 21, 1984, a hearing on the petition was held under the supervision of the Regional Director for Region 19 of the National Labor Relations Board (the Board). Thereafter on December 24, 1984, the Acting Regional Director issued a Decision and Direction of Election in a unit of all employees, a unit significantly larger than that petitioned for by the Union. An election was conducted under the supervision of the Regional Director on February 22, 1985. The results of the election were, out of 94 ballots cast, 12 in favor of representation by the Union, 66 against, and 16 ballots were challenged. Thereafter, the Union filed timely objections to the conduct of the election.

On January 8, 1985, the Union filed an unfair labor practice charge against Respondent and ARCO-Alaska, Inc. This charge was amended on April 2, 1985. Thereafter, on April 10, 1985, a complaint was issued by the Acting Regional Director against Respondent and ARCO-Alaska, Inc., alleging violations of Section 8(a)(3) and (1) of the National Labor Relations Act. On that same date, the Acting Regional Director issued a notice of hearing on certain of the Union's objections to the conduct of election and an order consolidating the representation case and the unfair labor practice case for hearing before an administrative law judge.

At the request of Respondent, the hearing was rescheduled from April 30 to June 25, 1985. Thereafter, the hearing was rescheduled from June 25 to September 24 at the request of the General Counsel. Prior to the opening of the hearing on September 24, I engaged in a series of conference calls with counsel for the parties. The General Counsel's and Union's cases were based almost entirely on the testimony of Travis Ballard, Respondent's project manager from approximately August 1984 until January 1985. Ballard, a resident of Texas, was working on an oil project in the country of Angola. After his discharge by Respondent, Ballard gave affidavits that purportedly established violations of the Act by Respondent and ARCO-Alaska. However, the General Counsel had not served Ballard with a subpoena until after he had left this country and gone to work in Angola. At the request of the General Counsel and Union, the hearing was opened on September 24 in order to place Ballard in noncompliance with the subpoena. Shortly thereafter, the General Counsel filed an application with the United States Court for the District of Oregon for enforcement of the subpoena. On October 3, 1985, the district court issued an order requiring Ballard to appear before me on January 7, 1986. On January 7, 1986, Ballard again failed to appear and I rescheduled the case for trial on February 25, 1986, regardless of Ballard's presence. Shortly thereafter, the General Counsel filed a petition for civil contempt with the district court seeking to compel Ballard's attendance at the February 25 hearing. The district court heard argument in the contempt case on February 24, but did not issue a decision until May 28, 1986, when it dismissed the petition for contempt on the ground that the subpoena had not been properly served.

As mentioned earlier, I heard this case in trial during February and March 1986. Ballard never appeared at the hearing. Without Ballard's testimony, the General Counsel and Union had no evidence of any violation of the Act by ARCO-Alaska, Inc. and, accordingly, I granted ARCO's motion to dismiss the complaint against it. I also denied a request for a further continuance to obtain Ballard's attendance at the hearing based on the General Counsel's failure to properly serve the subpoena. The General Counsel and the Union sought special permission to appeal my ruling. On May 29, 1986, unaware of the district court's ruling that no valid subpoena had been served on Ballard, the Board granted the General Counsel's and the Union's appeal on the dismissal as to ARCO-Alaska and the denial of a continuance and ordered that the record be reopened pending the outcome of the subpoena enforcement proceedings.

In view of the district court ruling that no valid subpoena had been served on Ballard, I again closed the record on June 6 and denied the General Counsel's and the Union's request for a further continuance. However,

on June 16, I reopened the record based on representations by the Union and the General Counsel that Ballard had returned to the United States and could be properly served by July 15, 1986. A hearing date was scheduled for July 22, conditioned on proper service on Ballard. However, proper service on Ballard could not be effectuated. It is believed that Ballard left the United States and returned to Angola. On July 15, I closed the record for the third time and dismissed the complaint against ARCO-Alaska, Inc.[1] In closing the record, I left open the possibility that the General Counsel or the Union could move to reopen the record on proper service of a subpoena on Travis Ballard. However, no further motion to reopen the record has been filed.

On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a Texas corporation that was working under contract with ARCO to build modules in Coos Bay, Oregon, for shipment by barge to the Alaska oilfields in time for installation during the summer months of 1985. During the times material Respondent purchased and received goods and services valued in excess of $50,000 directly from sources located outside the State of Oregon. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Respondent began working in August 1984 to build modules for ARCO for shipment to Alaska in the summer of 1985. Travis Ballard arrived at the Coos Bay jobsite in August 1984 to prepare for the construction that was scheduled to begin in October 1984. Gayle Hansen was hired by Ballard on October 10 to run the personnel office and interview prospective employees. On October 19, the Union filed a petition for representation of Respondent's employees performing plumbing and pipefitting work. The General Counsel and the Union allege that Respondent, through Gayle Hansen, screened applicants in an attempt to avoid hiring union members and union sympathizers. It is Respondent's position that Hansen was simply a clerical employee and that her words and conduct had no bearing on Respondent's hiring practices.

The General Counsel and the Union also allege that (1) Respondent laid off employees in October and November 1984 in order to discourage support for the Union; (2) Respondent failed to recall from layoff and/or terminated employees in order to discourage support for the Union; (3) Respondent hired nonunion employees from outside the State and paid these employees higher wages than the previously hired union supporters; and (4) Respondent constructively discharged three pipewelder employees by paying them wages less than the nonunion pipewelders.

As indicated earlier, the Union's objections to the conduct of the election have been consolidated for hearing. The objections, which are also alleged as unfair labor practices, are that Respondent (1) terminated and laid off employees because of their union sympathies; (2) hired individuals based on their antiunion sympathies; (3) paid higher wages and benefits to nonunion employees; and (4) discriminated against the three pipewelders resulting in their constructive discharge because of their union sympathies.

In support of its allegation that Respondent intended to eliminate union support by its hiring practices, the General Counsel and the Union sought the testimony of Travis Ballard. As indicated earlier, Ballard was never properly served with a subpoena.

Based on Ballard's unavailability at trial, the Union offered his pretrial affidavits under Rule 804(b)(3) of the Federal Rules of Evidence contending that Ballard's admission of unfair labor practices was a statement against interest and, therefore, an exception to the hearsay rule.[2]

The Union argued that Ballard was admitted to practice as an attorney in the State of Texas and that the admission of unfair labor practices could result in disciplinary proceedings before the bar. According to Respondent, Ballard has been the subject of prior bar disciplinary proceedings. In considering the circumstances under which the statements were given, I was greatly influenced by the fact that prior to giving the statements in question Ballard had brought suit against Respondent in superior court in Oregon alleging an unjust discharge and further alleging that he was discharged because he had not more effectively discharged the plan or scheme of unfair labor practices established by Respondent. This particular fact made the statements appear to be in Ballard's interest rather than against his interest at the time the statements were made. Even assuming that the possibility of bar disciplinary proceedings is sufficiently against interest as to qualify under this Rule, a point I find extremely doubtful, Ballard's immediate pecuniary

[1] Although the Union filed a timely request for review of the first dismissal of the entire complaint against ARCO-Alaska, neither the General Counsel nor the Union filed a request for review of the July 15, 1986 dismissal of the complaint against ARCO-Alaska. Accordingly, under Sec. 102.27 of the Board's Rules and Regulations, the case against ARCO-Alaska, Inc. is closed.

[2] Rule 804(b)(3) states:

(b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement against interest—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances indicate the trustworthiness of the statement.

interest was served by these statements supporting his lawsuit. In fact, Respondent settled the lawsuit for approximately $30,000.

The Union argued that Ballard's second of two affidavits, although given prior to the settlement of his lawsuit against Respondent, was signed after the settlement agreement. The Union argued, therefore, that at the time the second statement was signed it was no longer in Ballard's interest to make statements against Respondent. However, I found that argument unpersuasive. Under all the circumstances, it would not appear that Ballard's signing of the second statement, which was consistent with his previously signed statement, would qualify as a statement so far contrary to Ballard's interest as to lead to the inference that a reasonable man in his position would not have made the statement unless he believed it to be true. I reaffirm my ruling that the affidavits are inadmissible hearsay and lack the necessary trustworthiness required of exceptions to the hearsay rule.

B. *Respondent's Hiring Practices*

Respondent is a wholly owned subsidiary of Kellog Rust Incorporated, the second largest contractor in the United States. Respondent is "the open shop construction arm of the Kellog Rust Group" and is headquartered in Houston, Texas. Respondent's corporate labor relations policy provides:

> The development of labor relations policies for KRI projects is carried out by the Vice President of Operations assisted by the KRI Personnel Department. This team will establish the project labor approach based upon the findings of an Area Survey which considers such aspects as the available skilled labor pool, the workload in the area, the political climate and local labor and community attitudes. For every KRI open shop project, a Project Industrial Relations Plan is prepared dealing with employment screening procedures, security plans, the media, and local contacts with judiciary and law enforcement agencies.

Prior to the commencement of its operations in Coos Bay, Respondent conducted a survey to determine the viability of an open-shop operation in that area. That survey stated that the area was viable for an open-shop operation and indicated that the unions in the area were very weak. The document states that the American Builders and Contractors personnel "feel that the Coos Bay area is ideal for [Respondent's] purposes and they also feel that [Respondent] would have no union problems." The survey concludes that "KRI can work open shop in the area with little or no union problems." While the survey mentioned several unions by name, it did not mention the Charging Party Union.

Travis Ballard, Respondent's highest ranking official at the Coos Bay facility, was quoted in the newspapers and on television both before and after the filing of the Union's representation petition stating that Respondent was an open-shop or nonunion facility and preferred to continue to operate in that manner. Further, Respondent's advertisements in the local area newspapers for craftsmen indicated that the Company was an open-shop contractor and fabricator.

It is clear that Respondent was intent on operating as an open shop or on a nonunion basis. The question is whether Respondent took unlawful action in an effort to preserve its open-shop or nonunion status.

Gayle Hansen, called by the General Counsel as an adverse witness, was hired by Respondent on October 10, 1984, to run the personnel office at the Coos Bay jobsite. Hansen was hired by Travis Ballard and told that Respondent was an "open shop"[3] company. Ballard told Hansen that Respondent needed skilled people to work on an open-shop basis. According to Hansen, Ballard said, "We're open shop and we're going to have to be careful of the union background." Hansen was aware of Ballard's often-quoted preference to remain open shop or nonunion.

Based on her experience in the Coos Bay Area, Hansen could determine whether an employer listed by an applicant as a previous employer was union or nonunion.[4] At the beginning of her employment with Respondent, Hansen would write union or open shop next to the previous employer's name listed on a job applicant's employment application. Hansen testified that she gave all employee applicants her "open shop speech." The open-shop speech informed the applicants that Respondent was a Texas-based company building oil modules for ARCO. Hansen told the applicants that Respondent was an open-shop company and preferred to remain open shop. Hansen then stated that open shop meant that employees crossed craft lines. An employee hired for one job, for example, as a pipefitter, could expect to be used by the Company in the warehouse or as a structural ironworker depending on the Company's needs. Hansen also informed the applicants that Respondent had previously had pickets on the job, that a union had filed a representation petition, and that there might be pickets on the job in the future. Hansen would make a notation on the job application of the employee applicant's remarks or comments to this open-shop speech.[5]

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[3] Hansen originally testified that open shop meant that a company did not follow strict craft lines, but required employees to perform different jobs and perform different skills throughout a job. However, as the hearing progressed, Hansen began to concede that she and Ballard used the term open shop to indicate that a company was nonunion or did not have a union contract.

[4] Ballard and Respondent's other supervisors were from out of State and did not have knowledge of the union or nonunion status of Oregon employers.

[5] In early to mid-November, Hansen was advised by an attorney for Respondent not to write the previous employer's union or nonunion affiliation on the job application. Thereafter, Hansen made comments on "post-it" slips (yellow paper that was attached with a removable adhesive to the job application). Hanson continued to make notations of the employee's comments to her union shop speech, but stopped writing whether the previous employers were union or not. Hansen testified that she attempted to white-out the comments about a previous employer's union affiliation on the job applications but since the comments could be read even after the white eradicator solution had been applied, Hansen did not attempt to white-out the comments on all the applications. In some instances where Hanson attempted to white-out the comments, she rewrote the comments on the yellow post-it slips.

Hansen testified that she did not ask any applicants about their union background or union sympathies. However, the comments Hansen received from employee applicants and her notation of these comments seem to indicate that Hansen was seeking to elicit comments of dissatisfaction or negativism toward unions. The applicants expressly stated that they would cross picket lines. Hansen explained that she asked open-ended questions and that the applicants volunteered the information regarding their dissatisfaction with unions and their willingness to cross picket lines. One explanation for such responses to Hansen's open-shop speech is that Ballard had been extensively quoted in the media expressing Respondent's desire to remain open shop and Respondent's desire to resist the Union's attempt at organization of its employees. Thus, it is not unlikely that an applicant would express antiunion or antipicket views to Hansen in an attempt to increase his or her chance of being hired.

A review of the notations placed on the applications by Hansen reveals that she recorded employees' comments that they would cross picket lines, had worked under nonunion conditions in the past, had dissatisfaction with unions in the past, and had never belonged to a union. Further, some notations revealed Hansen's comments that she believed the applicant would cross a picket line or was "a good open shop person." The General Counsel argues that the allegation that Respondent unlawfully screened employees for their union sympathies and backgrounds is established by the comments on General Counsel's Exhibit 7. That exhibit is the employment application of Walter Nash, a local pipewelder whose experience was with employers in Alaska and Washington. On a post-it attached to the application, Hansen had written: "Are these previous employers union? If so, we aren't interested." The applicant in question had listed pipewelding experience with two firms in Alaska and one in Washington State. The applicant was not hired. Hansen testified that this comment was directed to her secretary, but she did not further explain why Respondent would not be interested in this applicant if his previous employers were unionized. No other agent of Respondent testified to any lawful reason or explanation for this post-it.

The second most damaging piece of evidence against Respondent was given by Hansen. Hansen testified that she called Don Laube, a personal friend and the manager of Chambers Plumbing and Heating, to check on the qualifications of applicant William Sandine for employment as a pipefitter. Hansen testified that Laube specifically told her that Sandine was a good plumber, but was not that experienced as a pipefitter. Laube, called as a witness by the Union, testified that he did not talk to Hansen about Sandine. Laube testified that he had known Sandine for over 20 years and that Sandine had been Chambers' only pipefitter. According to Laube, Sandine was responsible for all the pipefitting work done by Chambers Plumbing during that time period. Laube testified that he never would have told Hansen that Sandine was not a qualified pipefitter or otherwise criticized Sandine's work because to do so Laube would, in effect, be criticizing himself and Chambers Plumbing. According to Laube, his conversation with Hansen was simply her asking whether Chambers Plumbing's employees would be willing to work alongside Respondent's employees if Respondent subcontracted some work to Chambers Plumbing. Laube answered that his employees often work alongside nonunion employees on such a basis.

Hansen testified again after Laube, but never rebutted or denied his testimony. Laube, a friend of Hansen, had no motivation to testify untruthfully and his demeanor on the stand was very convincing. I credit Laube completely on this point and find that Hansen's testimony regarding Sandine was a fabrication to cover Respondent's failure to hire a qualified applicant from the Coos Bay area. Hansen knew Sandine to be a long-time union member and apparently could find no truthful explanation for Respondent's failure to hire him. This is particularly important, since Respondent claims that it later had to hire applicants from outside the State because there were no qualified applicants in the area.

There is some doubt as to Hansen's effect on Respondent's hiring. Hansen accepted applications and interviewed employees. Thereafter, the applications were passed on to Superintendents Dickie Stewart and George McConnell.[6] George McConnell, now employed by Respondent at a different location, testified that in hiring he did not pay attention to Gayle Hansen's comments. According to McConnell, Hansen did not know what type of skilled people Respondent required. Stewart was present during the hearing, but was not called to testify.

According to McConnell, Respondent hired pipefitters from Houston in December and from Coos Bay subsequent to that. McConnell testified that certain applicants were rejected because they had no welding experience or did not have the necessary pipewelding experience. However, McConnell never addressed the qualifications of certain applicants from the Coos Bay area who possessed pipefitting or pipewelding experience. McConnell admitted that he was aware of Respondent's open-shop status and that he was responsible to ensure that Respondent remained an open shop.

Robert Claassen, an applicant for employment as a pipefitter, testified that when he was interviewed by Gayle Hansen, he was told that Respondent was open shop and preferred to stay that way. Hansen told Claassen that Respondent had sent 18 welders and fitters from Houston, Texas. Claassen testified that Hansen told him that if the employees voted to organize that Respondent would move from Coos Bay. Claassen's job application indicated that he had 28 years' experience as a pipefitter. Hansen placed three plus marks on Claassen's application indicating that Hansen judged him to be an excellent prospect. On an attached post-it, Hansen noted that she had given Claassen her open-shop speech and that he seemed dependable. Hansen also included three question marks. The question marks were not explained by Hansen or any other witness. The three previous employers were large union firms. Claassen was not hired.

[6] Prior to December 1984, applications were also given to Lawrence Lutes, then a superintendent.

Buster Clemens, an applicant for employment as a pipefitter, was also interviewed by Gayle Hansen. Clemens was interviewed by Hansen in October. On Clemens' job application Hansen made the notation that his two previous employers were "union." Clemens had worked as a pipefitter in Alaska and as a plumber locally in the Coos Bay area. After noting that she gave Clemens her union shop speech, Hansen remarked that Clemens "wanted to stay here." After noting that she mentioned pickets, Hansen recorded that Clemens had answered "you've been fair." Clemens was not hired.

Randall McDonald applied for employment with Respondent in October 1984. In a telephone conversation McDonald told Hansen that he had module experience in Alaska and Hansen stated that was the type of experience Respondent was looking for. Subsequently, McDonald was told by Hansen that Respondent had all the pipefitters it needed. The three previous employers indicated on McDonald's application were union employers. McDonald was not hired.

In December 1984, Respondent's personnel manager, Gerald Smith, sent pipewelders and pipefitters from Texas and Utah to Respondent's Coos Bay facility. These employees were paid $12.10 per hour—$1.90 more per hour than the local pipewelders received.[7] These out-of-state recruits also received 20 cents per mile travel pay and up to a week's pay as a bonus. Hansen did not interview any of these employees. There was no satisfactory explanation why these out-of-town welders were paid a higher wage rate than the welders hired locally. Nor was it explained why Respondent needed to hire from out of state at additional expense while not hiring local workers.[8]

Terry Emerson, a union member and welder hired by Respondent in October 1984, testified that Ballard told him that Respondent recruited these out-of-state welders because Respondent knew they would tend to be nonunion workers.[9]

Hansen testified that the wage rate for pipewelders in October and November 1984 was a flat rate of $10.20 per hour. However, she testified that she received a revised wage schedule from Respondent's Houston office (Gerald Smith) which reflected two wages rates for pipewelders. This latter wage schedule was backdated to June 1984, apparently to justify the higher wage rate for the out-of-state hires. Hansen could not explain why the wage schedule was backdated and Gerald Smith did not testify. George McConnell testified that the $10.20 was an entry level rate and that an employee could receive a merit rate to $12.10 after the employee proved himself. According to McConnell this merit system was in effect at the commencement of the job.[10] However, this testimony did hold up under cross-examination and McConnell later testified that the merit system was established in November or December. However, even with this revised time schedule, Respondent's witnesses were unable to explain why pipewelders hired locally and performing well were paid $10.20 per hour and out-of-state welders were hired in, not at the starting rate but, at $12.10 per hour the alleged merit rate.[11] As stated earlier the General Counsel and Union allege that Respondent paid the local pipewelders, thought to be union members, lower wages than the out-of-state welders, thought to be nonunion, in order to discourage union activities in violation of Section 8(a)(3) and (1) of the Act.

C. *The Alleged Constructive Discharges*

Employees Steven Thomas, Terry Emerson, and Joseph Babcock were hired by Respondent in October 1984. All three were union members and were journeymen pipewelders. McConnell admitted that these three welders were competent and could not give any reason why these three were paid less than the welders hired from outside the State.

After learning that the new out-of-state welders were earning an extra $1.90 per hour, Thomas, Babcock, and Emerson complained to Ballard. Ballard told the employees that it was a corporate decision (meaning Gerald Smith in Houston) and the best Ballard could do was pay the employees $12.10 retroactive to the start of the week. The employees demanded $12.10 retroactive to the first day that an out-of-state welder received $12.10. Ballard said he could not do that and all three employees quit.[12] As mentioned earlier, the General Counsel and

[7] The wage rates paid to the out-of-state recruits was $1.90 more per hour over the wage rates Respondent had listed in its newspaper advertisements. The out-of-state recruits had previously worked for Respondent or for some other large nonunion construction firms.

[8] Respondent argues that it was required to hire from out of State because there was a shortage of qualified applicants locally. However, no testimony was offered to support this argument.

[9] This statement of Ballard was made after he had left Respondent's employ and was clearly hearsay statement. Respondent did not make a timely objection and, therefore, the evidence was admitted. During closing argument, Respondent's counsel sought to exclude this hearsay apparently contending that he had misunderstood a previous ruling allowing a statement made by Ballard, during a time when Ballard was an agent of Respondent, as an admission by a party opponent.

In the absence of an objection from the party against whom the evidence is being offered, hearsay is admissible and becomes part of the record. *Alvin J. Bart*, 236 NLRB 242, 243 (1978); *Passaic Daily News v. NLRB*, 736 F.2d 1543 fn. 15 (D.C. Cir. 1984). The theory is that having not objected to the hearsay, the opposing party apparently does not take issue with the evidence. Here, such an inference would clearly be a fiction. Respondent consistently took issue with any statement made by Ballard, particularly as here, when the statement was made after Ballard's termination by Respondent. Respondent has consistently taken the position that any statement made by Ballard is untrustworthy and that to credit Ballard without granting Respondent an opportunity to cross-examine him would be contrary to the rules of evidence. Due to the circumstances of Ballard's discharge, subsequent lawsuit against Respondent, and unavailability at trial, I treat Ballard's statement as testified to by Emerson as hearsay and, therefore, give it no weight.

However, based on other facts and circumstances, more fully discussed infra, I draw the very same inference, i.e., that Respondent was hiring the out-of-state workers, who had worked nonunion in the past and were probably not union members, in an attempt to avoid hiring local workers who had worked for union employers or who were referred by the Union, and who probably were union members.

[10] McConnell is not credited on this point.

[11] The $10.20-per-hour wage rate was used in Respondent's employment advertisements and in the hourly wage schedule utilized prior to the filing of the petition.

[12] Emerson testified that after Ballard's discharge, Ballard told him that Respondent paid the three welders a lower wage in the hope that they would quit working for Respondent. For the reasons stated earlier, I treat this as hearsay and give it no weight, notwithstanding that Respondent made an untimely objection.

Union contend that this conduct amounts to a constructive discharge of the three employees.

D. *The Alleged Unlawful Layoffs*

On October 30, 1984, Respondent laid off approximately half of its work force and on November 7 it laid off the remaining employees. The reason advanced at the time of the layoffs was a shortage of materials. There is much conflicting testimony on the issue of whether there was in fact a shortage of materials resulting in the layoffs.

Robert Lelong, Respondent's material manager at the time of the layoffs, testified that the layoffs were not necessitated by a lack of materials. According to Lelong, at the time of the layoffs he confronted Ballard[13] and asked why Respondent was giving material shortage as a reason for the layoffs. Ballard refused to explain but assured Lelong that it was no reflection on Lelong's work.

In support of his statement that the layoffs were not necessitated by a lack of materials, Lelong testified that it was usual for there to be material shortages on the job and that the normal procedure was to assign employees to another task while awaiting supplies. Lelong explained that certain company documents compiling problems were used to lay the groundwork for back charges on the contract. Lelong conceded that material was often delivered without the proper certifications, but testified that this did not require shutting down the job. According to Lelong, it was standard practice to proceed without the certifications because the necessary documentation would arrive a few days later. Lelong also stated that ARCO, Respondent's customer, allowed materials to be used without certification on hand on at least 10 occasions. It was not until December 1984, well after the layoffs at issue, that Respondent ceased asking ARCO for permission to use materials while awaiting certifications. Finally, Lelong testified that he had not, prior to the instant hearing, heard that a lack of isometric drawings was a reason for the layoffs.

Respondent offered substantial evidence to rebut Lelong's testimony. Thomas Walters, formerly Lelong's assistant, testified to a shortage of materials. The Union contends that Walters had no experience and that the documents he relied on related to events subsequent to the second layoff.

William Tow, a laborer and carpenter, also testified to a shortage of materials. Further, Tow testified that materials arrived at the jobsite without proper certification. The Union contends Tow was not on the jobsite during October and November 1984 and had insufficient experience regarding the materials.

George McConnell testified to both a shortage of materials and a shortage of proper certification of materials. McConnell testified that he was not involved in the decision to lay off employees and knew nothing about the layoffs until the day they were announced.

Pipewelders Steven Thomas, Dennis Carney, Terry Neely, and Terry Emerson testified there was work for all the welders in the fabrication shop when they were laid off.

E. *The Alleged Unlawful Terminations*

By letter dated November 20, 1984, Respondent terminated 9 out of the 12 pipewelders employed in its fabrication shop. The nine pipewelders who were on layoff at the time were fired because of the rate of rejection of their welds. The General Counsel and the Union argue that the rejection rate was a pretext and that Respondent terminated the pipewelders because it knew from the representation case that 11 of the 12 employees were affiliated with the Union. Respondent's knowledge of the union affiliation of the pipewelders is not at issue. Rather, the question is whether they were terminated because of their union affiliation or because of the rate of rejection of their welds.

Pursuant to Respondent's agreement with ARCO, X-Ray, Inc., an independent quality control inspection company, X-rayed the welds. In the welding of certain joints, more than one employee worked on the weld. Each welder had his own stamp or mark so that the individual welder would be known for each weld or portion of a weld. In welding two pipes or a pipe and a fitting together, the two pieces are first tacked in four spots. Then four passes are made around the pipe with welding material. The first pass is called the root pass, the second pass is the hot pass, the third pass is called the filler pass, and the final pass is the cap. At the start of the job, one welder would make the first two passes and another welder would make the final two passes.

Elvin Reese, an inspector for X-Ray, Inc., testified that the X-ray process used to test the Respondent's welds revealed not only the faulty weld but also that portion of the weld that was at fault, thereby allowing X-Ray, Inc. and Respondent to identify the culpable welder. The testing by this independent inspection company commenced prior to any union activity at the jobsite and was required by ARCO because of the nature of the job. There is no reason to suspect that the testing or submission of the testing reports was in any way designed to discriminate against employees. The question presented is whether Respondent seized on these nondiscriminatory tests as a pretext to discharge the welders known to be affiliated with the Union.

George McConnell testified that he met with Dickie Stewart to evaluate employees prior to their recall from layoff. According to McConnell, Respondent originally had set a rejection rate of 5 percent as acceptable, in other words, employees with a rejection rate in excess of 5 percent would not be retained. However, early in the job, there were unforeseen problems with the welding. In making their determinations regarding dismissal or retention of welders, McConnell and Stewart terminated all employees with a rejection rate of 20 percent or more, resulting in the discharge of 9 of the 12 welders. The remaining three welders, Emerson, Thomas, and Babcock, had rejection rates of approximately 6 per-

[13] Ballard and Lelong were still in Respondent's employ at the time of these conversations. I, therefore, overruled Respondent's hearsay objection. I found these statements to be admissions by a party-opponent under Sec. 801(d)(2), Federal Rules of Evidence, and by definition not hearsay.

cent.[14] McConnell and Stewart used the reports made by X-Ray, Inc. in calculating such employees' rejection rate. McConnell testified that he assumed the accuracy of these reports and did not make further investigation or calculations. Had McConnell made further calculations he would have discovered that in many cases more than one welder had been charged for the same welding error. I credit McConnell's testimony that he relied on the accuracy of X-Ray, Inc.'s reports and that he made no further calculations. I believe that McConnell had more confidence in the calculations of X-Ray, Inc. than he would have in any separate calculation he could have made himself. I am convinced that McConnell accepted the representation of X-Ray, Inc. that an employee was only charged for his own errors and that McConnell was not aware that more than one welder had been charged with the same error.

Another factor complicating the determination of whether Respondent was motivated by the welders' union sympathies in the discharges of November 20 is the testimony regarding the problems encountered by Respondent's welders in the initial welds done and tested on the job.

Respondent's welders were experiencing a problem with the tacks (the first step in the welding process) cracking in many of the 8-inch pipes. The welders discussed this problem with McConnell and Quality Control Manager James McLemore. This problem was discussed in the shop and in a general meeting attended by all the welders and supervisors. Several of the welders, Don Davis, Terry Neely, Terry Emerson, and Joseph Babcock, testified that McConnell and McLemore told them that these initial welds on the 8-inch pipes would not be held against them.

McConnell testified that he knew that the welders were having problems with the 8-inch pipes, but denied telling the welders that these errors would not be counted against them. Elvin Reese, the testing technician, confirmed that the error rate in the 8-inch pipe was unusually high and would have caused him to believe there was a problem with the pipe, especially since the error rate in the 3-inch pipe was very low.

After the layoffs of October 20 and November 7, the procedure for welding the 8-inch pipe was changed. The company records indicate that ARCO and Respondent did not require the first 18 welds on 8-inch pipe to be rewelded because of a change in material. However, McConnell counted all errors in the 8-inch pipe against the welders in determining their rejection rate, including the first 18 welds which had been "deleted due to a design change."

The General Counsel and the Union contend that Respondent counted as errors welds that had no flaws or no visible flaws. I reject this contention. Although several employees testified that in repairing rejected welds they were unable to find the flaw, that testimony was rebutted by the testimony of Reese and McConnell. First, many of the flaws that showed up in the x-rays were just not visible to the naked eye or not visible after the necessary grinding required to get to the spot of the flaw. Second and most important, after a weld failed to meet the inspection, the added cost of repair was the same to Respondent whether or not the flaw could be observed. In other words, Respondent incurred double labor costs when a weld was rejected whether or not the flaw was visible after grinding. I find insufficient basis to conclude that X-Ray, Inc. or McConnell intentionally inflated the rejection rates of the welders in this manner.

The termination of pipewelder Dennis Carney deserves special mention. Carney had only one error in four welds and that error was during the first 18 shop welds that were deleted because of a design change. McConnell admitted that a welder's first two welds were x-rayed and if there were any errors his next four welds would be X-rayed. McConnell admitted that Respondent deviated from its own procedure in not allowing Carney to have more welds X-rayed. McConnell admitted that Carney was a good pipewelder. In fact, Carney had only four welds because he was assigned by supervision to repair the welds of other employees. Although Carney's rejection rate was 25 percent, it would have been zero if calculated correctly. It should have been clear to McConnell and Stewart that Carney did not have a sufficient number of welds tested and that Carney was not given the same opportunity as other employees to establish his abilities before being terminated.

F. *Analysis*

1. The hiring practices

The General Counsel and Union contend that Respondent violated the Act by screening job applicants in order to eliminate possible supporters of the Union. The job applications submitted in evidence tend to support that argument. Applicants who had previously been employed by unionized firms had that fact highlighted on their job applications. Hansen had been instructed that Respondent was an open shop or nonunion and that it intended to remain as such. She was told to be careful in hiring union employees. No legitimate business justification was advanced for the notation of an applicant's past affiliation with a unionized employer. The only inference to be drawn from the highlighting of an employee's past association with a union or a business associated with a union is that Respondent considered such affiliation or sympathy in making employment decisions. Legal counsel told Hansen that it was unlawful to mark an application by referring to the past union affiliation but Hansen was not instructed to refrain from making any remarks elsewhere or from commenting on an employee's union sympathies. Thus, Hansen gave employees her "open shop" speech and then memorialized their responses regarding unions and picket lines. Again, no lawful explanation for making such notations was ever offered.

Hansen's remarks on the application of an employee, "Are these previous employers union? If so we aren't interested" is a stunning admission of an intent to discriminate against employees with a history of union representation or affiliation. No actual union membership or ac-

[14] As indicated earlier, Emerson, Thomas, and Babcock, the three welders that survived the November 20 discharge, were then paid $1.90 per hour less than the new hires from out of State.

tivities were required, the mere employment with "union employers" was sufficient to preclude employment by Respondent. How many other applicants were so completely denied opportunity for employment is known only to Respondent and its agents.

Hansen's statement to applicant Claassen that Respondent would move from Coos Bay if the employees voted to organize is further evidence that Respondent intended to ensure that it would remain open shop. Hansen's falsification regarding the failure to hire applicant Sandine supports an inference that Respondent had an unlawful motive for the refusal to hire. See, e.g., *Keller Mfg. Co.*, 237 NLRB 712, 716 (1978); *Party Cookies, Inc.*, 237 NLRB 612, 623 (1978). See also *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Here, I draw the inference that Respondent's motive in not hiring Sandine—a motive that Respondent wished to conceal—was the unlawful motive of avoiding hiring union sympathizers. Hansen knew that Sandine was a long-time employee of Chambers Plumbing, a union contractor. Surrounding circumstances lead to the inference that this unlawful motive was not confined to Sandine but affected Respondent's hiring practices with regard to other pipewelders and pipefitters.

Hansen's deliverance of her open-shop speech and memorialization of the employees' reaction or comments constitute further evidence that Respondent intended to screen out applicants who tended to sympathize with unions. Based on the applicants' willingness to supply negative information about unions, it seems clear that the applicants sensed that Respondent intended to remain open shop or nonunion and that comments negative to unions would enhance an applicant's chance of hire.

Subsequent to the filing of the petition, Respondent began hiring pipefitters and pipewelders from out of state. The timing of these events is an important factor in determining whether Respondent was motivated by its desire to avoid hiring union sympathizers. Second, the hiring of these out-of-state employees was against Respondent's self-interest.[15] This labor was more expensive. Respondent paid travel expenses and a wage rate of $1.90 per hour in excess of what it had been paying to pipewelders hired locally but who had been referred by the Union.

The Board stated in *Big E's Foodland*, 242 NLRB 963, 968 (1979); *Hoboken Shipyards*, 275 NLRB 1507 (1985):

> Essentially, the elements of a discriminatory refusal-to-hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employee knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.

For the reasons expressed above, I find that the Union and the General Counsel have established a prima facie case that Respondent unlawfully failed to consider for employment applicants whom the employer suspected possessed union sympathies or union affiliation, even if such sympathy or affiliation was only established by past employment with a unionized employer. *Alexander's Restaurant & Lounge*, 228 NLRB 165 (1977). Once the prima facie case has been found, an unfair labor practice is established unless the employer is able to demonstrate, as an affirmative defense, that the same conduct would have taken place absent the discriminatory motive. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

In response, Respondent offered its main defense that Hansen was neither a supervisor nor agent but simply a low-level employee who only performed a ministerial function in the hiring process. To this end, Hansen testified that she was not personnel manager but simply employed in the personnel office. However, during her employment with Respondent, she utilized business cards furnished by Respondent which described Hansen as a personnel manager. Although the testimony regarding Hansen's hiring is vague, no higher official of Respondent having offered any testimony regarding Hansen's duties or authority, it appears that Hansen was hired to screen applicants for the supervisors such as McConnell and Stewart. According to McConnell, Hansen did not understand the type of experience that Respondent required. In this regard, McConnell testified that applicants with some welding experience were considered good prospects by Hansen but, in fact, this welding experience was not the highly skilled experience McConnell required for his pipewelders. Although this evidence convinces me that many of the applicants may not have been qualified for the pipewelding positions, it does not counter the evidence indicating that a qualified applicant, with previous employment with union contractors, would not get past Hansen in the hiring process and, therefore, would not be hired. In fact, Gerald Smith in Houston made sure that qualified applicants did not get past Hansen or McConnell, by hiring out-of-state nonunion applicants and sending them to the job without any input by McConnell or other supervisors.

Hansen's comments concerning an employee's past employers and his or her reaction to Hansen's open-shop speech appear to be her major job function. If the supervisors were not concerned with Hansen's comments or recommendations, what purpose did she serve? Why have Hansen interview job applicants if her comments were ignored and she did not know what type of experience Respondent required?

Respondent's attorney was aware as early as November of Hansen's activities in designating applicants' past employers as union or open-shop businesses. The attorney took no steps calculated to stop Hansen from indicating an employee's union sympathies. Thus, she was told it was unlawful to write on an application that a past employer was a union firm. She was not discouraged, apparently, from making such notations elsewhere or from soliciting employees' views toward unions by utilizing her open-shop speech and open-ended questions.[16] I find Respondent was fully aware of Hansen's

[15] See *Madison South Convalescent Center*, 260 NLRB 816, 831 (1982).

[16] As indicated earlier, only Hansen testified regarding these instructions. The attorney, while present, did not testify.

attempts to learn of an employee's past employment with union firms and the employee's union sympathies and that Respondent took no action to stop it. Rather, Respondent desired such action for that was a major reason why Ballard hired Hansen in the first place.

With respect to hiring, Hansen apparently hired her own secretary. From this record, it cannot be found that Hansen made any other effective recommendation for hiring. However, as mentioned earlier Hansen effectively screened employees, such as Claassen, Clemens, Sandine, and Nash, from any opportunity for hire. Hansen had an office that was designated as the personnel office and Respondent's personnel records were maintained in Hansen's office.

Therefore, in the circumstances presented in the instant case, I find no merit in Respondent's argument that Hansen was simply a low-level employee whose comments did not affect its hiring process. I find irrelevant the question of whether Hansen was a supervisor within the meaning of the Act. Rather, I see the issue to be whether under common law agency principles, Hansen was an agent for whose conduct Respondent can be held liable. Hansen was employed by Respondent to perform services in its personnel office and her performance was under Respondent's control. Respondent either directed Hansen to take the unlawful action or, at the very least, took no steps, after learning of her conduct, to prohibit her from engaging in that conduct. Thus, I find that Hansen's conduct was authorized or ratified by Respondent. Moreover, the conduct was performed in furtherance of Respondent's objective to remain an open shop. Thus, I find no basis for Respondent to avoid liability for its agent's misconduct, supervisors or not, performed in the furtherance of Respondent's policy to remain open shop, particularly where Respondent authorized or ratified such conduct.

I am not persuaded by Respondent's argument that Supervisors McConnell and Stewart did not share Ballard's and Hansen's animus toward unions. Where, as here, a hiring decision adopts the tainted recommendation of a subordinate official who harbors antiunion animus, her supervisors will not be heard to argue that their decision was free of discriminatory intent. "To rule otherwise would provide a simple means for evading the Act by a division of corporate personnel functions." *Allegheny Pepsi-Cola Bottling Co. v. NLRB*, 312 F.2d 529, 531 (3d Cir. 1962). Accord: *JMC Transport v. NLRB*, 776 F.2d 612, 619 fn. 6 (6th Cir. 1985); *Boston Mutual Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982). Moreover, unfair labor practices here were not the rogue actions of Hansen as argued by Respondent. Rather, Hansen was acting pursuant to the open-shop policy of Respondent with the aid and acquiescence of Ballard, Smith, and Respondent's attorney. Moreover, Superintendents McConnell, Stewart, and Lutes were well aware of Respondent's open-shop policy and Hansen's highlighting of employees' union affiliation. To believe that these supervisors ignored such matters when reviewing job applications requires a degree of naivete, which I cannot reach. McConnell's affirmations of good faith are insufficient to dispel the strong case of systematic discrimination.

Respondent correctly asserts that there were many more applicants than there were available jobs. Hansen was instructed to do a great deal of interviewing in anticipation that Respondent would acquire work in addition to that of ARCO-Alaska at the Coos Bay facility. Unfortunately, most, if not all, of its anticipated work did not come to fruition. According to Respondent, as a result of the mass of applicants and applications, it is possible that a qualified applicant like Claassen or Clemens would "fall through the cracks" without any malevolence on the part of Respondent. Although Respondent's argument is logical, the evidence establishes that Respondent intentionally sought to exclude applicants on the basis of prior employment with union businesses and that Respondent particularly sought to discriminate with respect to jobs in the pipefitting and pipewelding categories.

Although vacancies did not exist for all the employees excluded on the basis of suspected union sympathies, I find that to be no defense to a violation. See *Alexander's Restaurant & Lounge*, supra; *Madison South Convalescent Hospital*, supra. As the Board stated in *Shawnee Industries*, 140 NLRB 1451 1452–1453 (1963), enf. denied on other grounds 333 F.2d 221 (10th Cir. 1969):

> Under the Act an employer must consider a request for employment in a lawful, nondiscriminatory manner, and the question whether an application has been given such consideration does not depend on the availability of a job at the time an application for employment is made. Consequently, the Act is violated when an employer fails to consider an application for employment for reasons proscribed by the Act and the question of job availability is relevant only with respect to the employer's backpay obligation.

Therefore, "final determination of job availability and possible backpay liability will be properly left to compliance." *Apex Ventilating Co.*, 186 NLRB 534 fn. 1 (1970).

Next, Respondent contends that statistically its hiring records show that employees with a past history of employment with union firms had just as good a chance, if not a better chance, of employment than applicants with a history of nonunion employment. The fact that Respondent did not discriminate against all applicants does not bar a finding of a violation. *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964); *NLRB v. W. C. Nabors Co.*, 196 F.2d 272, 276 (5th Cir. 1952), cert. denied 344 U.S. 865 (1952).

Statistics are competent in proving employment discrimination, *Teamsters v. U.S.*, 431 U.S. 324, 339–340 (1977). However, statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, the usefulness depends on all the surrounding facts and circumstances. Id. at 340; see, e.g., *Hester v. Southern Railway Co.*, 497 F.2d 1374, 1379–1381 (5th Cir. 1974). The statistics utilized by Respondent list as applicants with union background persons who posed no threat to Respondent's open-shop operation. For example, persons listed included supervisors for union companies, employees for a company that later

went nonunion, employees who worked only a short time for a union employer, nonbargaining unit employees, employees who worked for a company that is now union but was nonunion at the time of the employment, employees of a union company that closed, and employees who were members of industrial unions rather than a craft or construction union. Moreover, Respondent's statistics made no distinction between employers likely to be sympathetic to the Charging Party and those that would not. However, in hiring after the petition was filed, Respondent hired no employees in the pipefitter and pipewelding job categories who revealed a union background of any kind. Prior to the filing of its petition and Hansen's screening procedures, 12 of the 13 employees hired in these categories had a union background. In any event, Respondent's argument does not rebut the main indicia of the discrimination, the highlighting of an employee's past association with an employer that had a union agreement.

Respondent's conduct with respect to the pipefitters and pipewelders, after the filing of the petition, clearly establishes a pattern of discrimination. Respondent unlawfully laid off employees, unlawfully discharged employees, unlawfully refused to consider qualified applicants with union backgrounds for employment, and unlawfully paid higher wages to nonunion out-of-state applicants. The impact of that conduct was to change the complement of union employees in the unit petitioned for by the Charging Party to a nonunion complement. In the event the Union's position on the smaller bargaining unit was successful in the representation case, it would have been left without its support in the election. When the Employer's position was successful in the representation hearing, the Union had little or no chance to prevail in the election.

The difficulty is whether Respondent's unlawful hiring policy with respect to pipefitters and pipewelders was so widespread as to include all job applicants regardless of positions. Such a determination cannot be made with any degree of certainty from this record. But that ambiguity was caused by Respondent's unlawful hiring practices and, therefore, that ambiguity will not be resolved in Respondent's favor. Based on the record before me, I can do nothing other than to defer the difficult remedial questions of the identity of the discriminatees and the backpay due them to the compliance stage of the proceeding. Reinstatement is not an issue as there was no facility in operation at the time of the instant trial. It appears the discriminatees would have been laid off, in any event, at the completion of Respondent's project for ARCO-Alaska.

In sum, I conclude that Respondent has failed to rebut the Union's and the General Counsel's prima facie case that Respondent discriminated against suspected union sympathizers by attempting to identify union sympathizers and by failing to consider for employment suspected union sympathizers. Respondent has failed to establish that the same hiring would have taken place even in the absence of such unlawful motive. I leave to the compliance stage the establishment of the identity of the particular discriminatees and the related questions of backpay.

2. The hiring of the out-of-state, nonunion employees and the payment of higher wages

As discussed earlier, concurrent with the unlawful practice of not considering for employment pipefitters and pipewelders with a past history of employment with union businesses, Respondent hired out-of-state employees, with a history of working for nonunion businesses, at a wage rate of $1.90 per hour higher than its established wage rate.

A wage schedule was backdated in November or December in an apparent attempt to justify the higher wage rate. I give no credence to McConnell's testimony that the higher wage rate was based on merit because employees performing well were not given the wage rate while new hires were given the merit increase before they could prove themselves meritorious.

Gerald Smith, apparently the agent of Respondent who could supply the justification, if any, of the out-of-state hiring and the higher wage scale, did not testify. This is particularly significant as such hiring was suspiciously timed and was contrary to Respondent's self-interest. Moreover, the failure of Smith to testify can lead to an inference that his testimony would be adverse to Respondent. See *Madison South Convalescent Hospital*, supra, 260 NLRB at 828 fn. 4; *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 fn. 1 (1977). Here, I draw the inference that Smith did not testify because there was no legitimate business justification for the hiring of the out-of-state workers at a premium rate. The only conclusion to be drawn is that Respondent's desire not to hire union sympathizers in the pipefitting and pipewelding categories was so strong that it was willing to pay an additional $1.90 per hour to avoid such hiring.[17]

I further find that Respondent unlawfully discriminated against pipewelders Emerson, Thomas, and Babcock in paying the $1.90 per hour less than the nonunion welders from the time of the hire of the first welders at the higher wage rate until the date of their termination of employment. However, as discussed in more detail, infra, I do not find Emerson, Babcock, and Thomas to have been constructively discharged as alleged in the complaint.

3. The alleged constructive discharges

The Board has held that a constructive discharge is established when it is shown that (1) the employer established burdensome working conditions sufficient to cause the employee to resign and (2) the burden was imposed on the employee because of his union activities. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976); *Algreco Sportswear Co.*, 271 NLRB 499, 500 (1984).

In *Algreco Sportswear*, an employee quit because she was discriminatorily receiving the lowest of three wage rates.[18] Although the Board found that the wage rate

[17] In addition, Respondent paid travel costs to the nonunion out-of-state workers.

[18] The employee was not receiving a reduction in wages but receiving less than she was entitled to under a newly implemented system.

paid to the employee was discriminatory, it refused to find that the burden imposed by Algreco was so intolerable as to force her resignation. "The test is of necessity, an objective one, taking into account the circumstances of each case. The mere existence of discrimination is insufficient to warrant consideration of abandonment of employment as constructive discharge." 271 NLRB at 500. See also *Van Pelt Fire Trucks*, 238 NLRB 794 (1978).

Based on the Board's holding in *Algreco Sportswear*, there can be no finding of a constructive discharge here. The employees, although discriminatorily receiving a lower wage than the new out-of-state hires, were offered the new higher wage rate retroactive to the beginning of that week. Thus, the only burden here was the failure to give the retroactive pay to the time of the hiring of the first out-of-state welder. Thus, as in *Algreco Sportswear* there is discriminatory intent but the burden imposed by the Respondent was not so "difficult and unpleasant" as to force the three welders to resign. Respondent's offer to raise the welders' wages to the level of the out-of-state workers precludes a finding of a constructive discharge. Rather, I am required to find that the three employees voluntarily quit their employment and are not entitled to reinstatement or backpay as a result of their quitting. That, of course, does not preclude a remedy for the period of time when the three welders were discriminatorily receiving $1.90 per hour less than the rate paid to the nonunion out-of-state welders.

4. The alleged unlawful layoffs

A difficult question is presented by the allegation of unlawful offs in October and November 1984. The General Counsel and the Union have established a prima facie case. After the filing of the petition, Respondent laid off employees because of an alleged shortage of materials. The record demonstrates Respondent's animus against union sympathizers and its strong desire to remain nonunion. Further, if Respondent was willing to discriminate in regard to hire and wages against union sympathizers, there is no reason to believe it would not discriminate with regard to laying off or firing employees because of union sympathies. Finally, the testimony of Lelong established that Respondent could continue to operate in the absence of some materials and in the absence of certification of materials. The testimony of the welders revealed that there was still welding that could be done. Most importantly, Lelong testified that Ballard, at the time Respondent's highest ranking official, admitted that a material shortage was not the real reason for the layoffs. Based on these facts and the other concurrent unfair labor practices, I find that a prima facie case has been established and that the burden shifts to Respondent to establish that the same action would have taken place in the absence of protected conduct.

In response, Respondent contends that the layoffs were necessitated by material shortages, lack of certifications, and lack of isometric drawings. Respondent offered documentary evidence indicating late shipment of materials. Further, Respondent's records revealed that materials had been received without the proper certification and that the certifications had been delayed.

The testimony of Willie Tow, a laborer, and Thomas Walters, a material handler and Lelong's assistant, both of whom I credit, established that there was in fact a shortage of materials and delay in receipt of the material certifications. However, I find that the testimony of Tow and Walters insufficient to rebut Lelong's testimony that Respondent could have reassigned employees and continued operations with the materials on hand. The testimony of the welders that they still had assignments to perform was not rebutted by either Tow or Walters. Further, Lelong's testimony that Respondent could perform work while awaiting the certifications was not rebutted. Walters testified that Respondent encountered a problem with such a procedure. However, the events to which Walters referred did not occur until sometime after the layoffs in question and could not have entered into Respondent's thinking.

Although McConnell testified that Respondent had a material shortage at the time of the layoffs, he did not credibly rebut Lelong's testimony. McConnell apparently overreached himself in testifying regarding the handling of materials. In one important respect, McConnell's testimony gave credence to that of Lelong. McConnell admitted that he had no advance knowledge of the layoffs and that he was not involved in the decision to lay off employees. Certainly, in a legitimate layoff McConnell would have been given notice and would have determined which employees to lay off and which to retain. In my view, that buttresses a finding that the layoffs were not in the ordinary course of business but, rather as Lelong testified, for another reason known only to Ballard. All the circumstantial evidence indicates that the reason was Respondent's desire to remain a nonunion shop.

Respondent must show by a preponderance of the evidence that it would have engaged in this same conduct even in the absence of its unlawful motive. I conclude that Respondent has not met its burden. Respondent has shown that reasons for layoffs may have existed, but Respondent has not established that it would not have attempted to operate by reassigning employees and by using materials conditioned on receipt of certification had Respondent not been consumed with a course of conduct designed to remain open shop.

5. The alleged unlawful terminations

During the layoffs, Respondent terminated and did not recall from layoff nine pipewelders allegedly because their rate of rejection on welds was too high. The terminations took place after Respondent learned, during the representation proceeding, that its welders were union members or at least union sympathizers. Based on the timing of the terminations, Respondent's knowledge of the pipewelders' union affiliation, the concurrent unfair labor practices, Respondent's animus toward the Union, and its desire to remain open shop, I find that the Union and the General Counsel have established a prima facie case of discrimination.

The record reveals that pursuant to its agreement with ARCO-Alaska Respondent was obligated to have the welds tested by X-Ray, Inc. As indicated earlier, I find

that the testing and the procedures of X-Ray, Inc. were nondiscriminatory. Further, I find that there was no discrimination in the documents generated by X-Ray that were later used by McConnell and Stewart in terminating employees because of a high rate of rejection. Thus, I believe that Respondent can establish that a welder would have been discharged, absent his union sympathy, if his rate of rejection was in excess of 20 percent. However, I find Respondent has not satisfied that burden with respect to employee Dennis Carney. Carney was assigned, after only three or four welds, to repair the welds of other employees. He was so chosen because he had demonstrated superior skill. McConnell admitted that Carney was a good welder and that Respondent deviated from its own procedure in not allowing Carney further opportunity to weld before terminating him. Thus, with respect to Dennis Carney, I find Respondent has not rebutted the prima facie case but rather has shown that absent his union sympathies Carney would not have been terminated. I conclude, therefore, that Respondent terminated Carney because of his suspected union membership in violation of Section 8(a)(3) and (1) of the Act.

As mentioned earlier, I find no unlawful motivation in McConnell's and Stewart's use of the documents prepared by X-Ray, Inc., nor is the fact that two employees were charged for the same error. I do not find that McConnell was aware of such an error but rather that he legitimately relied on X-Ray's document. However, I do not draw the same conclusion regarding the utilization of the first 18 welds in calculating an employee's rate of rejection. From the face of X-Ray's document, it is clear that the first 18 welds should not be counted. Thus, for each of the eight welders at issue, I calculated the proper rejection rate based on X-Ray's documents. Using a proper calculation, I found that two other alleged discriminatees would have had a rejection rate of less than 20 percent. I find that these two welders, Jorge Elizalde and Leonard Paloma, would not have been disqualified from further pipewelding assignments absent union considerations. However, there are six pipewelders that because of their rate of rejections, I find would have been discharged even absent union considerations.

6. The representation case

The unfair labor practices found above, occurring during the pendency of the representation petition, are more than sufficient to set aside the election. Therefore, I shall recommend that the Board set aside the election and remand the case to the Regional Director for further proceedings. As Respondent had no Coos Bay facility and no employees in Oregon, at the time of the instant hearing, I do not recommend a second election. In any event, on remand, the Regional Director can take whatever further action is proper.

CONCLUSIONS OF LAW

1. Respondent, KRI Constructors, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local No. 51 is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in a pattern or practice of screening job applicants to determine suspected union sympathizers and refusing to consider applicants for employment based on previous employment with union businesses or for other suspected union sympathies, Respondent discriminated in regard to hire in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

4. By hiring out-of-state, nonunion employees in order to avoid hiring union sympathizers, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By paying out-of-state, nonunion employees higher wage rates and discriminating against suspected union sympathizers regarding wages, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By laying off employees in October and November 1984 in order to discourage union membership or support, Respondent violated Section 8(a)(3) and (1) of the Act.

7. By terminating employees Dennis Carney, Leonard Paloma, and Jorge Elizalde in November 1984 because of union membership or activities, Respondent violated Section 8(a)(3) and (1) of the Act.

8. The evidence does not establish that Respondent constructively discharged employees Terry Emerson, Thomas Babcock, and Eugene Thomas in violation of the Act.

9. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent did not otherwise engage in the unfair labor practices alleged in the complaint.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

It having been found that Respondent unlawfully discriminated against job applicants based on their suspected union sympathies, it will be recommended that Respondent make such employees whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, less net earning during the period of such backpay accrual. Employees Dennis Carney, Jorge Elizalde, and Leonard Paloma will also be entitled to be made whole by reason of the discrimination against them. Backpay in all cases is to be computed on a quarterly basis making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be provided in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Terry Emerson, Thomas Babcock, and Eugene Thomas shall be made whole for the failure to pay them

the higher wage rates paid to nonunion welders from the date of the hire of the first welders at the higher rate until the date when the three employees quit their employment, with interest.

I shall further include a visitatorial provision permitting General Counsel to obtain discovery in the United States court of appeals regarding compliance with this recommended Order. I find that such a visitatorial clause is necessitated by the numerous difficult compliance problems involved herein. See *Hilton Inn North*, 279 NLRB 45 fn. 3 (1986).

[Recommended Order omitted from publication.]

United Rubber, Cork, Linoleum and Plastic Workers of America, Local 250, AFL–CIO (Mack-Wayne Closures) ***and*** **International Union of Tool, Die and Mold Makers.** Case 22–CB–4927

July 29, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On May 22, 1986,[1] the National Labor Relations Board issued its Decision and Order in this proceeding finding that the Respondent Union violated Section 8(b)(1)(A) of the Act when it took certain actions that amounted to an arbitrary refusal to process David O'Neill's grievance.[2] On June 23 the Respondent filed a petition for review with the United States Court of Appeals for the Third Circuit. The General Counsel filed a cross-application for enforcement on July 28. Subsequently, the Board requested the Third Circuit to remand the case to permit the Board to reconsider its ruling in light of an intervening decision by the United States Court of Appeals for the Ninth Circuit.[3] The Third Circuit Court of Appeals granted the Board's request and remanded the case on November 17. On December 10 the Board advised the parties that they might file statements of position regarding the issues under reconsideration. The General Counsel and the Respondent filed statements of position.

In our prior decision, after finding that the Respondent had breached its duty of fair representation by arbitrarily refusing to process O'Neill's grievance in violation of Section 8(b)(1)(A), we ordered the Respondent to remedy its statutory violation by requesting the Employer, Mack-Wayne Closures, to reinstate O'Neill to his former position and, if the Employer refused to do so, to promptly pursue the remaining stages of the grievance procedure, including arbitration, in good faith with all due diligence.[4] In the event that it was not possible for the Respondent to pursue the remaining stages of the grievance procedure for any procedural or substantive reason, we ordered the Respondent to make whole O'Neill for any loss of pay he may have suffered as a result of the Respondent's unlawful conduct. We explained that this latter make-whole provision, a provisional or conditional make-whole remedy, was necessary in order to restore the status quo, remedy the injury, and deter the wrongdoer. Acknowledging that the merits of O'Neill's grievance were not certain, we, nevertheless, found that placing the risk of this uncertainty on the wrongdoer was consistent with fundamental equitable principles and longstanding Board precedent.[5]

After we issued our decision in *Mack-Wayne I*, the United States Court of Appeals for the Ninth Circuit denied enforcement of a Board order containing a similar provisional make-whole remedy. *San Francisco Pressmen v. NLRB*, supra. In rejecting the provisional make-whole remedy ordered in that case, the Ninth Circuit relied on certain decisions of the United States Supreme Court in Section 301 contract cases,[6] which require a plaintiff to prove, in order to prevail in a civil action against the union, both that the union breached its duty of fair representation and that the action the employer took against the employee was in breach of the contract. The Ninth Circuit noted that two other circuits had also rejected the Board's make-whole remedy[7] and the court stated that the Board in *Glass Bottle Blowers Assn. (Owens-Illinois, Inc.)*, 240 NLRB 324 (1979), had applied the rule that the court endorsed. The Ninth Circuit analogized duty of fair representation cases to cases involving attorney malpractice liability, where the plaintiff must establish both that the duty was breached and that the underlying case could have been won. Thus, the court held that the "[e]mployees must show both a wrongful discharge by the Employer and a breach of duty by the Union to collect backpay from the Union." 794 F.2d at 423–424.

We have reconsidered our decision in *Mack-Wayne I* in light of the Ninth Circuit's decision in *San Francisco Pressmen v. NLRB*, supra, the decisions of other circuits, the General Counsel's and the Respondent's statements of position in this case, and the Board's experience with the duty of fair representation doctrine as developed in *Miranda Fuel* [8] and its progeny. We find that the Board's

[1] All dates are 1986 unless otherwise indicated.

[2] *Rubber Workers Local 250 (Mack-Wayne Closures) (Mack-Wayne I)*, 279 NLRB 1074 (1986).

[3] *San Francisco Pressmen v. NLRB*, 794 F.2d 420 (1986).

[4] Additionally, we ordered the Respondent to permit O'Neill to be represented by his own counsel during the remaining stages of the grievance procedure and at any arbitration proceeding, and to pay the reasonable legal fees of such counsel. *Mack-Wayne I*, supra at 1075.

[5] See, e.g., *San Francisco Pressmen (San Francisco Newspaper)*, 267 NLRB 451 (1983), supplemented 272 NLRB 899 (1984), enf. denied in part 794 F.2d 420 (9th Cir. 1986); *Steelworkers Local 15167 (Memphis Folding Stairs)*, 258 NLRB 484 (1981), enf. denied 692 F.2d 1052 (7th Cir. 1982); *Teamsters Local 559 (Mashkin Freight)*, 257 NLRB 24 (1981), enfd. without opinion 714 F.2d 115 (2d Cir. 1982); *Abilene Area Sheet Metal Contractors Assn. (Abilene Sheet Metal)*, 236 NLRB 1652 (1978), enfd. in relevant part 619 F.2d 332 (5th Cir. 1980); *Electrical Workers UE Local 485 (Automotive Plating)*, 170 NLRB 1234 (1968), supplemented 183 NLRB 1286 (1970), enf. denied in part 454 F.2d 17 (2d Cir. 1972).

[6] *Bowen v. Postal Service*, 459 U.S. 212 (1983); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976); *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

[7] *Steelworkers v. NLRB*, 692 F.2d 1052 (7th Cir. 1982); *NLRB v. Electrical Workers UE Local 485*, 454 F.2d 17 (2d Cir. 1972).

[8] *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963).

provisional make-whole remedy as set out in *Mack-Wayne I* effectuates the policies and administration of the Act and we will adhere to that remedy, as modified below. In so doing, we find it necessary to summarize our approach to this issue and our rationale in detail. Further, to ensure that a union that is alleged to have breached its duty of fair representation is not presented with an inequitable "Hobson's Choice," as described below, we shall modify our procedural application of the provisional make-whole remedy to allow the union, at its election, to litigate the merits of the grievance at the underlying unfair labor practice hearing or to defer the issue to the compliance stage.

I. THE PROVISIONAL MAKE-WHOLE REMEDY

In *Miranda Fuel*, supra, the Board adopted the view that a union's breach of its duty of fair representation constituted a violation of Section 8(b)(1)(A). We reasoned that the union's statutory obligation under Section 9(a) to fairly and impartially represent all employees gave rise to a corresponding employee Section 7 right to fair representation by the union.[9] Since our *Miranda Fuel* decision, we have consistently found that a union's arbitrary failure or refusal to process an employee's grievance, or a union's processing of a grievance in a perfunctory manner, violates the union's duty of fair representation and Section 8(b)(1)(A). Having identified the union's unlawful conduct, we have fashioned appropriate remedies in the context of the specific case before us in order to remedy the unfair labor practice. These remedies have been approved by the courts.[10] Thus, in addition to our usual cease-and-desist order and notice posting requirement, we have required the offending union to request the employer to consider reinstating the grievant or to consider the grievance on the merits, to take the grievance to arbitration pursuant to the applicable bargaining agreement,[11] and (if necessary) to file a Section 301 action to compel arbitration.[12] We have also required the union to permit the affected employee to be represented by counsel of his or her own choice at any grievance proceeding and to reimburse the employee the reasonable fees of counsel.[13]

These remedial provisions share a common objective. They are all designed to restore the parties to their preunfair labor practice posture to the maximum extent possible. They are intended to hold the union to the terms of the collective-bargaining agreement that it negotiated with the employer and to permit the employee to have his or her grievance resolved on its merits pursuant to the negotiated grievance procedure. In cases, however, where the employer is not before the Board as a party and resolution of the grievance pursuant to the agreed-on procedure becomes impossible, then we have concluded that the union must make the employee whole or the employee will be left without an adequate remedy for the union's unlawful refusal to process the grievance.

Prior to ordering a provisional make-whole remedy, however, we have either explicitly or implicitly required an affirmative showing of a nexus between the unfair labor practice and the make-whole remedy. See *Mack-Wayne I*, supra at 1074 fn. 3. Some of our prior decisions speak of this nexus in terms of the employee's grievance not being "clearly frivolous."[14] Although other decisions have not specifically discussed the "merits" of the grievance, analysis of those decisions reveals that an initial showing of some merit has been a consistent (albeit implicit) prerequisite to a make-whole remedy.[15] When we have found that a union breached its duty of fair representation by failing to process a grievance but that the employee's grievance was, nevertheless, without merit, we have refused to order a make-whole remedy.[16]

The requirement that the employee's grievance not be "clearly frivolous" can be considered as the General Counsel's burden of proving a nexus between the unfair labor practice and the provisional make-whole remedy. Of course, the General Counsel may elect to forgo the provisional make-whole remedy and seek the traditional cease-and-desist order, posted notice, and other remedies. The General Counsel is not required to show that the grievance was not "clearly frivolous" in order to establish the appropriateness of those remedies. By es-

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[9] See also 2C Morris, *The Developing Labor Law* at 1308 (2d ed. 1983).

[10] See, e.g., *San Francisco Pressmen v. NLRB*, supra; *Abilene Area Sheet Metal Contractors v. NLRB*, supra; *Teamsters Local 559 (Mashkin Freight)*, supra.

[11] See, e.g., *San Francisco Pressmen v. NLRB*, 794 F.2d at 423, enfg. in relevant part 267 NLRB 451 (1983); *Groves-Granite*, 229 NLRB 56, 66 fn. 48 (1977), supplemented 232 NLRB 381 (1977).

[12] Cf., e.g., *San Francisco Pressmen v. NLRB*, supra. *Groves-Granite*, 232 NLRB at 381 (noting the respondent's failure to file a Sec. 301 action to compel arbitration was a failure to comply with the Board's prior order to process grievance).

[13] See *San Francisco Pressmen v. NLRB*, supra.

[14] *Service Employees Local 579 (Beverly Manor)*, 229 NLRB 692, 696 (1977); *Massachusetts Laborers (Manganaro Masonry)*, 230 NLRB 640, 643 (1977); but see *Steelworkers Local 15167 v. NLRB*, 692 F.2d 1052 (7th Cir. 1982), enf. denied 258 NLRB 484 (1981) (where court denied enforcement to a Board decision which found that since the grievance was "not clearly frivolous" it was presumed *meritorious*).

[15] See, e.g., *Lea Industries*, 261 NLRB 1136 (1982) (where a similarly situated employee was actually reinstated when the union filed a grievance on her behalf); *Operating Engineers Local 139 (C. F. Kalupa, Inc.)*, 256 NLRB 535 fn. 2 (1981) ("on the face of it there is every indication that Reif's grievance was meritorious"). *Electrical Workers IBEW Local 2088 (Federal Electric)*, 218 NLRB 396 (1975) (similar grievance granted).

[16] *Teamsters Local 705 (Associated Transport)*, 209 NLRB 292, 293 (1974), enfd. sub nom. *Kesner v. NLRB*, 532 F.2d 1169 (7th Cir. 1976), cert. denied 429 U.S. 983 (1976).

tablishing that the employee's grievance is not "clearly frivolous," however, the General Counsel has shown that *some* damage or injury flows from the union's unfair labor practice, if only the loss of the employee's right to "test" the employer's case. Having shown that some injury flows from the union's statutory violation, we have allowed the union to come forward with proof that its conduct did not ultimately "cause" any further injury by establishing that the employee's grievance was not meritorious.[17] In practical effect, the burden of proof regarding the merit (or lack of merit) of the employee's not "clearly frivolous" grievance shifts to the wrongdoing union.

We believe that the union should bear this shifted burden of proof. Admittedly, absent a determination on the merits pursuant to the agreed-on procedure, the outcome of the employee's grievance cannot be certain. This uncertainty, however, is due directly to the fact that the union violated its statutory duty. In keeping with traditional equitable principles that the wrongdoer shall bear the risk of any uncertainty arising from its actions,[18] the union must bear the ultimate risk of any uncertainty regarding the "merits" of the grievance.

Strong policy considerations support this view, especially in the context of an employee's discharge grievance, a grievance as the one we deal with here. As we have noted, part of the injury that an employee suffers when his or her union unlawfully refuses to process a grievance is the denial of the opportunity for a fair hearing; the right to challenge the employer's decision; and the right to argue that, even if the employer had "just cause" for discharge, mitigating circumstances support a reduced penalty.[19]

In a disciplinary arbitration proceeding, the burden of establishing the propriety of the employment decision will generally be on the employer.[20] Where, as here, the Union caused the grievance process to malfunction, a union should assume this burden, the burden of establishing that the employee's grievance would have been denied or that the discharge was justified. If the Board were to impose on the General Counsel the burden of proving that the employee would have won the grievance, then the employee would be deprived of a significant procedural and tactical advantage available to him in the grievance process, the right to sit back and force the employer to "make its case." To permit the employee to be deprived of this advantage solely as a result of the union's wrongful conduct conflicts with our congressional mandate to effectuate the policies of the Act and remedy the union's unfair labor practice.

It is important to stress that the Board does not impose a punitive remedy here,[21] nor do we establish an irrebuttable presumption of merit or a per se entitlement to backpay. The Board takes an exceedingly small step by placing the ultimate burden of proof regarding the merits of a grievance on the union. Only in those cases where a union has been unable to secure consideration of a not "clearly frivolous" grievance whose merits are uncertain will this allocation of proof have any effect on the outcome of the case. In these limited circumstances, it is appropriate for any uncertainty to fall on the wrongdoer and not the innocent victim.

In general civil litigation, the burden of establishing a particular matter will often be placed on the party with special knowledge regarding that matter.[22] As between the General Counsel and the union, the union obviously has more particular knowledge regarding the merits of the underlying grievance than does the General Counsel. The union, not the General Counsel, has a continuing collective-bargaining relationship with the employer. Thus, the union, not the General Counsel, has direct knowledge of the "common law of the shop," the parties' past practice, the bargaining history of the contract, the location and availability of witnesses and evidence, and the particular facts of the relevant grievance. Finally, the union, not the General Counsel, is aware of the particular needs of the employer and whether those needs might themselves mitigate against discharge of the employee.[23]

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[17] See *Teamsters Local 705*, supra; *Security Personnel (Church Charity Foundation)*, 267 NLRB 974, 980 (1983).

[18] *Bigelow v. RKO Pictures*, 327 U.S. 251, 265 (1946). Contrary to the Respondent's contention, we find *Bigelow's* principles to be applicable here. We have already concluded that the Union's unfair labor practice has resulted in some injury; the grievance process has malfunctioned as a result of the Union's unlawful conduct. Thus, we are here concerned with the scope or "amount" of injury.

[19] This "mitigation" consideration is particularly relevant in this case since O'Neill was a toolmaker for the Employer and toolmakers were apparently in short supply. In fact, the record shows that it was only when Shop Steward Ferry attempted to make this very argument to the Employer that Union President Huther interrupted, "lost his cool," and stated that they were there "to fire the guy."

[20] Elkouri & Elkouri, *How Arbitration Works* at 661, 663 (4th ed. 1985); Fairweather, *Practice and Procedure in Labor Arbitration* at 254–256 (2d ed. 1983); Baer, *Discipline and Discharge under the Labor Agreement* at 32–36 (1972).

[21] *Carpenters Local 60 v. NLRB*, 365 U.S. 651 (1961), is not contrary to our decision. In *Carpenters*, the Supreme Court held that, in order to require the union to reimburse dues and fees collected pursuant to an illegal agency shop clause, the General Counsel must establish that a union's membership was induced to pay fees and dues they would not *otherwise* have paid if not for the illegal agency shop clause. Here, however, it is clear that but for the Union's violation of its duty of fair representation O'Neill's grievance would have been heard on its merits.

[22] McCormick, *Handbook of the Law of Evidence*, § 337 at 787 (2d ed. 1972).

[23] See fn. 19, supra. We note that here we are not shifting the burden of establishing a prima facie case from the General Counsel to the Union,

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Shifting the burden of proof regarding the merits of the grievance from the General Counsel to the wrongdoer when required by public policy is not without precedent under the Act or other employment-related Federal statutes. Once the General Counsel has established a prima facie case that an employer has discharged or refused to hire an individual based on illegal considerations, the burden of proof shifts to the employer to establish that the discriminatee would have been fired or would not have been hired for legitimate reasons in the absence of the illegal motivation.[24] A civil plaintiff and defendant have analogous burdens of proof in Title VII proceedings as well.[25]

We are cognizant of conflicting courts of appeals' decisions on this matter.[26] Representative of decisions contrary to our approach is the decision of the Ninth Circuit Court of Appeals in *San Francisco Pressmen*, supra. The Ninth Circuit suggested that the burden of proof in duty of fair representation cases under the Act should follow the rule in attorney malpractice cases. *San Francisco Pressmen*, supra at 425 fn. 11. A plaintiff in such a case must show not only that there was a breach of duty, but also that the claim otherwise could have prevailed. We find, however, that the special character of the grievance-arbitration process, where the employee is in effect "presumed" to be "innocent,"[27] distinguishes duty of fair representation proceedings from attorney malpractice actions. In an attorney malpractice case, the plaintiff has the additional burden of proving that the underlying claim was meritorious because, in the absence of the attorney's malpractice, the plaintiff would still have had to prove the merits of the underlying claim.[28]

Contrary to certain courts, we also think that it is inappropriate to rely on cases decided under Section 301 for the proposition that the General Counsel must bear the burden of proof concerning the merits of the underlying grievance. Even though Section 301 cases *may* involve a corresponding duty of fair representation claim against the union, the underlying claim, a breach of contract claim, remains the essence of the Section 301 suit. A typical breach of contract action does not present any compelling policy reasons to justify altering traditional common law burdens of proof. Significantly different policy considerations come into play where, as here, the Board has been charged with advancing what Congress has "declared to be the policy of the United States." NLRA Section 1. Since we established that a breach of a union's duty of fair representation was an unfair labor practice, we have applied to the judicially created duty of fair representation doctrine our own unique institutional and policy consideration. We find that shifting the burden of proof from the General Counsel to the union is required to administer our resources, comply with our congressional mandate, and give a meaningful remedy in duty of fair representation cases.[29]

To summarize, we hold that in an 8(b)(1)(A) case where the union has breached its duty of fair representation with regard to the processing of an em-

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only shifting the burden regarding establishing the appropriateness or inappropriateness of a provisional backpay remedy. Compare *Aqua-Chem, Inc.*, 288 NLRB 1108 (1988) (where a Board majority, Member Johansen dissenting, rejected the view that the respondent's initially superior knowledge of the relevant facts regarding the unfair labor practice allegations *alone* justified shifting the burden of proving or disproving a *violation* of the Act). Member Johansen does not agree with this characterization of *Aqua-Chem*.

[24] *Wright Line*, 251 NLRB 1083 (1980). Although *Wright Line* established an analytical framework for resolving whether an employment decision was *motivated* by illegal consideration, that approach is analogous to the our approach here because it focused on causation issues, was developed in response to conflicting courts of appeals' decisions, and was in part a "recognition of the practical reality that the employer is the party with best access to proof of its motivation." Id. at 1088.

[25] *Day v. Mathews*, 530 F.2d 1083 (D.C. Cir. 1976) (once discrimination is shown, the plaintiff is entitled to backpay unless the defendant can prove by clear and convincing evidence that the plaintiff would not have been hired, promoted, etc., even if there had been no discrimination). Significantly, the D.C. Circuit Court of Appeals concluded that policy considerations similar to those articulated here mandated this result.

[26] *San Francisco Pressmen v. NLRB*, supra; *Steelworkers Local 15167 v. NLRB*, supra; *NLRB v. Electrical Workers UE Local 485*, supra. But see *Abilene Area Sheet Metal Workers v. NLRB*, supra; and *Teamsters Local 559*, supra.

[27] See generally Baer, *Discipline & Discharge under the Labor Agreement* at 32–33.

[28] Contrary to the Ninth Circuit's indication, the Board in *Glass Bottle Blowers Assn. (Owens-Illinois, Inc.)*, 240 NLRB 324 (1979), did not apply the rule the court ascribes to it. There, the judge ordered the respondent union to pay the charging party and his brother the wages they lost from the period beginning with the abrogation of their operator seniority until there was a fair resolution of their grievance. Thus, the judge ordered the union to make the employees whole even if the union were able to compel the employer to consider the grievance on the merits and the grievance was determined to have been without merit. It was this latter per se backpay award that we rejected when we ruled that to "now" require the union to pay the grievants' back wages "might" be punitive. See 240 NLRB at 325. Nothing in *Glass Bottle Blowers* compels a contrary result to the one we reach here.

[29] We do not read the Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), as compelling a different result from our decision in this case. In *DelCostello*, a case involving a private party's claim against a union, the Court was not addressing the same policy concerns that we must address in this case, a case involving a claim by the General Counsel that the Union violated the Act. Although the source of a union's duty of fair representation may be the same in both cases, the judicial and administrative mechanism used to resolve these cases is very different. The former case is governed by court rule and common law. The latter case is governed by our own procedural rules and rules of decision. Interestingly, the Supreme Court in *DelCostello* expresaly rejected the argument that Sec. 301 duty of fair representation lawsuits were governed by state statutes of limitations governing legal malpractice claims. Inter alia, the court stated that the analogy between legal malpractice claims and claims like the one before us "suffers from objections peculiar to the realities of labor relations and litigation." Id. at 167. As the Supreme Court in *DelCostello*, we too find that a duty of fair representation claim has "no close analogy in ordinary state law." Id. at 165. Member Johansen additionally notes that the Board's remedial authority is based on Sec. 10(c), not on the contract.

ployee's grievance, the General Counsel has an initial burden of establishing that the employee's grievance was not clearly frivolous in order to be entitled to a provisional make-whole remedy. If the General Counsel establishes that nexus between the union's unlawful conduct and the remedy, the burden of proof shifts to the union to establish that the grievance was not meritorious. We shall apply these rules to all cases where the union violates Section 8(b)(1)(A) by failing to properly process an employee's grievance and, to the extent any of our prior decisions may conflict with this decision, we overruled then to the extent of the inconsistency.

II. PROCEDURAL APPLICATION OF THE SHIFTING BURDEN OF PROOF

Any provisional make-whole remedy we order will only take effect if the union has failed or has attempted and been unable to have the employer consider the grievance on its merits. The primary goal of the Board's order is to return the parties to their preunfair labor practice posture and to have the employee's grievance considered pursuant to the agreed-on procedure. Resolving grievances pursuant to the parties' agreed-on process leads to greater industrial peace and stability. Thus, a provisional make-whole remedy only becomes important if the grievance cannot be resolved pursuant to the agreed-on process.

We recognize, however, that there are circumstances when the union and the employee may be faced with a difficult and inequitable "Hobson's Choice." For example, if the union alleged to have violated its duty of fair representation is attempting to process the grievance while the unfair labor practice hearing is pending, or if there exists a realistic possibility that the employer will consider the grievance on the merits if the union is later ordered to process it, then it may be unfair to the union and the employee for the Board to *require* the union to attempt to prove in the unfair labor practice case that the grievance lacks merit.[30] In this and similar cases, it seems more appropriate to allow the union to first pursue the grievance and, if it cannot be resolved pursuant to the negotiated procedure, then to argue the merits of the grievance at a subsequent compliance proceeding.[31] On the other hand, if the union has in its possession at the unfair labor practice hearing substantial evidence that the grievance lacks merit, then the union may wish to present that evidence at the unfair labor practice hearing and it makes little sense to *force* the union to defer the issue to the subsequent compliance stage.

We, therefore, hold that, in the context of this class of cases only,[32] the union should be given the option of litigating the merits of the employee's grievance at either the unfair labor practice hearing or at the subsequent compliance stage. We will not allow the union, however, to litigate this issue twice. Prior to the close of the unfair labor practice hearing, the union must have made an unambiguous election to litigate the merits of the grievance at the unfair labor practice hearing or at the compliance stage.

III. THE INSTANT DISPUTE

Applying the above standards to the instant dispute, we find that the General Counsel has presented sufficient evidence to establish that O'Neill's grievance was not clearly frivolous. O'Neill testified that, at a hearing before the Equal Employment Opportunity Commission (EEOC) in January 1983, the Employer agreed to reduce one of his two written warnings to an oral warning. Accordingly, when O'Neill received a "third" written warning that subjected him to discharge in May 1983, he claimed that he had only two written warnings. Although there is conflicting evidence regarding the Employer's agreement to reduce one of the written warnings to an oral warning, this material fact is in issue, and it demonstrates that O'Neill's grievance was not clearly frivolous.[33]

Having met the initial burden of demonstrating that O'Neill's grievance was not clearly frivolous, the burden of proof shifts to the Respondent to establish that O'Neill's grievance was not meritorious. The Respondent may attempt to prove that O'Neill's grievance lacks merit either at the unfair labor practice hearing or at the compliance stage. In its statement of position, the Respondent points out that it attempted to raise the merits of O'Neill's grievance at the unfair labor practice hearing. Arguably, the Respondent was prevented from fully litigating this issue. Accordingly, we will remand this case to the judge so that the Respondent may elect to litigate the merits of O'Neill's grievance now or at the compliance stage. Should the Respondent elect to litigate the merits issue now, the judge shall convene a hearing for the purpose of

[30] See, e.g., *Tubari Ltd.*, 287 NLRB 1273 fn. 8 (1988).

[31] We have recognized this problem in the past and have resolved it by retaining jurisdiction over the case in its unfair labor stage, pending the outcome of the grievance process. See, e.g., *Electrical Workers UE Local 485 (Automotive Plating)*, 170 NLRB 1234 (1968); *Groves-Granite*, supra. This retention of jurisdiction approach has not proved to be satisfactory.

[32] By "class of cases," we mean complaints alleging a violation of Sec. 8(b)(1)(A) based on the respondent's alleged failure or refusal to properly process an employee's grievance whem the General Counsel is seeking a provisional make-whole remedy.

[33] The record contains other evidence bearing on the written versus oral nature of O'Neill's warnings, but the evidence cited above is sufficient to meet the General Counsel's burden of proof.

taking evidence and, on conclusion of the hearing, the judge shall prepare and serve on the parties a supplemental decision. Should the Respondent elect to litigate the merits issue at the compliance stage, then we will give effect to the remedy ordered in *Mack-Wayne I* and will order the Respondent to attempt to process O'Neill's grievance.

ORDER

It is ordered that the record in this proceeding is reopened and remanded to Administrative Law Judge Howard Edelman for the purpose of allowing the Union to elect whether to present evidence on the merits of the grievance at a hearing or at a subsequent compliance stage.

If the Union elects to present evidence on the merits of the grievance at the compliance stage, it is further ordered that the remedy and the order provided in *Mack-Wayne I* shall be given full effect.

If the Union elects to present evidence on the merits of the grievance at this time, Judge Edelman shall convene a further hearing for the purpose of taking evidence in accordance with this decision; and on the hearing's conclusion Judge Edelman shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall govern.

MEMBER CRACRAFT, concurring in part and dissenting in part.

Although I agree with my colleagues that this proceeding should be remanded, I disagree with their allocation of the burden of proof on remand. Before assessing backpay liability against the Union, I would require that the General Counsel prove that employee O'Neill's grievance was meritorious.[1]

In order to obtain backpay in a Section 301 failure to fairly represent suit, the burden of proof is on the plaintiff to establish that his or her grievance was meritorious. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 570–571 (1976). This is the burden of proof that I would utilize in 8(b)(1)(A) cases involving breaches of the duty of fair representation.

My placement of the burden of proof is based on a rationale rejected by my colleagues: because the duty of fair representation is a court-created doctrine belatedly incorporated by the Board in Section 8(b)(1)(A),[2] the burden of proof in 8(b)(1)(A) duty of fair representation cases is most appropriately placed in accordance with the burden of proof in Section 301 suits.[3]

Although acknowledging the parallels between the duties of fair representation in Sections 8(b)(1)(A) and 301, my colleagues, nevertheless, reject application of the Section 301 burden of proof placement in 8(b)(1)(A) actions for policy reasons. They note in particular that the essence of a Section 301 action is a breach of contract claim. However, as the Supreme Court noted in *Vaca v. Sipes*, 386 U.S. 171, 181–183 (1967), the duty of fair representation was an essentially court-created doctrine that was implied from Federal labor law and not based merely on contract. In light of the development of the statutory duty of fair representation, I am not persuaded that we are free to place a heavier burden on the union simply because our basis for liability is solely statutory rather than statutory and contractual.[4]

My colleagues further find that the heavier burden of proof is required "in order to administer our resources, comply with our congressional mandate, and give a meaningful remedy in duty of fair representation cases." I disagree with these justifications.

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[1] Former Member Dennis also espoused this view in *Rubber Workers Local 250 (Mack-Wayne Closures) (Mack-Wayne I)*, 279 NLRB 1074, 1075–1076 (1986). I agree with her dissent and adopt it.

[2] *Vaca v. Sipes*, 386 U.S. 171, 181–183 (1967).

[3] Indeed, the Supreme Court has relied on the similarities in the duty of fair representation in 301 suits and 8(b)(1)(A) actions in determining the appropriate statute of limitation applicable in a 301 action. *DelCostello v. Teamsters*, 462 U.S. 151 (1983). "[T]he family resemblance [between the duties of fair representation under Sec 301 and Sec. 8(b)(1)(A)] is undeniable, and indeed there is a substantial overlap. . . . [D]uty of fair representation claims are allegations of unfair, arbitrary, or discriminatory treatment of workers by unions—as are virtually all unfair labor practice charges made by workers against unions. . . . Similarly, it may be the case that alleged violations by an employer of a collective-bargaining agreement will also amount to unfair labor practices." Id. at 170. See also *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981): "Yet the two claims [in a Sec. 301 suit for breach of contract and the duty of fair representation] are inextricably interdependent. 'To prevail against either the company or the Union . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union.'" Id. at 66–67 (Stewart, J., concurring in the judgment), quoting *Hines v. Anchor Motor Freight*, 424 U.S. at 570–571.

[4] The majority further justifies establishing a burden of proof different from Sec. 301 suits by distinguishing grievance-arbitration procedures from other proceedings. Specifically, the majority asserts that an employee is presumed innocent in grievance arbitrations. Initially, I disagree with this generalization because it assumes that all arbitrations uniformly apply the same burdens or standards of proof. Further, a grievant is presumed innocent if the employer burden of proof is to establish "beyond a reasonable doubt" that the grievant engaged in the conduct resulting in discipline. Although arbitrators do tend to use this standard if the alleged offense involves criminal intent or moral turpitude, many arbitrators do not use this standard in other types of cases. In cases not involving criminal intent or moral turpitude, arbitrators often will look merely at whether the grievant is guilty and whether the offense justifies the discipline. See Elkouri & Elkouri, *How Arbitration Works* at 663 (4th ed. 1985). Accordingly, I do not believe that the "special character" of grievance-arbitration proceedings justifies placing the burden of proof on the union.

Administration of our resources: Our resources will not be conserved by application of my colleagues' procedural framework. My colleagues hold that before the end of the unfair labor practice hearing the Respondent Union may announce whether it elects to present evidence on the merits of the grievance during the unfair labor practice proceeding or at the subsequent compliance stage. Because the Union need not state when it will present the evidence on the merits, the General Counsel will have no way of predicting the extent, if any, to which she should prepare evidence and witnesses for the hearing. Defending against the Union's case that the grievance was not meritorious obviously requires preparation on a much more extensive basis than simply showing the grievance was "not clearly frivolous." Moreover, my colleagues' bifurcation of the liability proceeding will often require backpay proceedings before court enforced liability is a certainty or, alternatively, court enforcement before backpay liability is a certainty.

Our congressional mandate: The Board's congressional mandate to advance the statutorily declared labor policies of the United States as set forth in Section 1 of the Act is the same mandate advanced by the courts in interpreting Section 301 of the Act.[5] Accordingly, I reject my colleagues' reliance on this congressional mandate to distinguish between the court and administrative interpretations of the duty of fair representation.

Meaningfulness of remedy: Finally, my colleagues declare that the shifting burden of proof provides a meaningful remedy in duty of fair representation cases. I disagree. The General Counsel's burden to show that the grievance was "not clearly frivolous"[6] establishes only that the grievant lost the opportunity to test his or her grievance. This showing that a grievance is "not clearly frivolous" provides only a nexus to the grievant's opportunity to test the grievance. However, if the General Counsel establishes that the grievance is not clearly frivolous, under my colleagues' analysis the General Counsel has without more carried the burden of establishing that full backpay is due the grievant. I would not conclude that this showing of nonfrivolousness justifies a speculative and/or punitive backpay award.[7]

Application of the burden of proof that I espouse leads me to concur in my colleagues' decision to remand this case for further evidence. It appears that the parties were precluded from litigating the merits of the grievance. As the record now stands, the General Counsel has not met the burden of proof that I would place on her to establish that the underlying grievance was meritorious. I agree, however, that she has established that the Respondent Union has failed to fairly represent the Charging Party in processing his grievance. Normally, under these circumstances, I would find a violation and order the Union to pursue the remaining stages of the grievance procedure, including arbitration and payment of reasonable attorney's fees should the Charging Party desire to be represented by counsel of his own choosing. For the reasons I have stated, however, I would not order the Respondent to pay backpay without the General Counsel's sustaining her burden of proof in showing merit.

[5] *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957).

[6] Although it is not perfectly clear, it appears that a grievance is "not clearly frivolous" if there exists any theory on which the grievance could have prevailed.

[7] Given the speculative nature of an award absent a showing of merit, arguments concerning the Union's superior knowledge of the relevant facts are irrelevant in placing the burden of proof. Moreover, I dispute the majority's generalization that information regarding the grievance may be more attainable or particularly within the knowledge of the Union as justifying their placement of the burden of showing that the grievance lacked merit on the Union. The grievant usually has greater personal knowledge of the events leading up to the receipt of discipline than the Union. With the grievant-Charging Party's assistance, the General Counsel would be sufficiently armed with the information necessary to meet the burden of proof that I would allocate to her.

Bridgeway Oldsmobile, Inc. *and* Automobile Salesmen's Union, Local 1095 United Food and Commercial Workers, AFL–CIO. Case 32–CA–7184

August 5, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On October 15, 1986, the Board issued a Decision and Order in this proceeding[1] adopting the findings of the administrative law judge that the Respondent violated Section 8(a)(1), (3), and (5) of the Act, including, in pertinent part, that the Respondent retained an employee who wished to retire so that the employee could vote against the Union in the representation election and hired three employees for the purpose of undermining the Union's support in the election. Subsequently, the Union petitioned the United States Court of Appeals for the Ninth Circuit to review the Board's Order for failure to include, as part of the remedy, backpay to the employees who lost commissions as a result of the Respondent's unlawful unit packing. On February 24, 1988, the court issued a decision granting the petition for review and remanding the case to the Board to consider the Union's contention.[2]

On April 11, 1988, the Board accepted the court's remand and notified the parties that they could file statements of position concerning the issue on remand. The General Counsel and the Union filed statements of position.

In compliance with the court's remand, and in light of the statements of position filed by the General Counsel and Union, which were unopposed by the Respondent, we have reconsidered our original decision and find it appropriate to require the Respondent to make whole its employees for any commissions lost as a result of the Respondent's unlawful unit packing. See *Suburban Ford*, 248 NLRB 364 (1980). Accordingly, we will modify our prior Order to provide this additional relief.

AMENDED REMEDY

We shall order the Respondent, in addition to the relief prescribed in our original Order, to reimburse its employees for commissions lost as a result of its hire of employees Simpson, Decker, and DePolo on March 5, 1985, and the retention of employee Harper on March 28, 1985, to undermine support for the Union in the election held April 10, 1985. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*.[3]

ORDER

The National Labor Relations Board modifies its order previously issued in this proceeding at 281 NLRB (1986), as set forth below:

1. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs accordingly.

"(d) Make its employees whole, plus interest, for commissions lost as a result of hiring and retaining employees for the purpose of undermining support for the Union in the election held April 10, 1985."

2. Substitute the attached notice for that of the administrative law judge.

[1] 281 NLRB 1246 (1986).

[2] *Food & Commercial Workers Local 1095 v. NLRB*, No. 87-7127 (unpublished).

[3] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees or deny their leave requests because we know or suspect they are engaging in union activities.

WE WILL NOT coercively interrogate our employees about their own union membership, activities, or sympathies or the union membership, activities, or sympathies of their fellow employees.

WE WILL NOT threaten our employees with loss of employment, closure of the dealership, unspecified reprisals or with the futility of organizing a union because they engaged in union activities.

WE WILL NOT solicit our employees or applicants for employment to withdraw from membership in the Union.

WE WILL NOT make statements to employees giving them the impression that their union activities are under surveillance.

WE WILL NOT tell an employee not to come in unless he intended to vote against the Union.

WE WILL NOT employ salespersons for the purpose of undermining support for the Union.

WE WILL NOT retain an employee who desired to retire so that employee could vote against the Union.

WE WILL NOT deny any employee's leave request and subsequently terminate that employee because he engaged in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Thomas Roberts whole for any earnings he might have lost as a result of his unlawful discharge, with interest.

WE WILL offer Thomas Roberts immediate employment to his former position or, if that position no longer exists, to a substantially equivalent one, without prejudice to his seniority rights or any other rights or privileges of employment, and make him whole or any earnings he may have lost as a result of our unlawful refusal to reemploy him, with interest.

WE WILL remove from our files any reference to the unlawful discharge of Thomas Roberts and notify him, in writing, that such has been done and that our unlawful actions will not be used as a basis for future personnel action against him.

WE WILL, on request, recognize and bargain with Automobile Salesmen's Union Local 1095, United Food and Commercial Workers Union AFL-CIO as the exclusive representative for purposes of collective bargaining of our employees in the following appropriate unit:

> All full-time and regular part-time salespersons employed by Bridgeway Oldsmobile at its 25715 Mission Blvd., Hayward, California facility; excluding all mechanics, parts, lubrication, lot employees, employees currently covered by a collective bargaining agreement, financial and insurance employees, office clerical employees, guards, and supervisors as defined in the Act.

WE WILL bargain with the above-named labor organization with respect to rates of pay, wages, hours, and other terms an conditions of employment and, if an agreement is reached, embody such on in a written, executed contract.

WE WILL make our employees whole, with interest, for commissions lost as a result of hiring and retaining employees for the purposes of undermining support for the Union in the election held on April 10, 1985.

BRIDGEWAY OLDSMOBILE, INC.

North Star Drilling Company, Ltd. *and* National Maritime Union of America, AFL–CIO. Case 1–CA–19086

August 9, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On February 22, 1984, Administrative Law Judge Harold Bernard Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

In affirming the judge's findings and conclusions, we note that the Board's order in *Sabine Towing & Transportation Co.*, 205 NLRB 423 (1973), on which the judge in part relied, was denied enforcement in the Fifth Circuit, 599 F.2d 663 (5th Cir. 1979), where this case might be reviewed if the Respondent chooses to contest our order. The court refused to uphold the order in *Sabine Towing* because it believed that the Board had improperly transferred to the Employer the burden of proof regarding the existence of alternative means by which the Union could communicate with employees and because, in its view, the Board had ignored evidence that the Union there had, in fact, been relatively successful in contacting employees while they were ashore. 599 F.2d at 665. In *Sabine* the record indicated that the tanker employees went ashore eight times a month for periods of 17 to 35 hours at a time, and that the union organizers had managed to meet substantial numbers of them in taverns, restaurants, or at their homes. The union also had a list of employee names and addresses to aid this effort and had been able to send its literature onto the tankers.

In the present case, however, there were not similar frequent port calls, and the union organizers were ejected from or denied entry to the heliport sites from which employees were transported to the drilling platforms and back. The Respondent's only effort to reach an accommodation with the Union regarding one of these onshore sites occurred just as the Respondent was preparing to move the platform to a different location.

Finally, in *Sabine*, the Board's order required that access to the tankers be granted, whereas the order in the present case provides that the Respondent may also comply with the order by providing suitable onshore access. Thus, in the present case, the General Counsel has clearly carried the burden of showing that the Union lacked reasonable alternatives to those provided in the order for communicating with the Respondent's employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, North Star Drilling Company, Ltd., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Subject to reasonable rules and regulations, allow nonemployee organizers of the National Maritime Union of America, AFL–CIO, or other labor organizations, to have access on the vessel *Alaskan Star* to employees during their free time for the purpose of soliciting them on behalf of a labor organization, or for consulting, advising, meeting, or assisting employees regarding their rights to self-organization; or provide a suitable off-premises site to the Union for such purposes."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT continue or give effect to our policy barring nonemployee organizers from access to employees on our vessel the *Alaskan Star* for soliciting them during their free time on behalf of the National Maritime Union of America, AFL–CIO, or any other labor organization, or for consulting, advising, meeting, or assisting the employees regarding their rights to self-organization, provided,

[1] Member Johansen adopts the judge's conclusions because he finds them consistent with the Board's recent decision in *Fairmont Hotel*, 282 NLRB 139 (1986).

Chairman Stephens finds the judge's analysis consistent with his concurring opinion in *Fairmont*.

Member Cracraft did not participate in *Fairmont*. However, so long as *Fairmont* remains Board law, she will apply the analysis set forth in that decision. She agrees with her colleagues that Respondent violated the Act by failing to provide union organizers reasonable access.

[2] We conform the judge's recommended Order and notice with his findings.

however, that nothing shall be construed to prohibit us from making and enforcing reasonable regulations in respect to visits to our vessel by such nonemployee union organizers, or from providing suitable off-premises access to the organizers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, subject to reasonable rules and regulations, allow nonemployee organizers of the National Maritime Union of America, AFL–CIO, or other labor organizations, to have access on our vessel *Alaskan Star* to our employees during their free time for the purpose of soliciting them on behalf of a labor organization, or for consulting, advising, meeting, or assisting our employees regarding their rights to self-organization; or we shall provide a suitable off-premises site to the Union for such purposes.

NORTH STAR DRILLING COMPANY, LTD.

Gerald Wolper, Esq., for the General Counsel.
Peter Chatilovicz, and *David D. Kadue, Esqs.*, of Washington, D.C., for the Respondent.
Henry Dooley, of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD JR., Administrative Law Judge. This case was heard in Boston, Massachusetts, on December 1, 2, and 3, 1982, on complaint allegations that the Respondent refused to grant union organizers access aboard its oil rig, *Alaskan Star*, to talk with its crewmembers, thereby violating Section 8(a)(1) of the Act.

Based on the entire record,[1] including the witnesses' demeanor, and consideration of ably prepared briefs by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited partnership formed under the law of the State of Texas, with an office in Houston, Texas, operates an oil rig vessel, the *Alaskan Star*, in waters off the United States, including points located off Masssachusetts and Louisiana, for the purpose of discovering oil. Respondent, during such operations, admits to annually receiving materials valued in excess of $50,000 from points outside Massachusetts and to engaging in commerce within the meaning of the Act. It is so found.

The Union admittedly is a labor organization as defined in the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

The *Alaskan Star* is a semisubmersible and self-propelled drilling vessel operating in offshore United States waters, where she probes into the ocean floor searching for oil. Designed to withstand severe sea conditions, the floating rig sits on twin pontoons 50 feet wide and 260 feet long, which support massive columns on which rest the main and upper deck, as well as the drilling floor attaining an elevation of 141 feet. The latter "platform" area, 226 feet by 207 feet, contains space for equipment, supplies, cranes, the well-center, rig substructure area, a helicopter landing pad, and the crew's quarters.

The vessel, operational in the Baltimore Canyon off Atlantic City, New Jersey, from April 1980 to July 1981, was moved to George's Bank off Hyannis, Massachusetts, on July 22, 1981, and was later again moved, this time to waters off Venice, Louisiana, on August 21, 1982, arriving there the following month.[2]

During these operations, she is manned by a 96-employee crew consisting of about 19 supervisory-ranked individuals and 76 others, this crew consisting of senior tool pushers, drillers, derrickman, floor hands, barge engineer, balance control operator, rig engineer, subsea engineer, technicians, crane operators, radio operator, welder, and roustabouts. There is also a paint crew assigned to continually maintain the rig. An independent contractor is used to staff and operate the ship's galley with its own employees.

The rig operates 24 hours a day, every day, at an estimated cost of $120,000 daily. The employee operating complement is divided into 4 crews overall, consisting of 19 nonsupervisory employees in each crew. These crews serve on a rotating and staggered basis, so that two crews are on shore at any given time, and two crews are on board, in each case one of the two ashore, and one of the two on board taking part in a 1- or 2-week stay, depending on when they were rotated. Thus a crewman on crew A when first reporting for duty has spent 2 weeks ashore and now contemplates 2 weeks on duty, and would be relieving a crewman on crew B who had spent 2 weeks on duty and who then was being released for 2 weeks ashore. The so-called staggering comes in because crew A, after relieving crew B, will then be aboard with crew C, which at that point will be on board for only 1 more week (having spent 1 week before with crew B, after which it will be relieved by crew D, and so forth.

Crewmembers work 12-hour shifts and then are off 12 hours. While off duty the employee generally spends 30 to 40 minutes showering and changing clothes, 30 min-

[1] Respondent's unopposed motions to strike from the record attachments 1 and 2, contained in Charging Party's brief and being a magazine article concerning safety aboard oil rigs, and a letter to the Regional Office concerning the Union's withdrawal from a settlement agreement, respectively, as neither was introduced at the hearing, but was merely attached to Charging Party's posthearing brief, are granted, as is its motion to correct minor errors in its brief. The General Counsel's motion to correct transcript inaccuracies is likewise granted.

[2] The vessel's stay in any location is of an uncertain duration, and depends on variables not always predictable such as the hardness in the composition of soil beneath the ocean floor, weather conditions, and decisions of the operator. A well can take 6 months to a year to drill.

utes at mealtime, and the remainder watching television, playing cards or darts, and sleeping. The employees also attend training sessions conducted by management on board the vessel during this time. There are areas employees and supervisors alike frequent, such as the galley, two recreation rooms, bunk rooms, washrooms, the deck area, and the helicopter.

While on duty, there are no scheduled breaktimes or scheduled meals for the employee, who takes two meals when time can be found and spends 15 minutes for each. Generally, the work performed is dirty, demanding, and dangerous due to moving, spinning, lifting, and freely swinging chains, pipes, cutting or drilling equipment with which employees work in close quarters, the pitching and rolling of the deck aboard a vessel on the high seas, subject to storm-caused extreme movements, and possible, though unpredictable, exposure to lethal sour gas released from beneath the ocean floor during drilling and that can find its way up to the workers through the drilling equipment or housing. These potential hazards have not, however, prevented the *Alaskan Star* from compiling a record of 800 accident-free days at the time of this hearing, an indication that safety is an important and successfully addressed concern.

Employees aboard the *Alaskan Star* reside in some 13 different States: Texas, Mississippi, Louisiana, Arkansas, Alabama, Florida, Connecticut, New York, Maryland, Rhode Island, Massachusetts, Minnesota, and Arizona, a scattered geographical pattern subject, moreover, to annual changes reflecting an established yearly 25-percent employee turnover in the industry.[3]

Employees get to work and retun home as follows:

While the *Alaskan Star* was off Hyannis, Massachusetts, July 1981 to August 1982, the Respondent flew employees from New Orleans and Houston to Hyannis on a company plane. This was the case for 90 percent of the employee complement. Other employees drove from their homes to Hyannis. From Hyannis, the Respondent flew employees from a helicopter service heliport out to the rig, picked up employees heading for shore points following their 2-week tour of duty, and transported them by plane from the Hyannis airport to New Orleans and Houston, where such employees then drove home. Other relieved employees who had been helicoptered to Hyannis drove home from there, about 10 percent of the employee complement. After the Alaskan Star moved to its position some 25 miles off the Venice, Louisiana shoreline in September 1982, employees had to find their own transportation to Venice when returning from their homes to report for work, or when returning home from Venice after their tour on duty because the Respondent, at that time, only furnished transportation by helicopter to and from its drilling vessel and a heliport in Venice operated by Petroleum Helicopter, Inc., a private company. These helicopter landing areas on shore, at Hyannis and Venice, so-called transfer points, are discussed further below.[4]

B. *The Union's Organizing Drive*

As noted, the *Alaskan Star* was located in the Baltimore Canyon off Atlantic City from April 1980 to July 1981. Union organizers Henry Dooley, national organizing director, and Robert Healey, business agent, undertook the effort to organize *Alaskan Star* employees sometime in July 1981. None of the employees on that vessel or on other such type rigs were represented by the Union.

Dooley's testimony shows that following his direction to Healey that the organizing get underway, he was informed that helicopters used a landing field in Hyannis to ferry employees to and from the rig, and that supply boats carried goods to the rig from Davisville, Rhode Island; accordingly, Dooley instructed Healey to go to those points and see if Healey could organize employees there.

Healey visited the Hyannis helicopter office twice, found it locked, and on the second trip went to the main terminal where, on inquiring when and whether oil rig people were being flown, was told this occurred on Mondays. On September 14 Healey again returned to the heliport, found the door unlocked, went in, and introduced himself to individuals there and was engaged in conversation seeking to determine whether the persons were from the rig, when an individual entered the waiting room from an inner office and, after learning from Healey that he was a union organizer, told Healey he was not allowed in there. Prior to Healey's introducing himself as a union official he asked the individual whether there was any work at the rigs and was told cooks were needed. It was only after Healey revealed his status and informed him that he was interested in organizing rig employees that the official ordered Healey to leave, also informing him that Healey was not allowed out on the oil rigs either. Healey noticed watchmen walking around and left. That same day Healey drove to Davisville, Rhode Island, to both try to organize rig supply boat employees and to see if the employees on the rig supply boats could talk to the men on the rigs about joining the Union. On arrival, Healey introduced himself to a guard as a representative of the National Maritime Union and was told, "they don't want you guys down on those boats, I can't let you through—you must have special permission from the people that run the boats." Healey, after being directed to the office, went there to find it locked. He then left.

Healey thereafter returned twice a month to Hyannis, sometimes finding the office vacant, other times seeing people inside, but talking to individuals, for the most part, outside the building. He was not excluded on these occasions and did not see the official who excluded him earlier. There were only a couple people in the waiting room at a time and he testified he never learned who

[3] Respondent manager of human resources, Gary Horn, when questioned by me, did not "have" the turnover for the *Alaskan Star*, but described the industry turnover rate, opining that *Alaskan Star's* turnover was "not much." Area Manager Theodore Falcom testified "there may have been some turnover" on the vessel.

[4] The George's Banks location was 120 miles off Hyannis, and large helicopters ferried as many as 12 to 14 employees each trip, although for such purposes at the Venice location, 25 miles off shore, 4 to 6 employees were carried in smaller helicopters each trip.

was on the *Alaskan Star*, there being different rig employees there who told him they could not provide such information, as they did not know. Healey described his visits as experiences when he would go down there and find not too many people around and "they always seemed to be in a hurry to go some place, so there wasn't much of a place to meet anyone."

Early in Healey's efforts, in somewhat paralleling events, Dooley testified to having numerous phone calls with Healey concerning the latter's failure to make any progress in locating or communicating directly or indirectly with rig employees, whereupon Dooley decided to request Respondent to grant him access aboard the vessel, and to provide the Union with a list of employees' names and addresses. Healey's efforts, as described above, to communicate with employees without such access or list continued. By letter dated July 24, 1981, the Union requested Respondent to provide such access and a list, as described. Believing that the vessel was still in Baltimore Canyon, Dooley referred to being granted access to the vessel's incorrect location because by then the *Alaskan Star* had moved to the George's Banks location. Dooley mailed a second letter to Respondent with the same requests on August 18, 1981, this time correctly placing Respondent's vessel at George's Banks. Not receiving a reply to either of his letters to Respondent, described above, Dooley filed the instant charge on September 21, 1981.

Healey's visits to Hyannis, described above, continued after this charge was filed, as did the Union's efforts generally, described below.

C. *Respondent's Reply to the Union's Requests*

Respondent denied the Union's request for access to *Alaskan Star* and a list of employee names and addresses on November 2, 1981, citing in its refusal a nonvisitors policy based on protection of trade secrets, safety concerns, and expense. At the same time, however, Respondent offered to provide an alternative means of access to the Union at the Hyannis airport, during which, for a 15-minute period 1 day a week for 4 weeks the Union would be free to address employees.

Although the Union filed an amended charge on November 3, 1981, asserting that Respondent, pursuant to the Company's November 2 letter, was "continuing" to refuse access to the Union to talk with its employees on board the *Alaskan Star*, Respondent's offer of an alternative means was destined to later bear fruit, although only temporarily.

On November 9, 1981, the Board's Regional Office issued complaint followed by Respondent's answer. The record next shows that cross-motions for summary judgment were filed by Respondent in March 1982, and by the General Counsel in April 1982.

Sometime in April 1982, the Exxon Corporation assigned its contract pursuant to which the *Alaskan Star* was drilling for oil on Exxon's behalf to the Tenneco Corporation, which was to remain *Alaskan Star's* "operator" (her crew remaining intact) until August 1982. During this period, on June 15, 1982, a three-man television camera crew from a Boston TV station visited aboard the *Alaskan Star* during an intended 6-hour tour, reduced to 4-1/2 hours because of weather considerations. After a 1-hour flight, the TV station visitors stepped onto the helicopter platform on the rig, received instructions in the recreation room, including advice about the dangers of sour gas and the proper way to conduct themselves, and toured the operation including the galley, where they spoke with employees, the mud logging room, the rig on drilling floor, the cabins, and the geologist's office. The TV station's field producer, Hamilton Fisher, who was with the visitors, testified that he spoke to people in each area visited while they were on duty, though during slack time, and that he was not told there were any places on the rig off limits to his group; nor was he asked to sign any agreements prohibiting disclosure of confidential matter, but was asked to acknowledge understanding the dangers on the rig as explained by rig officials, and to waive liability for any injuries incurred while on board.

D. *The Parties' Settlement Agreement*

On August 10, 1982, as an outgrowth of the parties' discussions, Respondent's counsel, Peter Chatilovicz, mailed a letter to the Union for Dooley's signed approval, which contained a carefully detailed format providing the Union with access to the *Alaskan Star* employees in the Hyannis helicopter facility's waiting room, during scheduled periods of time—25 minutes in duration—for eight meetings. The plan improved on Respondent's earlier-described suggestion contained in its November 2, 1981 letter of refusal and, in general, manifests a thoughtful resolution crafted with good intentions. Dooley signed the proposed resolution with corrections added, and sent the papers back to Respondent. Counsel Chatilovicz then wrote the Board's executive secretary August 13, 1982, confirming an earlier communication seeking delay in disposition of the pending Motions of Summary Judgment on the basis of a pending settlement and advising that an agreement had, in fact, been reached. When Dooley received a copy of such letter he wrote the Board on August 19, 1982, denying that any agreement had been reached and requesting the case be processed.

Although the record contains no explicit explanation why Dooley took this position, there is some basis to infer that it was because he had gotten word from "people on the Cape [Cod] whose husbands or boyfriends worked on the towboats that take these rigs down south and they told us that it was going to Venice," sometime before he visited Hyannis to "learn" for himself the whereabouts of the *Alaskan Star*. During such later visit, a 10-day stay in Hyannis in September 1982, Dooley went to the helicopter office and found, each day, no one there, whereupon he drove to Davisville, Rhode Island, to "check it out."

In any event, the record in fact shows that the *Alaskan Star* departed from George's Bank enroute to offshore Venice, Louisiana, on August 21, 1982, and that Respondent notified Dooley of this in a letter dated August 30, 1982, which refers to such information being provided Dooley "recently," and also offers a similar arrangement at Venice, "if conditions at the new location are

substantially the same as the conditions which existed at the Hyannis location." The letter further specified "(that is, should your ability to contact our employees be as limited as it was when the employees left the rig in Hyannis)."

On September 9, 1982, the *Alaskan Star* arrived at the Venice location. The same day, the Board dismissed the parties' Motions for Summary Judgment.

E. *The Union's Visit to Venice*

Learning from spouses and friends of tugboat crewmembers who served on towboats used to move rigs that the *Alaskan Star* was then located off Venice, some time in early October 1982, Dooley traveled there. During his 2-day stay, on October 11 and 12, Dooley visited the helicopter landing site, operated by Petroleum Helicopter, Inc. While standing outside the fenced-in parking lot taking down a license tag number after having taken a picture, Dooley testified he was approached by a person from the direction of a building inside the fence who told him to "get the f— out of there." Explaining during examination that he would leave public property when advised to do so in the "Bayou" country, Dooley left promptly, his stay lasting only 5 to 10 minutes. The remaining time Dooley spent searching out available meeting places with no success, having been told by a local innkeeper it would not be wise around Venice to provide a meeting place for such purpose because it would hurt his business.

Respondent, on November 2, 1982, wrote the Regional Director for the Board's Region 1, seeking dismissal of the complaint based on the August 1982 resolution and indicating that the charge had not been withdrawn pursuant to such settlement, "apparently because Respondent was required by its client [under contract] to move its oil rig to a new location in the Gulf of Mexico."[5] The Regional Office, through counsel for the General Counsel Gerald Wolper, informed Respondent by letter dated November 12, 1982, that such dismissal was inappropriate as the proposals in the agreement referred to did not afford any remedy to employees given the *Alaskan Star's* present location, and the Union (the Charging Party) objected to the proposed agreement as a resolution of the issues in the case for the same reason, citing *Roadway Express*, 246 NLRB 174 (1979).

Prior to the hearing in this case Dooley testified he had some seven contacts with company counsel during which (except for a call on October 11, 1982) he described the Union's difficulties in contacting *Alaskan Star* employees. In fact, there is no indication in the record that the Union has succeeded in contacting or identifying any of them from the July 1981 beginning of its organizing efforts and the hearing on December 1982.[6] During those contacts, I find, the Union was continuing to press its request for access aboard the *Alaskan Star*, and Respondent, by its course of conduct then and at the hearing, was continuing to refuse such request, as well as the request for a list of employees' names and addresses. It is further clear that Respondent was notified on or about November 24 and at the hearing on December 1, 1982, of the General Counsel's intention to amend this complaint to add the then-present location of *Alaskan Star* off Venice to the allegation that Respondent had violated Section 8(a)(1) of the Act. In addition, Respondent was accorded full opportunity and encouragement to seek additional time to respond to the amendment, if it deemed such was necessary, but declined the opportunity through experienced counsel. The ruling to allow the amendment stands confirmed.

It follows from such that Respondent's motion before me to dismiss the complaint, either because the matters involving Hyannis-based events were settled, or because there was no issue properly before me regarding Venice must fail for the reasons noted above, that is, the failure of the settlement to resolve the real, present controversy (and one that will continue unless resolved regarding all future locations) and the propriety behind granting the amendment to the complaint.

F. *Analysis and Conclusion*

It is the clear and settled law of the land that the question whether employee rights under Section 7 of the Act must be secured by permitting a union access to employees on an employer's premises is resolved by determining whether reasonable alternative means exist by which the union can communicate with those employees. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1966). In those instances when employees are said to be isolated from normal contacts with the outside world due to location and the requirement they reside on the employer's premises for substantial periods of time, as in the instant case regarding *Alaskan Star* employees—who are on board 2 weeks in a row—there is said to exist no substitute for union access to the employees while they are on board. *Sabine Towing & Transportation Co.*, 205 NLRB 423 (1973), enf. denied 599 F.2d 663 (5th Cir. 1979).

Respondent contends, however, that the Union could have made home visits to employees and that the fact that only one-half its employees would be home at any one time is irrelevant. Since 90 percent of the employees were flown to Hyannis from their residences for transport by helicopter to the *Alaskan Star*, the Union could not use the license plates of cars parked there to track down such employees' addresses and was barred from the parking lot in Venice from doing so. Moreover, as the Board has held, without a list of names and addresses—which the Respondent refused to furnish the Union—home visits as well as mail and telephone solicitation would be a futile means for a union to pursue. *Hutzler Bros. Co.*, 241 NLRB 914, 916 (1979). The record further indicates that there is no uniformity in the wearing of company insignia by employees either as a result of practice or company requirements as that such insignia, which the record shows is, in fact, only sporadically

[5] Respondent's own explanation for Dooley's refusal to implement the agreement confirms the inference drawn as to this motive set forth above.

[6] At the hearing Dooley testified he eschewed Respondent counsel's offer to make a joint visit to Venice during a phone call on October 11, 1982, because the agreement fell through and things seemed always to "disperse" in the parties' own efforts to resolve matters.

evident, provides no reliable basis to identify and communicate with employees.

The record further indicates clearly that phone calls to the rig employees are "not encouraged," so that the Union was denied this means of communication as well. Nor would use of mass media, on the face of matters, constitute reasonable alternatives since *Alaskan Star's* location is sometimes far at sea where costly television transmission or radio transmission cannot be relied on, the location changes between points far distant from one other so that channel selection would be difficult and, as a result, these means are considered of little use and not to constitute a reasonable alternative to direct access. *Hutzler Bros. Co.*, above at 915, citing *Solo Cup Co.*, 172 NLRB 1110 (1968). The thin possibility that ads placed in trade journals would find their way to the Union's targeted readership at some undetermined time aboard *Alaskan Star*, where papers and such journals are available, would likewise fail to afford a reasonable alternative.

There remain for consideration contentions by the Respondent that the Union had a reasonable alternative means to contact employees at the helicopter transfer points, and that it did not do enough to contact employees on its own to warrant being accorded access in this case.

It takes little analysis to doubt that the transfer points afford an opportunity for the Union to address employees with its message. The location of the transfer points changes as the location of the *Alaskan Star* changes—already she has been stationed at three locations, Baltimore Canyon, George's Banks, and off Venice, Louisiana. There is uncertainty, insofar as the Union is concerned, whether the same employee transfer point will serve the *Alaskan Star* from place to place and for what period of time, or whether a new point will have to be assimilated into its communications and direct contacting efforts. By its nature, the transfer point, as organizer Healey noted, seemed to be the scene of people in a hurry to go some place—understandable given the fact that half the employees there were heading home (immediately, it should be noted at the Venice point since they did not have to await Respondent's plane) after 2 weeks at sea. Healey found no success in identifying *Alaskan Star* employees at the transfer point in Hyannis, though in retrospect the Respondent contends he could have simply read the passenger manifest at a check-in counter, and for his part, Dooley was barred from the Venice point altogether. It is clear as well that the number and identity of the crews being helicoptered to the transfer points varies—and that Respondent's transfer of employees—the system, varies depending on whether it is flying them from the transfer point (Hyannis)[7] to their homes, in which case employees must wait to board the plane and are thus "available," or whether employees are free to leave immediately (Venice), and are really only available on a catch-as-catch-can basis—if identified. Further, the number of flights differs with the size of the helicopter; thus there are different numbers of employees arriving at different times depending on the point's location distance from the *Alaskan Star*. I find all these variables and obstacles in the way of communication with employees to provide too tenuous a basis on which employee statutory rights should be made to depend. *Belcher Towing Co.*, 238 NLRB 446 (1978), and 256 NLRB 666 (1981); *Sabine Towing & Transportation Co.*, above at 425. As has been noted before, a reasonable alternative requires something more conducive to communication than the hectic atmosphere arising from the busy comings and goings in these transfer points, where supervisors, officials, and different companies' rig crews commingle and where, as matters stand, it is dubious that employees may exercise their Section 7 rights in a "relaxed atmosphere." *Alaska Barite Co.*, 197 NLRB 1023, 1028–1029 (1972).

Finally, although Respondent went to considerable lengths to belittle the Union's efforts to contact employees (since such efforts may justifiably have merited such observations, from Respondent's vantage at least) and contended that the failure to take certain specific steps, such as (a) following unidentified persons to restaurants near the transfer points, (b) visiting Hyannis on days when the Union knew shift changes occurred while Northern Star was temporarily off Hyannis, and (c) gathering clues from clipboards and public address announcements of the arrivals of helicopters from the *Alaskan Star* to the heliport transfer points, militates against a finding in the Union's favor such argument is based on the incorrect premise that, in effect, a union must show it has explored and exhausted nearly every possible alternative means for contacting employees before direct access can be permitted. Such a view has been uniformly rejected as it misfocuses the inquiry into union efforts overly narrowing the scope of the true and correct question whether Section 7 rights of employees can be addressed reasonably by means other than the preferred face-to-face contact given the objective circumstances in which employees find themselves, as revealed by the entire record, not just a Monday morning quarterbacking-type review of the Union's performance alone *Belcher Towing Co.*, 256 NLRB 666, 666–667 (1981); *Alaska Barite Co.*, above at 917. Here, the Union's continuing efforts to locate and contact employees, either directly, or indirectly through supply boat crews, relatives, and friends of towboat crews that move the rigs, numerous visits to Hyannis, Davisville, Rhode Island, and Venice, Louisiana, contacts in towns where employees might be expected to visit, and through requests to Respondent for employee names and addresses during the entire course of the campaign in 1981 and 1982 demonstrate substantial efforts to contact and communicate with other means alleged as reasonable but found inadequate, make it plain that the Union's efforts, to secure on-premises access even under Respondent's limited view of the governing legal principles, arise not merely from a desire for mere convenience, but from necessity.

G. *Respondent's No-Visitors Policy*

The *Alaskan Star* is registered under the United States flag to the highest classification for floating drilling vessels under requirements of the Coast Guard, American Bureau of Shipping, U.S. Public Health Service, and

[7] There is no indication the Union learned the whereabouts of the plane used to fly employees to and from Hyannis.

Federal Communications Commission. There have been visits by the latter Agency's personnel from the Bureau of Department of Minerals Management quite frequently, and nonemployees of independent contractors are regularly onboard, as were officials of Tenneco Corporation while the Exxon contract was assigned to Tenneco. Supple boats visit the rig to drop off materials and goods, and nonoperating personnel, such as the personnel directory, sometimes visit the *Alaskan Star*. In addition, as noted above, a television three-man crew visited aboard *Alaskan Star* to interview and film employees during the rig's operation 120 miles off Hyannis, at the direction of Tenneco officials. In addition, inspections onboard are conducted by agents from the American Bureau of Shipping.

Moreover, during his testimony, Theodore Falcon, area manager for one of Respondent's partners, stated that human resources personnel have been out to the *Alaskan Star* and talked about unions four or five times within a year. He testified the content in the discussions basically had to do with, "we [had] some communications and that the union people may be talking to them" and that "they were just making them aware of the fact that unions were maybe going to be approaching them." Falcon continued that, "they, you know, just were making these fellows aware of that, you know, just—also, you know, [that] *we have been to this point a nonunion company*." (Emphasis added.)

It is readily apparent that the Respondent's nonvisitors policy has generally yielded to accommodate the dictates of various surrounding circumstances that may be accurately traced to mitigating factors in each instance yet in their totality reflect "where there is a will there is a way." It follows, as well, that specific concerns for safety, injury-related liability, and confidentiality allegedly underpinning such policy have likewise been modified to tolerate a substantial degree of visitation, so that there is no reason to suppose visits by union organizers, under carefully drawn procedures, could not likewise be tolerated aboard the *Alaskan Star* notwithstanding the no-visitor rule. The Union has already stated on the record that its own insurance covers its representatives from injuries onboard seagoing vessels and is willing to sign waivers holding Respondent free from liability; that it has no interest in trade secrets aboard ship, and that it would be willing to have its representatives stay out of the crew's sleeping quarters. Respondent's burden is further lessened, somewhat, because access for the Union need not go beyond what is reasonably necessary to serve the purpose at hand. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 544–545 (1972); *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948). Nor can there fairly be said to be propriety or a securing of employee Section 7 rights in allowing such a no-visitors rule to bar union access to employees on the *Alaskan Star* where, it has been demonstrated, nonoperating personnel of Respondent are often flown to address employees in training sessions on the subject of unions, including the facts that the union may be approaching employees and that the company has been nonunion. This observation does not impinge on an employer's rights to address his own employees on the subject of unionism; it has, instead, a bearing only on whether, when an employer chooses to do so in an isolated worksite, it can then refuse to allow employees to be addressed with other views on the exercise of their Section 7 rights at the same worksite on the basis of a no-visitor rule administered in the fashion and the circumstances this one has been administered in. For this additional reason, although the earlier cited reasons suffice, I find the rule is no basis to bar access to employees on the rig. See generally *American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132 (8th Cir. 1979), and cases cited above.

Based on the foregoing, including a necessary balancing of the competing interests at stake, I find that Respondent violated Section 8(a)(1) of the Act by refusing the Union access to its employees on the *Alaskan Star*. *Interlake Steamship Co.*, 174 NLRB 308 (1969); *Ingram Barge Co.*, 204 NLRB 63 (1973); *New Pines, Inc.*, 191 NLRB 944 (1971); *Monogram Models*, 192 NLRB 705 (1971); *Scott Hudgens*, 130 NLRB 414 (1977), and cases cited above.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section I, above, occurring concerning its operations described, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent, by refusing to allow union organizers aboard the *Alaskan Star* to engage in organizing activity among its crewmembers, engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Although the violation of law is premised on Respondent's refusal to allow union organizers on board the *Alaskan Star* to talk to employees, there is no reason why a full remedy cannot be afforded employees by recommending Respondent be ordered to allow the Union reasonable access on board the *Alaskan Star* or, in the alternative, that Respondent provide suitable off premises access to employees along the same or improved lines of the parties' earlier agreement, reached while *Alaskan Star* was located off Hyannis, Massachusetts. This is so because although it is true that, for example, the transfer points were, as matters stood, predecision, not reasonable alternative means of access, there is reason to believe that with this decision in hand, the parties, with Respondent's cooperation in particular, could fashion suita-

ble arrangements to ensure that the transfer points or their equivalent become reasonable alternative sites for access. This could be accomplished if the access were shaped to reasonably duplicate what the circumstances surrounding access would be were such to be accorded on board the *Alaskan Star*, that is, *Alaskan Star* employees identified beforehand as such could be contacted face to face, on employer-owned or leased property, or when the Union had an acknowledged right to be present in better than a trespassers status, for regular periods of time when employees were scheduled to be present (as they are when on the vessel) in a relaxed atmosphere for reasonable lengths of time over a reasonable period of time. Given the changes in the *Alaskan Star's* position, and the dynamics aboard her, including weather-caused problems, serious dangers, the expense and incursion into operations necessitated by an order directing access be provided *only* on the rig, I see no reason, in this unique set of circumstances, to saddle the parties with so limited an order and believe the alternative *as constructed pursuant to this decision and recommended Order* will effectuate the policies of the Act. The remedial order, of course, will accord *Alaskan Star* employees such access by union organizers wherever the vessel is located to avoid multiple litigation, insofar as possible and desirable, should the *Alaskan Star* have been moved since the hearing, or is moved following the decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, North Star Drilling Company, Ltd., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Continuing or giving effect to its policy barring nonemployee organizers from access to employees on its vessel the *Alaskan Star* for the purpose of soliciting them during their free time on behalf of the National Maritime Union of America, AFL–CIO, or any other labor organization, or for consulting, advising, meeting, or assisting the employees regarding their rights to self-organization, provided, however, that nothing shall be construed to prohibit the Respondent from making and enforcing reasonable regulations concerning visits to its vessel by such nonemployee union organizers, or from providing suitable off-premises access to organizers, as described in the remedy section of this decision as full compliance with the recommended Order.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist National Maritime Union of America, AFL–CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its premises in Houston, Texas, and at employee transfer points and on board its *Alaskan Star*, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Nuclear Automation Division of Esterline Electronics Corporation *and* Sara B. Eichelberger. Case 6–CA–15864–2

August 11, 1988

SUPPLEMENTAL DECISION AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On December 30, 1985, Administrative Law Judge Lowell Georlich issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions. The Respondent filed a reply to the General Counsel's motion to strike its exceptions and to the General Counsel's limited cross-exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent's offer of reinstatement to discriminatee Sara Eichelberger contained in its November 23, 1982 letter was invalid and that Eichelberger was therefore entitled to backpay through June 30, 1984, when the Respondent made a valid offer of reinstatement to her.

We cannot agree with the judge's conclusion and, for the reasons set forth below, have decided it is necessary to modify current Board law regarding a discriminatee's duty to respond to an offer of reinstatement once it has been made.

As credited by the judge, the letter sent to Eichelberger, dated November 23, 1982, was signed by the Respondent's vice president of operations and stated:

> Please be informed that the company is offering you immediate reinstatement of employment of the same position you last held with the Company or a comparative position.
>
> You are to report to work Wednesday, November 24, 1982.

Eichelberger received the letter later that same day, November 23, 1982, but did not communicate with the Respondent.[2] She ultimately returned to work on July 2, 1984, in response to a second offer of reinstatement dated June 27, 1984.

The judge found that the time allotted for Eichelberger to report to work was wholly inadequate and that the Respondent's letter of November 23, 1982, was therefore not a valid offer of reinstatement. In so finding the judge relied on prior Board precedent as enunciated in such cases as *Penco Enterprises*, 216 NLRB 734 (1975); *Murray Products*, 228 NLRB 268 (1977), enfd. 584 F.2d 934, 940 (9th Cir. 1978); *Brenal Electric*, 271 NLRB 1557 (1984); and *Fredeman's Calcasieu Locks Shipyard*, 208 NLRB 839 (1974).

In *Penco Enterprises*, the Board reiterated its policy that a discriminatee, on receiving an offer of reinstatement, has a "fundamental right to a reasonable time to consider whether to return."[3] There is no rule on the period of time that will constitute reasonable notice to the discriminatee, however, and as the Board noted in *Fredeman's Calcasieu Locks Shipyard*, what constitutes a "reasonable time" will depend essentially on the situation in which an employee finds himself.[4] Significantly, the Board added, "obviously, if there is no valid reason for a discriminatee's not being able to return to work at the fixed date, we will likely view that date as dispositive of the issue." Nevertheless, under established Board precedent, the burden does not shift to the discriminatee to contact the employer and request additional time. Rather, it has been our view that such a requirement places an undue and unwarranted burden on the discriminatee to make a counterproposal. *Harrah's Club*, 158 NLRB 758, 759 at fn. 1 (1966), revd. in pertinent part 403 F.2d 865 (9th Cir. 1968).

We have reconsidered the question regarding a discriminatee's duty to respond to an offer of reinstatement because several courts that have reviewed the Board's current rule have rejected it. The reasons for rejecting the Board's current rule

[1] The General Counsel has filed a motion to strike the Respondent's exceptions. We deny the General Counsel's motion.

As part of the remedy the General Counsel seeks an order which will include a visitatorial clause authorizing the Board, for compliance purposes to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Order. We have concluded that under the circumstances of this case such a clause is not warranted. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[2] On receiving the letter, Eichelberger telephoned Board Agent Thomas Stefanic, but was unable to reach him until the following day. According to Eichelberger's testimony, when she did speak with Stefanic on November 24, he asked her if the letter directed her to call the Respondent and talk to its vice president of operations, Ray Rambler. When she replied it did not, he told her not to worry about it and that he would talk to the Respondent's attorney. Stefanic further stated that, "it may be just a way of tolling wages."

[3] See also *Highland Plastics*, 256 NLRB 146, 159 (1981); *Mid-County Transit Mix*, 264 NLRB 782, 792 (1982); *Brenal Electric*, 271 NLRB 1557 (1984).

[4] With regard to an offer that demands the employee accept and return to work on the same day he receives it, the Board has stated, "[t]hat would, except in unusual circumstances, be an unreasonable condition to which we would not require strict compliance by the employee; nor would we find such an offer to have terminated the backpay period." *Fredeman's Calasieu Locks Shipyard* at 839.

were best stated by the Tenth Circuit in *NLRB v. Betts Baking Co.*, 428 F.2d 156, 158 (1970):[5]

> Both employer and employee are bound by the requirement of good faith dealings with each other. And it does not place an undue burden on the employee to require him to inform his employer of his intentions concerning reinstatement within a reasonable time after notice.

Thus, the court in *Betts* reasoned that an offer of reinstatement is not rendered invalid simply because it affords the discriminatee what may be regarded as an unreasonably short period of time in which to consider it. We agree.

When a discriminatee receives a letter that unconditionally offers reinstatement and that also states a report-back date, we will not find the offer invalid simply because the specified reporting date appears unreasonably short. The offer will be treated as invalid, however, if the letter on its face makes it clear that reinstatement is dependent on the employee's returning on the specified date or if the letter otherwise suggests that the offer will lapse if a decision on reinstatement is not made by that date. If the letter does not expressly condition the offer on compliance with the report-back date, the discriminatee cannot know, until he or she calls the employer, whether that date is inflexible and whether a reasonable time for making a decision on the offer will be granted. Similarly, until the discriminatee replies, the employer cannot know when the discriminatee would be able to return.

A discriminatee who receives an offer that is invalid under the rule just stated will not have backpay tolled as a result of failure to respond, since there has been no valid offer to trigger a response. A discriminatee who receives an otherwise valid offer, however, cannot rely on the mere inclusion of an unreasonably short report-back date in the letter to justify a failure to make some response to the employer, if only to ask for more time to consider the offer. A failure to make such a response within a reasonable time after the offer has been made will toll the running of backpay.[6] This approach, we believe, satisfies the "requirement of good faith dealings" properly imposed on both employer and employee.

In the instant case, discriminatee Eichelberger received a letter on November 23, 1982, unconditionally offering her reinstatement and directing her to report to work the next day. The letter did not state that the offer would lapse if she was unable either to report the next day or to commence work then or soon thereafter. Yet she gave the Employer no clue why she could not respond to that offer; indeed, she made no response at all. In these circumstances, we will toll Eichelberger's backpay as of a reasonable time after this unconditional offer of reinstatement was made.

In determining what constitutes a "reasonable time," we find that the Respondent's existing policies and agreements governing bargaining unit members are helpful.[7] Thus we find that the Respondent's reinstatement offer to Eichelberger dated November 23, 1982, remained open for 10 days thereafter, at which time its backpay liability was tolled.

ORDER

The National Labor Relations Board orders that this proceeding is remanded to the Regional Director for Region 6 for the purpose of recalculating Eichelberger's backpay in accordance with our decision above.[8]

[5] The Ninth Circuit also rejected this rule. *Harrah's Club*, supra. See also *Consolidated Freightways v. NLRB*, 669 F.2d 790, 796 fn. 11 (D.C. Cir. 1981), noting that where an offer contains a time condition on acceptance, "courts look to the reasons why an employee failed to accept the offer of reinstatement within the time imposed by the employer before inquiring into whether the time condition is unreasonable."

[6] To the extent that *Harrah's Club*, supra, and other like cases are inconsistent with the analysis set forth; they are overruled.

[7] The Respondent submitted evidence that its standard practice with respect to recalls from layoffs of bargaining-unit members was to consider that a recalled employee had rejected the recall offer and become a voluntary quit unless he failed to return within 10 days of the postal date on the notice; an employee who was unable to return in that time because of illness and disability was only under a duty to give notice of such illness or disability within that period. Eichelberger was not a bargaining-unit member, and the judge found no credible evidence that she had ever been advised that the 10-day policy would apply to her. The judge thus rejected the suggestion that the policy governed the Respondent's offer to her as "spurious and an afterthought." Although we agree with the judge that this policy was not directly applicable to Eichelberger, we find that 10 days also is a reasonable time for our purposes here.

[8] The General Counsel's exhibits include, inter alia, backpay computations for the third and fourth calendar quarters of 1982. We note that the revised backpay calculation will include all the net backpay for the third quarter of 1982 and that portion of the $4482.52 net backpay for the fourth quarter of 1982 that accrues up to and including December 3, 1982.

Mary Theresa Enyart, Esq., for the General Counsel.
Timothy G. Hewitt, Esq., of Latrobe, Pennsylvania, for the Respondent.
Sara B. Eichelberger, of North Huntingdon, Pennsylvania, in propria persona.

DECISION IN BACKPAY PROCEEDING

LOWELL GOERLICH, Administrative Law Judge. On 9 August 1985 a backpay specification and notice of hearing was issued alleging that a controversy had arisen over the amount of backpay due under the terms of the Board's Order.[1]

[1] 270 NLRB 658.

On 18 October 1985 the matter came on for hearing at Pittsburgh, Pennsylvania, on the backpay specification and the answers of the Respondent, Nuclear Automation Division of Esterline Electronics Corporation. Each party was afforded a full opportunity to be heard; to call, examine, and cross-examine witnessess; to argue orally on the record: to submit proposed findings of fact and conclusions; and to file briefs. All briefs have been carefully considered.

FINDINGS OF FACT,[2] CONCLUSIONS, AND REASONS

Neither the formula nor the method used in the calculation of the discriminatee's backpay is disputed. The controversy is whether a letter sent by the Respondent on 23 November 1982 and received by the discriminatee on 24 November 1982 between 1 and 3 p.m. cut off backpay on 24 November 1982 because the discriminatee did not return to work in response to the offer of reinstatement set forth in the letter.

The letter is as follows:

November 23, 1982

Mrs. Sara Eichelberger
1311 Hillview Ave.
North Huntingdon, PA 15642
Certified Mail PO1 1662540

Sara,

Please be informed that the company is offering you immediate reinstatement of employment of the same position you last held with the company or a comparative position.

You are to report to work Wednesday, November 24, 1982.

Very truly yours,
NUCLEAR AUTOMATION
/s/ H. Ray Rambler
Vice President of Operations

The discriminatee did not respond to the letter by returning to work as directed.[3] The discriminatee returned to work on 2 July 1984 in response to a letter from the Respondent dated 27 June 1984. Thus the sole issue before me is whether the Respondent's letter to the discriminatee dated 23 November 1982 was a valid unconditional offer to return to work, which tolled the discriminatee's backpay. If the letter is found to be an invalid offer to which the discriminatee was not legally obligated to respond, then all else is immaterial since the discriminatee was legally required only to respond to a valid offer of reinstatement. Cf. *Burnup & Sims, Inc.*, 157 NLRB 366 (1966), enfd. 383 F.2d 987 (5th Cir. 1967).[4]

"The Board has long held that "[o]nly when a proper offer is made and unequivocally rejected by the employees is the employer relieved of his statutory duty to reinstate." *W. C. Mcquaide*, 239 NLRB 671 (1978).

A situation comparable to the facts in the instant case was considered by the Board in the case of *Penco Enterprises*, 216 NLRB 734 (1975). In that case the discriminatee received a letter dated 10 March 1972 on 13 March 1972 offering reinstatement that contained this language, "We request you report for work 7:00 a.m. on Tuesday March 14, 1972." The Board found that the letter was not a valid offer of reinstatement. The Board opined (216 NLRB at 734, 735):

> More importantly, however, it is clear that no matter what interpretation is given to the third paragraph,[5] Respondent's letter provided Mooney only 1 day at the most to decide whether to accept the offer of reinstatement. It is also clear that a discriminatee, upon receiving an offer of reinstatement, has a fundamental right to a reasonable time to consider whether to return, While we do not attempt to precribe what is reasonable in every circumstance, we do not view the time alloted herein as reasonable. Mooney would have had to inform Respondent of his intentions the same day he received the letter or else report for work the following morning. We find this totally inadequate.

Applying this reasoning of the Board, I find that in the instant case the time allotted for Eichelberger to report for work was wholly inadequate and thus the Respondent did not make a valid offer of reinstatement to her by its letter of 23 November 1982.[6] See also *Standard Tank Cleaning Corp.*, 197 NLRB 873 (1972); *Murray Products*, 228 NLRB 268 (1977); *Brenal Electric*, 271 NLRB 1557 (1984); *Michael M. Schaefer*, 246 NLRB 181 (1979); *Fredemen's Calcasieu Locks Shipyard*, 208 NLRB 839 (1974). In the latter case the Board said the most extreme example of this kind of offer is one that demands the employee to accept it and return to work on the same day he receives it." In the instant case since the normal reporting time was 8:30 a.m. the discriminatee was given less than 24 hours to return to her job.

Because I have found that the Respondent's offer of reinstatement contained in its 23 November letter was invalid, and that the Respondent has not contested the backpay computations of the General Counsel, I find that there is due and owing the discriminatee Eichelberger $36,036.88, plus interest accrued thereon to the date of payment, minus social security and income tax

[2] The facts found are based on the record as a whole and the observation of the witnesses.

[3] On receiving the letter the discriminatee telephoned Board Agent Thomas Stefanic on the afternoon of 23 November 1982, but was unable to reach him until the next day. After the discriminatee related the contents of the letter to Stefanic, Stefanic told her "not to worry . . . he would talk to Mr. Hewitt" (the Respondent's attorney) and that he "felt" that it was "just a way of tolling wages."

[4] In *Harrah's Club*, 158 NLRB 758 fn. 1 (1966), the Board opined "[t]he reinstatement obligation properly rest with Respondent and is satisfied only by a valid and unconditional offer of reinstatement."

[5] The third paragraph, "In the event you do not wish to return notify this office by phone, or mail on Monday March 13, 1972, or we must remove your name from the recall list." (216 NLRB 734.)

[6] The Respondent claims that the discriminatee had at least a 10-day period to respond to the offer, during which period alternative arrangements could have been made for her convenience. But there is no credible evidence that the discriminatee knew or was advised by the Respondent of such elongation of the reporting period. The letter is clear and unambiguous. I consider the contention to be an afterthought and spurious.

deductions, if any, as required by state and Federal laws, as set forth in the specification.[7]

On these findings of fact and conclusions of the law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Nuclear Automation Division of Esterline Electronics Corporation, North Huntingdon, Pennsylvania, its officers, agents, successors, and assigns, shall pay to Sara Blanche Eichelberger the sum of $36,038.88, plus interest[9] accrued there on to the date of payment, social security and income tax deductions, if any, as required by state and Federal laws.[10]

[7] I have examined the cases relied on by the Respondent and because of the cases cited above I find them inapposite.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] Interest is to be computed as provided in the enforced Order.

[10] I find no present need for recommending the visitatorial clauses requested by the General Counsel.

The Water Association *and* United Paperworkers International Union, Local 1967, AFL–CIO. Case 9–CA–25231

August 15, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

Upon a charge filed by the Union, the General Counsel of the National Labor Relations Board issued a complaint May 2, 1988, against the Respondent alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that since March 18, 1988, the Respondent has demanded, as a condition of conducting second-step grievance meetings, that the Union agree to audiotape recording of the meetings. On May 17, 1988, the Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On June 6, 1988, the General Counsel filed with the Board a Motion for Summary Judgment asserting that the Respondent's answer does not place in issue any factual allegations and raises only a question of law.

On June 9, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response, and the Union filed a brief supporting the General Counsel's motion.

Ruling on Motion for Summary Judgment

The complaint alleges that the Union is the recognized exclusive collective-bargaining representative of an appropriate unit;[1] that the Respondent and the Union are parties to a collective-bargaining agreement that expires November 30, 1989; that since March 18, 1988, the Respondent has demanded, as a condition of conducting second-step grievance meetings, that the Union permit audiotape recording of the meetings; that this condition is a nonmandatory subject of bargaining; and that since March 18, 1988, the Respondent has insisted to impasse on this demand. The Respondent's answer to the complaint states that "the allegations as contained in the Complaint are substantially true except that [the Respondent] denies that the activities as described therein is an unfair labor practice." Thus, the Respondent's answer admits the factual allegations in the complaint.

We have found that insisting to impasse on the use of a recording device during a grievance meeting constitutes an unlawful insistence on a nonmandatory subject of bargaining in violation of the duty to bargain in good faith.[2] Accordingly, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the complaint. There being no material facts in dispute, and in the absence of any cause to the contrary having been shown by the Respondent, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the production and distribution of potable water at a facility in Butler County, Ohio, where it annually derives gross revenues in excess of $250,000, and purchases and receives at its facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Ohio. We find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since March 18, 1988, the Respondent has demanded, as a condition of conducting second-step grievance meetings, that the Union permit audiotape recording of the meetings, and since March 18, 1988, the Respondent has insisted to impasse on that demand. By their conduct, we find that the Respondent has violated Section 8(a)(5) and (1) of the Act. *Pennsylvania Telephone Guild*, supra; *Hutchinson Fruit*, supra.

[1] The appropriate unit is:
All full-time and part-time employees including, but not limited to, equipment operators, maintenance employees, water treatment plant employees, meter readers, janitorial employees, warehousemen, and all other production and maintenance employees. Excluded from the bargaining unit are all office clerical employees, purchasing agents, staking engineers, managerial employees, professional employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

[2] See *Pennsylvania Telephone Guild*, 277 NLRB 501 (1985), enfd. 799 F.2d 84 (3d Cir. 1986), and *Hutchinson Fruit Co.*, 277 NLRB 497 (1985). We decline to follow the Respondent's suggestion that we overrule these cases.

The Eighth Circuit's decision in *NLRB v. Southern Transport*, 355 F.2d 978 (8th Cir. 1966), relied on by the Respondent, is not controlling. As the Tenth Circuit stated in *NLRB v. Bartlett-Collins Co.*, 639 F.2d 652, 658 (10th Cir. 1981), cert. denied 454 U.S. 961 (1981), *Southern Transport* did speak favorably of stenographic recording of bargaining sessions, but this was in relation to the court's decision that the insisting party's demand had been made in good faith. The Eighth Circuit did not consider whether the matter constituted a mandatory subject of bargaining.

CONCLUSIONS OF LAW

By insisting to impasse on and after March 18, 1988, on the use of a recording device during grievance meetings, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by insisting to impasse on the use of a recording device during grievance meetings, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, The Water Association, Butler County, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the United Paperworkers International Union, Local 1967, AFL–CIO by insisting to impasse on the use of a recording device during grievance meetings.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by the United Paperworkers International Union, Local 1967, AFL–CIO, as the exclusive representative of the employees in the appropriate unit set forth below, bargain in good faith by meeting, processing, and discussing with the Union grievances filed pursuant to the collective-bargaining agreement. The appropriate unit is:

> All full-time and part-time employees including, but not limited to, equipment operators, maintenance employees, water treatment plant employees, meter readers, janitorial employees, warehousemen, and all other production and maintenance employees. Excluded from the bargaining unit are all office clerical employees, purchasing agents, staking engineers, managerial employees, professional employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

(b) Post at its place of business in Butler County, Ohio, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with the United Paperworkers International Union, Local 1967, AFL–CIO by insisting to impasse on the use of a recording device during grievance meetings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, on request by the Union, as the exclusive representative of the employees in the appropriate unit set forth below, bargain in good faith by meeting, processing, and discussing with the Union grievances filed pursuant to the terms of the collective-bargaining agreement in effect between ourselves and the Union. The appropriate unit is:

> All full-time and part-time employees including, but not limited to, equipment operators, maintenance employees, water treatment plant employees, meter readers, janitorial employees, warehousemen, and all other production and maintenance employees. Excluded from the bargaining unit are all office clerical employees, purchasing agents, staking engineers, managerial employees, professional employees,

guards and supervisors as defined in the National Labor Relations Act, as amended.

THE WATER ASSOCIATION

Globe Business Furniture, Inc. *and* Local 2338, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 26–CA–11921

August 16, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On December 11, 1987, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a brief in support, and the General Counsel filed cross-exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to modify the remedy,[3] and to adopt the recommended Order.[4]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by locking out its employees, we note that the lockout was implemented following the Respondent's repeated, unlawful refusals to provide the Union with information it had requested for bargaining. Within the context of these preexisting unfair labor practices, the Respondent's subsequent lockout of its employees may not be found legitimate.

Similarly, the Respondent's failure to provide the Union with crucial information central to bargaining renders unlawful its December 8, 1986 meetings with employees. While it is true, as the Respondent contends, that an employer may properly meet outside the presence of the union in order to explain its contract proposals directly to its employees, this is not so when the employer, as the Respondent has done here, has denied the Union the very information it needed to evaluate those same proposals during negotiations. In such circumstances, the Respondent's dialogue with employees is not a privileged communication under Sec. 8(c) of the Act, but rather is an effort at circumventing its obligation to deal with the exclusive representative of those employees. Accordingly, we agree with the finding that the Respondent thereby violated Sec. 8(a)(5) and (1) of the Act. Cf. *United Technologies*, 274 NLRB 609, 610 (1985), enfd. 789 F.2d 121 (2d Cir. 1986).

[3] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy. These additional amounts may be determined depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213 fn. 7 (1979).

[4] The General Coounsel's request for a visitatorial clause is denied in the absence of any evidence indicating a likelihood that the Respondent will attempt to evade compliance. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Globe Business Furniture, Inc., Hendersonville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Jane Vandeventer, Esq., for the General Counsel.
Charles Hampton White and *Richard L. Colbert, Esqs. (Cornelius & Collins)*, of Nashville, Tennessee, for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on 10 December 1986,[1] a first amended charge on 18 December, and a second amended charge on 23 January 1987, by Local 2338, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO[2] (the Union), and complaint issued on 27 January 1987. As amended at the hearing, it alleges that Globe Business Furniture, Inc. (Respondent or the Company) refused to furnish the Union with information on (1) its employees' addresses, telephone numbers, sex, ages, and marital status; (2) insurance costs, including present insurance cost and the past 2 years' loss experience, and factors used in determining Respondent's projected costs and rationale for increase in costs; and (3) Respondent's previous employee turnover, including documentation thereof. Further, the complaint alleges that the Company bypassed the Union and dealt directly with its employees by soliciting them to accept the Company's bargaining proposals. The foregoing actions are alleged to be violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

Further, the complaint alleges that Respondent engaged in a lockout of its employees in an attempt to modify a collective-bargaining agreement to which it and the Union were parties, and otherwise to undermine the Union, in violation of Section 8(a)(3) and (1) of the Act.

A hearing was held before me on these matters on 27, 28, and 29 April 1987 in Nashville, Tennessee, and the General Counsel and Respondent thereafter submitted briefs. On the entire record, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Indiana corporation with an office and place of business in Hendersonville, Tennessee, where it is engaged in the manufacture of furniture. During the 12-month period ending 26 January 1987, Re-

[1] All dates are in 1986 unless otherwise indicated.
[2] The Charging Party's name appears as amended at the hearing.

spondent sold and shipped from its Hendersonville, Tennessee place of business products, goods, and materials valued in excess of $50,000 directly to points outside the State of Tennessee, and purchased and received at the place of business goods and materials exceeding the aforesaid amount in value directly from points outside the State of Tennessee. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings establish that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Relationship Between the Parties*

Since 1963 the Union has been the collective-bargaining represenative of Respondent's employees in a unit of production and maintenance, tool room, and shipping and receiving employees. The parties have entered into a series of collective-bargaining agreements and are currently parties to such an agreement, which was effective on 18 December 1986 and expires accordingly to its terms on 1 December 1989.[3] The issues in this proceeding concern events preceding and following the expiration of the prior agreement, on 1 December 1986.[4]

B. *Bargaining in November*

1. Summary of the evidence

a. *Union's bargaining demand and request for information*

By letter dated 2 September 1986, Ray White, executive secretary of the Southern Council of Industrial Workers, informed Company Vice President Frank Patterson that the Union desired to modify the then existing agreement, and requested the Company to begin negotiations with White's assistant, Timothy Byrd. White's letter also requested Patterson to furnish Byrd with the names, addresses, phone numbers, classifications, and wage rates of all employees, together with the age, sex, and marital status of each employee, the number of single and family insurance plans, and a complete breakdown on present insurance cost plus the past 2 years' loss experience.[5]

Company Industrial Relations Manager Danny Bates responded a few days later with a letter to Byrd. Bates stated that it would take him "a while" to get all the requested information, and that he might be unable to get some of it. In the meantime, Bates suggested that negotiations begin on 6 November.[6] In a later telephone conversation between Bates and Byrd, the former requested that the date be changed to 7 November.[7] The bargaining sessions in November principally concerned noneconomic matters.

b. *The 7 November meeting*

The meeting was held at the Gallatin City Electric Company, about 10–12 miles from Hendersonville.

The Union was represented by Byrd as chief spokesman, Local Union President Willie Jenkins, Chief Union Steward Clifford Wilkinson, and Local Union treasurer Dorothy White. The last three individuals were company employees. Respondent was represented by Vice President Patterson and Industrial Relations Director Bates.

Byrd testified that the Union submitted proposed written changes in the contract. A preprinted topic entitled "Article 22—Insurance" was followed by the comment "See Attachment." However, there was no attachment pertaining to insurance.[8] According to Byrd, he told the Company's representatives that the Union was unable to make a proposal on insurance because the Company had not provided the information requested in White's letter. This information was needed, Byrd informed the Company, so that the Union could get a competitive "bid" on insurance from the Southern Council of Industrial Workers Trust Fund. Byrd went over the information requested in White's letter. According to Byrd, the Company gave no reason for not having the information—Patterson merely shrugged his shoulders. However, Byrd affirmed that Bates said that the Company would give the information to Union President Jenkins within a few days so that the latter could forward it to Bryd.

Company Vice President Patterson agreed that the Union asked for the information requested in White's letter, but contended that Industrial Relations Director Bates submitted it in a handwritten note. Although Bates was called as a witness by Respondent, he did not testify about insurance discussions at the 7 November meeting—except to deny that there was any request for insurance information concerning unit employees until 13 December. Byrd agreed that he received a note, but at the next meeting. Patterson also contended that the Union's proposed modifications of the contract were submitted at a meeting on 17 November, and that the Union's reason for the absence of an insurance proposal was that it had not had time to get a bid from the Union's trust fund—not that it had been prevented from doing so by the Company's failure to provide the requested information.

c. *The 17 November meeting*

At the next meeting, on 17 November, the parties were represented by the same individual. According to Byrd, corroborated by Union President Jenkins and Chief Steward Wilkinson, the Union informed the Company's representatives that they had not yet provided the insurance information requested in White's letter of 2 September. In the absence of this information, the Union proposed a general increase in medical benefits, plus a dental plan. As indicated, Byrd agreed that Bates gave him a note; it indicated, according to Bryd, that the

[3] G.C. Exh. 3.
[4] G.C. Exh. 2.
[5] G.C. Exh. 4.
[6] G.C. Exh. 5.
[7] Testimony of Byrd.
[8] G.C. Exh. 6

Company had paid insurance claims of more than $400,000 in 1985 and $438,000 in 1986. Also, the sheet of paper showed over 200 single employee plans, and over 300 family plans, a total of about 540. Byrd affirmed that he again asked for the information requested by White's letter, and that Patterson and Bates said they would have it the next day.

As indicated, Patterson gave a different chronology of events. In addition to asserting that the Union's proposals on contract modification were submitted at the 17 November meeting, he contended that there was no more discussion of insurance (i.e., no renewal of the Union's request for insurance information). On the other hand, Patterson also contended that on 17 November he gave Byrd a letter to the Company from Corroon & Black, the administrator of the Company's self-funded insurance plan.[9] Byrd denied seeing this letter before the hearing, and affirmed that he saw only a handwritten note from Bates.

d. *The 18 November meeting*

The same represenatatives met the next day, 18 November. Byrd testified that he then told Bates that the Company total of more than 500 unit employees—over 200 single and over 300 married employees—was false, and that Bates gave no reply. The Union argued that the Company's totals must have included nonunit employees such as clericals, and employees at the Company's wholly owned subsidiary, Summer Manufacturing, located at Franklin, Kentucky. Byrd demanded the insurance costs and employee totals only for unit employees at the Hendersonville plant. Bates called his office, and said that the unit complement was 377. Chief Steward Wilkinson agreed with this figure.

Company Vice President Patterson denied that there was any discussion of insurance or a request for insurance information at the 18 November meeting.

e. *The 19 November meeting and comments by Company's chief financial officer*

On the next day, 19 November, the Company's vice president in charge of finance, James Mills, attended the meeting. According to Byrd, corroborated by Wilkinson, Mills discussed company finances, and said that the medical insurance cost was either $1.40 or $1.46 hourly per employee.[10] The Union multiplied the number of employees in the plant times $1.40 times the number of work hours yearly, and came up with an asserted company cost of about $1.2 million for medical insurance. The Union's representative doubted the accuracy of this figure, and asked Mills whether it was true. He asserted that it was. The Union protested the discrepancy between the prior year's cost, $438,000, and the $1.2 million projection claimed by the Company.

Chief Steward Wilkinson testified that he told the Company that they as well as the Union knew that their $1.2 million figure was "ridiculous." Patterson agreed that the figure was high and said that he would try to get to Corroon & Black in a day or two, and get the matter "straightened out." Byrd affirmed that Patterson promised the information the next day.

Company Vice President Patterson acknowledged that Mills spoke at the 19 November meeting and gave "projected financial information." However, Patterson denied that there was any discussion of insurance or any request for insurance information. The Union asked to see the Company's audited financial statements. Mills did not testify.

f. *The 20 November meeting*

On 20 November the Company made its economic proposals to the Union.[11] They continued to include Company-paid insurance, but increased the employee deductible over that in the previous plan.[12] Whereas the Company paid for dependent coverage under the then existing plan, proposed that employees pay for this expense under the new contract.[13]

As shown hereinafter, these proposals were changed to an offer that the only employee payment for dependent coverage would be by "temporary" employees, and that this would be restricted to one-half the cost of such coverage. Whereas the old contract paid for all insurance costs (up to specified limits) for dependents and employees who had completed their "probationary periods," the Company's new proposal was that employees would first be covered after 120 days of employment, but that "new" employees would be required to pay one-half of the cost of their dependent coverage. The witnesses occasionally substituted "temporary" for "new" employees in identifying those employees who would be required to pay one-half of dependent coverage.

According to Byrd, the Union could not determine the actual cost for dependent coverage for new or temporary employees without getting some explanation from the Company for the difference between the $438,000 last-year cost figure, and Mills' projection of about $1.2 million for the next year. Although the Union asked for an explanation, the Company gave no answer. Byrd testified that Patterson just shrugged his shoulders, and that Bates said the Company could not get the information. Byrd responded to Bates that the latter *could* get information on insurance costs for every unit employee at Hendersonville from Corroon & Black. Bates again denied that he could get the information, and Byrd replied that Bates knew he could, that all Corroon & Black had to do was "punch their computer a couple of times" and get the information.

In addition, the Union requested information from the Company on the amount of savings that it would achieve as a result of its economic proposals.

[9] The letter, dated 30 October, states that the Company's medical insurance expenses in 1985 for "Globe employees" were about $432,000, and in 1986 about $438,000. "Projected" expenses for 1987 were about $91 for each employee and about $245 for each family (R. Exh. 1).

[10] Chief Steward Wilkinson testified that Mills gave $1.40 as the hourly cost.

[11] G.C. Exh. 8.

[12] G.C. Exh. 2, art. 22.

[13] G.C. Exh. 8.

Patterson testified that the parties agreed on language changes, and that the Union wanted to know the projected savings from the Company's economic proposal.

g. Union's request for insurance costs and other information concerning unit employees

As noted, the Union questioned the Company's projected insurance costs, based in part on its belief that those costs included nonunit employees. Wilkinson testified that the Union on 18 November requested costs only for unit employees.[14]

In an apparent effort to prove that the Union knew or could have learned the number of unit employees and thus their insurance costs, Industrial Relations Manager Bates testified about union access to timeclocks and timecards in the plant, and six union stewards. The existing contract had a checkoff provision, and the Company provided a union steward with a weekly checkoff report.[15] In addition, according to Bates, the Company distributes a seniority list twice yearly to the union president and a steward, and posts it on all three of the Company's bulletin boards.[16] Finally, a weekly seniority list is distributed to all supervisors. Bates agreed that salaried employees had a better health plan than hourly employees, and that the benefits were paid differently.

Union President Jenkins testified that there were 70–80 employees in the bargaining unit who were not members of the Union, and whose names were not on the checkoff list. Tennessee is a right-to-work state. He testified that he saw all three of the Company's bulletin boards daily during the last 4 months of 1986, and never saw an employee seniority list. The Union's president affirmed that he asked Bates for one in late 1986. Jenkins further testified that he could have obtained a list at any time—which he explained by saying that he got one, without management approval, from an office clerical. Jenkins asked Bates for a copy of the foreman's seniority roster, but never received one.

Examination of the Company's checkoff printouts supplied to the Union and the seniority lists assertedly posted on the bulletin boards shows that neither of these documents indicated the employees' addresses, telephone numbers, sex, age, or marital status.[17]

Chief Steward Wilkinson testified that he had access to the checkoff lists and the timecards, and from the latter could have counted the number of unit employees. Wilkinson stated that he agreed with Bates that the total of 377 unit employees was accurate, and that it was this figure that the Union used in its computation that Mills' $1.40 hourly insurance amount meant a total insurance cost of $1.2 million to the Company.

[14] I do not credit Bates' testimony that the Union first asked for unit insurance costs on 13 December. In addition to Wilkinson's explicit testimony, it is obvious from White's original demand letter that he was asking for information pertaining to unit employees. Patterson admitted that he knew the parties were negotiating only about unit employees.

[15] R. Exh. 2.

[16] R. Exh. 3.

[17] R. Exhs. 2 and 3.

2. Factual analysis

Union spokesman Byrd was a credible witness with good recall of the events. In addition, he was corroborated on various points by other union witnesses. The only company witness who testified about these events, Vice President Patterson, was inconsistent at times and was uncorroborated. Thus, Patterson's assertion that there was no discussion of insurance at the 17 November meeting is inconsistent with his claim that he then gave a copy of the Corroon & Black letter concerning that subject to union spokesman Byrd. In the absence of any testimony from Financial Officer Mills, I credit the union witnesses that Mills discussed company finances including projected insurance costs of 19 November. Patterson agreed that Mills gave "projected financial information," but denied that he discussed insurance. I do not credit this denial, or Patterson's other denials that the Union requested insurance information. I conclude that the Union on various occasions repeated the request for information in White's letter and told the Company the reason it needed this information—in order to get a competitive bid from the union trust fund. It is unnecessary to determine whether the Union's proposal was made on 7 or 17 November, although it is probable that Byrd was correct in affirming that it was given on the earlier date.

As set forth above, White's letter asked for various items of information about employees, the number of single and family insurance plans, and the past 2 years' loss experience. Additional requests for information were made during the November negotiations based on the Company's profered information—the costs specifically attributable to unit employees, and the reasons for the Company's projected increase in costs from about $438,000 to about $1.2 million annually.

The testimony of Byrd and Wilkinson corroborates the Company's evidence that it gave the Union a handwritten note with the 1985 and 1986 loss experience based on the Corroon & Black letter.[18] However, the letter specifies that it concerns the benefit plans of "Globe employees," not unit employees. The fact that this loss figure includes nonunit employees is further established by the Company's assertion of about 540 insurance plans—far more than the 377 employees that, Bates agreed, were in the unit. Such individuals included salaried employees who, according to Bates, had a better plan with benefits that were paid differently. It follows that the cost figures given to the Union in November did not portray the prior insurance costs of unit employees for two reasons—the figures included nonunit employees, and the latter had a different benefit plan.

Based on all the evidence, I conclude that there were 377 employees in the unit at the time of these negotiations. However, it does not follow that the Union would have been able to compute the prior insurance costs for unit employees even if it had had a reliable cost figure for all company employees—the variation in cost between unit and nonunion employees was such that a unit cost figure based on the proportion of unit employees

[18] R. Exh. 1.

(377) to total employees (540) would have been inaccurate.

Further, the Company claimed a "projected" cost for the forthcoming year with an increase from $438,000 to about $1.2 million. This was not explained by the Company despite the Union's request for clarification.

I therefore conclude that, through November, the Company did not provide any of the information requested by the Union, either in White's 2 September letter, or during negotiations. However, the parties did agree on various noneconomic matters.

C. *Bargaining in Early December*

1. The 1 December meeting, the Union's rejection of the Company's proposal, and the extension agreement

The period between the 20 November meeting and the 1 December meeting included the Thanksgiving holiday. Union spokesman Byrd testified that he had other union business on the first 3 days of that week. However, Byrd affirmed, he offered to meet with the Company on the weekend before 1 December (a Monday), when the existing contract was scheduled to expire. The Company refused to, according to Byrd. Patterson denied this, and asserted that he offered to meet on Thanksgiving Day, the following Friday, or the weekend. Byrd was the more credible witness and I accept his version.

On Monday, 1 December, the Union advised the Company at the meeting that union spokesman Byrd would be available through Thursday of that week but would be unavailable on Friday because of other commitments.[19]

The Union submitted economic proposals,[20] as did the Company.[21] The latter included a new insurance provision that required all employees employed after 1 December 1986 (new employees) to complete 120 workday before being eligible for insurance benefits. Therefter, the Company would pay for new employees' insurance and the employee would pay for one-half of his dependents' coverage.[22] There was no change in coverage for existing employees. According to union spokesman Byrd, the Company said that it would save about $500,000 as a result of this proposal over a 5-year contract. Company Vice President Patterson testified that the savings would be $40,000 to $50,000, although the period in which they would be effected is not clear from the record.[23]

Byrd protested that the Company's stated insurance costs were not true, and asked why those costs would have increased over 60 percent from one year to the next. According to Byrd's uncontradicted testimony, the Company gave no response.[24]

The Union's membership rejected the Company's proposal on the evening of 1 December but voted to continue working during continued negotiations. Byrd called Patterson and requested a 15-day extension of the agreement. He conceded that he told Patterson that there would be a strike vote if the Company refused to extend the contract. Following a return call from Patterson, Byrd and other union representatives went to the plant in the evening and were presented with an extension agreement that provided that the extension would not go past midnight on 8 December, and that the exclusive issue to be discussed was the length of the contract. The Union demanded that this latter restriction on the remaining issues be omitted, and the Company agreed.[25]

2. The 2 December meeting

The Union continued to protest the validity of the Company's insurance costs, and the Company replied that they were based on "actuarial valuations." However, Patterson admitted that he told the Union that he would call Corroon & Black and get the dollar amount, based on actual loss experience, of the Company's proposal that new employees pay half the cost of dependent coverage.

The Union was also concerned about a "two-tier" employee system—the Company's hiring of "temporary" employees at lesser wage rates and benefits. The Company's 1 December proposal would have eliminated a prior restriction on the number of such employees.[26] In response to the Union's inquiry, the Company said that it planned to hire 100 temporary employees in the following year. The Union then asked for the Company's turnover rate during the past 3 years as a rationale for its projection of the hiring of temporary employees, and the Company promised to provide it the next day. The parties also discussed wages and other economic issues. Patterson agreed that Byrd said it was the Union's intention to negotiate without a strike.

3. The 3 December meeting

Bates told the Union that the Company had an 8–10-percent turnover rate, and that 40–50 employees annually had left the Company. Although Chief Steward Wilkinson said that he accepted this figure, Byrd testified that he told the Company it was "ridiculously high," and that the national average was less than 5 percent.

The Union continued to protest the accuracy of the Company's asserted insurance costs, and asked how much new employees would actually have to pay as their one-half share of the cost of dependent coverage.[27]

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[19] Testimony of Union President Jenkins.

[20] G.C. Exhs. 9 and 10.

[21] G.C. Exh. 11.

[22] G.C. Exh. 11, art. 22.

[23] According to Patterson, the Company's proposal would achieve its greatest savings as a result of the insurance revision, with changes in wages, job classifications, and other categories resulting in lesser savings.

[24] On the same day, 1 December, the Union's auditor examined the Company's financial statement with Company Vice President Mills. Byrd testified on cross-examination that the Union's auditor could not determine the Company's financial status because the Company did not use "proper accounting procedures." However, the Union did not raise the issue again, and the Company's financial status was not an issue thereafter.

[25] G.C. Exh. 12.

[26] G.C. Exh. 11, art. 15, sec. 14.

[27] According to Patterson, the Union made this request on 2 December, and he told them on 3 December that it would be no more than $75 to $76 monthly. However, he agreed that it was "excessive," and promised a lower figure based on "actual" costs.

Finally, the Union renewed its demand for the information requested in White's 2 September letter, and the Company promised to give it the next day.

4. The 4 December meeting

Byrd and Jenkins testified that the Company stated that one-half of dependent coverage for temporary employees would be about $75. This in turn was based on Corroon & Black's "projected" costs in their 30 October letter, which asserted a cost of about $91 for single employees and about $245 for family plans.[28] Byrd averred that the Company's reasoning on the $75 charge was as follows: "You take $91 from $244, that leaves you with $150, and you divide by two which is $75 and that is what the figure would be." This was one-half the single rate, according to Jenkins.[29]

The Union asked the Company to provide the information previously requested and the Company replied that they did not have it. At that point, there was a recess which the Uion prepared a letter to the Company requesting (1) documentation (a) that 377 was the correct number of unit employees, and (b) that the employees' turnover figures previously given were accurate; (2) the projected number of employees in 1987; (3) the projected number of temporary employees in the next 3 years and the means of arriving at this figure; and (4) a determination about the projected temporary employees would be in addition to the estimated unit complement of 377. In addition, the letter repeated the previously expressed discrepancies between the 1986 and projected 1987 insurance costs, and requested the factors used in figuring the 1987 projection as well as an explanation of the 60-percent increase.[30]

The Union then delivered this letter to Patterson. Byrd affirmed that he told the Company that the information was needed because of the effect that the Company's proposals would have on temporary employees and the insurance costs of new hires. According to Byrd, Patterson said that he would give the requested information to Union President Jenkins and other union officials on the following day. Patterson agreed on cross-examination that he told the Union he would provide a response the next day.[31]

According to Byrd, the meeting closed with his announcement that he had to leave town and would call the Company about the next meeting. Patterson contended that Byrd promised to call him back the same afternoon, and to have the next meeting either on the same day or the following day, 5 December. Byrd did not call, according to Patterson. Union President Jenkins, however, testified that Patterson was reminded on 4 December that he had been advised 3 days before that Byrd would be out of town on 5 December. Further, according to Jenkins, it was agreed on 4 December that Byrd would call Patterson on the morning of 8 December (a Monday) to arrange the next meeting. I credit Byrd's and Jenkins' testimony concerning the way in which the 4 December meeting ended.

After the meeting, Vice President Patterson asked Union President Jenkins for a meeting the next day, 5 December. Jenkins refused because Byrd was out of town. Patterson testified that Jenkins called early on 6 December stating that there could be no meeting because Byrd was out of town. Patterson also asserted various preparations for a 5 December meeting. Jenkins denied the call, and I do not credit Patterson's testimony—he knew on 4 December, or before, that Byrd would be out of town on 5 December and that there would be no meeting on that day.

5. Company's final proposal on 6 December and Union's rejection

Byrd returned home on the evening of 5 December and found messages from Patterson and Bates waiting for him on his telephone recorder. Patterson wanted a meeting on 6 December, and Bates left his work number. Patterson called Byrd early on Saturday, 6 December, and requested a meeting that day. Byrd responded that he had a meeting in the afternoon with Ray White and that evening with the negotiating committee. Patterson then said that he would deliver the Company's "final proposal" that morning to Jenkins and the other committee members. Byrd replied that, under these circumstances, the committee was not compelled to present the proposal to the membership. Byrd asked whether the Company had given Jenkins the information that it had promised on 4 December. Patterson replied that the Company had not done so. Byrd then responded to Patterson that the Company was not negotiating in good faith. He repeated the Union's need for the information. Union President Jenkins confirmed that he asked Bates for the requested information on the morning of 5 December, and that the latter said he did not have it.

Patterson and Bates personally went to Jenkins' home on Saturday morning, 6 December, and attempted to deliver a company proposal. Jenkins refused to receive it on the ground that the committee would have questions about it, but the Company's representatives left the proposal and a cover letter in Jenkins' mailbox and distributed copies to other committee members, including Byrd.[32]

The Company's proposal suggests various benefit increases for current employees, lesser benefits for employees hired after 1 December 1986, and other provisions. The Company's 1 December proposal that new employees pay one-half of the cost of insurance coverage for dependent[33] is amended to provide that the cost to the employees would be calcualted on the prior year's actual cost to the Company. However, there is nothing in the proposal itself to indicate the dollar value of that cost.[34]

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[28] Supra, fn. 9.

[29] Without quarreling over the Company's arithmetic, its apparent reasoning was that subtraction of the cost of a single employee plan from the cost of a family plan resulted in the cost of dependent coverage, and that half this amount would be the Company's proposed expense to be paid by new employees. These figures are based on Corroon & Black's projected costs for 1987 rather than the actual costs for prior years (R. Exh. 1).

[30] G.C. Exh. i4.

[31] Patterson also contended that he could buy only estimate future sales and the number of employees.

[32] G.C. Exhs. 15 and 16.

[33] G.C. Exh. 11, art. 22.

[34] G.C. Exh. 15, sec. II, art. 22.

Although the prior agreement limited the Company to 15 temporary employees, after which it was required to advance the most senior temporary employees to probationary or full-time status,[35] the Company's 6 December proposal changed this to allow the Company 50 temporary employees, after which the most senior temporary employees would obtain "seniority right" only in the event of layoff or recall.[36]

The Union's membership met on Sunday, 7 December, and voted to reject the Company's proposal but to continue working and to send the negotiating committee back to the bargaining table. The issues preventing acceptance were the Company's proposal on new or temporary employees and on insurance. The lesser benefits for new or temporary employees would have created a "two-tier" employee system, and the insurance proposal was not understandable. Byrd read the latter proposal based on actual costs according to its terms, but told the members that the Company's proposed $75 charge was based on projected costs.[37]

D. *Patterson's Meeting with Employees on 4 or 5 December*

1. Summary of evidence

The complaint originally alleged that the Company attempted to bypass the Union and deal directly with employees by soliciting them on 8 December to accept the Company's bargaining proposals. The complaint was amended at hearing to allege 13 and 15 December as additional dates of such activity. Further, the record contains evidence of company meetings with employees about the bargaining on other dates.

Patterson testified that he had a "communications meeting" on 5 December with 16 to 20 "first shift employees" in which he explained the Company's 1 December proposal. The Company had received word from employees that they did not understand the proposal and believed that the Company was trying to cut benefits. At this meeting, various employees, including Randy Shehane, told the Company that it should "take" its proposal "to the employees."

Randy Shehane, a union vice president, testified on cross-examination that he had served "on something at the Company that is called a communications committee," which held monthly meetings with management. On 1 December, the Company's maintenance superintendent called union members out of the shop and asked them whether they understood the Company's proposal of that day. At a "communications meeting" on 4 December, there were various nonunion employees who had not attended union meetings and who stated that they did not understand the Company's 1 December proposal. Shehane himself said this, and agreed that it was possible that somebody at this meeting suggested that Patterson meet with employees and explain the proposal, although Shehane did not recall suggesting this himself.

2. Factual analysis

I credit Shehane's testimony that a superintendent called union members out of the shop on 1 December and asked them whether they understood the Company's proposal.

The record is not clear on the nature and function of the "communications committee." If it was a union committee, there appears to be no reason why its meetings with management would be attended by employees who not only were not members of the committee, but were not even union members. It is also unclear whether there was one meeting on 4 December, one on 5 December, or two meetings.

I conclude that on 4 or 5 December, Patterson addressed "first shift employees," as he testified, who for some reason were present at a management meeting with the communications committee. At this meeting, Patterson explained the Company's 1 December proposal. Some employees, including Shehane, suggested that he explain the proposal to employees. Patterson in fact had already done so at the meeting prior to receipt of this advice.

E. *The Events of Monday, 8 December—Patterson's Further Meetings with Employees, His Conversation with Byrd, and the Lockout*

1. The meetings with employees

a. *Summary of the evidence*

Patterson and Bates held various meetings with employees on 8 December. Shehane testified about a meeting with 50 to 60 press and maintenance employees that began about 10 a.m. and lasted about an hour. According to Shehane, Patterson said that the Union had "misled the membership," and that he wanted to explain the Company's proposal before the members voted on it.[38] In a question-and-answer period following his speech, Patterson was asked why the employees had been required to work the previous Saturday. His answer was that there had been "a threat of either a lockout or a strike." Somebody asked Patterson whether he would "lock the doors," and he replied that the Company would do so if necessary.

Union Steward Walter Brinkley testified that he attended a meeting of about 30 employees that began about noon and lasted 30 to 45 minutes. Patterson read parts of the Company's proposal from a screen, and said that he wanted to make sure the employees understood it before they voted on it that night. Somebody asked why the Company had not answered Byrd's questions, and Patterson replied that he had done so to the best of his ability. The Company's vice president said that if the employees "didn't vote on it that night that the gates would be locked."[39]

[35] G.C. Exh. 2, art. 15, sec. 14.
[36] G.C. Exh. 15, sec. II, art. 15, sec. 14.
[37] Testimony of Byrd and Jenkins.

[38] Patterson obviously was unaware that the membership had already rejected the Company's proposal on the previous day.
[39] On cross-examination, in response to a leading question concerning whether Patterson had threatened the employees in any way, Brinkley answered in the negative.

Patricia Jones, a sewing machine operator, testified that she attended a meeting of about 30 cutting, sewing, and receiving employees that began about 2 p.m. Patterson read the contract from a projector and told employees that the Union either did not understand it or had not explained it accurately to the members. Patterson further stated that the employees did not realize how serious the problem was and that there could be a lockout.

Union President Jenkins testified that he attended an employee meeting on 8 December at which Patterson "showed slides and read the contract." Jenkins asked Patterson whether the employee's one-half share of the insurance expenses was still $75, and Patterson replied that it was.[40]

Company Vice President Patterson denied that he told employees he was going to lock them out. However, he asserted that employees asked him whether there was going to be a strike or a lockout, and whether they could continue to work. According to Patterson, the fact that the employees asked these questions gave him the "option" to lock them out, and he so advised them. Patterson also asserted that the Company's insurance proposal on 6 December was based on the previous year's actual cost. However, he agreed on cross-examination that he did not give the Union the actual figures on unit costs prior to 8 December, and that the Company first asked for this information from Corroon & Black on 14 December. By letter from Corroon & Black dated 15 December 1986, the Company received the "actual cost (of insurance) for the bargaining unit employees" for the year ending 1 September 1986.[41]

b. *Factual analysis*

I credit the testimony of the General Counsel's witnesses and conclude that the Company held employee meetings on 8 December during which Vice President Patterson read the Company's last contract proposal and said that the Union had misled the members about it, and stated that there might be a lockout. Further, as noted, the Union Steward Brinkley testified that at the meeting he attended, Patterson said the "gates would be locked" if the employees "didn't vote on it that night." I credit Brinkley's testimony and conclude that Patterson thereby communicated to employees the message that there would be a lockout if the employees did not vote *favorably* on the Company's proposal—it is obvious that he did not intend to close down the Company if the employees *accepted* the last company proposal.

I further conclude that the Company had not given the Union the actual cost of one-half of dependent coverage at that time, and, indeed, did not even have it. I credit Jenkins' uncontradicted testimony that Patterson told employees on 8 December that the cost was still $75. Since this figure was based on Corroon & Black's "projected" cost figures in its 30 October letter,[42] the clause in the Company's 6 December proposal—that the employee's share was based on *actual* cost—was either erroneous or incomplete.[43]

2. Byrd's conversation with Patterson and the lockout

a. *Summary of evidence*

Byrd was scheduled to go to Athens, Georgia, on other union business on 8 December. He affirmed that he called Patterson's office at 7 a.m. that day pursuant to his undertaking during the last negotiating session on 4 December. According to Byrd, Patterson's secretary said that he was in meetings and was unavailable. While on the way to Athens, Byrd called again and spoke with Patterson's secretary about 9:30 or 10 a.m. Patterson was still busy. Finally, about 4:30 p.m., Byrd spoke with Patterson and advised him that the Union had rejected the last offer but was not threatening to strike. The members wanted to continue working and negotiating and there were other issues to discuss. Patterson replied that he was locking out the employees at midnight. Byrd responded that the Company had other options such as implementing its final offer, and that the employees were not going to strike under any circumstances. This ended the conversation and Byrd immediately returned to Tennessee.

Patterson testified that he "could not believe" that Byrd was "on the road to Athens," but agreed that Byrd tried to call him. Patterson contended that he tried to call back. Bryd finally reached Patterson at 4:30 p.m. Patterson agreed that Byrd said the men wanted to continue working but denied that he said there would be no strike. According to Patterson, he told Byrd that he was not going to allow the employees to continue working because the Company had "tried to meet during this time and that time." Accordingly, the parties were at impasse, and the Company was exercising its rights to shut the plant down. Byrd offered nothing further, according to Patterson.

The Company therefore shut the plant down at midnight on 8 December. Its reasons, according to Patterson, was that the Union had rejected the last company proposal, and that it was necessary "to bring this thing to a head . . . and place some pressure on Mr. Byrd to get back to Tennessee to negotiate a contract." According to Byrd, the Company had never previously asserted that the parties were at impasse.

b. *Factual analysis and summary*

Patterson's admission that Byrd said the men wanted to continue working is the equivalent of saying that there would be no strike. Accordingly, I credit Byrd's testimony on this issue. Although Byrd did not specifically sug-

[40] On cross-examination, Chief Steward Wilkinson, in response to a leading question, asserted that the Company's 6 December proposal did away with projected costs and was based on the prior year's actual cost.

[41] G.C. Exh. 24.

[42] Supra, fn. 9.

[43] It is clear from the foregoing that Wilkinson's testimony, cited above, fn. 40, is inaccurate. In cross-examination of Wilkinson on the Union's demand letter of 4 December (G.C. Exh. 14), counsel elicited a statement that that letter did not demand the actual dollar amounts of the insurance coverage. However, as shown above, the Union demanded this information on 2 or 3 December, Patterson gave the figure of $75 to $76, and agreed that it was "excessive."

gest the date of another bargaining session, I credit his testimony that he told Patterson that the union members wanted to continue negotiating, that there were other issues to discuss, and that the Company had options other than a lockout.

In summary, the parties' last bargaining session on 4 December included the Union's written request for information and the Company's promise to supply it the next day. The Company did not do so. It tried but failed to arrange a meeting on 5 or 6 December. The union spokesman's reasons for his unavailablity on those days were communicated to the Company. The Company submitted another proposal that the employees rejected because of concern about temporary employees and insurance costs. On the next day, 8 December, Vice President Patterson spoke to employees, had the conversation with Byrd described above, and shut down the plant at midnight.

F. *Communcations Between the Parties and the Meeting on 13 December*

1. Summary of evidence

Vice President Patterson wrote a letter to Byrd dated 9 December "confirming" their conversation on 8 December that the membership had voted to continue to work without a contract and had rejected the Company's proposal. The letter further advised that the Company "plans to exercise its rights as to not operating the plant without a contract."[44] Byrd wrote a letter dated 12 December in which he affirmed that he had told Patterson that the employees were ready to work under the old contract, to continue negotiating, and were not threatening to strike. Further, Byrd had offered to let the Company implement its last offer pending further negotiations. The letter also accuses the Company of engaging in an illegal lockout and unfair labor practices.[45]

Byrd received a call on 10 or 11 December from the Federal mediator for the purpose of arranging a meeting. This was accomplished and the meeting was held at the usual place, the Gallatin City Electric Company. The Union was represented by the same individuals—Byrd, Jenkins, Wilkinson, and Dorothy White—while the Company was represented by Patterson, Bates, and company counsel. The Federal mediator was also present.

According to Byrd, the Union said that there was no sense in having a meeting if the Company did not provide the information previously requested, in particular, information on the insurance costs and the turnover rate. Byrd read or delivered his letter of 12 December to Patterson, and reminded the Company of the Union's requests in Ray White's 2 September letter and the Union's 4 December communcation. Patterson stated that he would try to call Corroon & Black immediately and the meeting recessed. The Company's representatives returned to state that they were unable to get the information at that time, but might be able to get it by 15 December at which time they would call to arrange a meeting.

Patterson agreed with most of Byrd's testimony, except that he testified that the Union's request for insurance information had a new element—whereas the Union had previously requested the "projected cost on the Company's total insurance program," it now wanted the "projected costs (for) the hourly bargaining unit." Patterson averred that Byrd was acting "very independent."[46]

2. Factual analysis

I credit Bryd's testimony regarding this meeting. Patterson's assertions that the Union had previously requested the cost of the Company's total insurance program, including the costs of nonunit employees, and first requested the "projected" costs pertaining to unit employees on 13 December are inaccurate for the two reasons previously given—the Union had previously asked for the actual costs pertaining only to unit employees.

G. *Patterson's Conversation with Wilkinson on the Evening of 13 December and Meetings at Shoney's on 15 December*

As indicated, the amended complaint alleges that the Company attempted to bypass the Union on 13 and 15 December as well as on an earlier date. Chief Steward Wilkinson testified that he and his wife were attending a company Christmas party on Saturday evening, 13 December. After supper, Patterson came to their table and said that they had to "discuss this thing and get it resolved." Wilkinson replied that he was there to have a good time and did not want to talk business—he was going to dance with his wife. A short time later, Patterson came back and said that they "really needed to discuss this."

Wilkinson told Patterson that changes had to be made in the Company's insurance proposals and the hiring of temporary employees. The Union could not accept an arrangement whereby some employees paid for insurance and others did not—this would split the Union. Instead, Wilkinson suggested all the employees might pay a smaller amount and had in the past paid $3.08 weekly for dependent coverage. He also suggested that the Company delay in the hiring of temporary employees. Patterson said he would draw something up, and Wilkinson suggested that Patterson call him Monday morning at his home. Patterson's testimony agrees with this account on the essential points.

Patterson called Wilkinson on the morning of 15 December and met with him and Union President Jenkins for lunch at Shoney's. Company President Parks was present. The Company's representatives presented a rough draft of an agreement, and Jenkins again asked for the information the Union had requested.

[44] G.C. Exh. 18. The letter was sent to a former address of Byrd's but he received it 2 days later.

[45] G.C. Exh. 17.

[46] Patterson also noted that Byrd was wearing a T-shirt of the United Furniture Workers, which was seeking representation at the Company's Sumner subsidiary. Byrd theorized that the Company wanted a poor contract in Hendersonville in order to influence the voters at Sumner in a forthcoming Board election on 19 December.

The parties met again at Shoney's later the same day. In addition to the original union representatives, Dorothy White was present on this occasion, while James Mills and a Corroon & Black representative were on the Company's side.

The evidence is conflicting on the nature of insurance data presented by the Company. Chief Steward Wilkinson testified that he was shown a Corroon & Black letter dated that day (15 December). The letter in fact shows insurance costs for unit employees for the prior 2 years and indicates that the cost had gone down. There is no reference to future projected costs.[47] Nonetheless, Wilkinson asserted that the Corroon & Black representative spoke of "projected" costs and said that "there was no way of nailing it down to a dollar and cents figure." Union President Jenkins testified that the costs on Corroon & Black's "first sheet" had gone down but "then the next year they went triple high, triple the difference with their records showing a trend of everything . . . going down and then all of a sudden it was going to triple." Jenkins told the Company that they "could get it cheaper from Aetna," said that he could never understand the Company's figures. Company Vice President Patterson testified that the Corroon & Black representative, a "Mr. Beard . . . tried to explain again . . . that those were projected costs based off actual valuations."

I conclude that at this meeting the Company did show Jenkins, Wilkinson, and White a Corroon & Black letter dated 15 December showing actual unit employee costs for 1985 and 1986.[48] There is no credible evidence that the Union's representatives were given copies. The Company also showed them a prior letter from the same firm projecting higher costs for 1987.[49]

The Corroon & Black representative responded to Jenkins' objections in essence by arguing that they were irrelevant, because the parties were then discussing a flat weekly rate of $3 for all employees. The Company also suggested other "options."[50] Company President Parks asked the Union's representatives whether they could "handle Mr. Boyd."

H. *Meetings on 16 and 17 December and the Final Agreement*

The parties met again on 16 December. The Company was represented by Patterson, James Mills, and the Federal mediator was again present. The Union's representatives were joined by Southern Council Executive Secretary Ray White. Union Vice President Randy Shehane was also present.

White told the Company's representatives that he was the Union's exclusive bargaining agent, that he had designated Byrd as his representative, and that the Company's meetings with other union representatives were unlawful in the absence of Byrd. Patterson testified that is was the first time he had been so advised.

The Union again asked for the requested information on insurance and the turnover rate. There is no evidence that the Company showed either of the two Corroon & Black letters (on insurance) at this meeting, and Byrd flatly denied that he ever received information on the actual cost of insurance for unit employees. The Company presented the Union with another proposal,[51] and offered to allow the employees to return that night if the Union ratified it by midnight. Failing ratification, a new lockout would go into effect. Thereafter, the mediator informed the Union's representatives that the Company would no longer meet with them face to face.

Nonetheless, negotiations were conducted on 17 December, with the mediator acting as an intermediary between the Union's representatives stationed at Shoney's Inn, and the Company's representatives at the Gallatin Electric Company. The Union presented various written questions that the mediator carried to the Company and to which the Company responded. Thus, the Union asked whether the Company intended to utilize temporary employees as in the past in a manner not detrimental to full-time employees, and the Company answered affirmatively. The Union asked questions about new hires and queried about other "options" that the Company had suggested in its 15 December meeting with the "local" committee. The Company responded with various monthly charges in lieu of the weekly insurance charge.[52]

A final agreement was executed on 17 December. It provided, inter alia, for insurance coverage according to a benefit schedule for all employees who had completed 120 working days. All employees were to pay $3 weekly for insurance coverage. The agreement increases the number of temporary employees the Company may hire from 15 to 25,[53] and continues to compensate them at wage rates less than that of regular employees.[54] The employees returned to work on 18 December.

Byrd credibly testified that the Union never received from the Company the number of single and family insurance plans, as requested in Ray White's 2 September letter.[55] Further, the Company did not provide documentation on the number of bargaining unit employees or the number of turnovers, nor did it supply the factors used in calculating the "projected" increase in insurance costs—all requested in the Union's 4 December letter.[56] Finally, the parties stipulated that the Company did not provide the Union with information on the names, addresses, age, sex, telephone numbers, and marital status of unit employees as requested in White's letter.

I. *Legal Analysis and Conclusions*

1. Alleged unlawful refusal to supply information

The Board has stated the applicable legal standard as follows:

[47] G.C. Exh. 24.
[48] Ibid.
[49] R. Exh. 1.
[50] G.C. Exh. 21.
[51] G.C. Exh. 19.
[52] G.C. Exh. 21.
[53] G.C. Exhs. 2 and 3; art. 15, sec. 14.
[54] G.C. Exh. 3, Appendix A.
[55] G.C. Exh. 4.
[56] G.C. Exh. 14.

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> It is well established . . . that Section 8(a)(5) of the Act imposes on an employer the duty to furnish a union, upon request, information relevant and necessary to enable it to intelligently carry out its statutory obligations as the employees' exclusive bargaining representative. And, under the standard relevancy as applied by the Board and the courts, it is sufficient that the Union's request for information be supported by a showing of "probable" or "potential" relevance.[57] *Florida Steel Corp.*, 235 NLRB 941, 942 (1978).

It is clear that information concerning the cost of employee insurance[58] and other employee benefits[59] is relevant and necessary in order to enable the bargaining representative to meet its statutory obligations. In this case the Union wished to compare the costs of the employer's self-insurance plan with the costs of plans offered by a union trust fund, and communicated this need to the Company in support of its request for information concerning the addresses, age, sex, telephone numbers, and marital status of employees, as well as the number of single and family insurance plans. The Board and the courts have concluded that this information must be produced when requested by the Union pursuant to its statutory obligation.[60]

The Company's argument that the Union knew or could have learned the number of unit employees is irrelevant, because even with this knowledge the Union could not have determined the actual costs of their insurance for the reasons given above. Although the Company did give the actual cost insurance of unit employees to the "local" committee on 15 December, this is no defense since the Company did not supply all the requested information, and that which it did no supply was not timely—the information was provided very late in the bargaining after repeated union requests,[61] and after the Company had engaged in a lockout.

Further, as noted, the Company refused to supply factors to justify an increase in its "projected" insurance costs during the first week of December. The Company's argument that this information was not needed on 15 December since the parties were then considering a flat weekly charge is not persuasive for essentially the same reason that its late submission of factual insurance costs was inadequate—the Union required this information at least by the time of the early December bargaining, prior to the lockout. Although the parties did reach agreement on an insurance provision that incorporated a weekly charge for all employees, the Union never received all the information that it needed to compare the employer's self-insurance plan with alternative union trust fund plans.

The complaint also alleges Respondent's unlawful refusal to supply documentation for its asserted turnover rate. The Union demended this information on 2 December in response to the Company's stated plan to hire 100 temporary employees in the following year and the Company's "two-tier" employee system, under which temporary employees received lesser wages and benefits than other employees. When the Company responded on 3 December that the annual turnover rate was 40–50 employees, union spokesman Byrd replied that this was "ridiculously high," and the Union's letter of 4 December requested documentation of this figure. Byrd told the Company the reasons the Union needed this information and the latter promised to supply it the next day. However, the information was not supplied. Instead, the Company's 6 December proposal raised the number of permissible temporary employees from 15 to 50, and altered the rights of senior temporary employees to progress to full employee status. The issue of temporary employees was one of the reasons that the employees, on 7 December, rejected the Company's 6 December proposal, which was followed by the Company's lockout on 8 December. Finally, on 16 December, the Union again asked for the requested documentation on the Company's turnover rate. It was not supplied. Although the parties ultimately agreed on an increase in temporary employees from 15 to 25, the fact that the documentation on the turnover rate was never supplied contributed to the employees' rejection of the Company's 6 December proposal and thus to the lockout.

The fact that the Company proposed an increase in the number of temporary employees who already worked at lesser wages and benefits, and proposed further diminishment of their rights, went to the core of the employer-employee relationship. The Union represented all the employees, and it was its statutory obligation to explore the Company's asserted rationale for these proposals. Accordingly, I conclude that under the broad standard of relevance governing union requests for information,[62] the Union has supported its request for documentation on the turnover rate with a showing of at least probable or potential relevance.

I therefore find that Respondent, by refusing to supply, or delaying in supplying, the Union with requested information on insurance costs of unit emplolyees, including present costs and the past 2 years' loss experience, the number of single and family insurance plans, the factors used in determining a projected increase in costs, the employees' addresses, telephone numbers, sex, ages, and marital status, and documentation on previous employee turnover, thereby violated Section 8(a)(5) and (1) of the Act.[63]

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[57] *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

[58] *Hall Industries*, 285 NLRB 391 (1987); *American Marine Decking Systems*, 277 NLRB 433 (1985); *E. I. duPont & Co.*, 271 NLRB 1245 (1984).

[59] *Del Rey Tortilleria*, 275 NLRB 1486 (1985); *Van Dorn Plastic Machinery Co.*, 265 NLRB 864 (1982).

[60] *Safeway Stores v. NLRB*, 691 F.2d 953 (10th Cir. 1982), enfg. 252 NLRB 1323 (1980); *Action Automotive*, 284 NLRB 251 (1987); *Coalite, Inc.*, 278 NLRB 293 (1986); *Emro Marketing Co.*, 272 NLRB 282 (1985), enfd. 786 F.2d 151 (7th Cir. 1985); *S-B Mfg. Co.*, 270 NLRB 485 (1984); *Riveredge Hospital*, 266 NLRB 1198 (1983), enfd. as modified 789 F.2d 524 (7th Cir. 1986); *Grand Islander Health Care Center*, 256 NLRB 1255 (1981).

[61] *Hall Industries*, supra at fn. 57; *Postal Service*, 276 NLRB 1282 (1985).

[62] *Florida Steel Corp.*, supra. See authorities cited in *Leland Stanford Junior University*, 262 NLRB 136, 138–139, enfd. 715 F.2d 473 (9th Cir. 1983).

[63] I make no finding on evidence pertaining to refusal to supply other information where such refusal is not alleged in the complaint.

2. Alleged unlawful direct dealing with employees

a. *Factual summary*

The evidence shows that a company supervisor asked employees on 1 December whether they understood the Company's proposal of that day, and that Company Vice President Patterson explained the proposal to employees on 4 December. Some employees, including Union Vice President Shehane, suggested at that meeting that Patterson explain the proposal to employees. Following submission of another company proposal on 6 December and its rejection by the Union on 7 December (unknown to Patterson), the Company's vice president on 8 December read details of the last proposal to employees, declared that the Union had misled them about it, said that there might be a lockout, and communicated to employees the message that the plant would be closed down if they did not vote favorably on the plan that night.

After a regular negotiating session on 13 December, Company Vice President Patterson approached Chief Steward Wilkinson in the evening at a social occasion and said that the matter needed to be resolved. After an initial rejection by Wilkinson, Patterson again approached him and the steward responded with suggestions that led to meetings 2 days later between the Company and members of the Union's bargaining committee, absent Chief Spokesman Byrd. The Company's president asked the Union whether it could "handle Mr. Byrd." At this meeting, the Company for the first time showed Jenkins, Wilkinson, and White documentation of the actual costs of insurance for unit employees, which had been going down, but continued to argue the validity of "projections" for the next year showing that costs were going up. At the regular meeting the next day, 16 December, when Executive Secretary Ray White and Chief Spokesman Byrd were present, the Union again asked for the insurance data but the Company did not provide it.

b. *Legal analysis*

It is well established that it is unlawful for an employer to negotiate directly with individuals when they have a bargaining representative.[64] However, Section 8(c) of the Act provides that the expression of views, argument, or opinion does not violate the Act "if such expressison contained no threat or force or promise of benefit."[65]

The Board has recently affirmed that "free and open discussion by all parties . . . affords the best chance for successful conclusion of negotiations . . . . Indeed, employees ought to be fully informed as to all issues relevant to collective-bargaining negotiations and the parties' positions as to those issue."[66] The mere fact that an employer outlines to employees the details of contract proposals which he had presented to the union does not constitute a violation of the Act.[67] In another case, the employer sought to inform employees of the employer's proposals to the union and said that the employees might strike if his proposals were not accepted. An actual strike voted had been conducted and the employees of other employers in a multiemployer association, of which the employer had formerly been a member, were actually on strike. The Board concluded that by these and other actions the employer did not engage in direct dealing with employees or make coercive comments. *Putnam Buick*, 280 NLRB 868 (1986), enfd. sub nom. *Machinists v. NLRB*, 827 F.2d 557 (9th Cir. 1987).

Nonetheless, the Board in *Putnam Buick* also noted that "violations of Section 8(a)(5) will be found if employer communications with unit employees during collective-bargaining negotiations are coercive or invite direct bargaining between the employer and the employees" (280 NLRB at 869).[68] And, in a case where the employer threatened discharge of employees if they did not vote in favor of the employer's proposed decrease in wages, the Board concluded that the employer had engaged in unlawful direct dealing. *Chestnut Ridge Mining Corp.*, 268 NLRB 374 (1983).

In the case at bar, union spokesman Byrd did say on 1 December that there would be a strike vote if the Company did not extend the expiring contract. However, the contract was extended and there was no strike vote. Company Vice President Patterson told employees in one of his 8 December meetings that there was "a theat of either a lockout or a strike." A threat of a lockout could only have come from the Company. As for a strike, there had been no threat during the events following the last bargaining session on 4 December and the Company's submission of its 6 December proposal. Although union members on 7 December voted to continue working and negotiating, this was a vote on the Company's last proposal, not a strike vote. Finally, on 8 December spokesman Byrd explicitly informed Company Vice President Patterson that there would be no strike despite the Union's rejection of the last proposal. Patterson, however, communicated to employees on 8 December the message that he would lock them out if they did not vote favorably on the Company's last proposal that night. This was followed by an actual lockout at midnight, and, in later negotiations, another lockout threat.

I conclude that Patterson's statements to employees on 8 December that the gates would be locked if the employees did not vote favorably on the Company's last proposal that night were coercive.[69] These statements tended to force union members to accept the Company's last proposal, which they had already rejected in a union meeting the day before. Accordingly, I find that Respondent thereby engaged in unlawful direct dealing with employees in violation of Section 8(a)(5) and (1) of the Act.[70]

[64] *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–685 (1944).
[65] National Labor Relations Act, Sec. 8(c).
[66] *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985).
[67] *Safelite Glass*, 283 NLRB 929 (1987).

[68] In support of the principle set forth above, the Board cites *Maskin Freight Lines*, 272 NLRB 427 (1984), and *Friederich Truck Service*, 259 NLRB 1294 (1982). 280 NLRB at 869 fn. 6.

[69] Union Steward Brinkley's testimony on cross-examination, that Patterson had not threatened employees, is conclusory in nature is entitled to little weight in light of the credited evidence as to what Patterson actually said.

[70] Although Union Vice President Shehane was one of the employees who, on 5 December, suggested that the Company explain its 1 December proposal to employees, he did not suggest, much less authorize it to

Continued

As indicated, the amended complaint also alleges that the Company's conversation with Chief Steward Wilkinson at the Christmas party on 13 December, and with Wilkinson, Local Union President Jenkins, and treasurer White on 15 December also constituted unlawful direct dealing with employees.

There is little doubt that the Company preferred dealing with the local committee rather than with Byrd, and that it was Vice President Patterson who initiated the discussion with Wilkinson at the Christmas party. Moreover, the Company showed the Corroon & Black "actual" insurance costs only to the local committee, and Company President Parks asked members of the committee whether they could "handle" Byrd, who acted "very independent" according to Patterson.

It is true that Southern Council Executive Secretary Ray White asked the Company to begin negotiations with Timothy Byrd. Nonetheless, the amended pleadings establish that "Local 2338, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO" was the statutory bargaining representative of the unit employees.[71] Wilkinson was not only chief steward of Local 2338, but also a member of the Union's negotiating committee. Although Patterson approached Wilkinson at the party, it was the chief steward who advanced a formula to resolve the insurance issue and who suggested that Patterson call him the following Monday morning.

Jenkins and White, who, with Wilkinson, met with company representatives on 15 December, were also members of the Union's negotiating committee and were union officers. Jenkins was the president and White the treasurer. In a case with similar facts, the union president claimed that he met with employer representatives only as an individual. Nonetheless, his actions and those of another committeeman, although "not actually negotiations, were representative in nature." *BASF Wyandotte Corp.*, 276 NLRB 1576, 1584 (1985). In the case at bar, the Company's representatives and the local committee discussed at least one of the principal issues in the negotiations, the cost of insurance to unit employees. I conclude that Wilkinson's actions on 13 December, and his and those of Jenkins and White on 15 December, were representative in nature, and that the Company did not engage in lawful direct dealing with employees during those meetings. Accordingly, I shall recommend that this allegation be dismissed.

3. Alleged unlawful lockout

Respondent argues that the 8 December lockout was lawful because the parties had reached impasse. No economic agreements had been reached and the Company "from December 4 through December 8 . . . was unable to persuade Byrd to bring the negotiations back to the negotiating table."[72] When Byrd talked with Patterson on 8 December, he "did not request any further negotiation session; offer any counterproposals; or request another extenstion." In addition, he did not "specify any particular problems that the Union had with the Company's final offer."[73]

Accordingly, Respondent argues, the parties were at impasse and it was entitled to lock out its employees "for a lawful purpose, namely to persuade the Union to return to the negotiating table and to consider the Company's proposals."[74] Further, neither the "absence of any reasonalbe fear of strike nor the absence of an impasse makes a lockout in support of bargaining demands unlawful."[75]

Respondent's summary of the facts is not in accordance with the credited evidence. Thus, although the parties may not have reached agreement on economic issues, this was due "in part to the fact that they had agreed to discuss noneconomic issues first and had reached some agreement on these matters. It is also inaccurate to assert that the Union failed to state its disagreement with the Company's 6 December proposal. On that day, when union spokesman Byrd was informed that the Company had not delivered the promised information to Union President Jenkins, Byrd told Company Vice President Patterson that the Company was bargaining in bad faith. It is clear that the Union's objection to the Company's "final proposal" was that it was not accompanied by relevant information that the Union needed in order to evaluate it, and that this objection was communicated to the Company.

The Company's stated purpose of the lockout, to "persuade the Union to return to the negotiating table," also distorts the facts. The Union had never left the bargaining table, except for brief and reasonable absences of union spokesman Byrd in connection with other union business. The Company knew that the last negotiating day in the first week of December would be 4 December, a Thursday, because Byrd was scheduled to be out of town on other union business on Friday. It was agreed that Byrd would call the Company the following Monday, 8 December, to arrange another meeting. The Company then tried to compel a Saturday meeting, but Byrd was previously scheduled for two other meetings that day on the Union's negotiations with the Company.

As agreed, Byrd tried to reach Patterson at 7 a.m. on Monday, but was informed that the Company's vice president was in meetings and was unavailable. After repeated attempts throughout the day, Byrd finally reached Patterson at 4:30 p.m. and was informed that a lockout would begin at midnight. It is untrue, as asserted by the Company, that Byrd made no counterproposals. He suggested other alternatives to a lockout such as the Company's implementing its last offer pending negotiations. Although Byrd did not then request an extension of the contract, his original request for a 15-day extension had previously been rejected by the Company in lieu of a shorter extension. The fact that Byrd was "on

threaten employees in order to win acceptance of its proposal. Further, Patterson on 8 December discussed a later company proposal, not the one referred to by Shehane. The latter was not then a member of the bargaining committee and has not been shown to be speaking on behalf of the Union at that time.

[71] G.C. Exhs. 1(g) and 1(i).

[72] R. Br. 34.

[73] Ibid.

[74] Id. at 35.

[75] Ibid. The Company cites *Harter Equipment*, 280 NLRB 597 fn. 6 (1986), and *Birkenwald Distributing Co.*, 282 NLRB 954 (1987).

the road to Athens" (on other union business) did not make him unavailable for a meeting on Tuesday—in fact, Byrd returned to Tennessee Monday night after learning about the lockout.

The Board has stated the criteria for determining an impasse as follows:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968).

Even if Respondent's unlawful conduct prior to the lockout were to be disregarded, it would be difficult to find a bona fide impasse on the facts in this case. During the 4 days of bargaining on economic matters that began on 1 December, the principal disagreement was not over the substantive nature of the Company's proposals, but, rather, with the factual data asserted by the Company to justify those proposals. This is insufficient to warrant a finding of impasse. "All items on which the parties had not agreed are not necessarily items causing an impasse; mere discussion of unresolved items falls short of unlawfully, president demands to the points of impasse." *Sanderson Farms*, 271 NLRB 1477, 1479 (1984). In this case the only persistent demands were those of the Union for information—and even on this issue the Company did not refuse outright, but continuously promised to supply the information, only to default until late in the negotiations at which time it supplied only part of the information. Further, as indicated, the Company's asserted reason for the lockout—to bring the Union back to the bargaining table—is based on an erroneous factual premise.

However, I need not base an impasse finding on the *Taft Broadcasting* criteria alone, because the Company did engaged in unlawful conduct prior to lockout—it engaged in direct dealing with employees and refused to supply relevant information demanded by the Union. It is well established that such conduct bars a finding of a bona fide impasse.[76]

Respondent has not advanced any business reason for the lockout—unless its asserted but invalid claim that it needed to get the Union back to the bargaining table can be called a business reason. The obvious object and tendency of the Company's threat to lockout its employees was to compel them to vote favorably on the Company's last proposal. By such threat, which formed a part of its unlawful direct dealing with employees, the Company thereby demonstrated its union animus.[77] Considering these factors together with the Company's unlawful refusal to give relevant information to the Union,[78] and the absence of a threat to strike,[79] it is clear that the lockout was unlawful.[80]

The cases relied on by Respondent are inapposite.[81] The issue in those cases was the legality of the hiring of temporary replacements after a lawful lockout, which followed the employer's presentation of legitimate bargaining positions. As the Board noted, "there is no evidence that the Respondent engaged in bad-faith bargaining before or after the lockout." *Harter Equipment*, 280 NLRB 597 (1986). In contrast, Respondent violated Section 8(a)(5) prior to the lockout by its direct dealing with employees and by its refusal to supply information to the Union. Accordingly, following the above-cited cases where the lockout was preceded by unlawful bargaining, I conclude that the lockout was intended to compel employee acceptance of Respondent's last bargaining proposal, and thus to undermine the Union. This conduct tended to discourage membership in the Union and was thus violative of Section 8(a)(3) and (1) of the Act.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Globe Business Furniture, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 2338, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance and tool room employees, shipping and receiving employees, working group leaders and janitors employed by Respondent at its Hendersonville, Tennessee plant excluding all office clerical and plant clerical employees, draftsmen, guards, technical and professional employees and supervisors as defined under the National Labor Relations Act.

4. Since about 1963 and at all times material, the Union has been the designated collective-bargaining representative of the employees in the above-described appropriate unit, and has been recognized as such representative in prior collective-bargaining agreements with Respondent.

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[76] *Dahl Fish Co.*, 279 NLRB 1084 (1986); *Coalite, Inc.*, 278 NLRB 293 (1986); *Cowin & Co.*, 277 NLRB 802 (1985); *Harvstone Mfg. Corp.*, 272 NLRB 939 (1984), enfd. as modified 785 F.2d 570 (7th Cir. 1986).

[77] *Bedford Cut Stone Co.*, 235 NLRB 629 (1978).

[78] *Bagel Bakers Council*, 174 NLRB 622 (1969), enfd. as modified 434 F.2d 884 (2d Cir. 1970).

[79] *Quaker State Oil Refining Corp.*, 121 NLRB 334 (1958), enfd. 270 F.2d 40 (3d Cir. 1959).

[80] See also *American Cyanamid Co.*, 235 NLRB 1316, 1324 (1978); *Siebler Heating & Air Conditioning*, 219 NLRB 1124, 1131 (1975), revd. on other grounds 563 F.2d 366 (8th Cir. 1977); *Crockett-Bradley, Inc.*, 212 NLRB 435, 441 (1974), enfd. 523 F.2d 449 (6th Cir. 1975).

[81] *Harter Equipment, Inc.*, 280 NLRB 597 (1986); *Birkenwald Distributing Co.*, 282 NLRB 954 (1987).

5. By refusing to timely supply the Union requested insurance costs of unit employees, including present costs and the past 2 years' loss experience; and by refusing to supply information on (a) the factors used in determining a projected increase in costs; (b) the number of single and family insurance plans, the employees' addresses, telephone numbers, sex, ages, and marital status; and (c) documentation of previous employee turnover, Respondent thereby committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

6. On 8 December 1986, by bypassing the Union and attempting to cause its employees to accept Respondent's last bargaining proposal, Respondent thereby committed an additional unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

7. On 8 December 1986, by locking out its employees until 18 December 1986 in an attempt to compel them and the Union to accept its last bargaining proposal, Respondent thereby discouraged membership in the Union and thus committed an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act.

8. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent has not committed any unfair labor practices except as specified here.

THE REMEDY

Having found that Respondent had engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent unlawfully refused to supply the Union with timely information on the insurance costs of unit employees, including the present costs and the past 2 years' loss experience, I shall recommend that, on request, it forthwith gave such information to the Union. The fact that Respondent did submit such information on 15 December 1986 is an insufficient reason for not requiring it do so again, since said submission was not timely, was given only to the local committee and not the full committee, and the documents themselves were not supplied.

Having found that Respondent unlawfully refused to give the Union information on factors used in projecting an increase in insurance costs of unit employees, the number of single and family insurance plans, the addresses, telephone numbers, sex, ages, marital status of such employees, and documentation on previous employee turnover, I shall recommend that Respondent be required, on request, to submit such information to the Union.

Having found that Respondent unlawfully locked out its employees from 8 to 18 December 1986, I shall recommend that Respondent be ordered to make them whole for any loss of earnings they may have suffered by reason of the unlawful lockout, buy paying each of them a sum of money equal to the amount he or she would have earned during the lockout, less net interim earnings during such period, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and to pay into any employee benefit funds established by the last contract the sums that Respondent would otherwise have been required to pay absent its unlawful lockout, with interest on such payments as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[82]

On the basis of these findings of fact and conclusions of law and on the entire record, I issue the following recommended[83]

ORDER

The Respondent, Globe Business Furniture, Inc., Hendersonville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to timely supply Local 2338, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO as the statutory bargaining representative of the employees in the unit stated below, with the insurance costs, including the present costs and last 2 years' loss experience of the unit employees. The bargaining unit is:

> All production and maintenance and tool room employees, shipping and receiving employees, working group leaders and janitors employed by Respondent at its Hendersonville, Tennessee plant excluding all office clerical and plant clerical employees, draftsmen, guards, technical and professional employees and supervisors as defined under the National Labor Relations Act.

(b) Refusing to supply the above-named labor organization with the factors used in determining a projected increase in insurance costs for 1987, the number of single and family insurance plans in the aforesaid unit, the unit employees' addresses, telephone numbers, sex, ages, and marital status, and documentation of previous employee turnover in the aforesaid unit.

(c) Bypassing the above-named labor organization as the statutory representative of the employees in the above-stated unit, and attempting to cause the employees in that unit to accept its last bargaining proposal, or any bargaining proposal.

(d) Discouraging membership in the above-stated labor organization, or any other organization, by locking out its employees in an attempt to compel them to accept its last bargaining proposal or any other bargaining proposal, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

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[82] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[83] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effecutate the policies of the Act.

(a) On request, supply the above-named labor organization with the insurance costs, including the present costs and the last 2 years' loss experience, of the employees in the above-stated unit; the factors used in determining a projected increase in unit insurance costs for 1987; the number of single and family insurance plans in the aforesaid unit; the unit employees' names, addresses, telephone numbers, sex, ages, and marital status, and documentation of previous employee turnover in the aforesaid unit.

(b) Make whole each employee whom it locked out from 8 until 18 December 1986, and pay into each employee benefit fund established by the last contract the sum that Respondent would otherwise have been required to pay, absent its unlawful lockout, except to the extent such sums have already been paid, in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursement due employees under the terms of this Order.

(d) Post at its plant at Hendersonville, Tennessee, copies of the attached notice marked "Appendix."[84] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[84] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refused to supply Local 2338, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, as the statutory representative of the employees in the unit listed below, with the insurance costs, including the present costs and last 2 years' loss experience, of the unit employees, the factors used in determining a projected increase in insurance costs for 1987, the number of single and family insurance plans, the unit employees' addresses, telephone numbers, sex, ages, and marital status, and documentation of previous employee turnover in the unit. The unit is:

> All production and maintenance and tool room employees, shipping and receiving employees, working group leaders and janitors employed by Respondent at its Hendersonville, Tennessee plant excluding all office clerical and plant clerical employees, draftsmen, guards, technical and professional employees and supervisors as defined under the National Labor Relations Act.

WE WILL NOT bypass the above-named labor organization, or any other labor organization, in an attempt to compel our employees to accept any of our bargaining proposals.

WE WILL NOT lockout our employees in an attempt to compel them to accept our bargaining proposals, nor in any other way discriminate against them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, supply the above-named labor organization with information on all the items listed above.

WE WILL make whole every employee whom we unlawfully locked out from 8 to 18 December 1986, and WE WILL pay any required amounts into any employee benefit fund, to the extent we have not already done so, with interest.

GLOBE BUSINESS FURNITURE, INC.

Martin Industries, Inc., Huntsville Division *and* International Molders and Allied Workers Union. Case 10–CA–22189

August 16, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 17, 1988, Administrative Law Judge Robert A. Gritta issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Martin Industries, Inc., Huntsville Division, Huntsville, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Josephine S. Miller, Esq., for the General Counsel.
Brent L. Wilson, Esq. (Elarbee, Thompson & Trapnell), of Atlanta, Georgia, for the Respondent.
Hubert Coker, Coordinator, of Madison, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on 30 July 1987 in Huntsville, Alabama, based on a charge filed by International Molders and Allied Workers Union (the Union) on 11 December 1986 and a complaint issued by the Regional Director for Region 10 of the National Labor Relations Board on 3 February 1987.[1] The complaint alleged that Martin Industries, Inc., Huntsville Division (Respondent) violated Section 8(a)(1) and (3) of the Act by refusing to grant its employees quarterly merit wage increases and the annual general wage increase. Respondent's timely answer denied the commision of any unfair labor practices.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel and Respondent.

On the entire record in this case, and from my observation of the witnesses and their demeanor on the witness stand, and on substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that Martin Industries, Inc., Huntsville Division is an Alabama corporation engaged in the manufacture of gas and wood burning heaters in Huntsville, Alabama. Jurisdiction is not in issue. Martin Industries, Inc., Huntsville Division in the past 12 months, in the course and conduct of its business operations, shipped products from its Huntsville, Alabama facility valued in excess of $50,000 directly to points located outside the State of Alabama. I conclude and find that Martin Industries, Inc., Huntsville Division is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ISSUES

1. Whether Respondent's withholding of merit wage increases from its Huntsville employees on 1 July and 1 October 1986 and 1 January and 1 April 1987 violated the Act.

2. Whether Respondent's withholding of its annual general wage increase from its Huntsville employees in August 1986 violated the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

There is little or no factual dispute involved here. Historically, Respondent operated four plants in Alabama. The plants were located in Huntsville, Athens, Florence, and Sheffield.[2] The Florence and Sheffield plants are unionized whereas the Athens plant is nonunion. The Huntsville plant, at all times material, was the subject of a union organizational drive culminating in several Board-conducted elections.

Over the years, Respondent maintained a policy of granting annual general wage increases to the Huntsville employees. Pursuant to the policy, all employees at the Huntsville facility received the following wage increases:

January 1980, an increase equal to 14 percent of their hourly wage.

January 1981, an increase equal to 10 percent of their hourly wage.

January 1982, an increase of 30 cents per hour.

August 1983, an increase of 25 cents per hour.

August 1984, an increase equal to 7 percent of their hourly wage.

August 1985, an increase of 30 cents per hour.

In addition to the general wage increase policy, Respondent maintained a quarterly merit wage increase policy for the Huntsville employees. The policy provides:

[1] All dates are in 1986 unless otherwise indicated.

[2] The Florence plant was sold 1 January 1987.

> Your supervisor should evaluate your job performance, attendance, and attitude at the end of your first ninety (90) days of employment and may increase your base pay. Future pay increases will be considered at the end of each calendar quarter, if evaluation indicates a raise is warranted, until the top pay scale of the job classification is reached. An employee does not "automatically" advance to the top pay classification. Advancement depends upon the employees' demonstration of skill and qualifications in the judgment of his supervisor.

The same merit wage increase policy and annual general wage increase policy apply to the Athens facility employees.

Events of 1986 at the Huntsville Plant

On 17 January, the Union filed a petition for representation of Respondent's employees in Case 10–RC–13267. An election was conducted on 2 April. The unit of employees voting was:

> All production and maintenance employees, including plant clericals, lead men, quality control inspectors, warehouse employees, control repair division (CRD) employees and machine shop employees at the employer's Seminole Drive and Governors Drive, Huntsville, Alabama location, but excluding all other employees of the employer, including office clericals, guards, watchmen and supervisors as defined in the National Labor Relations Act.

The tally of ballots showed approximately 179 eligible voters with 85 votes for the Union and 87 votes against the Union. No ballots were challenged, but one ballot was voided.

The Union, on 9 April, filed objections to the election. The Regional Director, on 14 May, issued a Supplemental Decision and Direction of Second Election based on the Union's meritorious objections. A second election was conducted on 11 June. The resultant tally showed that approximately 175 voters were eligible and 86 ballots were cast for the Union with 85 ballots cast against the Union. No ballots were challenged or voided. On 16 June, Respondent filed objections to the election. On 18 June, a second supplemental decision, order directing hearing on objections, and notice of hearing was issued by the Regional Director, dismissing certain objections and scheduling the remaining objection for an evidentiary hearing. Following the Regional Director's decision, Respondent discontinued its quarterly merit wage increase policy at its Huntsville facility for the bargaining unit employees. The quarterly merit wage increase policy at the Athens facility continued uninterrupted.

On 7, 8, and 12 August, a hearing on objections was conducted in Huntsville, Alabama. Within this same timeframe, Respondent discontinued its annual general wage increase policy for the Huntsville employees within the appropriate bargaining unit. However, all nonbargaining unit employees at Huntsville received the annual general wage increase in August. Likewise, all employees at the Athens facility received their annual general wage increase in August.

The hearing officer, on 3 October, issued a report and recommendation on objection finding merit to Respondent's objection and recommending that the Board sustain the objection. On 10 April 1987, the Board adopted the hearing officer's report and recommendation and issued a Decision and Direction of Third Election. Respondent, on 13 April 1987, granted a general wage increase and reinstated its quarterly merit wage increase program for its Huntsville facility employees.

Respondent discontinued the quarterly merit wage increase program and the annual general wage increase policy for the bargining unit employees at the Huntsville facility because its objections to the second election were pending final resolution by the Board. All wage increases were withheld from the bargaining unit employees at Huntsville without explanation to the employees.[3]

Louis Martin testified he is now the vice president of engineering and in 1986 was plant manager of the Huntsville facility. As plant manager, he had partial responsibility to decide the range of wage increases under the merit wage increase policy and based on his supervisor's evaluations to decide the amount of merit wage, if any, within the established range, to grant each eligible employee at Huntsville. Martin also had partial responsibility to decide the amount or percentage of each annual general wage increase for Huntsville employees.

Each year merit wage increases are given 1 January, 1 April, 1 July, and 1 October with supervisory evaluations completed a week prior to the start of the quarter. Albeit, all Huntsville employees received the merit wage increase on 1 April, Martin did not participate in the wage decision because he had previously assumed his new duties and was no longer the plant manager. The annual general wage increase is given in August in both the Huntsville and Athens divisions. The merit wage increase range for 1986 was zero to 20 cents. Following the election within a week or two, Martin consulted counsel about the propriety of giving merit wage increases for the third quarter. Counsel's advice was to discontinue the merit wage increase program for bargaining unit employees at Huntsville, but to continue the merit program uninterrupted at the Athens facility. Thus, no merit wages were given 1 July or 1 October 1986 or 1 January or 1 April 1987 at Huntsville for all employees involved in the union organizing campaign. Nonunit employees continued receiving their merit wage increases each quarter. Likewise, no supervisory evaluations were made during those same quarters for any employees involved in the union organizing campaign, but nonunit employees continued being evaluated.

Respondent also consulted with counsel on the propriety of giving the annual general wage increase to the Huntsville employees in August 1986. The decision was to withhold the annual general wage increase from the Huntsville bargaining unit employees and to grant the increase to the nonunit employees. The decision was based

[3] The above originates in a stipulation of facts, other objective evidence in the record, and uncontroverted record testimony.

solely on the union organizational status of the Huntsville plant and the case pending before the Board. Additionally, Respondent granted the annual general wage increase to all employees at the Athens facility.

Immediately following the Board's Order of 10 April 1987 directing a third election, Respondent reinstated its merit wage increase program and granted merit wage increases to the bargaining unit employees of the Huntsville Division. At the same time, the bargaining unit employees received the general wage increase previously withheld in August 1986.

Martin stated that neither wage increase was withheld from the Huntsville employees to punish or discriminate against employees voting for the Union.

Analysis and Conclusions

The General Counsel contends that Respondent's actions of withholding wage increases while a representation case is pending are per se violations of the Act. Alternatively, the General Counsel argues that Respondent has failed to rebut her prima facie case of discrimination.

Respondent argues that its actions of withholding the two wage increases were lawful because it was maintaining the status quo required by the law. Respondent further contends that the instant case is distinguishable from the cases involving wage actions immediately prior to an election or the cases involving ultimate certification of the union, creating a presumption that prior instituted changes in wages were unlawful. Respondent would place controlling emphasis on the fact that its objection to the second election was meritorious to make legitimate both the withholding of wages as well as the reinstitution of the wage programs.

Both parties have cited Board and court cases to support their differing positions. Those cases considering, prejudice to the collective-bargaining posture of the parties, an employer's obligation to bargain where the wage increases are discretionary, or the interrelation between organized and unorganized units separate and distinct from one another, I have considered to be inapposite and therefore not helpful to my determination. The remaining citations, particularly those employing the approach of looking at all the relevant circumstances to determine whether the employer intended, by its actions, to discourage union activity, I found helpful and did consider.

On the surface, wage issues, like those in the instant case, appear to fall within that "damned if you do and damned if you don't" category but "it ain't necessarily so." Where the facts show otherwise, an employer will not be found in violation of the Act.

Several Board cases over the years have reaffirmed yardsticks to be followed by employers undergoing a union organizational campaign. I am guided by the following rules of case law:

> Absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. [*Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701 (1974).]

> [D]uring union organizing [a]n employer must take the action that it would have taken were there no union activity underway. [*Associated Milk Producers*, 255 NLRB 750 (1981).]

> [W]ithholding of pay raises from employees who are awaiting the holding of a Board election violates the Act if the employees otherwise would have been granted the pay raises in the normal course of the employer's business. [*Progressive Supermarkets*, 259 NLRB 512 (1981).]

> When an employer, prior to a union campaign, has an established wage increase policy, the suspension of that policy during the union campaign will normally be found to violate Sec. 8(a)(3) unless the employer postpones the increases only for the duration of the campaign and informs the employees at the time of the postponement that the sole reason for its action is to avoid the appearance that it seeks to intervene in the election, and the Board finds that this in fact was its reason. [*Smith & Smith Aircraft Co.*, 264 NLRB 516 (1982).]

> [Generally,] an employer violates Section 8(a)(3) and (1) when it varies from its established practices of granting wage increases and other benefit improvements because of the pendency of a representation campaign or because a labor organization has been elected by its employees to represent them for collective-bargaining purposes. [Not the law of the case but an affirmation of the general rule.] [*Peabody Coal Co.*, 265 NLRB 93 (1982), enfd. in part 725 F.2d 357 (6th Cir. 1984).]

It is undisputed that Respondent had an established wage policy respecting quarterly merit wage increases and annual general wage increases. The quarterly increases were based on a range of zero to 20 cents and the annual was a percentage increase usually decided in late July. Further, the decisions to withhold the quarterly increases for 1 July, 1 October 1986, 1 January, 1 April 1987, and the annual general wage increase of August 1986 were based on the Union's presence in the continuing organizational campaign and the advice of counsel. Throughout Respondent's entire organization, the only employees denied wage increases were the bargaining unit employees at Huntsville. All other employees, including nonbargaining unit employees at Huntsville, received all wage increases due pursuant to the established wage policies.

Respondent argues that employers are in peril, no matter what they do, because the risks are too great during union campaigns. Here, the risks emerged in January, but were assumed when the 1 April quarterly merit wage increase was implemented just prior to the first election of 2 April. The risks apparently only became perilous to this Respondent after the 11 June election won by the Union. Indeed, Respondent contends that the peril ceased to exist with the Board's Order setting aside the second election and directing a third election on 10 April 1987, and therefore on 13 April 1987 the aborted wage programs were once again reinstituted. Somewhat

contrariwise, Respondent also contends that its cessation of the wage programs was its way of maintaining the status quo. Clearly, the status quo is evidenced by the wage increases granted to the Athens plant employees and the nonbargaining unit employees of the Huntsville plant, not the withholding of wage increases for selected employees. Although the Board recognizes that employers can freely give benefits to unrepresented employees while negotiating wages with the representative of other employees, the key is the established bargaining obligation of the employer. Here no such obligation is establshied, but rather, employees supporting the Union still are faced with an election of their chosen representative. That is to say, here, the employees' vote is still subject to influence by Respondent's wage policies policies that Respondent wants to control, as if by a valve, and turn on or off depending on the outcome of an election.

Additionally, Respondent argues that the absence of any evidence that it used the withholding of the wage increases to undermine employee support for the Union or made comments implying that the Union or the employees' selection of the Union was the cause of the withholding, preclude any finding of discrimination. As further support for its argument, Respondent emphasizes the testimony of Martin that the decisions to withhold the wage increases were not based on a desire to punish or discriminate against employees for selecting the Union as their collective-bargaining representative. But, admittedly, the wage increases were withheld because of the pending representation case and only after the employees selected the Union as their collective-bargaining representative.

In my view, it is impossible to separate the effects of Respondent's wage policy conduct on the employees from the conduct itself. The merit wage and annual wage practices were well established. All employees knew to expect five wage increases during any given year. Without any explanation for the cessation, bargaining unit employees would clearly attribute the loss of wages to the successful union campaign, just as the nonbargaining unit employees would attribute their continuing wage increases to the lack of unionization. Thus, by its silepce, Respondent has squarely placed the onus for no wage increases on the union activity of its employees. A reasonably prudent employer would have foreseen that such a sterile cessation of past wage practices for bargaining unit employees would be viewed by those employees as punishment for past union activities and as a warning for the future exercise of Section 7 rights in subsequent elections. Although I cannot discredit Martin's self-serving testimony of the nonbasis for the decisions to withhold the several wage increases, I can, and do, conclude and find that the foreseeable effect of the decisions to withhold wages outweigh the probative value of Martin's statement. In the least, a cancellation of expected wage increases is obviously susceptible of being understood by bargaining unit employees as interference with their union organizational rights. The legislative mandate prohibits interference, whether intentional or not, and whether pursuant to bona fide competent advice of an expert. Advice of counsel therefore is not a defense to conduct found unlawful because of the coercive effect on employees. I therefore find that Respondent has unlawfully interfered with its employees' Section 7 rights and thereby violated Section 8(a)(1) of the Act. I further conclude and find that Respondent, by failing to continue to apply its established wage increase practices to bargaining unit employees and by failing to grant wage increases pursuant to those practices to employees who would otherwise have received them, but for their selection of the union as their bargaining representative, is sufficient to support the inference that the employees' protected activity was a motivating factor in Respondent's decision. Respondent's unlawful motive is further evidenced by the preferential treatment accorded the unrepresented employees who received without interruption all the wage increases pursuant to Respondent's wage policies. Such disparity tends to discourage employees' exercise of their Section 7 rights. The General Counsel has clearly established a prima facie case of discrimination under the Board's decision in *Wright Line*, 251 NLRB 1083 (1980). Just as clearly, Respondent would not have taken the same action in the absence of the protected union activity of its employees. Accordingly, I find that Respondent, by withholding the wage increases from its bargaining unit employees while granting the wage increases to its unrepresented employees, has violated Section 8(a)(3) and (1) of the Act.

My conclusions and findings are further supported by the fact that the reinstatement of the withheld wages was precipitated by the Board Order nullifying the election won by the Union and directing a third election.

Conclusions of Law

1. By canceling scheduled wage increases for bargaining unit employees during a union organizational campaign, Respondent has interfered with employees' exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

2. By failing to give wage increases to bargaining unit employees because they selected a union as their bargaining representative, while granting the wage increase to its unrepresented employees, Respondent has discriminated against its represented employees in violation of Section 8(a)(3) and (1) of the Act.

3. The unfair labor practices described above have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.[4]

[4] The General Counsel moved for a remedial order containing a visitatorial provision authorizing "discovery," if necessary, to monitor compliance with the Board's Order. The need for such an order is not demonstrated and I therefore deny the General Counsel's motion.

Having discriminatorily denied wage increases to its bargaining unit employees of its Huntsville Division, Respondent must make evaluations of those employees for 1 July and 1 October 1986 and 1 January and 1 April 1987, and grant increases in accord with its merit wage increase policy. Also, quarterly interest on the merit wage increases shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[5]

In addition, Respondent must grant to its bargaining unit employees the same annual wage increases given to nonrepresented employees in August 1986, less the amounts received in April through August 1987, with interest, computed in the manner prescribed above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Martin Industries, Inc., Huntsville Division, Huntsville, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Canceling scheduled wage increases for bargaining unit employees of the Huntsville Division during any union organizational drive.

(b) Discriminating against its bargaining unit employees of the Huntsville Division by withholding wage increases because they selected a union as their bargaining representative.

(c) In any like or relate manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Evaluate bargaining unit employees of the Huntsville Division in accord with its merit wage policy for the quarters beginning 1 July and 1 October 1986 and 1 January and 1 April 1987, and grant wage increases for those quarters to all eligible bargaining unit employees with interest as outlined in the remedy section of this decision.

(b) Grant the same general wage increase to bargaining unit employees of the Huntsville Division as it granted to nonrepresented employees in August 1986, less those amounts previously received in April through August 1987, with interest as outlined in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its offices in Huntsville, Alabama, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT cancel scheduled wage increases for our bargaining unit employees at the Huntsville Division during any union organizational drive.

WE WILL NOT discriminate against our bargaining unit employees of the Huntsville Division by withholding wage increases from them because they selected a union as their bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole all bargaining unit employees at the Huntsville Division for any loss of earnings and other benefits resulting from our discrimination against them, plus interest.

MARTIN INDUSTRIES, INC., HUNTSVILLE DIVISION

Southern California Developmental Health Services, Inc. *and* Teamsters Local No. 186, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] Cases 31–CA–16421 and 31–CA–16430

August 16, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On May 18, 1988, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs [2] and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Southern California Developmental Health Services, Inc., Camarillo, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Mori Pam Rubin, Esq., for the General Counsel.
Gary Gill, Executive Director and *Kathi Mottaz*, of Camarillo, California, for the Respondent.

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent's sole exception is to the judge's finding that the Board has jurisdiction in this matter. The Respondent asserts that it was not the operator of the instant health care institution but merely managed it for the operator, so that the jurisdictional standard of $500,000 for retail enterprises should apply rather than the $250,000 standard for health care institutions as defined in Sec. 2(14) of the Act. The Respondent, however, stipulated to facts that indicate it was, during the relevant period of time, the Employer in this matter. Furthermore, the judge credited testimony that showed the Respondent acted as the employer and operator of this health care institution.

Accordingly, we find that the admission in the uncontroverted stipulation remains binding, and that the judge's assertion of jurisdiction is proper. *Milford Manor*, 233 NLRB 1283 at fn. 1 (1977); see also *Resident Home for the Mentally Retarded of Hamilton County*, 239 NLRB 3, 6 (1978).

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This consolidated matter was tried in Los Angeles, California, January 11 and 12, 1988. The complaint, based on charges filed by Teamsters Union Local No. 186, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union), alleges that Southern California Developmental Health Services, Inc. (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging Lesi Crowel, Brenda McMillian, Bruce Pickrell, and Gwenndolynn Thompson on February 22, 1987; by discharging Vincente Woodward on February 23, 1987; and by discharging Benjamin Long on March 4, 1987.[1]

The complaint alleges that Respondent further violated Section 8(a)(1) on February 16, 1987, when Facility Administrator Jean Turnage "impliedly threatened an employee with loss of employment because of that employee's union activity"; and on February 24, 1987, when Executive Director Gary Gill "promised an employee increased benefits if he refrained from supporting the Union."

I. JURISDICTION AND LABOR ORGANIZATION

From February 1 through May 22, 1987, Respondent managed a complex of five homes for developmentally disabled adults in Camarillo, California. It received over $250,000 in Government funds to do so, of which over $5000 came from Federal sources. Respondent thus managed a health care institution as defined by Section 2(14) during that period; and, so doing, was engaged in and affecting commerce within Section 2(6) and (7).

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED MISCONDUCT

A. *Evidence*

1. Background

By contract with an enterprise known as Total Living Continuum (TLC), Respondent took over management of the Camarillo homes from TLC as of February 1, 1987. The homes, each with six "client" beds, were named Bedford, Catalina, Harmony, Loma, and Rowland.[2] Respondent also operated similar facilities elsewhere in Southern California at the time. Gary Phillip Gill, Ph.D., with the titles executive director and clinical director, is Respondent's ranking official. Beneath him in the Camarillo chain of command were Terri Guiboa and

[1] Sec. 8(a)(3) forbids an employer from "discriminat[ing] in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." Sec. 8(a)(1) prohibits an employer from "interfer[ing] with, or coerc[ing] employees in the exercise of the rights guaranteed in Section 7" of the Act. Sec. 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

[2] Although the contract plainly envisioned permanency, Respondent terminated the arrangement by letter to TLC dated May 22, 1987, returning control to TLC. Respondent had concluded, according to the letter, that it did not "have the resources in terms of money, personnel and time . . . to properly operate the five TLC facilities."

Jean Turnage, entitled "facility administrators."[3] Gill transferred them from an Orange County facility, placing Guiboa in charge of Bedford, Loma, and Rowland, and Turnage in charge of the other two.

Gill testified that the five homes were "quite short staffed" when the changeover took place; that Respondent needed "at least" 12 or 13 additional employees. Respondent consequently began advertising for help immediately, according to Gill, and gave tryouts to "a large number of" the resulting applicants. In some instances, Gill continued, Respondent was "so desperate that it did not follow the tryout procedure."[4]

Gill further testified that "continuity of staff" was desired; that "it was important to keep people who had learned to work with the clients, and to maintain as much stability as possible with respect to the staff." Gill recalled, as well, that a case manager for the Tri-County Regional Center, which monitored the homes on behalf of the California Department of Developmental Services, was "very concerned that [Respondent] keep on as many TLC staff as possible" to minimize client anxiety.[5]

All the alleged discriminatees were on the TLC staff before the changeover, with three—Crowel, Thompson, and Woodward—having the title of house supervisor and possessing certain indicia of true supervisory authority. Among Respondent's first actions, coincident with the installation of Guiboa and Turnage as facility administrators, was to divest those three of supervisory status; and, a few days later, to give each the title of program coordinator.

By memorandum dated February 9 to families of the "residents," Gill stated, referring to Crowel, Thompson, and Woodward, that Respondent was "extremely fortunate that three of the most experienced House Managers from TCL are working with us, although in a new capacity." The memorandum also states that most staff salaries would be "increased substantially, which will allow us to better retain our current staff."

By memorandum to the employees dated February 11, Gill sought to dispel "rumors" that Respondent intended to replace "all of the old staff," proclaiming, "I want to assure you that I have no intention of doing that." The same memorandum stated that, while Respondent "will be instituting a slightly different system," it wanted the stafff "to carry on with the current programs" for the present. Referring to Crowel's, Thompson's, and Woodward's new roles, it stated that their "initial responsibility is to make sure that the current program is maintained"; and that, upon introduction of the new program, they "will assist in training staff in how to implement it as well as in making sure it is operated properly."

[3] The parties stipulated that Guiboa and Turnage were supervisors and/or agents of Respondent for purposes of the Act.

[4] Gill testified that "most of" the applicants "were tried out for just several hours and paid out of petty cash" if not retained.

[5] The case manager stressed, per Gill, that the "clients do not like changes and . . . are difficult to work with, and it's therefore important to keep people who have learned to work with them and to maintain as much stability as possible."

2. Organizational activity

The idea of union representation apparently was first broached on February 4 in a conversation among Crowel, Thompson, and Woodward. The next day Thompson raised the matter in a telephone conversation with Dennis Shaw, an official of the Union, and an organizational meeting took place on February 12 at a Bob's Big Boy restaurant. The meeting was conducted by Shaw and attended by perhaps 10 employees. Crowel, Thompson, and Woodward signed union cards during the meeting, distributed cards to coworkers, and otherwise espoused representation during the ensuing few days. The other three alleged discriminatees also signed cards: Long and Pickrell at work about February 12 and McMillian in Thompson's car on February 16. These three solicited the signatures of others, as well.

On February 20, the Union filed a petition for election with the NLRB.[6] Gill testified that he first learned of the union activity on February 20 when informed of the filing. Thompson testified, on the other hand, that she told Gill, following a "very hostile" staff meeting on February 18, that he "shouldn't have a bad attitude with everyone else, because [she] was the one that started the union drive." Gill did not address this incident in his testimony, but did acknowledge that he knew before February 20 that some of the employees were upset and had been circulating a petition. He added, however, that he "never understood [that] to have anything to do with the Union."

The record suggests that Guiboa knew of the union ferment almost from its inception, and that Turnage also was aware well before Gill's professed first knowledge. Thus, Thompson testified without contradiction that she told Guiboa about it shortly after her initial telephone conversation with Union Official Shaw; and Long testified, likewise without contradiction, that he overheard an exchange between Turnage and Guiboa, on February 12 in which Guiboa wondered where Crowel, Thompson, and Woodward were, and Turnage replied that she thought they were starting a union.[7]

3. Turnage's alleged February 16 misconduct

McMillian, who had been vacationing in the East since before the changeover, first worked for Respondent on February 16. Thompson, who is her sister, drove her to work that day, apprising her of the union activity and inducing her to sign a card. That afternoon at work, according to McMillian, she asked coworker Angie Moreno if she had signed a card. Some time later, McMillian testified, Turnage told her that she was "start-

[6] An election was held March 21. The tally was 11 to 9 for representation, with 10 challenged ballots. The matter apparently was never finally resolved because of Respondent's withdrawal from management in May.

[7] Guiboa did not refer to Crowel, Thompson, and Woodward by name, according to Long, but instead as "the three musketeers—an appellation by which they were known to coworkers and management alike. Asked his notion of the term's derivation, Gill testified that the three "work together in concert, they spend a lot of time together, they share certain concerns, they are sort of presenting a unified front." He continued that he "never understood it to mean having any implications or repercussions or any connection with the unionization efforts."

ing on the wrong foot" by "trying to get people to sign union cards at work," and that she would have "to be loyal to the Doc if [she] wished to work for" Respondent.

McMillian's rendition of this incident is uncontroverted. Turnage did not testify; moreover, Respondent concedes in its brief that Turnage "probably did make the threats" attributed to her.

4. The five discharges of February 22 and 23

a. *Additional background*

Gill testified that his responses, on learning of the election petition, were several. First, he spoke with Guiboa and Turnage. They told him they knew the employees were discontented, he recalled, but claimed ignorance of any union activity. He then called TLC President Mark Katz, declaring that Respondent was rescinding the contract by which it had assumed management of the homes, after which he had "two or three" telephone conversations with the Tri-County Regional Center. The Regional Center prevailed on him to rescind the contract, he testified, at the same time intimating that the intrusion of a union would be a "bad precedent."[8]

Gill conferred with a lawyer on February 21, assertedly telling him that the filing of the petition put him in "an awkward position" inasmuch as he had "made some decisions about staffing changes and [did not] want it to appear that [he was] doing it because of the union activity." The lawyer recommended, according to Gill, that Respondent meet that problem by issuing written termination notices to those being discharged.

Each of the five alleged discriminatees fired on February 22 and 23 received a written notice of termination, after which the practice was dropped. All were signed by Gill and dated February 22.

The record contains no substantial evidence that Gill's decision to effect the February 22 and 23 discharges in fact was made before he received word of the election petition or otherwise learned of the union activity. It contains compelling evidence, on the other hand, at least with regard to the three program coordinators, that the decision was reached and carried out in haste. Thus, by memorandum to the families dated February 22, Gill stated:

> When I wrote to you before, I had indicated that Lesi Crowel, Gwen Thompson, and Vince Woodward would be functioning in the newly created position of Program Coordinator. Unfortunately that system did not work as well as I had envisioned, and I have concluded that we can provide more closely coordinated supevision by relying on the Facility Administrators. . . . In view of our decision not to use Program Coordinators, I am temporarily bringing up a few of our Orange County supervisors to help institute our new . . . program *a bit sooner than I had planned.* [Emphasis added.]

b. *The discharge of Pickrell*

Pickrell, a programmer at Catalina, was the first of the six to be told, receiving a termination notice from Turnage the morning of February 22. The notice gave as reason for the action:

> After reviewing your performance we have concluded that your work performance is not satisfactory and we no longer desire your services.

Pickrell testified that after he read the notice he asked Turnage for an explanation that she told him to speak with Gill and that Gill told him, simply, that he had decided, after "consulting with supervisors and other staff," that Pickrell's "services were no longer needed." Gill did not describe any such consultations in his recital, nor does the record contain any convincing evidence otherwise that they occurred.

At the time Pickrell was romantically involved with Crowel, who was to be fired later that morning. Gill testified that "one of the considerations" behind Pickrell's discharge, although not "a major component," was Grill's concern that his continued presence after Crowel's departure "might cause problems."

A more basic reason, Gill averred, was that while Pickrell "worked well with the clients and implemented the existing program," he "was opposed to the changes that [Gill] was trying to make." Gill elaborated:

> I felt like I had to make some changes, and I felt like I had to put together a team that would be willing to make some changes and modifications and would be willing to work with me. I just simply felt that I had to put together a team that was supportive of the kind of programming and clinical inttervention that I wanted to make.

Gill admittedly "never sat down face to face" with Pickrell to discuss his attitude toward the proposed changes. He added that the information he obatained about Pickrell's attitude "was hearsay," but did not reveal the sources or describe the nature of that information. Gill admitted, as well, that "most of the employees" felt "they had a good system" as it was, and "that there was no need to make any changes"; yet, not everyone of that persuasion was discharged.

No changes had been instituted as of February 22.

c. *The discharges of Crowel and Thompson*

Turnage called Thompson at home the morning of February 22, reporting that Gill wanted to meet with her, Crowel, and Woodward at 11 a.m., and asking that she pass the word to the other two.

Thompson was unable to locate Woodward, but she and Crowel appeared at Gill's office as directed. Gill told them that he had "thought it was going to work out, but it's just not working out"; and "after further

[8] Gill testified that the Regional Center informed him, in the same context, that it had contracted its oversight agency in Sacramento, which reported that no comparable facility in the State was organized. Gill was notably evasive when pressed by counsel for the General Counsel whether the Regional Center had voiced concern about a bad precedent. He answered, variously: "they were being very cautions"; "I'm not sure that's what they were saying"; "they would probably deny that they ever said it that was"; and "I sort of figured out what they were saying, yeah."

consideration" he had "decided to terminate" them. With that, he handed each a termination notice and a final paycheck, said he "appreciate[d] all [their] help," and escorted them to the door.[9]

Both termination notices stated:

REASONS FOR ACTION

> After careful consideration and analysis, this management of our agency has decided to eliminate your job position.

Asked why he had decided to eliminate the program coordinator positions so soon after creating them, Gill testified that "a number of things" had happened, "the least of which was the unionization effort." He enlarged:

> [A]s I reevaluated the amount of money that was coming in, and the amount of expenses that I had, I became aware that there simply wasn't any way, despite how good an appointment it might have been clinically, to maintain the five supervisors [Turnage, Guiboa, and the three program coordinators], and that, regretfully, I had to make that decision, not on a clinical basis, but simply on a financial basis.[10]

Gill continued:

> I think if I could have afford[ed] it, they [the program coordinators] would have been of very big help to me, and it would have helped the program, no question about that in my mind.

d. *The discharge of McMillian*

As earlier mentioned, McMillian, a programmer, first worked for Respondent on February 16, having just returned from vacation. Also, as previously noted, Turnage told her on February 16 that she was "starting on the wrong foot by trying to get people to sign union cards at work," and that she "needed to be loyal to the Doc if [she] wished to work for" Respondent.

McMillian worked at Catalina under Turnage, on February 16. She had spent much of the preceding night on an airplane from the east coast, not expecting to work February 16, and was persuaded to work that day on little notice because of "an emergency."[11] Turnage, unimpressed with her performance, recommended during a scheduling meeting February 18 that she not be retained. Thompson and Crowel, citing the arduous plane ride, argued that she had not received a fair trial. Gill agreed, and Guiboa volunteered to "take her" at Rowland. Gill thereupon penciled in McMillian to work several of the remaining days in February, as well as March 3–5.[12]

McMillian worked full shifts at Rowland on February 20 and 21. She also worked on February 22 until about noon, when Guiboa handed her an envelope and told her to read the enclosed note. The note stated in relevant part:

> After reviewing our staffing needs we have concluded that we do not have a full-time position for you in our agency at this time. We appreciate your willingness to fill in at Catalina and Rowland House this past week.

After reading the note, McMillian exclamined: "You couldn't possibly be overstaffed. Why? What have I done?" Guiboa answered, "It's all in the envelope."

Gill testified that his position regarding McMillian is:

> . . . that we tried her out and looked at other offers that we had—we were trying to get an all-male staff at Rowland and we simply decided that, that there were other people who would be more appropriate for that position.

Gill appended that he did not "mean to imply that he fired McMillian "because she had done a poor job." Rather, he went on, he was "getting a lot of pressure from the Regional Center to try to use as many male staff as possible to deal with some difficult male clients," so he decided on February 21 "to try to go with a male staff" at Rowland.

The record contains no evidence that a male replacement for McMillian had been located or was in prospect at that time. Gill conceded that the procurement of a male staff "was difficult to do" and "took awhile."

e. *The discharge of Woodward*

Because of Thompson's inability to locate Woodward on February 22, Gill would have discharged him when he fired the other two program coordinators, Crowel and Thompson. Woodward's termination notice was identical to theirs, prepared by Gill at the same time.

Woodward received formal word the afternoon of February 23. Informed that morning by Pickrell about the other discharge, he called Respondent's office, and was told that a paycheck was "waiting for" him. He consequently went to the office that afternoon, where-

[9] This description of the encounter derives from the testimony of Crowel and Thompson. Gill testified that it "went pretty much as they described."

[10] Further, with regard to Respondent's economic circumstances, as newly perceived by Gill, he testified:

> I had had several meetings with licensing, I had become aware of the . . . extent that the deficiency had to be corrected, the extent that the findings that were being applied to TLC, in that effect, to [Responent], I had become aware of problems with the land, with the lease, I became aware that [Respondent] would have to pay rent for the burned-out building [a structure on the Catalina premises], and that the landlord didn't intend in any quick way to rebuild it. I became aware that at least two of the monies from at least two of the clients was going to be held up, and that's six thousand dollars a month. By then I had begun to make corrections on one of the homes and it had already cost close to eight thousand dollars to make the repairs and buy the additional furniture, and I could see that to bring all the other houses into compliance was going to be very expensive.

[11] The flight arrived at 2 a.m. McMillian received a call at 7 a.m. that she was needed at work.

[12] Gill assertedly decreed that "the fair thing to do before making a decision was to have her try out for three days." The schedule, which is in evidence, unambiguously establishes that McMillian's status was more permanent than that; however, as do her personnel records, which state that her hire date was "2/1/87," and a staffing sheet prepared by Respondent about February 1, which contains this entry: "Brenda McMillen [sic] (on leave)."

upon Gill gave him the termination notice and the same explanation he had given Crowel and Thompson. In addition, Gill assured Woodward that he had done "a really good job" and that Respondent would not cause him "any trouble" concerning unemployment benefits. Gill also raised Woodward's failure to work scheduled on February 21. Woodward responded, without elaboration, that "things had gotten a little too strange" at work the night before, prompting him to stay away.[13]

Gill testified that "it was [his] assumption that Woodward was quitting, because he didn't show up the [21]." Gill admitted, however, that Woodward never said he was quitting; that Woodward's position was being eliminated in any case; and that Gill had prepared the termination notice before hearing about the absence. Gill testified, as well, that the decision to terminate Woodward "had nothing to do with the quality of his work, it was simply a matter of there wasn't enough revenues generated to handle five supervisors."

Regarding Woodward's absence, Gill acknowledged that Respondent "had problems with people not showing up." The record suggests that employees generally were not assumed to have quit, nor were they discharged, when they failed to show up.

5. Gill's alleged February 24 misconduct

Long, the remaining alleged discriminatee, testified about a February 24 conversation with Gill in the staff office at Rowland, in which Gill said he had "heard rumors of a union starting," then told Long he would receive "a higher position and a higher raise" if he did not "go to any organization or be a part of any organization."

Gill did not speak of this in his testimony, nor was Long's account otherwise challenged.

6. The discharge of Long

Long, a programmer aide at Rowland, was discharged by Gill the morning of March 4. Long testified that Gill told him at the time that he was taking the action because Long was "out to sabotage the system and . . . did not want the program to work." Long responded, so he recounted, by asking if he could talk with Gill, anyway, about one of the facility administrators whom Long suspected of racial prejudice,[14] and Gill answered that he "only takes care of people that are loyal to him," and some of the employees were "out to stab him in the back." This account was not disputed by Gill. Long did not receive a written termination notice.

Gill testified that Long was fired

> . . . because on several occasions he didn't show up for work when assigned and we couldn't get in touch with him, and he was opposed to implementing the program the way I was trying to implement it. Ben had worked there before, had a notion of how the old program worked, was strongly committed to the old system. I felt I needed to make some changes, needed to implement the system that I was familiar with and that I could properly supervise. He was very open about his opposition, he was convinced that his way was proper, but he was opposed to my way, so I felt on that basis I had to make a change and get somebody in there who would work with me.

Gill continued:

> It had nothing to do with the quality of his work or how long he worked with the clients. I think he cared about the clients and I think he was firmly convinced that his way was correct and that he . . . was helping the clients.

Gill's affidavit, provided during the investigation of this matter, does not mention absenteeism as a reason for Long's discharge. Gill concededly never warned Long about absenteeism and, as earlier mentioned, Respondent "had problems with people not showing up."

B. *Conclusions*

1. Turnage's alleged February 16 and Gill's alleged February 24 misconduct

As noted, Respondent concedes in its brief that Turnage "probably did make the threats" attributed to her—namely, telling McMillian on February 16 that she was "starting on the wrong foot" by "trying to get people to sign union cards at work" and that she would have "to be loyal to the Doc if [she] wished to work for" Respondent.

With respect to Gill's alleged February 24 misconduct, Long's testimony was both uncontroverted and convincing that Gill told him, in the context of "rumors of a union starting," that he would receive a better job with higher pay by declining to participate.

The remarks of both violated Section 8(a)(1) as alleged; Turnage's by linking job security and Gill's by linking a better job and higher pay to abstention from union activities.

2. The allegedly unlawful discharges

a. *Controlling principles*

The Board stated in *Wright Line*:

[W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the

[13] Woodward testified that he had worked "a good deal of" the night of February 20, although not scheduled to do so, because of an emergency; that about midnight someone, presumably Turnage, instructed a new employee to escort Woodward off the premises; and that, as a result, Woodward "was absolutely disgusted" and chose not to report on February 21.

[14] Long is black.

same action would have taken place even in the absence of the protected conduct.[15]

b. *The five discharges of February 22 and 23*

I conclude that the General Counsel has made the requisite prima facie showing that the five discharges of February 22 and 23 were in unlawful retribution for the discharged employees' union activites and the Union's attendant filing on February 20 of a petition for election. The bases for this conclusion are:

(a) Each of the five dischargees was conspicuously prounion. All signed cards; all espoused unionization to coworkers; Crowel, Thompson, and Woodward participated in the seminal conversation on February 4; Thompson made the initial contact with the Union; McMillian was unlawfully rebuked by Turnage on February 16 about "trying to get people to sign union cards at work"; and Thompson told Gill on February 18 that she "was the one that started the union drive."[16]

(b) All the termination notices were dated February 22, four of the discharges occurred that day, and the fifth occurred a day later only because Woodward was unavailable on February 22. This contiguity indicates a common motive or trigger.

(c) That the petition was the common trigger is suggested by the temporal proximity between its filing and the discharges; by Gill's deep distress over the petition (and, by extension, the underlying union activity), as shown by his consequent declaration to TLC President Katz that he was rescinding their contract;[17] and by the haste of the discharge decisions implicit in Gill's memorandum of February 22.

(d) Union sympathies aside, each of the dischargees was at least an acceptable employee. Thus, Gill testified that the three program coordinators "would have been of very big help" if retained; that he did not "mean to imply" that he fired McMillian "because she had done a poor job"; and that Pickrell "worked well with the clients and implemented the existing program." This acceptability, in combination with Respondent's shorthandedness and the desirability of retaining as many as possible of the existing staff to preserve the continuity of staff-client relationships, further indicates that the petition was the trigger.

(e) The issuance of termination notices, at variance with Respondent's usual practice, betrays its perception that the discharges needed special cosmetic treatment to survive scrutiny.

I additionally conclude that Respondent has failed to overcome the General Counsel's prima facie showing. My reasons are:

(a) Gill's testimony that he terminated the three program coordinators "not on a clinical basis, but simply on a financial basis," was not convincing. Not only was his demeanor in the telling unpersuasive, but his recital was nebulous, lacked testimonial or documentary corroboration, and failed to explain with plausibility how the economic plight so forecefully captured his attention roughly coincident with the filing of the petition.

(b) Gill's testimony about Pickrell—that he was discharged mainly because he "was opposed to the changes that [Gill] was trying to make"—likewise was unconvincing. Again, his testimonial demeanor was unimpressive, and his professed bases for faulting Pickrell's attitude were vague and uncorroborated. Beyond that, Gill's admission that "most of the employees" saw no need to make any changes," yet were not fired, leaves little doubt that his concerns about Pickrell's attitude were but veiled—and incriminating—references to his prounion sentiments.

Incriminating, as well, was Gill's testimony that "one of the coonsiderations" behind Pickrell's discharge was a concern that, because of his romantic link with Crowel, he "might cause problems" after her termination. The illegality of Crowel's discharge thus necessarily attaches to Pickrell's.

Finally, the reason stated on Pickrell's termination notice—that his "performance [was] not satisfactory"—does not correspond with Gill's testimony, a circumstance impeaching both.

(c) Gill's testimony regarding McMillian's discharge suffered much the same deficiencies of demeanor and content as that just discussed. His statement that he had been "getting a lot of pressure from the Regional Center to try to use as many male staff as possible" was neither persuasively presented nor corroborated; and, even if true, does not explain the timing of the discharge decision, the day after the petition was filed, given that a male replacement evidently had not been located and that Respondent was seriously understaffed.

(d) As previously noted,[18] Gill's testimony that he learned of the union activity on February 20, when told about the petition, came across as contrived to convey the notion that at least some of the discharge decisions had been made before he came into knowledge. His testimony that he told Respondent's lawyers on February 21 that the petition put him in "an awkward position" inasmuch as he had "made some decisions about staffing changes" and did not want them to appear union-related, bore that same aura of contrivance. Apart from the sundry chinks in Respondent's defenses elsewhere noted, those defenses were grievously compromised by Gill's perceived need to dissemble in this fashion.

[15] 251 NLRB 1083, 1089 (1980). This formulation received Supreme Court approval in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[16] Thompson and McMillian, both with convincing demeanor, are credited that Thompson made this remark to Gill. Gill denied it only by implication, testifying that he learned about the union activity when told about the petition. That testimony came across as contrived, to convey the notion that at least some of the discharge decisions were made before Gill came into knowledge, and is not credited.

[17] Gill's distress doubtless was reinforced, moreover, by the Regional Center's intimations that unionization would be a "bad precedent." Substantial union animus also was revealed by Turnage's unlawful February 16 comments to McMillian and Gill's unlawful February 24 words to Long.

[18] See fn. 16, supra.

c. *The discharge of Long*

I conclude that the General Counsel also has made a prima facie showing that the March 4 discharge of Long was unlawful. Thus:

(a) Long was actively prounion, and Gill evinced his awareness of that on February 24 by targeting Long for a better job and higher pay if he refrained from union activity.

(b) By Gill's admission, the discharge "had nothing to do with the quality of [long's] work."

(c) Gill told Long in the conversation attendant the discharge that Long was "out to sabotage the system," that some of the employees were "out to stab him in the back," and that he "only takes care of people that are loyal to him."[19] In all the circumstances, including the continuing pendency of the election, the inference is unavoidable that Gill was alluding, at least in substantial part, to Long's prounion sentiments and activities and those of his coworkers.

(d) As revealed by Gill's earlier unlawful discharge of five employees, the extreme sanction of discharge was central to his union-fighting philosophy.

I further conclude that Respondent has not overcome the prima facie showing, Gill's testimonial demeanor once more was less than compelling, and his stated grounds for the discharge—that Long had not shown up for work "on several occasions" and "was opposed to implementing the [new] program"—again were wanting in specificity and corroboration. Yet worse, Gill's failure to cite Long's absenteeism in his affidavit, coupled with his admission that absenteeism was not unique to Long and that he had never warned Long about it, warrants the surmise that this reason was of after-the-fact conjuration; and his mention of Long's resistance to the new program fairly can be construed, as in Pickrell's case, as a coded reference to Long's union sympathies.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Lesi Crowel, Brenda McMillian, Bruce Pickrell, and Gwenndolynn Thompson on February 22, 1987, by discharging Vincente Woodward on February 23, 1987, and by discharging Benjamin Long on March 4, 1987.

2. Respondent additionally violated Section 8(a)(1) on February 16, 1987, when Jean Turnage told McMillian that she was "starting on the wrong foot" by "trying to get people to sign union cards at work," and that she would have "to be loyal to the Doc if [she] wished to work for" Respondent; and on February 24, 1987, when Gary Gill said to Long, in the context of "rumors of a union starting," that he would receive a better job, with higher pay, by declining to participate.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Southern California Developmental Health Services, Inc., Camarillo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of jobs, or promising them better jobs and higher pay, to discourage them from engaging in activities on behalf of Teamsters Union Local No. 186, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO or any other labor organization.

(b) Discharging employees for engaging in activities in support of any labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Make Lesi Crowel, Brenda McMillian, Bruce Pickrell, Gwenndolynn Thompson, Vincente Woodward, and Benjamin Long whole, with interest where appropriate, for any losses of wages or benefits suffered as a consequence of Respondent's unlawful terminations of them in February and March 1987.[21]

(b) If reasonable in all the circumstances,[22] offer to Lesi Crowel, Brenda McMillian, Bruce Pickrell, Gwenndolynn Thompson, Vincente Woodward, and Benjamin Long immediate and full reinstatement their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

(c) Expunge from the employment records of Lesi Crowel, Brenda McMillian, Bruce Pickrell, Gwenndolynn Thompson, Vincente Woodward, and Benjamin Long any reference to their terminations; and notify them in writing that this has been done and that their terminations will not in any way serve as a basis for future personnel or disciplinary action affecting them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Mail copies of the attached notice marked "Appendix"[23] to all employees who worked in any of the five

[19] Long's uncontroverted testimony in these particulars is credited.

[20] All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[22] As determined in the compliance phase of this proceeding.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

homes managed by Respondent in Camarillo, California, at any time from February 20 through March 21, 1987. Copies of the notice, to be provided by the Regional Director for Region 31, shall be signed by Respondent's authorized representatives and then promptly mailed by Respondent to the employees at their last known addresses.[24]

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[24] In light of the apparent impossibility of meaningful posting, mailing is necessary to ensure adequate dissemination of this Order.

APPENDIX

NOTICE TO EMPLOYEES
POST BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with loss or jobs, or promise them better jobs and higher pay, to discourage them from engaging in activities on behalf of Teamsters Union Local No. 186, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO or any other labor organization.

WE WILL NOT discharge employees for engaging in activities in support of any labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Lesi Crowel, Brenda McMillian, Bruce Pickrell, Gwenndolynn Thompson, Vincente Woodward, and Benjamin Long whole, with interest where appropriate, for any losses of wages or benefits suffered as a consequence of our unlawful terminations of them in February and March 1987.

WE WILL, if reasonable in all the circumstances as determined by the NLRB, offer to Lesi Crowel, Brenda McMillian, Bruce Pickrell, Gwenndolynn Thompson, Vincente Woodward, and Benjamin Long immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

WE WILL expunge from the employment records of Lesi Crowel, Brenda McMillian, Bruce Pickrell, Gwenndolynn Thompson, Vincente Woodward, and Benjamin Long any reference to their terminations; and WE WILL notify them in writing that this has been done and that their terminations will not in any way serve as a basis for future personnel or disciplinary action affecting them.

SOUTHERN CALIFORNIA DEVELOPMENTAL HEALTH SERVICES, INC.

Property Management Services Corporation d/b/a PMS Corporation *and* Hotel Employees and Restaurant Employees Local 355, AFL–CIO,[1] Hotel & Restaurant Employees' and Bartenders' International Union, AFL–CIO and Mar Del Plata Condominium Association, Inc., Party in Interest. Case 12–CA–10621

August 17, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On February 5, 1987, the National Labor Relations Board issued a Decision and Order[2] in which the Board, inter alia, ordered the Respondent and Mar del Plata Condominium Association, Inc. (Mar del Plata) to make whole bargaining unit employees for any loss of pay suffered as a result of their unlawful terminations and the subcontracting of unit work. Mar del Plata fulfilled its obligation to make the employees whole by settling the case and paying its portion of the net backpay due.

On November 24, 1987, the United States Court of Appeals for the Eleventh Circuit entered its judgment enforcing the Board's Order concerning the Respondent.[3] A controversy having arisen over the amount of backpay due from the Respondent under the Board's Order, as enforced by the court, the Acting Regional Director for Region 12, on April 29, 1988, issued a backpay specification and notice of hearing, alleging the amount of backpay due from the Respondent and notifying the Respondent that it should file a timely answer complying with the Board's Rules and Regulations.[4]

The Respondent did not file an answer to the backpay specification. On May 17, 1988, the Regional Director wrote to counsel for the Respondent and informed it of the need to file an answer by May 20, 1988, or face a possible summary judgment order. A copy of the Board's Rules governing the filing of an answer was mailed to the Respondent's counsel on that date.

On May 26, 1988, the compliance officer for Region 12 telephoned the Respondent's president and informed him that he had failed to file an answer to the backpay specification. The Respondent's president stated that he did not intend to file an answer. The compliance officer said that if an answer was not received by June 1, 1988, a Motion for Summary Judgment would be filed with the Board. The compliance officer also wrote the Respondent's president on May 26, confirming the substance of that day's telephone conversation.

On June 27, 1988, the General Counsel filed a Motion for Summary Judgment.[5] On June 29, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response. The allegations in the motion are therefore undisputed.

Ruling on the Motion for Summary Judgment

Section 102.54 of the Board's Rules and Regulations provides, in pertinent part, as follows:

> (a) . . . The respondent shall, within 21 days from the service of the specification, if any, file an answer thereto. . . .
>
> (c) . . . If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. . . .

The backpay specification states that the Respondent shall, within 21 days from the date of the specification, file with the Regional Director for Region 12 an answer to the specification. The backpay specification further states that if the answer fails to deny the allegations of the specification in the manner required under the Board's Rules and Regulations, and the failure to do so is not adequately explained, the allegations shall be deemed to be true and the Respondent shall be precluded from introducing evidence controverting them.

In addition to the backpay specification and notice of hearing, counsel for the General Counsel notified the Respondent of its failure to file an answer and that the General Counsel intended to seek summary judgment if no answer was filed.

The Respondent has not filed an answer nor offered any explanation for its failure to do so. In accordance with the rules set forth above, the allegations in the backpay specification are deemed to be admitted as true and the Board so finds.

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[1] Formerly, Hotel, Motel, Restaurant and Hi-Rise Employees and Bartenders Union, Local 355.

[2] *Mar del Plata Condominium Assn.*, 282 NLRB 1012 (1987).

[3] No. 87-5881, enfd. mem. (Nov. 24, 1987).

[4] The backpay specification was mailed to the Respondent by certified mail, return receipt requested. The Respondent admits receiving the backpay specification.

[5] Counsel for the General Counsel states in his Motion for Summary Judgment that the compliance officer wrote and telephoned the Respondent's attorney on May 26, 1988. Exhs. D and E to that motion indicate that the compliance officer communicated with the Respondent's president and sole shareholder on this date.

Accordingly, the Board grants the Motion for Summary Judgment and concludes that the amount due each of the bargaining unit employees is as stated in the backpay specification. The Board orders that payment to each bargaining unit employee be made by the Respondent as set forth in the backpay specification.

ORDER

The National Labor Relations Board orders that the Respondent, Property Management Services Corporation d/b/a PMS Corporation, Miami Beach, Florida, its officers, agents, successors, and assigns, shall make whole its bargaining unit employees by payment to them of the respective amounts stated in the backpay specification, plus interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), less tax withholdings required by Federal and state laws.

Wells Fargo Armored Service Corporation *and* International Guards Union of America, Local 66. Case 27–CA–10116

August 19, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On February 3, 1988, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wells Fargo Armored Service Corporation, Boulder, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union since April 23, 1987. In doing so, we do not rely on the judge's finding that the Respondent demonstrated a lack of good faith by failing to arrange for bargaining to begin following the termination of bargaining in the ATM unit on March 27, 1986. On December 23, 1985, the Respondent agreed, at the Union's request, to defer bargaining until after the ATM negotiations had terminated. There was no discussion at that time about which party would be responsible for initiating bargaining following the ATM negotiations. Under the circumstances, we do not believe that the Respondent's failure to take the initiative and affirmatively request bargaining after the termination of the ATM negotiations indicates a lack of good faith.

Michael D. Pennington, Esq., for the General Counsel.
Tom Franklin, Esq., of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Denver, Colorado, on 22 October 1987,[1] pursuant to a complaint issued by the Regional Director for Region 27 of the National Labor Relations Board on 26 June 1987, and which is based on a charge filed by International Guards Union of America, Local 66 (the Union) on 20 May 1987. The complaint alleges that Wells Fargo Armored Service Corporation (Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

[1] All dates herein refer to 1986 unless otherwise indicated.

Issue

Whether Respondent has violated the Act by failing and refusing to recognize, to meet with, and to bargain collectively in good faith with the Union as the exclusive bargaining representative of the relevant unit.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a Delaware corporation with headquarters in Atlanta, Georgia, engaged in the business of providing armored car services involving the pickup and delivery of valuables, including cash, checks, and documents from commercial customers and financial institutions, and having an office and place of business located in Boulder, Colorado. It further admits that during the past year, in the course and conduct of its business, it annually provided services valued in excess of $50,000 to other enterprises within the State of Colorado that are directly engaged in interstate commerce and derive income in excess of $50,000 from its Colorado business operations. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Guards Union of America, Local 66 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts* [2]

During all times material to this case, the Union represented three separate units of Respondent's employees: (1) a statewide unit of automated teller machine (ATM) technicians and dispatchers certified by the Board on 7 November 1985 and consisting of approximately 30 employees (G.C. Exh. 7, par. 1); (2) a Boulder, Colorado unit of full-time and regular part-time guards, certified by the Board on 19 November 1985 and consisting of between five to seven employees; and (3) a Denver, Colorado unit of guard employees consisting of approximately 70 employees (G.C. Exh. 7, par. 7). The issue in this case concerns primarily the Boulder unit of guards.

On 17 December 1985, the Union's then attorney sent the following letter to Respondent's attorney and chief negotiator:

[2] Many important facts are contained in a "Stipulation of Facts" (G.C. Exh. 7).

December 17, 1985

Mr. Tom Franklin
Assistant Vice President
Labor Relations, Wells
Fargo Armoured [sic] Service Corp.
Post Office Box 4313
Atlanta, Georgia 30302

Re: Wells Fargo Armoured [sic] Service Corp. & International Guards Union of America, Local No. 66 NLRB Case No. 27 RC 6572

Dear Mr. Franklin:

On November 19, 1985 the National Labor Relations Board certified the International Guards Union of America, Local No. 66 as the exclusive representative for purposes of collective bargaining of all full time and regular part time guard employees employed by Wells Fargo at its Boulder, Colorado location. Pursuant to that certification, please consider this letter a demand that Wells Fargo meet and negotiate with IGUA-66 for the purpose of entering into a collective-bargaining agreement. Please inform me when your bargaining representatives can meet with the union for this purpose or contact me so that we can schedule a meeting.

In addition, since IGUA-66 now represents these employees I request that you send me a list of the names, addresses and telephone numbers of all guards in Boulder that were not in the Excelsior list provided to the union prior to the election.

Very truly yours,
/s/ Kristin A. Kutz
Kristin A. Kutz

KAK/ps
cc: Paul Lynes
opeiu-5
afl–cio

[G.C. Exh. 2]

On 23 December 1985, the parties began negotiations for the ATM unit described above. Franklin represented Respondent at this and subsequent meetings while Kutz represented the Union at this meeting, but not at subsequent meetings.

One of the other persons in attendance on 23 December 1985 was Paul Lynes, president of the Union for a 6-year period of time ending in May. Lynes testified at hearing that Respondent never made a written reply to the 17 December letter published above (G.C. Exh. 2). Whether Franklin and Kutz had a conversation about the General Counsel's Exhibit 2, Lynes was not aware of any such conversation.

On the question of a conversation between Franklin and Kutz, Franklin himself testified at hearing, although he was also representing Respondent at hearing.[3] Licensed to practice law in the States of Missouri and North Carolina, Franklin is Respondent's chief spokesman at negotiations with labor unions. He testified that in the course of negotiations on 23 December 1985, he acknowledged to Kutz that he had received her 17 December letter and further told her that Respondent was ready and willing to negotiate, but would require separate meetings on separate days to negotiate for the ATM unit and for the Boulder unit. To this Kutz responded that she desired to finish the ATM negotiations first, and Franklin agreed.

On cross-examination, Franklin admitted telling the General Counsel before the hearing began that while he was certain of his conversation with Kutz, he was not certain at which of the ATM negotiating sessions the conversation had occurred. Franklin also admitted that he did not make the General Counsel aware that Franklin intended to be a witness. Finally, Franklin admitted that while he kept his own notes during the negotiating sessions, his notes for 23 December do not reflect the conversation with Kutz.[4]

After 23 December 1985, the parties met again during 1986 with respect to ATM negotiations on 16 and 17 January, 20 and 21 February, and 7 and 27 March (G.C. Exh. 7, par. 2). During the 1986 ATM negotiations, Kutz was replaced by Attorney Dennis Valentine of her law firm (G.C. Exh. 7, par. 3). The ATM unit employees went on strike on 23 February and made an unconditional offer to return to work on 12 March. No ATM agreement was ever reached and negotiations were discontinued on or about 27 March (G.C. Exh. 7, par. 4)[5]

Regarding the Denver guard unit, Respondent gave written notice, on 25 August, of its desire to negotiate changes in the existing collective-bargaining agreement. Negotiations began on 3 November, and continued until 20 January 1987 with the signing of a new agreement (G.C. Exh. 7, par. 5).

On 27 February 1987, Attorney Goldhammer, who represented the Union during the Denver guard unit negotiations referred to above, sent a letter to Respondent on behalf of the Boulder guard unit. It reads as follows:

February 27, 1987

Mr. Thomas P.G. Franklin
Wells Fargo Armored Service Corp.
Post Office Box 4313
Atlanta, Georgia 30302

[3] In permitting such testimony by advocates, the Board has held that it is not the Board's function or responsibility to pass on the ethical propriety of a decision by counsel to testify in an NLRB hearing. Where the testimony is otherwise proper and competent, it should be admitted into evidence. *Operating Engineers Local 9 (Fountain Sand & Gravel Co.)*, 210 NLRB 129 fn. 1 (1974).

[4] Although taken by surprise by Franklin's testimony, the General Counsel never requested a continuance to bring in Kutz as a witness. No reason was suggested for Kutz' absence, although she is apparently a practicing attorney in Denver. In light of this, I credit Franklin's testimony despite my misgivings caused by Franklin's failure to mention the conversation with Kutz in his "position paper" (G.C. Exh. 8) submitted to the Board and in other correspondence received into evidence, all of which documents are described below.

[5] On or about 14 June, Lynes had a conversation with a man named Williams, ATM union representative on the negotiating committee. Lynes stated it was no longer in the Union's best interest nor in the ATM unit's best interest for the Union to continue to represent the ATM employees. The record does not show whether the relationship was formally terminated.

Re: Wells Fargo Armored Service Corporation and International Guards Union of America, Local 66 NLRB Case No. 27-RC-6572

Dear Tom:

On December 17, 1985 Kristin Kutz of my firm wrote you a letter demanding that Wells Fargo meet and negotiate with IGUA 66 for the purpose of entering into a collective bargaining agreement for the Boulder, Colorado Wells Fargo armored guards.

Apparently, since that time, the parties have been involved with numerous other matters and negotiations have never begun regarding Boulder employees. However, at this time the union hereby renews its request with the company to bargain in behalf of the Boulder armored employees.

Please contact me at your earliest convenience and let me know when you have times and dates available for this bargaining. Thank you very much.

Very truly yours,
/s/Joseph M. Goldhammer
Joseph M. Goldhammmer

JMG/ps
cc: Paul Lynes
opeiu-5
afl-cio

[G.C. Exh. 3]

On 23 April 1987, Franklin answered with a letter of his own:

23 April 1987

Joseph Goldhammer
1563 Gaylord Street
Denver, CO 80206

Dear Joe:

I have reviewed the Boulder situation. The Company's position in this matter is simple. The National Labor Relations Board certified Local 66 of the International Guards Union of America to represent the Boulder Colorado employees on 19 November 1985. The parties never met to do any negotiating. In fact the only contact the Company had from Local 66 was the December 17, 1985 letter from Christine Koutz [sic]. There has been no attempt by the union to represent these employees since December 17, 1985.

It is our position that the one year presumption of certification has in fact expired and that Local 66 no longer legitimately represents the Boulder employees. The Company will therefore not meet to negotiate concerning these employees.

Sincerely,
/s/ Tom
Thomas P. G. Franklin
Assistant Vice President
Labor Relations

TPGF/jls

[G.C. Exh. 4]

On 6 May 1987, Goldhammer sent a final letter to Franklin, that is, final on terms of the evidence offered at the hearing. It reads as follows:

May 6, 1987

Mr. Thomas P. G. Franklin
Assistant Vice President
Labor Relations
Wells Fargo Armored Service Corporation
P.O. Box 4313
Atlanta, Georgia 30302

Dear Tom:

I am in receipt of your letter of April 23, 1987 regarding the Boulder situation.

This letter is to inform you that we have confidential authorization forms from a majority of the present members of the Boulder bargaining unit. Therefore, even though you may wish to obtain objective evidence to try to rebut the presumption after the one-year certification period has elapsed that the union still represents the members of the bargaining unit, I have evidence which will overcome any such objective evidence.

I would disclose the confidential cards to you only upon the assurance that you would continue to recognize and bargain with the union if I produced that sufficient number of authentic authorization cards. If you cannot provide that assurance, then I will be forced to file unfair labor practices charges for refusal to bargain. Therefore, I would like to know from you whether such disclosure would make any difference in your decision not to bargain with the union. Please respond to this inquiry within ten days. If no response is received within that period of time, I will assume that the cards will make no difference and I will proceed to file unfair labor practice charges.

Thank you very much.

Very truly yours,
/s/ Joseph M. Goldhammer
Joseph M. Goldhammer

JMG: tn
cc: Paul Lynes
opeiu 5
afl-cio

[G.C. Exh. 5)

While Franklin apparently did not reply to Goldhammer's letter of 6 May 1987, Franklin did send on 9 June 1987 a "position paper" to an agent of the NLRB which reads as follows:[6]

[6] The Board directs that so-called position papers of parties sent to the Board should be admitted into evidence, if the substance is material. *Mastillon Hospital Assn.*, 282 NLRB 675 fn. 5 (1987).

June 9, 1987
Wayne L. Benson
National Labor Relations Board
Region 27
260 New Custom House
721 19th Street
Denver, Colorado 80202

Re: Case No. 27–CA–10116

Dear Sir:

I have recently received the amended charge in this case and now have a better understanding as to the basis for the charge. I will attempt to express the employer's positions through this letter.

Local 66 of the International Guards Union of America was certified as a representative of all full time and all regular part time guard employees employed by the employer at its Boulder, Colorado location in case 27–RC–6572 which was dated 19 December 1985. I did receive a letter on February 27, 1987 from Joseph Goldhammer stating that the union wished to negotiate relating to the Boulder employees. I responded to that letter on April 23, 1987 but since the union had not "pressed its demand to enter into bargaining for this unit until February 27, 1987" (as stated in letter from Wayne L. Benson to Tom Franklin dated May 27, 1987) Wells Fargo had no obligation to bargain with Local 66.

It is the Company's contention that the National Labor Relations Board uses a reasonable standard as to the length of time a certification is deemed to be valid. The usual length of time is generally considered to be one year. In this particular case fifteen months have passed since the union "pressed" its right to bargin with Wells Fargo. It is Wells Fargo's position that the one year certification period has run and that the union does not still represent those employees.

It is Wells Fargo's position that at this time the most appropriate remedy would be for the union to get cards signed and press for a new election for those employees.

If you need any further information please feel free to contact me.

Sincerely,
/s/ Thomas Franklin
Thomas P. G. Franklin
Assistant Vice President
Labor Relations

TPGF:jls

[G.C. Exh. 8]

Returning to the testimony of Lynes, I note his testimony on cross-examination with respect to an important issue in this case. I quote directly from the transcript (Tr. 19–20):

> Q. Was there anything in between the [sic] 27 March, 1986 and 3 November, 1986 that was happening that hasn't been brought out here that would have prevented the union from requesting bargaining with the company?
>
> A. Yes.
>
> Q. Would you tell us what that is?
>
> A. Well, I had hip surgery during the negotiations with ATM, and I had rehabilitation. My wife's blind. I have—every time she needs to go anywhere I have to haul her. She has no way getting around. And we had a lot of changes in management, had a lot of grievances. I'm out of town three days a week, so it don't give me much time to get around, you know, get everything done that I want to get done. And through all the problems at the local—at that time I was on the executive board with the international. Had problems with them I had to answer to. Just too many items to keep up with. So between everything happening, time got away from me.
>
> Q. Just one last question, Mr. Lynes. To your knowledge on behalf of both yourself as president and as the officer agent of the union, are you aware at any time that Wells Fargo refused to bargain with you, your union, or your agents regarding Boulder employees?
>
> A. We never did get an answer from Wells Fargo saying they wanted to bargain or give a date.
>
> Q. Other than that, did anybody from Wells Fargo ever tell you or your agents or union that we will not bargain with you? We refused to bargain?
>
> A. Not personally, no.
>
> Q. What about anybody else in the union or your attorneys?
>
> A. Not that I know of.
>
> Q. Thank you.

On redirect examination, the General Counsel continued in the same vein. Again, I quote from the transcript (Tr. 20–21):

> Q. Mr Lynes, you just answered a question about what was going on to prevent you from requesting bargaining between ATM negotiations and the Denver guard unit negotiations. Could you describe for us the financial status of the union during that period of time? Especially right after the ATM negotiations ended.
>
> A. Yes. The financial status of Local 66, right after the ATM, was in bad shape. We had about $1,500 in the treasury and we owed over $10,000 in lawyers fees.
>
> Q. What were these lawyer fees for?
>
> A. For ATM, negotiating the ATM contract and the Colorado Springs contract, and had Vail. Union business.
>
> MR. PENNINGTON: I have no further questions.

B. *Analysis and Conclusions*

1. Do the facts and circumstances of this case establish Respondent's good-faith doubt of the Union's majority status

I begin with relevant rules of law stated in *Buckley Broadcasting Corp.*, 284 NLRB 1339, 1340 (1987):

> Absent unusual circumstances, there is an irrebuttable presumption that a union enjoys majority status during the first year following its certification.[3] On expiration of the certification year, the presumption of majority status continues but may be rebutted.[4] An employer who wishes to withdraw recognition after a year may do so in one of two ways: (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain.[5]
>
> The presumption of continuing majority status serves two important functions: first, it promotes continuity in bargaining relationships, i.e., gives the relationship "some measure of permanence,"[6] and, second, the presumption protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and prevents an employer from impairing that right without objective evidence that the representative the employees have designated no longer enjoys majority support.[7]

[3] *Ray Brooks v. NLRB*, 348 U.S. 96, 98–104 (1954).

[4] *Celanese Corp. of America*, 95 NLRB 664 (1951), cited with approval in *Ray Brooks*, supra.

[5] *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486 (2d Cir. 1975), enfg. 210 NLRB 443 (1974); *Allied Industrial Workers Local 289 v. NLRB*, 476 F.2d 868 (D.C. Cir. 1973), enfg. 192 NLRB 290 (1971); *Terrell Machine Co. v. NLRB*, 427 F.2d 1088 (4th Cir. 1970), enfg. 173 NLRB 1480 (1969).

[6] *NLRB v. Century Oxford Mfg. Corp.*, 140 F.2d 541, 542 (2d Cir. 1944), enfg. 47 NLRB 835 (1943). Chairman Dotson acknowledges the importance of continuity in bargaining relationships, but he does not necessarily accord it absolute supremacy in all contexts. See his and former Member Dennis' joint dissent in *Gibbs & Cox*, 280 NLRB 953 (1986) (withdrawal of recognition in a separately recognized unit that was assertedly "merged" into a larger overall unit).

[7] *Pennco, Inc.*, 250 NLRB 716 (1980), enfd. 684 F.2d 340 (6th Cir.), cert. denied 459 U.S. 994 (1982). See also *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. 2225 (1987).

There are no "unusual circumstances" present in the instant case that might constitute an exception to the above rules. See *United Supermarkets*, 287 NLRB 119 (1987).

Any attempt to establish a reasonable doubt of the Union's majority status must be asserted in good faith, based on objective considerations, and raised in a context free of employer unfair labor practices. *Lockheed Engineering & Management Services*, 271 NLRB 119, 124 (1984).

Each side appears to acknowledge the vitality of the Board rules recited above. Within the framework of the cited rules, Respondent contends (Br. 3) that because the Union sat idle during the presumed certification year and beyond, Respondent can reasonably doubt that the Union represented a majority of Respondent's employees. At page 5 of its brief, Respondent elaborates on its basic argument, contending that this inactivity by the Union is tantamount to abandonment of the units, which again leads Respondent to a good-faith doubt. If Respondent is correct, it is free to withdraw recognition and to refuse to bargain with the Union without fear of violating the Act. To determine whether Respondent is correct, I turn to the record.

The Boulder guard unit was certified by the Board on 19 November 1985. Under Board law, Respondent may not claim lack of majority status for the first year. Thereafter, Respondent is permitted to marshall its evidence to rebut the presumption of continuing majority support. Essentially, Respondent's evidence is that the Union remained inactive insofar as the Boulder guard unit is concerned until 27 February 1987 when Goldhammer wrote the letter recited in section A, infra (G.C. Exh. 3).

If the Goldhammer letter of 27 February 1987 is the terminal point of our inquiry, the beginning point is the Kutz letter to Franklin of 17 December 1985, also recited section A, "Facts" infra (G.C. Exh. 2). This letter is a valid and timely request to bargain. *Yolo Transport*, 286 NLRB 1087 fn. 2 (1987). Again as noted in section A, infra, Respondent acknowledges receipt of the bargaining demand and then agreed with union counsel to defer bargaining for the Boulder guard unit until the ATM bargaining was completed. The ATM negotiations terminated on 27 March (G.C. Exh. 7, par. 2). Arguably, Respondent was legally obligated at this time to respond to the Union's 17 December 1985 letter as Franklin and Kutz had previously agreed.[7]

In light of the above analysis, I find that Respondent is barred from challenging the Union's majority status by a lack of good faith. First, I adopt the General Counsel's argument (G.C. Br. 8–10) that during most of the allegedly inactive period, the Union was negotiating with Respondent with respect to either the ATM or Denver units. Nothing in those activities demonstrates an inactive or uncaring labor organization with respect to the Boulder unit.

Respondent's lack of good faith is evident for a second reason. Subsequent to 27 March, Respondent was under a continuing duty to bargain because the Union's request for bargaining continued in effect. *Dardanell Enterprises*, 250 NLRB 377, 379 (1980), affd. mem. 676 F.2d 687 (3d Cir. 1982). Cf. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); *Ambulette Transportation Services Corp.*, 287 NLRB 224, 228 (1987); Respondent's failure to bargain at a time Franklin had agreed, or at a minimum, to

[7] I accept the General Counsel's unchallenged theory of its case, expressed in par. 9 of the complaint, that dates an alleged violation of the Act from 23 April 1987. This theory successfully avoids any statute of limitations issue, and I note that none was pleaded nor litigated. Accordingly, I need not consider whether in light of Franklin's credited testimony any violation of the Act occurred shortly after 27 March, when the ATM negotiations were concluded. However, I note, the General Counsel's argument in its brief (Br. 13), assuming Franklin is credited, "the Respondent's obligation to respond to the Union's request to bargain was triggered when the ATM negotiations ceased."

arrange for its obligation to be continued again, shows lack of good faith.

In the alternative, as a matter of substantive law, I find that Respondent has not met its burden to show sufficient evidence establishing a good-faith doubt. Assuming, without finding, that mere union inactivity for several months, without additional factors, can lead to a showing of abandonment of the unit, which in turn can be the basis for an employer's reasonable doubt of the union's majority status, I find a lack of evidence to establish that the Union abandoned the Boulder guard unit, or that Respondent reasonably believed it did.

In *Bio-Medical Application of New Orleans*, 233 NLRB 1467 (1977), the Board noted:

> . . . unlike the Administrative Law Judge, we cannot reasonably find that had the Union failed to contact Respondent during [a 6-week period of time], this in itself would be sufficient to warrant the conclusion that the Union had abandoned interest in representing Respondent's employees.

The Board also noted the absence of a decertification petition as further evidence showing no abandonment. (No decertification petition exists in the present case.) See also *Imperial House Condominium*, 279 NLRB 1225, 1233 (1986); *Bay Area Sealers*, 251 NLRB 89, 113–115, affd. 665 F.2d 971 (9th Cir. 1982); and *All Brand Printing Corp.*, 236 NLRB 140, 147–148 (1978). (Union representative failed to visit plant for a 3-year period because union had agreed with respondent that negotiations would not begin until 60 days after bankruptcy order confirming plan of arrangement for settlement of debts.)

In *Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 839–840 (9th Cir. 1978), the court noted that "a union's inactivity, particularly in failing to monitor contract provisions and pursue grievances *is a factor* to be considered in arriving at a reasonable good faith doubt." (Emphasis added.) In that case, the Union did not attempt to negotiate a new contract until 3 years after expiration of the prior agreement. The Union also ceased monitoring compliance with the contract for a period of 2 or 3 years. However, in at least one case, the Union prosecuted a grievance and no showing was made that any other grievance was ignored. Finally, in enforcing the Board's Order, the court noted "the Board properly considered it suspicious that the company failed to assert inactivity as a reason for doubt of majority status until after the Union had resumed an active role." *NLRB v. King Radio Corp.*, 510 F.2d 1154, 1156–1157 (10th Cir. 1975), cert. denied 423 U.S. 839 (1975).

In this case, considering Respondent's evidence in its best light, I find virtually no evidence to support Respondent's claim that it had a reasonable doubt of the Union's majority status. To the extent there is a showing of some union inactivity here, this is only a factor to be weighed with other evidence such as the Union's original demand for bargaining, the Franklin-Kutz agreement to defer bargaining, and the Union's involvement with Respondent's Denver guard unit. I therefore reject Respondent's claim that it had a reasonable doubt of the Union's majority status. I further find, as alleged, that since on or about 23 April 1987, Respondent has violated Section 8(a)(1) and (5) of the Act.[8]

CONCLUSIONS OF LAW

1. Wells Fargo Armored Service Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Guards Union of America, Local 66 is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been and is the exclusive representative of all full-time and regular part-time guard employees employed by the Respondent at its Boulder, Colorado location, but excluding all office clerical employees and supervisors as defined in the Act.

4. By refusing to recognize, meet with, and bargain collectively with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and (5) of the Act, I shall recommend to the Board that Respondent be ordered to cease and desist and that it take certain affirmative action designed to effectuate the policies of the Act. I shall also recommend to the Board that Respondent be ordered to recognize and bargain, on request, with the Union as the exclusive bargaining representative of the employees in the appropriate unit and embody in a signed agreement any understanding reached. I shall also recommend that Respondent be ordered to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Wells Fargo Armored Service Corporation, Boulder, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize, meet with, and bargain with International Guards Union of America, Local 66, as the exclusive bargaining representative of the employees in the following appropriate unit:

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[8] In reaching any decision, I find it unnecessary to consider certain factors in this case, such as assessing the performance of the Union's attorneys during the time covered by this case, or deciding whether Lynes' personal circumstances excused the Union's failure to pursue its original demand for bargaining before 23 April 1987.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All full time and regular part time guard employees employed by the Respondent at its Boulder, Colorado location, but excluding all office clerical employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain collectively with International Guards Union of America, Local 66, as exclusive representative of its employees in the above-described appropriate bargaining unit, and embody in a signed agreement any understanding reached.

(b) Post at its Boulder, Colorado facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize, meet with, and bargain with International Guards of America. Local 66, as the exclusive representative of our employees in the following appropriate unit:

All full time and regular part time guard employees employed by the Respondent at its Boulder, Colorda location, but excluding all office clerical employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, on request, recognize, meet with, and bargain collectively with the above-named Union as the exclusive representative of our employees in the unit set forth above, and embody in a signed agreement any understanding reached.

WELLS FARGO ARMORED SERVICE CORPORATION

Lee & Sons Tree Service *and* Carl Strothers *and* Gregory Strange. Cases 1–CA–18017 and 5–CA–18114

August 19, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On June 13, 1988, Administrative Law Judge Walter H. Maloney issued the attached second supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lee & Sons Tree Service, Oxon Hill, Maryland, its officers, agents, successors, and assigns, shall pay Angela Murphy the sum set out in the recommended Order.

[1] We find that the Respondent has failed to meet its burden of proof regarding either of the contentions made in its exceptions. Concerning the contention that additional deductions from discriminatee Angela Murphy's gross backpay should be made for several "unpaid holidays," there is insufficient evidence of any specific holiday when the Respondent ceased operations and did not pay its employees. Concerning the contention that the Respondent was denied the opportunity to examine Murphy about her search for interim earnings because she did not testify, there is no evidence that she was unavailable to testify or that the Respondent made any effort to compel her testimony.

SECOND SUPPLEMENTAL DECISION

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me in Washington, D.C., on March 23, 1988, on a backpay specification issued by the Regional Director for Region 5 on November 16, 1987, which alleges that there is due and owing to six named discriminatees the amounts of backpay with interest that were set forth after their names in the appendices to the specification. The backpay obligation arose as the result of a Board Order, dated January 28, 1987 (282 NLRB 905), which granted the General Counsel's Motion for Summary Judgment and found that the Respondent had discharged these six individuals on April 14, 1986, in violation of Section 8(a)(1) and (4) of the Act. Respondent agreed that the formula selected by the Regional Director for computing backpay was correct, but disputed any obligation to include in the computations certain holidays and other days on which its work force did not work because of inclement weather. The Respondent also denied any obligation to reinstate discriminatee Carl Strothers because of asserted misconduct on his part following his discharge.

Either at the hearing or at some point in time thereafter, the General Counsel and the Respondent entered into individual settlement agreements involving the cases of discriminatees William Johnson, Louis Ross, Maurice Ross, Gregory Strange, and Carl Strothers. The settlement agreements either have been approved by me or are approved in this decision, and they are severed from this case. As a result there is left for adjudication only the amount due and owing to discriminatee Angela Murphy.

At the hearing the Respondent's president, Melvin Lee, testified that his firm gave regular paid holidays for Christmas, Thanksgiving, Independence Day, New Year's Day, and Martin Luther King's Birthday. The holidays were included in the General Counsel's original computation of gross backpay, which was made on a weekly basis, so that figure need not be disturbed because of the Respondent's contention relating to holidays. The General Counsel and the Respondent agreed that during the backpay period,[1] Respondent's employees lost about 24 days because of inclement weather, but were paid 2 hours for each of those days.[2] Accordingly, backpay computations must be reduced by 6 hours, on a quarterly basis, for each of those days, at Murphy's hourly rate of $5.82. The resulting computation for Angela Murphy is as follows:

Year/Qtr.	*Original gross backpay computation*	*Less time lost for inclement weather*	*Net backpay*
1986/2	$2,560.80	0	$2,560.80
1986/3	3,026.40	[1]104.76	2,921.64
1986/4	3,026.40	[2]384.12	2,642.28
1987/1	1,862.40	[3]349.20	1,513.20
Total			$9,637.92

[1] 3 days x 6 hours x $5.82 = $104.76.
[2] 11 days x 6 hours x $5.82 = $384.12.
[3] 10 days x 6 hours x $5.82 = $349.20.

The Respondent argues in its brief that the net backpay due and owing to A. Murphy should be further reduced by some unspecified amount because of what amounts to willful loss. It argues that her failure to ask for her job back before the Respondent made a formal tender of reinstatement is somehow evidence of an unwillingness on her part to work. The Respondent in this case was the wrongdoer. An obligation to offer reinstatement falls squarely on it, under the terms of the Board's Order, before it can be excused from backpay liability.

[1] The backpay period for all the discriminatees ran from April 14, 1986, the date on which they were discharged, until February 28, 1987, the date on which five of them were offered reinstatement. The computation for Strothers continued to run after that date, but that fact need not concern us now.

[2] The days in question were August 28, September 1 and 2, October 13 and 14, November 5, 11, and 26, and December 2, 9, 11, 18, 20, 26, 1986, and January 2, 22, 23, 26, 27, 28, 29, and 30, and February 2 and 3, 1987.

Respondent argues further that the failure of the General Counsel to place A. Murphy on the stand somehow precluded it from examining her as to the diligence with which she sought other employment during the backpay period. The burden to establish willful loss, either through failure to make an adequate search for work or otherwise, belongs to the Respondent. A. Murphy was present at the hearing in this case and the Respondent could easily have called her to the stand for this purpose had it desired to do so. Its failure in this regard in no way shifts the burden of proof in backpay proceedings, nor does it serve in any way to diminish the amount of backpay which is otherwise due and owing.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Lee & Sons Tree Service, Oxon Hill, Maryland, its officers, agents, successors, and assigns, shall pay to Angela Murphy the sum of $9,637.92, with interest as computed at the short term Federal rate used to compute interest on underpayments and overpayments of Federal income taxes under the provisions of the Tax Reform Act of 1986, less withholdings for taxes and social security required by Federal and state laws. *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Wells Fargo Armored Service Corporation *and* Northeast Armed Guards and Security Association. Case 1–CA–25070

August 19, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On June 13, 1988, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wells Fargo Armored Service Corporation, Wakefield, Massachusetts its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

"(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Kathleen F. McCarty, Esq., for the General Counsel.
Thomas Franklin, Esq., of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried in Boston, Massachussets, on March 10, 1988. The charge was filed November 2, 1987[1] (amended Dec. 9), and the complaint was issued January 15, 1988.

In negotiations on May 1, 1985, the Union (a newly formed guard union) rejected the Company's "final offer" of about $5.50 an hour for employees who were then being paid about $9.50 an hour. The Union, preferring to retain the higher wage without a contract rather than obtain a contract with that pay cut, continued to represent the employees without a written contract while organizing other armored guard company employees.

On October 15, 1987, after being certified at a second company and after engaging an experienced negotiator to serve as business agent, the Union submitted a written "request for a speedy resumption of our return to the bargaining table." The Company refused to deal with the business agent and withdrew its recognition of the Union. Despite the near 100-percent membership of the guards in the Union, the Company contends that the Union "abandoned or disclaimed the unit it was certified to represent" and that the Company "has justifiable grounds to assert a good faith doubt of [the Union's] continued majority support."

The primary issues are whether the Company, the Respondent, unlawfully withdrew recognition and refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, at its facility in Wakefield, Massachusetts, transports money and other valuables for banks and other customers. It annually performs services valued over $50,000 in other States. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Representation Without Written Agreement*

On January 9, 1985, the Union was certified as the exclusive bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time messenger-guards and driver-guards employed by Wells Fargo Armored Service Corporation at its Wakefield, Massachusetts location, but excluding all other employees, money room employees, vault employees, coin room employees, office clerical employees, technical employees, mechanics, professional employees, and all supervisors as defined in the Act.

The employees had voted 18–0 for representation by the Union (G.C. Exh. 2D).

In the fifth negotiating session on May 1, 1985, the Company made a final offer of a wage package of about $5.50 an hour for the crew members who were then "in the $9.50 range." As Union President Robert Currier credibly testified, "The Union, at that time, felt that things were better left alone. As long as the company didn't have a rollback on the employees . . . that we wouldn't attempt to come to a written bargaining agree-

[1] All dates are in 1987 unless otherwise indicated.

ment at the time." (Tr. 57–58.) The Company continued to pay the higher wages and in May 1987 gave the unit employees a wage increase (Tr. 73). It gave this increase and made other changes in working conditions without consulting with the Union (Tr. 77–78).

Meanwhile the Union continued to meet with the Company and attempted to resolve problems despite the absence of a grievance procedure.

It is undisputed, as Union President Currier credibly testified, that he met with the branch manager quite often in 1985, 1986, and 1987. The Company "changed branch managers quite often, and I've met and talked with all of them about union activity." Either the new branch manager or Currier, the secretary-treasurer (John Caughey or Michael Costa), and Trustee Ralph Leavy would request a meeting. Ususally more than one of the union representatives would attend these meetings. They discussed with the branch manager the lack of a union agreement, working conditions, the shortage of employees at the Wakefield branch, and various complaints and concerns. (Tr. 59–60, 67–69.)

The union representatives also met with the branch manger concerning a number of disciplinary actions. On one occasion in the spring of 1987 the Union was successful in getting employee William Damon reinstated On other occasion that spring the Union succeeded in getting employee Ralph Leavy's suspension reduced. (Tr. 80–81.)

About July 7 Union President Currier and Secretary-Treasurer Costa met Branch Manager Larry Gleak concerning the Company's withdrawing a 50-cent increase that employees Paul Brickley and John Martin had received in May. The union representatives "explained to [Gleak] that we were short manpower, there was a labor shortage on the premises, and to bring the rollback in pay would only create more headaches." Gleak promised to speak to Assistant Vice President Joseph Marinelli about it. (Tr. 29–30.)

On July 21 Currier and Costa again met with Gleak, along with Assistant Branch Manager David Heagan. Gleak stated that he had spoken to Marinelli and told them that the wage increase had been a clerical error (the employees being in the wrong classification) and that the rollback would stand. Currier stated that they were seeking "some kind of compromise that we could bring back to the membership, that would pacify the membership." He asked that the Company restore the wages immediately "because we should be talking about other things that were a concern in the garage, working conditions and so on." Then "we came to an impasse, and I suggested that they were backing us into a corner, and we couldn't do anything else except have a job action." It is undisputed that Gleak stated, or agreed, that "the ball is really in our court." (Neither Gleak nor Heagan testified.) (Tr. 30–311, 61–63, 73–75.)

The next day, Wednesday, July 22, the Union met and decided to have a 1-day job action. Then on Friday morning, July 24, President Currier telephoned the vault supervisor and advised him that the crewmembers in the bargaining unit would not be showing up to work that day "because of the impasse we had with the company in regards to the Brickley and Martin case." All except two of the unit employees stayed off the job that day—without any placards or picketing. (All, or nearly all the approximately 22 crewmembers were union memebers. A total of 19 of them paid dues that month. (Tr. 42; G.C. Exh. 5.) The employees returned to work Saturday, the following day, and continued to work without a union agreement. (Tr. 32–33, 35, 43, 63–64.)

B. *Withdrawal of Recognition*

The Union was conducting a successful organizing campaign at Brinks in Boston and also in Providence. It was certified for the guard unit in Boston on September 25 and in Providence about December or early 1988. (Tr. 16.)

On October 4 (Tr. 7) the Union selected Bertram Farnham, an experienced labor leader (Tr. 17), to be its business agent and secretary-treasurer. (He had briefly (Tr. 8) served as secretary-treasurer when the Union was founded in November 1984.)

On October 15 Farnham and President Costa, along with Trustee Leavy, who had been discharged about a week earlier, met with Assistant Vice President Marinelli and Branch Manager Heagan. Franham handed Marinelli a letter, dated October 15, that read:

> Please accept this notice as a request for a speedy resumption of our return to the bargaining table for the purpose of concluding a collective bargaining agreement. The [Union] waits your early reply. Please contact the undersigned [Farnham] at the following address.

Farnham identified himself as the Union's secretary-treasurer and business agent. (Tr. 9–13, 18, 36–37.)

Marinelli refused to recognize the Union or to deal with Farnham. He stated that the Company would not recognize Farnham as the secretary-treasurer of the Union and would not discuss anything with him, but that he had no objection to talking to employee Costa and to Leavy about his discharge (Tr. 12, 37). Neither Marinelli nor anyone else with the Company responded to the Union's written request to resume bargaining (Tr. 14).

Thus the Company on October 15 withdrew its recognition of the Union and since then has refused to bargain with it.

C. *The Company's Defenses*

The Company offers two defenses for withdrawing recognition and refusing to bargain with the Union.

First, the Company contends in its brief (at 4) that the Union "abandoned or disclaimed the unit it was certified to represent." It refers (at 5) to the Union's decision that "it was better to negotiate a collective-bargaining agreement and to leave everything status quo." Then, ignoring the evidence that the Union continued to represent the employees in meetings with the branch managers, the Company claims that the Union "never did again represent the employees." I reject this defense as frivolous.

Second, the Company contends (at 8) that "the facts of this case give rise to good faith, reasonable doubt as to [the Union's] majority status." It argues (at 9–10)

> The Union exerted no authority and no power from May 1985 until it filed the present charge. Wells Fargo Armored made many unilateral changes in working conditions without consulting anyone or any union. The Union never complained of these changes and never filed any unfair labor practice charges over them. Wells Fargo fired 18 people between 1985 and 1987. No grievances were filed or pursued. There was a one day strike on 24 July 1987. No one from [the Union] called Wells Fargo Armored and identified the strike as a [union] event. . . . The turnover at this branch was tremendous. Two hundred and nine employees worked in the unit classifications in a three year period. Today only six of the original group of employees remain in the unit.
>
> The large amount of time which was passed without union activity further suggests a lack of support by the employees of the Union. The last bargaining session was 1 May 1985. Twenty nine months passed before the [Union] made a request to meet with and bargain with the Company in October 1987.
>
> . . . .
>
> All the above factors form the basis for a reasonable, good faith doubt as to [the Union's] continued majority support.

Thus the Company cites no evidence of any employee disaffection with the Union and ignores the evidence that a large majority of the unit employees were dues-paying members. It also ignores the undisputed testimony that before the 1-day strike Union President Currier told the branch manager and his assistant that the union representatives were seeking a compromise "we could bring back to . . . pacify [our] membership" and warned them that they "were backing us into a corner, and we couldn't do anything except have a job action." The Company was therefore aware that the strike was a union event. The failure to protest the Company's unilateral actions and to file grievances relates to the absence of a collective-bargaining agreement and to the perceived relative strength of the parties in the bargaining relationship—not to any doubt of union support.

Although unable to negotiate a satisfactory collective-bargaining agreement, the Union continued to represent the unit employees and to command their support.

D. *Concluding Findings*

In *Alexander Linn Hospital*, 288 NLRB 103 (1988), the Board quoted the "longstanding legal principals" governing the withdrawal of recognition:

> After the certification year the presumption of majority status becomes rebuttable. . . . An employer who refuses to bargain with an incumbent union may rebut the presumption of majority status by establishing either (1) that at the time of the refusal to bargain the union in fact did not enjoy majority status, or (2) that the refusal was predicated on a good-faith and reasonably grounded doubt, supported by objective considerations, of the union's majority support.

As in that case, at fn. 19, "There is no evidence, nor any contention, that the Union had in fact lost its majority status." Instead, the evidence shows that a large majority of the unit employees were dues-paying members.

The Company, however, argues in its brief (at 7) that "A lot of time has passed since the date of certification" and "there was a tremendous amount of turnover." But, as in *Alexander Linn Hospitals*, the Company's "reliance on employee turnover is misplaced. The Board presumes that new employees support the union. See *Laystrom Mfg. Co.*, 151 NLRB 1482 (1965), enf. denied 359 F.2d 799 (7th Cir. 1966)." The Company has offered no evidence of union nonsupport to rebut that presumption.

I find that the Company did not have a good-faith and reasonable doubt, supported by objective considerations, of the Union's majority status. I, therefore, find that its October 15 withdrawal of recognition from the Union and its refusal to bargain since then violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By withdrawing recognition from the Union on October 15, 1987, and refusing to bargain since then, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Wells Fargo Armored Service Corporation, Wakefield, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Northeast Armed Guards and Security Association as the exclusive representative of the employees in the bargaining unit.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of

---

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time messenger-guards and driver-guards employed by Wells Fargo Armored Service Corporation at its Wakefield, Massachusetts location, but excluding all other employees, money room employees, vault employees, coin room employees, office clerical employees, technical employees, mechanics, professional employees, and all supervisors as defined in the Act.

(b) Post at its facility in Wakefield, Massachusetts, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Northeast Armed Guards and Security Association as the exclusive representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time messenger-guards and driver-guards employed by Wells Fargo Armored Service Corporation at its Wakefield, Massachusetts location, but excluding all other employees, money room employees, vault employees, coin room employees, office clerical employees, technical employees, mechanics, professional employees, and all supervisors as defined in the Act.

WELLS FARGO ARMORED SERVICE CORPORATION

Fox-Art Theatres, Inc. *and* Philadelphia Moving Picture Machine Operators Union Local No. 37 a/w International Alliance of Theatrical Stage Employees of the U.S. and Canada. Cases 4–CA–14631, 4–CA–14631–2, and 4–CA–14735

August 22, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On February 28, 1986, the National Labor Relations Board issued a Decision and Order[1] ordering the Respondent, inter alia, to make employee Irwin Kamner whole for any loss of earnings and benefits resulting from the Respondent's unfair labor practices, which violated Section 8(a)(3) and (1) of the National Labor Relations Act, and to make whole its unit employees for their losses and make payments on their behalf to the Union Pension Plan and Welfare and Insurance Fund for losses resulting from the Respondent's unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, and its failure to comply with the provisions of Section 8(d).

On August 29, 1986, the United States Court of Appeals for the Third Circuit entered its consent judgment enforcing the Board's Decision and Order.

On February 29, 1988, the Regional Director for Region 4 issued a backpay specification and notice of hearing. The Respondent filed a timely answer to the backpay specification. In its answer, the Respondent admitted each allegation in the specification.

On July 1, 1988, the General Counsel filed with the Board a Motion for Summary Judgment. In her motion, the General Counsel contends that the Respondent has raised no question of fact or law regarding the Respondent's obligation under the Board's Order, as enforced, and that the Respondent's obligations total $42,662.70, plus interest, as calculated and set forth in the backpay specification.

On July 6, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On July 20, 1988, the Respondent filed a response.

Ruling on Motion for Summary Judgment

Section 102.54 of the Board's Rules and Regulations provides in pertinent part as follows:

> (a) . . . The respondent shall, within 21 days from the service of the specification, if any, file an answer thereto. . . .
>
> (b) . . . The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. . . . As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice.
>
> (c) . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (d) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

In its response to the Notice to Show Cause ("Respondent's answer to General Counsel's Motion for Summary Judgment"), the Respondent admits that its obligations under the Board's Order total $42,662.70, plus interest, as calculated and set forth in the backpay specification, but states that "[i]t is denied that the Respondent has raised no questions of fact or law requiring a hearing or any further litigation as to its make whole obligations under the Board's Order, as enforced, insofar as the averment is a conclusion of law to which no response is required and the same is therefore denied." The response to the Notice to Show Cause fails to state specifically the basis for disagreement with the backpay specification or the question of fact or law that the Respondent has raised.

Accordingly, as the Respondent's answer has admitted each of the allegations of the backpay specification and the Respondent has not specifically denied the allegations of the backpay specification in its response to the Notice to Show Cause, nor adequately explained its failure to do so, we will grant the General Counsel's Motion for Summary Judgment and deem the allegations of the backpay specification to be admitted as true pursuant to Section 102.54(c).

[1] 278 NLRB 812 (1986).

ORDER

It is ordered that the General Counsel's Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that the Respondent, Fox-Arf Theatres, Inc., Narberth, Pennsylvania, its officers, agents, successors, and assigns, shall make whole Irwin Kamner and each of the unit employees listed in the backpay specification by paying them the amounts stated in the specification, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*,[2] and by paying on employees' behalf to the Union's Pension Plan and Welfare and Insurance Fund amounts set forth in the backpay specification, with interest.

[2] 283 NLRB 1173 (1987). Interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

Ziniz, Inc. *and* Lee Murray

Local 207, Successor to Local 1241, Millwrights and Piledrivers, a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO *and* Lee Murray. Cases 9–CA–24673 and 9–CB–6897

August 22, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 31, 1988, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent Employer filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that Respondent Employer Ziniz, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, and that Respondent Union Local 270, successor to Local 1241, Millwrights and Piledrivers, a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Columbus, Ohio, its officers, agents, and representatives, shall take the action set forth in the Order, except that the attached Appendix A[2] is substituted for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Minor grammatical errors in the judge's notice to employees have been corrected.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against you because you have attempted to enforce terms and conditions specified in our collective-bargaining agreement with Local 207, successor to Local 1241, Millwrights and Piledrivers, a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO.

WE WILL NOT threaten to discharge employees because they have attempted to enforce the terms of the aforesaid collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Bobby Lee Murray and Al Grubb Jr., immediate and full reinstatement to their former jobs on the UPS Project, if those jobs still exist, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less interim earnings, plus interest as set forth in the Decision of the Administrative Law Judge.

ZINIZ, INC.

Engrid Emerson Vaughn, Esq., for the General Counsel.
Dennis J. Stilger, Esq. (Hebel, Hornung, and Stilger), of Louisville, Kentucky, for the Respondent Employer.
Frederick G. Cloppert, Jr., Esq. (Cloppert, Partman, Sauter, Latanick & Foley), for the Respondent Union.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was heard by me in Columbus, Ohio, on 7 and 8 January 1988, on unfair labor practice charges filed separately on 17 September 1987 against Respondent Union and Respondent Employer. Based thereon, a consolidated complaint issued on 18 December 1987, alleging that Respondent Union independently violated Section 8(b)(1)(A) of the Act by threatening employees because they asserted rights acquired under a collective-bargaining agreement, by physically assaulting an employee because he expressed an intent to file unfair labor practice charges, by threatening an employee with a loss of work unless he agreed to drop intraunion and/or unfair labor practice charges, and by refusing and failing to accept employee grievances for processing under the subsisting collective-bargaining agreement. The complaint further alleged that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by causing or attempting to cause Respondent Employer to layoff or terminate employees Lee Murray, Al Gribb, Vincent Monteneri, and Homer Halley, because, inter alia, they concertedly complained about working conditions. Additionally, the complaint, as amended, alleged that Respondent Employer violated Section 8(a)(3) and (1) of the Act by terminating the above-named employees on request of Respondent Union or, alternatively, because they concertedly com-

plained about working conditions. Finally, it is alleged that Respondent Employer independently violated Section 8(a)(1) by threatening employees with discharge because they persisted in such complaints. In duly filed answers; Respondents denied that any unfair labor practices were committed. After close of the hearing, briefs were filed on behalf of the General Counsel, the Respondent Union, and the Respondent Employer.

On the entire record in this proceeding, including my opportunity directly to observe the witnesses while testifying and their demeanor,[1] and after consideration of the posthearing briefs it is found as follows.

I. JURISDICTION

Respondent Employer, a Kentucky corporation, is engaged as a contractor in the construction industry in various States of the United States, including a project calling for the installation of equipment at a United Parcel Service (UPS) facility in Columbus, Ohio, the sole jobsite involved in this proceeding. During the 12-month period preceding issuance of the complaint, a representative period, Respondent Employer purchased and received at that jobsite goods and materials valued in excess of $50,000 directly from points outside the State of Ohio.

The complaint alleges, Respondent Employer admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the parties concede, and I find that Respondent Local 207 (the Union) is a successor to Local 1241, Millwrights and Piledrivers, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO and a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

The issue of primary remedial concern in this proceeding arises from the midjob layoff of a number of union millwrights. All were members of Respondent Union. Initially the complaint rested exclusively on a theory that the discrimination was inspired by Respondent Union. This view was premised on the notion that, when longstanding union members asserted rights under a collective-bargaining agreement negotiated by the Union, the latter's functionaries were so offended that they intervened to cause the Employer to furlough the complaining employees. At the hearing, however, the complaint was amended to add an alternative theory, which assumes that the Respondent Employer acted to punish these workers for the complaints.

The jobsite involved was located in Columbus, Ohio, within the geographic jurisidiction of Respondent Union. Respondent Ziniz, a contractor based in Louisville, Kentucky, had been retained on that job to install a conveyor system on behalf of United Parcel Service. The general contractor was nonunion. However, Ziniz, prior to the commencement of work, agreed to be bound to the Respondent-Union's agreement covering millwrights on this job.[2]

Work commenced in early January 1987, and initially was scheduled for completion some 54 weeks later in January 1988. Jay McMillan was the Employer's superintendent on the job. The general foreman was Tom Waller, a union member, who was retained by McMillan, on recommendation of Respondent Union's business agent, David Evans. All millwrights were referred by Evans pursuant to the 48-hour, exclusive hiring arrangement set forth in article 4 of the governing collective-bargaining agreement. The job was manned also by crafts outside the Union's jurisdiction, including operating engineers and ironworkers.

Lee Murray (the Charging Party) is the central figure in this controversy. He is a journeyman millwright and a longstanding member of the Union. He was referred by the latter for employment with Ziniz in March 1987.[3] On 28 August, Respondent laid off two apprentice millwrights, six journeyman millwrights, two ironworkers, and a foreman. Since the layoff, up to the date of the hearing, Ziniz has hired four millwrights through the hiring hall. It does not appear that any of the 11 furloughed employees ever again were referred to the UPS jobsite.

The General Counsel contends that of the 11 that lost their jobs, Murray, Grubb, Monteneri, and Halley were unlawfully furloughed in reprisal for their efforts repeatedly to secure Respondent Employer's adherence to the collective-bargaining agreement—conduct that clearly falls within the protective mantle of Section 7 of the Act. *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967); *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

B. *Concluding Analysis*

1. The alleged protected activity

The complaint is critically dependent on parol testimony by Murray, which from time to time was augmented through the corroborative efforts of Grubb and Monteneri. Their testimony ranged from the entirely believable, to heavily exaggerated, to absolutely improbable. All three struck me as laboring under a conspiratorial bias. In any event, there can be little dispute that Murray and his coworkers, during their tenure on the job, questioned the compliance by Ziniz with the dictates of the collective-bargaining agreement, thereby satisfying the initial element of the General Counsel's burden.

Objectively viewed, certain of their complaints inherently would tend to serve as stronger irritant to manage-

[1] Credibility resolutions made are occasionally accompanied by objective rationale. This is intended to reinforce, not diminish, perceptions gained through my firsthand observation of the witnesses and their demeanor. Furthermore, unmentioned testimony is rejected to the extent that it is irreconcilable with expresaly credited evidence.

[2] See G.C. Exh. 2.

[3] Unless otherwise indicated, all dates referred to are in 1987.

ment than others. The early complaints seemed less extreme. None on their face typically would arouse emnity of the average labor functionary. All were confined to a 5-month period coextensive with Murray's tenure on the job. Thus, Murray testified that during the first week of his employment in March he complained about Ziniz' failure to furnish welding gloves and other safety equipment. He allegedly informed Business Agent Evans that Foreman Waller instructed Murray to purchase his own equipment for use on the job. On the credited evidence, however, it is concluded that the shop steward on the job, Rick Satterfield, did secure welding gloves for Murray, and welding glasses were also provided by management. As for the other safety equipment, based on the credited testimony of Business Agent Evans, contrary to Murray, it is concluded that the millwrights were required to provide their own welding hoods. Thus, in this area, the issues were routinely resolved in consonance with the contract through union intervention and without incident.

Receiving a similar disposition was Murray's complaint in May to Evans that the Company had refused to provide ice water as required by the contract. According to the credible evidence, the incident arose in mid-April, apparently due to unseasonably hot weather, and was corrected in due course. Any delay was attributable to the fact that ice water is generally the responsibility of the general contractor, who in this case was nonunion.

Murray, without corroboration, testified that, during the summer, he and other men complained about an unsafe condition created when workers were lifted by fork trucks without handrails and safety belts. As I understand Murray's testimony, when he complained to Satterfield, he was told, "you had a complaint, go down the road"; and when the issue was raised with General Foreman Tom Waller, "he just laughed at us." Nothing in the background suggests a probability that either Satterfield or Waller would have reacted at that time with such hostility when such a clearly defined safety hazard was called to their attention.

Murray's more current complaints were not resolved favorably to the employees. The first involved an alleged violation of article 16, paragraph 1 of the collective-bargaining agreement, which, in material part, states: "No foreman shall be in charge of more than six (6) men, another foreman for each six (6) millwrights thereafter will be appointed." At the time, Murray's crew apparently included Grubb, Monteneri, Bill Tomlin, and Phil Meyers. They were assigned to Foreman Danny Offill. About a week before the layoff, Offill was off work, apparently due to illness, for 2 days. Instead of naming a new foreman, General Foreman Waller assigned the crew to Foreman Bob Dillon. Dillon already had a crew and informed Murray that during this period he had between 13 and 15 men working under him. According to Murray, when he protested to Dillon, the latter agreed that the arrangement was incorrect but stated that "the company had a policy of breaking the contract" and that the business agent, and Thomas Waller, the general foreman of Ziniz, both had approved it, and that this is the way they were running the job.[4]

That same morning at approximately 8 o'clock, Murray assertedly sought out Waller, informing him that under the contract he was supposed to designate a foreman from the crew and that Dillon was barred from supervising 15 men. According to Murray, Waller responded, "that he was running the job and that he made the decisions." Murray was told that if he did not like it, he could "go down the road and find another job somewhere else."[5] Murray could not recall if he was accompanied, but then asserted a belief that Grubb was present. Grubb denied that this was the case. Murray then sought out Steward Satterfield. During a coffeebreak, he, together with Monteneri and Grubb,[6] informed Satterfield that Dillion was working 15 men, while Offill was off, and that Ziniz should have designated one of the journeymen as foreman, paying him the 75-cent hourly differential. According to Murray, Satterfield responded that it was Waller and Dave Evans who were running the job and that Satterfield could be of no help.[7]

The next day, Murray, having had no success, confronted Job Superintendent McMillan inquiring who made policy on the job. McMillan acknowledged that he was in charge. Murray then asked if it was his policy "to break our contract, and beat a man out of a lousy 75-cents an hour for a couple of days here?" McMillan replied in the negative. When Murray argued that he had been deprived of 75 cents an hour during the 2-day

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[4] Dillon was not called, and hence there is no explanation for the seemingly implausible remarks attributed to him by Murray. My suspicion of his account was enforced by my belief of Evan's testimony that he agreed with Murray and pressed his view to Superintendent McMillan. I was singularly unimpressed with Murray. His demeanor reflected a contentious posture, and a propensity to impose self-centered views on others through baseless argumentation, half-truths, exaggeration, and a manipulative, somewhat creative, approach to fact. On several occasions, his efforts to further his cause through declarations founded on mistaken perception impelled him to recant. Moreover, in the total circumstances, it is considered unlikely that Evans would have approved this departure from the contract, or that Dillon, himself a union official, would have indicted his business agent in a sell out to management. It is also difficult to believe that the Union would have forsaken its representational duties where the total value of the contract breach was $12. It is true that Monteneri and Grubb attempted to corroborate that Dillon stated that Evans had approved the breach of contract. I discredit them as well. Neither Grubb nor Murray identified Monteneri as present during the conversation with Dillon.

[5] General Foreman Waller, like Foreman Dibbs, was a longstanding member of Local 207 and its predecessors.

[6] Monteneri was not part of the crew and as an apprentice, he had no pecuniary stake in the outcome.

[7] Earlier, in April, Murray claims to have raised the same basic issue. He states that on that occasion an individual named Bleemel was supervising five crews, and also had a personal crew of 8 to 10 employees, including Murray. Murray claims that Bleemel on one occasion assigned him to work independently with three or four men on blueprints. Murray felt on that occasion that one of them should have received foreman wages. However, when he told Evans about it, Evans told Murray to forget it. This seemed an appropriate response, for Bleemel was Ziniz' key man on the job. Even if a general foreman, however, Bleemel was not limited contractually to the number of men he could superise. Murray had other complaints about Bleemel, including a charge that he worked with tools, conduct that Murray later admitted to be unrestricted by the president contract.

period of Offill's absence, McMillan indicated that he would take care of it.[9]

Murray did not again hear from McMillan. When he discovered that the extra 75 cents was not in his paycheck, he again sought out McMillan. McMillan this time allegedly told Murray that he had discussed the issue with Evans, and that Evans told him that as far as he was concerned the ratio was correct. McMillan went on to explain that when the total number of foremen on the job is divided into the total complement of millwrights, the resulting ratio was in compliance with that specified in the contract. Murray disputed this interpretation, arguing that Evans did not have the authority to delete, add to, or modify the contract. McMillan indicated that the decision was final, and that Murray would not be paid the additional sum.[9]

During their coffeebreak, Evans and Monteneri requested and were given permission to use McMillan's telephone to call Evans. Murray avers that Evans indicated that he had approved the Company's position that the seven foremen on the job were sufficient if divided by the total work force. Murray disagreed, going on to state that he had complained about union conditions for sometime, and that Evans had corrected none of them. He advised Evans that he would appreciate a transfer to another project if Evans was going to run the Ziniz job nonunion. Murray asked for a job in Cambridge, Ohio, but Evans told him "if you want another job, you just come down here, and quit that job, and come down here and go on the bottom of the list, and wait your turn, and I'll send you out when I get around to it." Evans allegedly told Murray that it was Evans' obligation to man the Ziniz job and Murray should stay right there. Monteneri then got on the phone and talked to Evans. Monteneri relates that Evans lectured that Murray was a "troublemaker" and that Monteneri should watch who he hung around with. According to Murray, McMillan was at his desk and in a position to overhear segments of their conversation.

The month of August was marked by several other issues championed by Murray. The first addressed the Company's employment of workers from Kentucky.

Murray's concern here was twofold: (1) an out-of-state foreman was retained in contravention of article 16, paragraph 4, which requires that "all foreman shall be qualified journeyman and members of the union having jurisdiction,"[10] and (2) the possibility that out-of-state millwrights might be retained when local millwrights are laid off. Shortly before the layoff, Murray avers that he had two conversations with Satterfield regarding this issue. First, Murray complained that the Company's use of foreman from Kentucky was wrong when qualified local people, who pay dues in the area, and were qualified to handle the work, were denied the opportunity. Satterfield allegedly replied that there were no local people available, an explanation that allegedly was echoed by Evans, when the problem was presented to him by Murray.

In the second conversation, Satterfield allegedly responded that he had discussed the issue with Evans and that Evans indicated that if the employees had grievances and complaints to go down the road and look for another job, because no grievances or complaints would be accepted on the UPS project.[11] When Murray allegedly sought to confirm that the Union would refuse to accept a grievance, Satterfield indicated that that is exactly what Evans told him to relate to Murray.[12]

A jurisdictional issue triggered the final complaint registered in August. In this regard, Murray relates that in the week before the layoff, while he, Grubb, and Monteneri were working on the belt crew, they observed members of Local 18 of the International Union of Operating Engineers installing guards and drive chains on the conveyor and running the overhead crane on the job. Murray felt that this was an intrusion on traditional millwright work. When approached, according to Murray, the operating engineers explained that the work had been assigned by Foreman Waller. In the presence of other members of his crew, Murray raised the issue with Foreman Dillon, who allegedly stated that he was without authority to alter the condition, if Waller had okayed it. Murray, together with Monteneri, then reported the matter to Satterfield.[13] Next Murray went to see Waller,

[9] The mere fact that Murray carried the matter to McMillan raises suspicion. At a minimum, it suggests that he did not accept that Evans had licensed the arrangement. Along that same line, in accord with Murray's account, one might rightfully assume that McMillan was either unmindful that Evans had condoned any such arrangement, or that, unlike Dillon, he declined to rebuff Murray with that information. Needless to say, I did not believe Murray, or anyone else who related that they received information that Evans concurred in the Employer's interpretation of art. 16.

[9] Murray states that this conversation took place in the presence of Grubb. It is the sense of Grubb's testimony that he was not present.

[10] An exception to this policy is suggested by art. 4, par. 2, wich authorizes employer to select one foreman "and/or" one key man.

[11] Monteneri describes the issue differently. He states that they complained to Satterfield that Kentucky men were on the job while local men were on the Union's out-of-work list. This varies meterially from the description of the issues offered by other witnesses, but if true, would provide a logical foundation to Satterfield's alleged response that "there were no local people available." Monteneri also stands alone in offering testimony concerning an incident arising 2 to 3 weeks prior to the layoff. Thus, he states that "we complained to Satterfield and Evans about the hire of an inexperienced foreman, whereupon they got the same general answer, i.e., "you want to complain, just find another job." Monteneri did not identify who else was involved in the incident, and his uncorroborated testimony is rejected.

[12] Satterfield acknowledged that prior to the layoff, in response to rumors, several men, including Murray, asserted that out-of-staters should be the first to go. He could recall no other complaints concerning that group. However, he, together with Evans, credibly related that the position advanced by the Union to management accorded with Murray's view and supported the local area preference. For this reason, and because the testimony of Murray, Monteneri, and Grubb in this regard did not ring true, I reject testimony that he suggested that they should quit, rather than register complaints. I also discredit the uncorroborated testimony of Murray that Satterfield took the position that grievances would not be accepted on the job.

[13] Satterfield testified that he checked the complaint only to find that Foreman Dillon and the operating engineers denied any intrusion on millwright's work. Although he did not personally observe any violation, Satterfield reported the charge to Evans and McMillan. Evans testified that in response he visited the jobsite and instructed McMillan to respect the jurisdictional rights of his Union. Evans also claims that he received and responded to a second complaint concerning the operating engineers. According to Evans, when he confronted Waller in this regard, Waller explained that the operating engineers were underworked and standing around. Evans claims to have rejected this excuse, insisting that they not

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challenging his right to assign the operating engineers to do millwright work. As I understand Murray's testimony, Waller explained that because the operating engineers were experiencing downtime, he opted to utilize them where he could, rather than having them sit around or be laid off.[14]

2. Foreman Waller's threat

The most crucial testimony in this case relates to an alleged encounter with Waller on the Wednesday prior to the layoff. At the time, a number of workers were on break, gathered around a coffee truck.[15] According to Murray, as the men were rehashing their jurisdictional complaints, Waller approached. Murray asked, "Tom, are you going to straighten this crap out?" Murray assertedly stated that the job was not being run according to the contract, that he could not live with it, and that he would file charges and get a hearing before the Union's district council against Waller and Dave Evans. Waller responded that he was running the job, and that he did not have to explain his decisions and actions to anyone. He allegedly told Murray that if he did not like the way he ran the job, Murray could quit, adding that if the men were going to "bitch together," they could "go down the road together."[16] These threatening remarks, including Waller's prediction that concerted complaints by employees concerning their working conditions would lead to discharge, substantiate that Respondent Employer independently violated Section 8(a)(1) of the Act. I so find.

3. The 28 August layoff

Virtually from its inception, rumors of layoff had circulated throughout the project. On Friday, 28 August, shortly after their coffeebreak, Murray was tipped off by an ironworker steward that he and Grubb would be laid off. When Murray sought confirmation from Satterfield, the latter stated that he knew nothing, but indicated that he would investigate. Later Satterfield returned, confirming that Grubb and Murray were affected. When Satterfield was unable to furnish a reason, Murray and Grubb sought out McMillan, who confirmed their inclusion. Murray argued to McMillan that it made no sense, as he was a leadman and had done quite a bit of work. McMillan allegedly responded that the layoff was decided by Waller and Evans, it already had been arranged and he had nothing to say about it. At this point, Murray mentioned the Kentucky men and apprentices, and others hired after him, asking whether they would be retained. McMillan is alleged to have replied that "all" were staying, adding that he had no complaint about Murray's work, but that Waller and Evans "decided that you would be gone."[17]

Murray then sought out Waller. He confronted him stating, "I understand I am being laid off." Waller said "that is correct." When Murray asked what was going on, Waller allegedly replied, "Well, I told you, if you're going to bitch together, you're go down the road together." Waller allegedly added that he had had enough, that he was running the job, and that he would make the decisions. Murray injected that he did not agree with those decisions. Waller said that if he had any complaints, to take them up with Evans, who had already okayed the layoff.[18]

That evening, Murray called the union hall several times, but could not reach Evans. On Monday morning, he went to the hall with Grubb, Halley, and Monteneri. Evans again was unavailable. He alleges that he informed the Union's secretary that they wished to grieve their layoff. Moreover, being dissatisfied with the secretary's effort to contact Evans, Murray told her to advise Evans that they would take the matter to the National Labor Relations Board and the Union's district council. With her permission, he then telephoned the NLRB in Cincinnati, Ohio, to request forms for filing unfair labor practice charges.

In analyzing the issues of discrimination, it is first observed that the General Counsel's proof does not support a reasonably based inference that the overall layoff, even partially, was founded on prescribed considerations. There is not a scintilla to suggest that the Respondent Employer eliminated seven innocent workers, including a foreman, two ironworkers and an operating engineer, to mask its interest in eliminating the four alleged discriminatees. In this posture, the General Counsel is relegated to proving that Murray, Grubb, Halley, and Monten-

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be used to perform millwright work. I believed Evans. In passing, it is noteworthy that Monteneri added several incriminating details, which were unconfirmed from other sources. First, he averred that Dillon stated that Evans had approved the use of operating engineers to perform millwright's work. Second he stated that Satterfield rejected the jurisdictional complaint, advising the men not to make waves. I did not believe Monteneri.

[14] It is the sense of Grubb's testimony that he did not accompany Murray when the latter confronted Waller and/or Satterfield concerning the operating engineers.

[15] Alleged discriminatee Homer Halley did not testify. He was described as simply "standing there" during this incident. He was not identified as having taken an active role in this any other incident litigated in this proceeding.

[16] Monteneri and Grubb confirm that Waller this latter remark. Waller, made though actively on payroll status at the time of the hearing (see Res. Emp. Exh. 6), was not called as a witness. Despite misgivings concerning the credulity of Murray, Grubb, and Monteneri, considering the import of the remark attributed to Waller and his apparent availability, it is fair to infer that, if called, his testimony would not have supported the Employer's interest. I also reject the denial that Waller, though general foreman, was not a supervisor. There is ample basis for deeming his actions to be binding on the Employer. Waller reported directly to Superintendent McMillan, and with the possible exception of the key man, was second in command on the project. Other foreman reported to Waller, received assignments from him, and he was responsible for the faithful discharge of duties by supervisors and rank-and-file workers within his jurisdiction. He was consulted concerning the employees to be retained in the event of a layoff and he clearly exercised independent judgment in the assignment of work and the direction of the work force. It is concluded that General Foreman Waller was a supervisor within the meaning of Sec. 2(11) of the Act.

[17] Grubb's version indicated that McMillan named Waller and Evans as having "made the layoff list." Monteneri, who did not witness the conversation, relates that in a separate conversation with Waller, he was referred to Evans to explain his inclusion because it was Evans who made out the list. The testimony of all three was considered untruthful.

[18] Grubb testified that he was not in a position to hear heated aspects of the conversation between Murray and Waller. As I understand Grubb's account, Waller did explain his selection, referring to a prior warning issued Grubb that he would be terminated if he persisted in talking too much on the job—a ground that I consider to involve misconduct, distinct from any form of protected activity.

eri were victims of discriminatory selection in the course of an otherwise legitimate, economic layoff.

Concerning Case 9–CB–6857, there is no primary evidence that the Respondent Union participated in any aspect of the layoff decision. The hearsay evidence offered through Murray, Grubb, and Monteneri does implicate the Union in that process, but even if believed, their testimony does not link with other competent proof establishing a rational circumstantial probability that Evans or any other union representative had any influence on the determination to let the alleged discriminatees go.[19] Accordingly, credible, probative evidence that the Respondent Union caused, or attempted to cause, any discrimination involved here, is lacking, and the 8(b)(2) allegations in this regard shall be dismissed.

Nonetheless, the General Counsel has substantiated a prima facie violation of 8(a)(3) and (1) in Respondent Employer's selection of Murray, Grubb, and Monteneri.[20] Against the background of prior complaints concerning contract issues, General Foreman Tom Waller, 2 days before the layoff, reacted with the comment that if the men were "going to bitch together," they could "go down the road together." This expression of animus, in context, is linked sufficiently to the protected concerted activity of Murray, Monteneri, and Grubb, to warrant the inference that their selection was founded, at least in part, on unlawful considerations. In these circumstances, the burden shifts and a finding of proscribed discrimination will only be allayed on proof that all three would have been included even had they engaged in no activity protected by the Act. See *Wright Line*, 251 NLRB 1083, 1089 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983).

In this regard, Superintendent McMillan testified that he alone determined those to be included in the layoff. He avers that the process began on Monday, 17 August, when he requested that Bleemel, his key man, and General Foreman Waller name those they wished to keep. At the time, 40 millwrights were employed, and McMillan, on receiving these recommendations, still had several selections to make on his own. McMillan claims to have made the final choice later in the week of 17 August based on (1) his personal on-the-job observations, (2) ongoing comments from other foremen concerning job performance,[21] and (3) the need for the particular millwright or crew, considering the work they were doing in relation to that required and ready for performance at the time.[22]

Apart from their earlier employment on the belt crew, no attempt was made to explain how or why Murray or Grubb were selected under the aforedescribed criteria. Beyond that, McMillan testified that it was difficult to distinguish between journeymen millwrights because all possessed the skills of their craft. In this light, his characterization of Murray as "one of the better workers on the job," together with his admission that work remained on the job that Murray was capable of performing actually enforces the inference of discrimination that emerges from the case-in-chief. Indeed, McMillan admitted that Bleemel named Murray as among those to be retained. Despite this, and for unexplainable reasons, McMillan still included Murray in the layoff. His doing so gives rise to an incongruity sufficiently serious to bring reality to Waller's prophesy that the men would "go down the road together."[23] Accordingly, it is concluded that, as Respondent Employer has failed to demonstrate that Murray or Grubb would have been selected for layoff, even had they declined to compel compliance with the collective-bargaining agreement, their terminations on 28 August violated Section 8(a)(3) and (1) of the Act.[24] The opposite conclusion is reached in the case of Monteneri, an apprentice. In his case, McMillan testified that Monteneri was the sole alleged discriminatee singled out by a foreman (Waller) as a candidate for termination. Since the latter's job inadequacies were confirmed by Murray, in this instance, I am willing to give benefit of the doubt to McMillan and based on his testimony that negative recommendations by foremen were considered, it is concluded that Monteneri would have been selected

[19] On this record, the parol testimony is not enhanced by any objective, impartial evidence suggesting that the Union spurned its traditional responsibilities in order to align itself with Employer efforts to repress complaints by its members. Here, the controversy generated by workers on this project was not so unusual as to imply that the Union might have been distracted from its rontine representational duties. In fact, based on the credited testimony of Satterfield and Evans, it is concluded that steps were taken to achieve a favorable resolution of each complaint, and compliance was achieved in all cases except the crew/foreman ratio issue, the jurisdictional dispute, the use of out-of-state millwrights did not develop into a genuine issue until after the layoff. The dispute concerning the crew/foreman ratio involved a mere $12. The provision of welding hoods, according to the Union, was not the Employer's responsibility, and the contract does not suggest that this interpretation was in error. With respect to any misuse of operating engineers, it does not appear that following Evans' demands in that regard, the Employer engaged in further intrusion on the Union's craft jurisdiction. On balance, there is no inherent basis for inferring that the Union reacted adversely to the jobsite conduct of the employees involved in this proceeding, and the credited facts are to the contrary.

[20] The 8(a)(3) and 8(b)(2) allegations involving Halley are dismissed as unsupported by evidence that the Employer had knowledge or a basis for believing that he engaged in any conduct protected by the Act. Indeed, there was no proof that he had in fact done so. Halley's standing on the evidence in this case is no different than the seven laid-off employees not mentioned in the instant complaint. In other words, the General Counsel has failed to establish that the selection of Halley, to any conceivable extent, was prompted by Section 7 activity.

[21] The front line foremen were not interviewed by McMillan as part of this process and they did not participate directly therein.

[22] It was my impression that counsel for the Employer made a more energetic attempt to explain the terminations on this last ground than his witness, McMillan. It is true that phase one of the project was drawing to a close at the time and, according to McMillan, the "majority" of the belting had been completed for that phase. However, although he testified that Murray, Monteneri, and Grubb were on the belt crew, he went on to testify that "they were out of the belt crew at the time of the layoff." Thus, completion of the belt work does not furnish an unambiguous, nondiscriminatory explanation for their selection. McMillan's failure to explain why, or even whether the precise work these individuals were doing at the time of layoff was dispensable is a crucial flaw in the defense. In Murray's case, the breakdown in proof was underscored by McMillan's inability, when subsequently asked, to provide any specific reason for terminating Murray, instead implying that it was quite accidental.

[23] Respondent Employer contends that Waller's threatening remark could not have influenced the layoff since the selections were made prior thereto. The persuasiveness testimony that he actually did not draft the list or communicate the names to headquarters until 26 or 27 August.

[24] McMillan's conclusionary testimony that he was not influenced by the concerted activity is rejected as unbelievable in the total circumstances.

for layoff even if he had not engaged in activity of a protected nature. Hence, the 8(a)(3) and (1) allegations in his case shall be dismissed.

4. The 8(b)(1)(A) allegations

The complaint alleged that, prior to the layoff, Respondent Union violated Section 8(b)(1)(A), through Satterfield's alleged threats that employees would lose employment because they questioned compliance with the governing collective-bargaining agreement. This allegation is dismissed as unsubstantiated by credible evidence. Satterfield believably related that he pursued all issues raised by Murray, Grubb, and Monteneri, had several resolved, and those not within this category were passed on to Evans. Based on all the evidence, it struck as entirely unlikely that the steward, either alone or under direction by the business agent would react with such hostility toward efforts by longstanding union members to enforce the contract. I did not believe the testimony of Murray, Grubb, and Monteneri that they were told to either withhold complaints or find other work and hence the 8(b)(1)(A) allegation based thereon shall be dismissed.

The complaint also alleged that the Union declined to accept grievances under the contract. This allegation is vaguely phrased, lacking identification of union agents involved, the grievances in question, or the specific timeframe when grievances were rejected. Insofar as addressed to Steward Satterfield, it is concluded that he did not unlawfully interfere with any employee's access, including that of Murray, to the contractual grievance machinery. In so finding, it is noted that credible evidence does not exist indicating that he was solicited by any employee to file a grievance concerning the layoff. On direct examination, Murray testified that on 28 August, after Satterfield notified him that he was included in the layoff, he and Grubb went to McMillan's office. He claims that he then went to discuss the matter with Waller. There is no indication during his examination-in-chief that he met with Satterfield to protest the layoff before he left the job that day. On redirect, however, after leading examination by counsel for the General Counsel, Murray testified that he "specifically" requested that Satterfield grieve his layoff, but then recanted: "I don't know if I got right down and said I'm filing a grievance in writing or not." Satterfield denied that any protest was lodged with him by Murray regarding the layoff. Based on Satterfield's credited denial, I find that Satterfield did not refuse to accept or process any grievance concerning the 28 August layoff. Nor is there testimony that Satterfield, prior to the layoff, was requested to file a formal grievance with respect to any of the miscellany of issues raised during that timeframe. Thus, the General Counsel's claim of illegality in this latter respect is premised on the notion that union agents shoulder a duty to equate carping with a formal request for invocation of the grievance process. I am unaware of any policy that would support imposition of such a burden on a labor organization, or its representatives. On the contrary, a requirement that employees make their intention clear is hardly onerous. In this light, as the evidence does not disclose that Satterfield was so apprised in this case, there is no basis for concluding that Respondent Union, through Satterfield, declined to accept or process a grievance in violation of Section 8(b)(1)(A) of the Act.[25]

The remaining 8(b)(1)(A) allegations are attributed to Business Agent Evans. In support it is argued that, during the period following the layoff, Evans: (1) threatened employees with loss of unemployment compensation if they persisted in protesting their layoff, (2) physically assaulted an employee because of his declared intent to file unfair labor practice charges, and (3) threatened an employee with loss of work unless he desisted from pursuing intraunion or unfair labor practice charges.

The initial act of alleged coercion took place in the course of a regularly scheduled, monthly union meeting held on Tuesday, September 1. Murray took the floor to downdress Evans, stating that he felt that the rules and bylaws had been routinely violated on the Ziniz job and that he had been approached by himself and other members to take corrective measures. Evans allegedly responded that there was nothing that could be done. Murray aserts that he then asked Evans to investigate the layoff, observing that he thought that they were laid off improperly.[26] Murray avers that he next told Evans that McMillan had indicated that they were temporarily laid off due to lack of materials but that Murray did not believe that this was so.[27] Evans then offered that Ziniz was trying to clear out the deadwood. However, Evans indicated that Murray did not fall into that category, but was selected for the following reason: "your problem is you bitch too much . . . you create dissension on the job . . . that's why you're being laid off, the man is trying to get rid of you for creating union problems."

The General Counsel appears to contend that in the course of the meeting Murray made a fruitless effort to perfect a grievance. Though not evident in his initial narrative, Murray testified that he did so at the 1 September union meeting by instructing Evans to grieve the layoff under the contract and to investigate the matter to hear-

[25] I did not believe Murray's testimony that he made a specific request to file a grievance to a clerical employee of the Union during a visit to the union hall on Monday, 31 August. The clerical employee is unidentified and there is no allegation that the individual in question was an agent of Respondent for any purpose. In any event, in rejecting Murray's testimony, I note his assertion that he was accompanied that day by Grubb, Halley, and Monteneri. Only Monteneri gave testimony tending to corroborate Murray, and he was not examined as to exactly what the secretary was told. More importantly Monteneri's effort at corroboration must be evaluated in light of his testimony on direct examination that he did not visit the union hall until the following Tuesday. Whatever the case, neither Murray nor Monteneri struck me as a reliable witness and their testimony was only accepted where enforced by reliable sources or outside probabilities.

[26] Although Murray assailed Foreman Waller after learning that the latter participated in his selection, he apparently did not confront Evans with the information he allegedly possessed that Evans also had participated in the preparation of the layoff list.

[27] Note that Murray's version of his terminal conversation with McMillan denied that McMillan gave any reason for the layoff. Instead Murray at that time testified that, when Murray requested an explanation, McMillan declined to give one, but simply stated that he had nothing to do with the decision.

ing under the grievance procedure.[28] According to Murray, Evans grinned, but did not say whether he would or he would not take that step. In contrast, Evans testified that, prior to the 6 October union meeting neither Murray, nor anyone else, requested that he file a grievance concerning the layoff.[29] As I prefer the testimony of Evans, and as the obligation to process a grievance does not arise until the employee specifically expresses such an intention, the 8(b)(1)(A) allegation, to the extent based on any claim that Evans refused to accept grievances, shall be dismissed as unsubstantiated by credible proof that such action was ever sought by any employee.[30]

An additional 8(b)(1)(A) allegation attributed to Evans during the course of this meeting is founded on Murray's testimony that Evans warned at that time that if the employees wanted to bitch about it "Mr. McMillan had agreed to hire us back, work us 2 days and fire us all."[31]

Evans admitted to a similar, but substantively different statement. Thus, he recalls having told the men that their layoff entitled them to unemployment, but that if the Union forced their reinstatement, the Employer could keep them for a few days and then fire them under conditions precluding unemployment benefit eligibility. Evans swore that this possibility was of his own invention, that it was hypothetical, and that McMillan had not stated that he would take any such action. I believed Evans, and based on his credited testimony, it is concluded that no coercive behavior might be ascribed to the Union through this effort to convince those affected that matters could be worse. Accordingly, the 8(b)(1)(A) allegation that employees were in any sense coerced by these remarks is dismissed.

The complaint alleges a further 8(b)(1)(A) allegation based on Evans alleged physical assault on 12 September of employees because they intended to file unfair labor practice charges. On that date, the Union sponsored a picnic. Murray attended with his wife and children. Early in the afternoon, Evans visited with Murray and his family. During a cordial conversation, Evans stated that he wished that Murray would drop the whole matter. The latter indicated that he could not do so, and that he wanted the district council to make a decision concerning whether Evans was properly enforcing the contract. Evans attempted to reason with Murray by explaining that the Union was in the process of a reorganization that could enhance Evans' authority, but that the exposure of Murray's charges would prejudice this opportunity. Murray next raised the possibility that a deal could be made, asking whether Evans was prepared to make concessions to him and his crew. Evans angrily indicated that he would make no concessions, but that if Murray dropped the charges, he would let Murray keep his health. When Murray asked if he was serious, Evans indicated that if Murray did not forget it and drop all the NLRB and union charges he would whip him right then and there. Murray then said that he had the papers right in his truck and had made up his mind to go ahead and file them. Subsequently, Murray went to his truck, obtained the papers, brought them to the picnic table, where he, together with Grubb and Monteneri signed them. According to Murray, during the afternoon, Evans came by several times, at one point telling Murray that he was going to wipe the floor up with him. According to Murray, each time Evans came by he became more "adamant about the fact that he was going to beat up Murray if he did not drop the charges."

Later, a fight did in fact break out. Monteneri, however, was a principal. On his own account, Murray got involved as a peacemaker, prevailing on the participants to resolve their differences, later when sober, at the union hall. Indeed, when another millwright, Jesse Thomas, and Evans each grabbed one of Monteneri's wrists, Murray intervened grabbing Evans' wrist stating "dammit, boys, let's just settle this at the union hall . . . you know, this is not the place . . . somebody's going to get hurt here, once this gets started." At this point, Evans' wife came running towards the men and jumped between them, attempting to kick Monteneri in the groin. She then grabbed Murray's hair, whereupon Murray's wife grabbed Mrs. Evans by the hair, and when another woman jumped in, it was Evans who became the peacemaker. But as Evans grabbed Mrs. Murray and attempted to drag her away she hit him in the nose, breaking his glasses.

As this chapter drew to a close, Mrs. Evans struck Murray in the back with a wooden food stirrer, and when he grabbed it, she bit his fingers severely. Evans' daughter then threatened Murray's wife with a beer bottle. And when an identified friend intervened on behalf of the daughter, Murray knocked him down twice.

Before leaving, Murray once more was approached by Evans who again demanded that Murray drop the intraunion and unfair labor practice charges. Murray said no, whereupon Evans then observed, "by God, we've got a problem." Murray challenged that if that was the way Evans felt, he could take a swing at Murray. Evans apparently declined, and Murray gathered up his family and left.[32]

[28] Murray's testimony in this respect was elicited through a prejudicially leading question, a fact that is all the more crucial when one considers my basic doubts concerning his veracity.

[29] Art. 11 of the collective-bargaining agreement requires a grievance to be filed within 48 hours of the occurrence, excluding Saturdays and Sundays. Thus, an employee who would invoke that process, at a minimum, must act within that timeframe. From all appearances, the requirement would have been met had Murray perfected his demand at the union meeting.

[30] Evans testified that he received a telephone call from Murray on Tuesday morning, 1 September, in which Murray disputed the Company's right to retain out-of-state millwrights while laying off local men. This was Evans' first contact with Murray after the layoff. Although the contract imposed no restraints on the Employer's discretion either in layoff selection or recall, Evans supported Murray's view and protested to McMillan, but to no avail.

[31] Monteneri did not attend the meeting, but met with Evans earlier that day. According to Monteneri, Evans told him that McMillan had informed Evans that if the men continued to bitch, that they would hire the men back for 2 days, and then fire them.

[32] Prior to the picnic, Murray had filed no charges. Thereafter, he filed internal union charges against Waller, Satterfield, Evans, and Dillon. The charges against Dillon were dropped, but those against Evans, Waller, and Satterfield were processed and were to be heard on 13 January 1988. The unfair labor practice charge, though apparently signed at the picnic, was not actually filed on 18 September 1987.

Monteneri testified that he did not arrive at the picnic until 5:30 p.m. He claims that they were having a great time, that they signed the charges, and that the charges went unmentioned until about 9:30 p.m. At that time, Evans approached Monteneri and told him that he was "trying to get him in trouble." Monteneri denied that this was his intent, arguing that if Evans had run the job right, the men would not have had to file charges. Evans then attacked Monteneri's ability as a worker, calling on millwright Jesse Duncan for support. The latter described Monteneri as "worthless."[33] Monteneri countered with an attack on Duncan's competence, and their argument continued until Evans grabbed Monteneri's arm, because it appeared that Monteneri and Duncan were on the verge of fisticuffs. According to Monteneri, Evans at that juncture was intoxciated and angry and, though attempting to separate him from Duncan, Evans threatened Monteneri "if we didn't straighten things out right then and there . . . drop the charges . . . I'm going to kick your ass." At this juncture, Murray intervened to quell the disturbance, but failed due to the intrusion of Mrs. Evans.

According to Monteneri, after the donnybrook involving the women ended, Evans asked him to leave. He replied:

> . . . I didn't start this fight . . . your wife started this fight and as far as I'm concerned she can leave.

Evans, angered by this remark, stated "come on, big boy, I'm going to whip your ass right where you stand." A fight ensued, but only after Monteneri and Evans returned to the parking lot. After getting the best of Evans, Monteneri left, with the former still echoing, "I'm going to kick your ass big boy."

The sole allegation in the complaint pertaining to the picnic specifies that Evans "physically assaulted" employees because they "expressed their intent to file charges with the National Labor Relations Board."[34] The General Counsel's witnesses, namely, Grubb and Monteneri, both related that fights were brewing well prior to the altercations described above, a state of events having nothing to do with internal or external charges against union officials. Monteneri and Murray, the sole witnesses to their confrontations with Evans, testified to numerous threats of harm by the latter, but did not relate either directly, or by implication that they were assaulted because of activity of a protected nature. On their own testimony, the first assault was initiated by Mrs. Evans and the second by Monteneri's refusal to leave the premises. Accordingly, the evidence does not substantiate that Evans assaulted any employee in consequence of activity of a protected nature. Nonetheless, as Evans did not refute the entirely plausible testimony that he repeatedly threatened Monteneri and Murray with physical harm if they did not drop the unfair labor practice and intraunion charges, both of which actions constituted activity protected by the Act, it is concluded that Respondent-Union violated Section 8(b)(1)(A) of the Act.[35]

The final allegation of the complaint is to the effect that Evans, on 14 September, threatened an employee with loss of work unless he agreed to drop all charges. This allegation is founded on Murray's testimony that, while at the union hall, he discussed the charges with Evans, who stated that this was the main thing on his mind, that they would have to be dropped, and that they would mess up his future. Evans allegedly made his point by stating that if Murray wanted to work steady, to have the opportunity to be designated as steward or foreman, and to avoid problems, he "would have to drop them."[36] Evans testified that he discussed the unfair labor practice charges with Murray on 17 September. At that time, Murray brought the signed unfair labor practice charges to his office, warning Evans that they would be filed if Evans did not get him reinstated on the Ziniz job. Evans allegedly responded that he had done all he could legally accomplish, and the filing of unfair labor practice charges was Murray's prerogative. According to Evans it was in this conversation that the Allied Riggers recovery was mentioned, with Evans stating that Murray's action and recovery against that firm had caused a hardship on the members because Allied Riggers, since, has avoided use of the Union's hiring hall. Evans' testimony in this respect was addressed to the only conversation within the timeframe mentioned in the complaint. His account implicitly refutes any threat related to the charges, and his testimony is preferred to that of Murray. Beyond that there was neither allegation, nor conclusive litigation of any unfair labor practices in *December*. Accordingly, the allegation that Evans threatened Murray with reprisals in violation of Section 8(b)(1)(A) in this respect shall be dismissed.

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[33] Monteneri testified that earlier that evening he observed Duncan and Evans at the brink of fisticuffs.

[34] Having canvassed the record, I have been unable to locate an amendment to the complaint challenging the legality of Evans' threats of bodily harm. Thus, a material variance with the pleadings is presented, which calls into play the Board's longstanding policy that unalleged unfair labor practices may be remedied, but only if fully litigated. Here, there was no attempt to litigate an evidentiary defense. However, Respondent-Union not only failed to interpose a procedural objection, but countered with a substantive argument that the threats did not relate to activity within the purview of Section 7 of the Act. In this light, it is concluded, allbeit reluctantly, that the issue of coercive threats is viable as having been fully litigated.

[35] There is no merit in the Union's legal contention that no violation inured because "the threats were related to the Internal Union charges that Monteneri and Murray were mentioning." This difference does not alter the result. Under the precedent, the distinct remedies available under the National Labor Relations Act are not displaced merely because the employee conduct is also protected by the Labor-Management Reporting and Disclosure Act. (See, e.g., *Steelworkers Local 5163 (Charles A. Bizzaro)*, 248 NLRB 943, and cases cited at 944 (1980). Moreover, even if the precedent were otherwise, the threats attributed to Evans transcended internal disciplinary procedures and remained unlawful because broad enough to restrain employee access to the National Labor Relations Board.

[36] Murray also averred that Evans telephoned him in December. In that conversation, Evans referred to the fact that Murray, in another unfair labor practice proceeding involving a local contractor, Allied Riggers, had been awarded $50,000 in backpay. Evans told Murray that because of this recovery, Murray had been collecting unemployment illegally, and that if the charges were not dropped, he would report Murray to the unemployment authorities. Evans allegedly also threatened to file internal disciplinary charges against Murray and to assess him $1000. Murray acknowledged that Evans also asserted that because of the Allied Riggers proceeding, he had encountered difficulty in getting that firm to hire employees through the Union.

CONCLUSIONS OF LAW

1. Respondent Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Employer independently violated Section 8(a)(1) of the Act by threatening to terminate employees because they invoked their collective-bargaining agreement and complained concerning their conditions of work.

4. Respondent Employer violated Section 8(a)(3) and (1) of the Act by terminating employees Bobby Lee Murray and Al Grubb because they complained concerning the failure to observe conditions of work set forth in the governing collective-bargaining agreement.

5. Respondent Union violated Section 8(b)(1)(A) of the Act by threatening to physically harm employees unless they declined to process internal union and unfair labor practice charges.

6. The above unfair labor practices have an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

7. Except as found above, Respondent Employer and Respondent Union have not committed any unfair labor practices alleged herein.

THE REMEDY

Having found that Respondent Union and the Respondent Employer have coerced and restrained employees in the exercise of their rights guaranteed by Section 7 of the Act, it shall be recommended that they be ordered to cease and desist therefrom, and to take other affirmative action designed to effectuate the purposes and policies of the Act.

Having found that Respondent Employer violated Section 8(a)(3) and (1) of the Act by terminating employees Murray and Grubb, it shall be recommended that they be offered immediate reinstatement to their former positions, if in existence on the UPS job, and make them whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them from 28 August 1987 until a bona fide offer of reinstatement, or termination of all utilization of millwrights on that project, whichever occurs first.[37] Backpay under the terms of this Order shall be computed on a quarterly basis, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), shall be reduced by net interim earnings, and shall include interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Counsel for the General Counsel apparently has not yield on a request set forth in the complaint that the remedy include a visitatorial clause, authorizing the Board to engage in discovery if necessary to monitor compliance. The Board recently has announced that such a relief is only appropriate where warranted on the exigencies of a particular case. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988). Here, there is neither showing nor argument suggesting that the specific conduct under scrutiny in this proceeding supports such relief. Accordingly, the request is denied.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

A. Respondent Ziniz, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees who attempt to enforce terms and conditions of work set forth in a collective-bargaining agreement.

(b) Discouraging activity on behalf of the labor organization, by discharging, or in any other manner discriminating against employees, with respect to wages, hours, or terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Bobby Lee Murray and Al Grubb, Jr. immediate reinstatement to their former positions, without prejudice to their seniority, or other rights and privileges, provided that those positions are still available, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Louisville, Kentucky office and all jobsites within the territorial jurisidiction of Local 207, Millwrights and Piledrivers, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO, copies of the attached notice marked "Appendix A."[39] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer immediately upon receipt, and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be

[37] Respondent Employer contended at the hearing that it objected to the recall of Murray in consequence of his threat addressed to General Foreman Waller. The impact of any such misconduct on the propriety of a remedial reinstatement provision has not been fully litigated, and represents a matter best resolved during compliance stages of this proceeding.

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[39] If this Order is enforced by a judgment of a United States Court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Employer has taken to comply.

B. Respondent Local 207, Successor to Local 1241, Millwrights and Pile Drivers, a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Columbus, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees with physical harm because they have declared their intention to file, or have filed, either intraunion, or unfair labor practice charges.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at all meeting halls and places where notices to members or applicants for referral are posted copies of the attached notice marked "Appendix B."[40] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Union has taken to comply.

[40] See fn. 39.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with physical harm because they have declared their intentions to invoke internal union disciplinary procedures or to file unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

LOCAL 207, SUCCESSOR TO LOCAL 1241, MILLWRIGHTS AND PILEDRIVERS, A/W UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO

Cassidy Cleaning, Inc. *and* **Michael Limes.** Case 5–CA–17614

August 22, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On October 30, 1986, the National Labor Relations Board entered its Order[1] directing Cassidy Cleaning, Inc., among other actions, to make whole certain employees for any losses resulting from the Respondent's unfair labor practices in violation of Section 8(a)(3) and (1) of the Act. The United States Court of Appeals for the Fourth Circuit enforced the Board's Order on December 21, 1987.[2] A controversy having arisen over the amount of backpay due under the Board's Order, the Regional Director for Region 5 on February 18, 1988, issued a backpay specification and notice of hearing alleging the amounts of backpay due and notifying the Respondent that it should file a timely answer. The Respondent failed to file an answer.

On April 8, 1988, the General Counsel filed a Motion for Summary Judgment. On April 13, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent thereafter filed a response to the Notice to Show Cause.

On the entire record, the Board makes the following

Ruling on the Motion for Summary Judgment

Section 102.54 of the Board's Rules and Regulations provides that if an answer is not filed within 21 days from the service of the specification the Board may find the specification to be true.

The backpay specification states that the Respondent shall file an answer within 21 days from the date of service of the specification, and that if the answer fails to deny the specification's allegations in the manner required under the Board's Rules and Regulations, and the failure to do so is not adequately explained, the allegations shall be deemed to be true. Further, the undisputed allegations in the Motion for Summary Judgment disclose that on March 17, 1988, no answer having been received from the Respondent, the supervisory compliance officer sent a letter to the Respondent informing it that unless an answer to the specification was received by March 24, 1988, a Motion for Summary Judgment would be filed. The Respondent did not file an answer to the backpay specification within the required time, and the General Counsel moved for summary judgment. In its order transferring proceeding to the Board and Notice to Show Cause, issued April 13, 1988, the Board specified that the Respondent's written reply be filed with the Board in Washington, D.C., on or before April 27, 1988. The Respondent's reply, dated April 26, 1988, did not respond to any part of the backpay specification but raises, instead, an independent issue.

In its letter the Respondent notified the Board that due to the hardship placed on the Company by an Internal Revenue Service levy on the Company's finances it was unable to comply with the Board's Order to pay the back wages.

We find that the Respondent's bare assertion that it is unable to satisfy the backpay order because of hardship is an invalid defense. In a backpay proceeding the issue is the amount due and not whether the Respondent is able to pay.

The Respondent's reply to the Board's Notice to Show Cause does not specifically deny or respond in any way to the allegations of the backpay specification as required by Section 102.54(b) of the Board's Rules and Regulations. Moreover, its assertion of hardship does not constitute an adequate explanation of the Respondent's failure to file a timely answer to the backpay specification.[3] We find that the allegations of the backpay specification are therefore admitted as true.

In the absence of any explanation for the Respondent's failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

Accordingly, the Board concludes that the net backpay due the discriminatees is as stated in the computations of the backpay specification, and orders the Respondent to pay those amounts to the discriminatees.

ORDER

The National Labor Relations Board orders that the Respondent, Cassidy Cleaning, Inc., Bethesda, Maryland, its officers, agents, successors, and assigns, make whole each employee named below by paying the amounts set forth adjacent to their names, with interest computed in the manner prescribed in *New Horizons for the Retarded*,[4] and ac-

[1] Not reported in Board volumes.

[2] No. 87-3641.

[3] *Star Grocery Co.*, 245 NLRB 196 (1979).

[4] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

crued to date of payment, minus tax withholdings required by law.

James W. Dickens Jr.	$4125.49
Clarice D. Glover	1300.76
Michael E. Limes	2806.52
Branton L. Powell	3608.46
Bryant M. Robinson	5626.82
Gerald R. Scales	3056.15
Denise D. Seymour	6757.44
Karen Smith	8143.82
Sherry L. Walters	5228.37
James L. Washington	5118.10
Walter White	2883.24

Synergy Gas Corp. *and* Frank Depolito. Case 2–CA–22075

August 22, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On February 18, 1988, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Synergy Gas Corp., Cold Spring, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.[2]

In paragraph 1(b), change "concerted activities" to "union activities."

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The notice need not be modified as it conforms to the change we have made in the language of the Order.

Richard L. DeSteno, Esq., for the General Counsel.
Elliot J. Mandel, Esq. (Kaufman, Frank, Schneider & Rosensweig, P.C.), of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, and Cold Spring, New York, on 5 days between 23 June and 4 August 1987. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (3) of the Act, interrogated its employees concerning their union activities and discharged employee Frank DePolito because he joined the Union. Respondent denies the material allegations of the complaint and alleges that DePolito was a manager of the Company and that he was discharged for misconduct.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent in October 1987, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

Respondent, a domestic corporation with an office in Farmingdale, New York, and a facility in Cold Spring, New York, provides bottled propane gas and maintenance service on gas lines and appliances.[2] Annually, Respondent purchases products valued in excess of $50,000 directly in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The uncontradicted testimony of all the witnesses taken together shows that Synergy Gas Corp. was an organization dedicated to expanding its area of operations. In August 1985, Synergy hired Frank DePolito as a serviceman for its approximately 23 propane gas customers in the area of Cold Spring, New York. DePolito worked out of his home in Cold Spring; an answering machine on his telephone took messages from Synergy's customers. DePolito drove to Synergy's branch in Parsippany, New Jersey, to pick up propane gas and other supplies as he needed them. DePolito parked the Synergy truck in a lot behind a local hardware store. The Cold Spring branch was designated as 4075.

At various times, Synergy employed other employees to work with DePolito. Their hirings and firings will be discussed below.

DePolito was supervised by Philip Nicolette, the area manager of Synergy. Nicolette spoke to DePolito many times per week on the telephone and came to Cold Spring to see DePolito several times per month. In addition, DePolito saw Nicolette at the Parsippany branch on occasion.[3] DePolito also received messages about customer calls from dispatcher Ray Vanderhoof of the Parsippany branch.

DePolito began work as an hourly paid employee earning $10.50 per hour. On 26 November 1985, Nicolette wrote to the vice president of operations, John Russell, to the effect that DePolito had been diligent in acquiring new accounts and asking that DePolito be paid

[1] Due to an error by the official court reporter in binding the exhibits in the instant case, a certain confusion has arisen. I note that the following exhibits were identified but were not received into evidence: R. 5, 11, 12, and 15a,b,c.

[2] Respondent's executive offices are in Farmingdale. Other facilities are scattered throughout the Northeast.

[3] Nicolette is responsible for about 32 branches of Synergy in New York and New England. His office is in Parsippany, New Jersey.

commissions on his new sales. Nicolette mentioned that DePolito needed more money to pay the hospital bills connected with the recent birth of his daughter. The letter closed with the statement that it was Nicolette's "intent to have Frank as our manager in Cold Spring [sic] when that plant requires." On 20 December 1985, Nicolette again wrote to Russell, this time to request that DePolito be granted a salary of $25,000 per annum. Nicolette pointed out that DePolito had been working long hours 6 days per week and stated, "I feel Frank has proven to me he is more than qualified to be a manager." This raise was granted by Synergy.

Synergy had no facility for storing propane gas in the Cold Spring area. If it was to expand the number of its accounts, the Company required a nearby plant so that its employees would not have to make the 2-hour drive to Parsippany for gas and other supplies. The Company made efforts to acquire property and secure a permit to build a storge tank in Cold Spring. DePolito was involved in these efforts because he was eager to advance his future with the Company as the head of an expanding branch. However, Synergy was unable to obtain a permit to build a plant with a propane storage tank, and eventually it decide to buy a going concern with an existing storage facility.

On 29 October 1986, Synergy purchased Economy Gas in Cold Spring from its owner, Wayne Bumstead. Contrary to his expectations, DePolito did not become the branch manager of the new facility; instead, Bumstead was asked to remain as manager and run the business. Bumstead received a yearly salary of $23,000. In addition, he had received a down payment of $35,000 from Synergy for the purchase of Economy Gas and he held a 10-year mortgage on the facility to secure future quarterly payments until the full purchase price of $440,000 had been paid.

In October 1986, Economy Gas consisted of a yard, storage facilities, and a house which contained a tiny office. The office had a desk for Bumstead's use, a counter to be used by other employees, and facilities for a secretary. Bumstead's residence was above the office. Economy Gas had about 1000 customer accounts which were taken over by Synergy. The employees of Economy Gas now worked for Synergy; these were Bumstead, Glen Pennachio, and secretary Paulette Pennachio, his sister. DePolito and Randy Collazo, Synergy's old employees, now worked out of the new Synergy facility in Cold Spring. The new facility was designated branch 4076.

By 18 November 1986, according to Nicolette, DePolito was complaining that Bumstead did not know how to run the business and was losing customers. DePolito also told Nicolette on 13 January 1987 that Bumstead's failure to dispatch employees properly had caused missed deliveries to Metro North, a major client. In turn, Bumstead complained about DePolito to Nicolette; he told Nicolette that DePolito made "arrogant comments" and that DePolito and Collazo were wasting time.

The instant case arises out of DePolito's discharge by Nicolette on 4 February 1987.

B. *Credibility of the Witnesses*

Nicolette testified on behalf of Respondent concerning all the issues in the instant case. He refreshed his memory as to dates and events from his daily diary while on the witness stand. Nicolette testified that the descriptions of events noted in his diary were written down soon after they occurred and were accurate. Nicolette had used the diary to prepare for his appearance at the trial here and it was clear that he relied on the diary for his recollection about many of the relevant events. Unfortunately, Nicolette's diary and his memory were shown to be inaccurate. For example, Nicolette testified that on 19 January 1987, when he had no trouble making the lengthy trip from Parsippany to Cold Spring despite a recent snowfall, DePolito had called Bumstead to say he was snowed in and could not work. This testimony purported to show that DePolito was not a dedicated employee. In fact, DePolito had notified Bumstead several days before January that his daughter was scheduled for surgery that day, and Bumstead had told DePolito to take the day off. DePolito had not called Synergy on January to say he was snowbound.[4] Nevertheless Nicolette's diary clearly shows a note for 19 January 1987 that DePolito was snowed in. The diary and Nicolette's testimony are thus inaccurate. Further, Nicolette gave detailed testimony about telephone calls made to him by DePolito and Bumstead on 3 February 1987 the day before Nicolette discharged DePolito. Nicolette stated that DePolito and Bumstead called him in Vermont at 10 and 11 a.m., respectively, to describe an altercation that had just taken place between them. Nicolette's diary supports this version of the events. However, the documentary evidence as well as the testimony of all the other witnesses called on this point by both Respondent and the General Counsel shows that the telephone calls were made at the end of the work day after 4 p.m. Nicolette testified that in order to surprise DePolito, whom he claimed to have found to be devious, he told DePolito he would be in Cold Spring in 2 days on 5 February, when, in fact, he intended to be there the next day, 4 February, and so informed Bumstead. However, Bumstead's testimony as well as Nicolette's diary show that Nicolette intended to be in Cold Spring on 5 February but changed his mind after speaking to Depolito and Bumstead. Thus, the elaborate story about planning to surprise DePolito was shown to be contrary to fact. There are other similar examples in the record which convince me that both Nicolette's testimony and his diary are unreliable, but I shall not detail all of them. Further, I observed that Nicolette was uncooperative on cross-examination. Due to my findings, I shall not rely on Nicolette's testimony where it is disputed.

Wayne Bumstead testified on behalf of Respondent. Bumstead contradicted Nicolette in certain important respects. Thus, while Nicolette admitted that Bumstead told him that employee Glen Pennachio mentioned signing a union card, Bumstead denied telling Nicolette. Further, Bumstead changed his testimony about whether he and Nicolette discussed DePolito's union activities when

[4] A copy of the hospital bill for the surgery was entered into evidence.

DePolito was discharged. I shall not credit Bumstead's testimony where it is contradicted by more reliable evidence.

Stanley Sather and Robert Crissey testified on behalf of Respondent. I shall credit their testimony.

Frank DePolito testified on behalf of the General Counsel. DePolito's testimony was consistent and in accord with the documentary evidence. DePolito's testimony sucessfully withstood a vigorous cross-examination, I shall credit it.

Randy Collazo testified on behalf of the General Counsel. Collazo is still an employee of Respondent. Although in a vulnerable position, Collazo answered readily and was cooperative on cross-examination. I shall credit Collazo's testimony.

Paulette Pennachio testified on behalf of Respondent. About some matters, she was less knowledgeable than the witnesses who had participated directly in the events at issue. Furthermore, Pennachio has worked for Bumstead for over 9 years and was personally loyal to him; this fact caused her to shade her testimony. However, I shall credit her testimony on matters about which she had direct knowledge.

C. *Supervisory Issue*

Respondent argues that DePolito was a supervisor when he was discharged in February 1987. Respondent asserts that DePolito had been manager of branch 4075 when it operated out of DePolito's home, and that when Economy Gas was purchased by Synergy, Bumstead became branch manager and DePolito became service manager of branch 4076.

Three drivers were employed to assist DePolito: Stanley Sather from late 1985, until 13 February 1986, Robert Tobin from 12 February, until sometime in the spring of 1986, and Randy Collazo beginning on 12 May 1986. DePolito and Sather had known each other for about 10 years when DePolito told Sather there might be a job for him at Synergy Gas. DePolito told Sather he could have the job but that he would have to speak to Nicolette first. DePolito and Sather drove to Parsippany and met with Nicolette in his office. Nicolette told Sather about Synergy's operations, procedures, and the accounts he would have to familiarize himself with. Sather filled out an employment application form at Nicolette's desk and then Nicolette told Sather he had the job with Synergy. Sather testified that DePolito fired him without giving him a reason: DePolito came to his house and asked for the keys to the truck. DePolito credibly testified that Nicolette instructed him to fire Sather because Sather had failed to come to Parsippany to pick up a truck. Nicolette gave DePolito a termination slip and told him how to fill it out. Pursuant to Nicolette's instructions, DePolito put "lack of performance" as the reason for termination and signed the form as branch manager. According to DePolito, Tobin was a friend of his.[5] After telling Tobin about the job, DePolito took Tobin to Parsippany to meet Nicolette. DePolito signed Tobin's new employee form as "branch manager." DePolito testified that Tobin was out sick with the flu for 1 week and Nicolette fired him although DePolito did not want to discharge Tobin. After Tobin's termination, Nicolette told DePolito to advertise in the newspaper for a new driver; Randy Collazo answered the advertisement. He was interviewed by DePolito and filled out an application form which DePolito signed as "employment manager." Then DePolito told Collazo that they would have to go see Nicolette in Parsippany. On 12 May 1986, DePolito and Collazo saw Nicolette in Parsippany. Nicolette reviewed Collazo's application form and asked about his prior work experience. Nicolette told Collazo he was hired. Collazo filled out a new employee form which DePolito signed as "branch manager."

At some point, DePolito grew dissatisfied with Collazo and told Nicolette that he should be discharged. But Nicolette said that he thought Collazo had potential and should be kept on. DePolito introduced Nicolette to another potential driver identified as "Steve." However, after Nicolette interviewed Steve he decided that Steve was a "hustler" and would not be a good employee. Nicolette told DePolito not to hire Steve.

From the summary given above, it is not at all clear that DePolito had the authority to hire and fire employees while he was in charge of branch 4075. I am not pursuaded that he had the authority effectively to recommend the hiring and firing of employees; Nicolette always interviewed DePolito's prospective drivers and told the men they actually had the job. Moreover, Nicolette told DePolito to fire Sather and Nicolette himself fired Tobin. Finally, Nicolette vetoed DePolito's wish to fire Collazo and hire Steve.

Before Synergy Gas took over Economy Gas and Bumstead became branch manager, DePolito handled all the paperwork for branch 4075. He submitted timesheets to the payroll office in Parsippany for himself and the driver and he submitted customer records to Parsippany for billing. The testimony shows that DePolito had the authority to approve time off for the driver. DePolito spoke to Nicolette on the telephone often concerning the Cold Spring operation. The record is unclear about DePolito's authority to direct the employees without consulting with Nicolette.

Once Economy Gas was purchased by Synergy, a wholly different system was in place. The new branch headed by Bumstead was given a new number, 4076. The testimony of all the credible witnesses shows that Bumstead ran the branch. Every morning, Bumstead met with the other employees and gave out the day's assignments. Bumstead decided which employee would service each customer, but he left it to the employees to decide in what order they would complete their tasks. Employees asked Bumstead for time off.[6] Billing of customers was handled by secretary Paulette Pennachio. At the beginning, Pennachio worked with the Parsippany billing office, but the intention was that eventually Pennachio

[5] Tobin did not testify in this proceeding.

[6] DePolito asked Bumstead's permission to be absent on 19 January 1987. Collazo asked Bumstead for permission to take time off.

would bill all customers of branch 4076 directly. According to Bumstead and DePolito, it took a while for the Synergy computer system to merge the paperwork of old branch 4075 into the paperwork of new branch 4076. Thus, for a few weeks after the purchase in late October, 1986, the Synergy computer continued to generate paper for DePolito and Collazo's timesheets and payroll separate from that of branch 4076. Further, billing for the approximately 23 customers DePolito had serviced was not immediately integrated into branch 407. Consequently, DePolito continued to do some paperwork for branch 4075 in the fall of 1986. But Bumstead and DePolito both testified that by January 1987, the Synergy computer system had absorbed old branch 4075 into new branch 4076 and DePolito no longer had any responsibility for payroll or billing.

One employee was hired after the purchase of Economy Gas. Nicolette hired Robert Crissey in early November and informed Bumstead that he would be working in Cold Spring.

On the day that the purchase of Economy Gas became effective, Nicolette met in Cold Spring with Bumstead, DePolito, and the other employees. Nicolette informed them all that Bumstead would be branch manager and DePolito would be service manager. Respondent relies on this fact to support its claim that DePolito was a supervisor. However, Bumstead testified that Nicolette told him to run branch 4076 as though it were his business. Bumstead described his job as to "cover all bases on whatever had to be done and make sure the operation ran smoothly." Bumstead stated that DePolito's job was to take care of the service work and installations and "layout the whole direction for the rest of the crew." However, from Bumstead's own testimony it is clear that Bumstead and not DePolito gave the crew work assignments everyday. Further, Bumstead also testified that he himself checked installations performed by the employees and saw that the work was done properly. Because DePolito was the most experienced employee, Bumstead assigned Collazo and Crissey alternately to work with DePolito on assignments so that they would learn to do installations.

The issue to be decided is whether on 4 February 1987, when he was discharged by Respondent, DePolito was a supervisor. I find that he was not. I do not believe that DePolito had authority to hire and fire employees before November 1986; there is no evidence that he had any such authority after November 1986. Once Bumstead took over the Synergy operation in November 1986, Bumstead assumed all authority to assign work to employees, lay out the routes, assign crewmembers to work together, and to grant time off. In addition, Bumstead reviewed the work to see that it had been done properly. There is no evidence that DePolito had any authority to discipline employees or adjust their grievances. The conclusion is inescapable that DePolito was an employee within the meaning of the Act on the day he was discharged.

D. *DePolito's Discharge*

Nicolette made the decision to discharge DePolito; he testified that he arrived at this decision while speaking to DePolito in the Cold Spring office on 4 February 1987. Nicolette attributed his decision to DePolito's attitude. The General Counsel asserts that Nicolette based his decision on DePolito's union activities.

1. Union activity

DePolito and Collazo testified that they began discussing the benefits of bringing a union into the plant in December 1986. During the first week of January 1987, DePolito obtained authorization cards from Local 456. DePolito and Randy Collazo signed the cards in early January. The two men visited Glen Pennachio at home in January 1987 and obtained his signature.[7] Paulette Pennachio testified that she was home with her brother Glen when DePolito and Collazo came to the house and gave him a union authorization card.

2. Respondent's awareness of union activity

On Friday, 30 January 1987, Glen Pennachio was in the office with Bumstead and Nicolette. Pennachio received his paycheck and when he saw that it did not contain the raise he expected, he got upset. According to Bumstead, Pennachio went "off the wall" and quit his job. The next day, Pennachio called Bumstead to apologize for his behavior; he also told Bumstead that DePolito had come to his house with union authorization cards. Pennachio told Bumstead that he had signed the card and then had second thoughts about it. Pennachio explained to Bumstead that he had quit the job "because he didn't want to be any part of [the Union]."[8] On Monday, 2 February, Glen Pennachio came to the plant saying that he would work his 2 weeks' notice. When Bumstead expressed surprise, Pennachio quit again. Sometime after this, Bumstead gave Pennachio his job back and got him the disputed raise.[9]

On 23 January 1987, John Russell, Synergy's vice president of operations, told Nicolette that he had heard a rumor that DePolito was organizing a union in Cold Spring and asked him to check it.[10] Nicolette testified that he did nothing about following Russell's instructions until 30 January when he spoke to DePolito in the parking lot of a diner in Cold Spring. Nicolette acknowledged that he called Bumstead on 26 January at 3 p. m. to ask him about "general attitudes and Frank [DePolito] and what was transpiring up there," but he claimed that despite Russell's questions 3 days before, he did not ask Bumstead about the union rumors.

According to Collazo, after the men had signed the cards in January, Collazo was in the office with DePo-

[7] Glen Pennachio did not testify in this proceeding.

[8] Paulette Pennachio also testified that her brother quit because he did not get the raise and too many people were bothering him about the Union.

[9] Pennachio apparently had a volatile temper. He had quit once before, on 7 January 1987, in an upset over a truck that malfunctioned. After he was out for 2 days, Bumstead let him come back to work. Paulette Pennachio, sister of Glen Pennachio, testified that he got upset and "loud" with Bumstead when the trucks broke down. Pennachio has a tendency to lose his temper and use profanity on such occasions; other employees heard Glen Pennachio use profanity to Bumstead.

[10] Russell obtained information about the rumor from Fleet Director Joe Gerard, whose son was a salesman in Cold Spring in late 1986.

lito, Bumstead, and Glen Pennachio. DePolito said he had told Bumstead about the Union and Bumstead shook his head saying. "I wish you hadn't said that." I credit this testimony, which is supported by DePolito's testimony.

Sometime in January 1987, according to DePolito, he and Bumstead were in the office together after business hours. DePolito told Bumstead the men needed a union. Bumstead replied that the men should wait until the end of the month because he did not want anything to interfere with his first quarterly payment from Synergy, which was due soon. Bumstead denied that this conversation took place; instead, he testified that he had a contract with Synergy and that union organizing could not affect his payments. However, after relying heavily on the contract of sale, Respondent did not introduce it into evidence and thus there is no proof that Synergy was obligated to make quarterly payments no matter what happened to the business. Moreover, there is no evidence that Synergy was obligated to continue Bumstead as branch manager. I credit DePolito's version of this conversation.

According to Collazo and DePolito on 21 or 22 January 1987, Crissey told DePolito that Nicolette wanted to see him. Collazo and DePolito were already in their cars. DePolito went in to the office and Collazo stayed in his car. In 5 minutes, Nicolette and DePolito came out and got into the front seat of DePolito's car. Collazo followed in his own car and they drove to the Countryside Terrace, a local restaurant. On the way, DePolito told Nicolette that the branch was not being run properly but Nicolette said they would have to put up with Bumstead for 2 more years.[11] In the restaurant parking lot, Collazo parked on the passenger side of DePolito's car, near Nicolette. After a minute, Nicolette rolled down the window and asked Collazo what his "problem" was. Collazo told Nicolette that the plant was badly run. Then Nicolette asked "what's with this Union bull shit?" DePolito and Collazo said they did not know what Nicolette was talking about. Nicolette replied that he heard DePolito and Collazo were trying to start a union. Nicolette said he heard from Bumstead that Collazo and DePolito went to Pennachio's house to obtain a signature on a card. Then Nicolette said he wanted to talk to DePolito alone and Collazo drove away. According to DePolito, after Collazo left, Nicolette said that the union talk was already in Farmingdale and he could not cover it up. Some further discussion about the branch ensued.

Nicolette claims that this conversation took place on 30 January.[12] In his version, when he went to the diner parking lot with Collazo and DePolito, the three men discussed medical insurance, wages, and friction among the employees in the shop. Then, according to Nicolette, he sent Collazo away and asked DePolito about the Union. DePolito denied that he had been talking union. Nicolette testified that one cause of friction in the Cold Spring branch concerned accusations that employees were not documenting the time spent or the materials used on a job. He instructed DePolito to adhere to paperwork rules that would be instituted.[13] Nicolette testified that he told DePolito he was a member of management and could not engage in union activity.

After this conversation, Nicolette testified, he saw Bumstead again and told him about the union rumor and DePolito's denial. Nicolette also urged Bumstead to see that the paperwork was done correctly. On cross-examination, Nicolette changed his testimony to say that he did not ask Bumstead about the union rumors until after he fired DePolito. At that time, he and Bumstead discussed Glen Pennachio's involvement with the Union. Based on Nicolette's shifting testimony and on Collazo's and DePolito's credited testimony, I find that on 30 January 1987 Nicolette asked Bumstead about the Union and that the two discussed Glen Pennachio.

I find that the conversation in the diner parking lot took place on 30 January rather than earlier as contended by DePolito and Collazo. I credit DePolito's and Collazo's version of the conversation. Thus, I find that by asking the two employees about "the union bull shit" and telling them that he knew they had solicited a card from Glen Pennachio, Nicolette conveyed to the employees that he disapproved of the union activities about which he was seeking information. Respondent thus coercively interrogated its employees in violation of Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984).

3. Events leading to DePolito's discharge

Nicolette testified that DePolito had some problem being reimbursed for his business telephone calls on behalf of Synergy; on Christmas Eve 1986, Nicolette and DePolito worked on recalculating the figures so the bill could be resubmitted for payment. Although Nicolette did not testify on direct examination about any warning he had ever given DePolito, on cross-examination, Nicolette recalled that on Christmas Eve he warned DePolito to "knock it off" about his "attitude towards the company . . . towards Wayne." DePolito denies this. I do not credit Nicolette and I find that this purported warning was an afterthought in Nicolette's testimony.

On 3 February 1987, a dispute erupted between DePolito and Bumstead concerning the hose winder mechanism of a tank truck. At 4:30 p.m. Bumstead was in the yard at the rear of the truck when DePolito walked by. DePolito and Collazo claim that DePolito told Bumstead he would see electrical wires arcing and that Bumstead threw down his tools and walked away. When DePolito said, "I guess we won't see the wires." Bumstead replied, "I don't need any of your wise bullshit." Bumstead then called DePolito a "guinea bastard" and DePolito called Bumstead "an asshole." Bumstead ordered DePolito to put his keys on the desk and get off the property. Bumstead claims that the argument started when DePolito told him he "was an asshole for working on the trucks" because he was not a mechanic. Both men agree that

[11] Nicolette had told DePolito that Synergy was only using Bumstead to gain a storage facility and that Bumstead would be discharged soon after the purchase of Economy Gas.

[12] Bumstead's testimony supports the 30 January date.

[13] On the next workday, Bumstead distributed blank forms to be used to record time and materials used on each job.

Bumstead ordered DePolito to go home. I credit DePolito's and Collazo's version of the events.

Soon after this exchange Bumstead called Nicolette, who was in Vermont. He told Nicolette, "I've had it. I don't need the nonsense." Bumstead did not ask Nicolette to discharge DePolito, he just wanted Nicolette to talk to DePolito. Bumstead testified that he did not know Nicolette was going to fire DePolito. DePolito also called Nicolette after he got home and told the latter about the incident. Nicolette said he would be in Cold Spring in a couple of days.

Nicolette testified that Bumstead called to say that DePolito was cursing and that he "refused . . . to do any jobs" and did not turn in his paperwork. I do not credit this testimony; Bumstead did not testify that he mentioned paperwork or the failure to do any jobs when he called Nicolette on 3 February.

According to Collazo and DePolito, on 4 February, the day of DePolito's termination, DePolito came to work and all went normally.

In the late afternoon, Collazo and DePolito returned from their work and Nicolette was in the office. Nicolette told DePolito "aparently what we talked about before didn't sink in." Nicolette said DePolito and Bumstead told different stories and he began reviewing DePolito's shortcomings with him. Nicolette took out his notebook and told DePolito that he had failed to pick up a truck once in November and that there was too much mileage on the truck. Then Nicolette told DePolito he was terminated. DePolito asked why he was being discharged. He told Nicolette to look at his worksheets to see how much work he did. Nicolette replied that they were lost. At some point in this conversation, Collazo said Bumstead was using the pickup truck after hours for personal use and that that accounted for the excessive mileage.

According to Nicolette, he was in the Cold Spring office on 4 February when DePolito came in after work that day.[14] Nicolette testified that he said to DePolito, "what's all the yelling and screaming going on again. I thought we talked this Friday." DePolito replied, "So?" Nicolette asked if DePolito had been turning in his paperwork. DePolito indicated that he had but that maybe Bumstead threw it away. Nicolette stated that he then fired DePolito because the latter was "very short, copping attitudes with me." DePolito's attitude was "negative." Nicolette stated that he had gone to Cold Spring with the purpose of getting DePolito and Bumstead together and ironing out their difficulties, not with the intent of firing DePolito. Nicolette testified that before he spoke to DePolito on 4 February, he had not planned to discharge him but only to admonish him to get along better with Bumstead. Nicolette testified that his decision to discharge DePolito came about because DePolito shrugged his shoulders and seemed unconcerned. DePolito's termination report was prepared by Nicolette. It states that DePolito was terminated for "Attitude and Actions Nonbecoming a Manager." The termination date shown is "2/4/87" and it bears Nicolette's signature date "2/2/87." Nicolette testified that he signed the document on 4 February; he could not explain why it was dated 2 February. The document thus suggests that Nicolette decided to discharge DePolito before 4 February 1987.

Even though Nicolette's initial testimony was that he fired DePolito for his "Attitude" and even though the official termination report supports this reason, Nicolette then added to his testimony and seemed to say DePolito was fired for a long list of shortcomings. Respondent introduced testimony purporting to show that DePolito was an unsatisfactory employee during 1986. Nicolette testified about a number of incidents involving alleged failings by DePolito. Some of these instances involve problems which Bumstead; the immediate supervisor, attributed to other employees: This included the Brewster North delivery missed by Collazo and the use of too much copper tubing by Crissey and Collazo. Other instances were satisfactorily explained by DePolito in unrebutted testimony: Bumstead complained that DePolito failed to make a delivery to a customer named Elton. The testimony shows that DePolito could not get up the Elton driveway in the Synergy pickup truck due to snow; however, when DePolito offered to try again, Bumstead's wife informed him that Bumstead had made the call already in a four-wheel-drive vehicle. Bumstead testified that a customer named Ritell complained that he ran out of gas because DePolito was not making automatic deliveries to him. However, Bumstead could not testify that Ritell had indeed requested automatic service, Nicolette testified in such a way as to imply that Bumstead had complained that DePolito stole some company property from a truck. However, Bumstead's version of the event was different; Bumstead saw DePolito remove something from the truck, but he did not check to see if company property was missing. DePolito credibly testified that he had removed his own tools from the truck. The only serious example of failure by DePolito to be cited by Bumstead and Nicolette involved the Lake View cottages job. This work called for numerous individual tank installations on a property in the process of being developed. Some of the housing units were near soggy ground. Instead of placing the tanks at the usual distance from the dwellings, which would have entailed the danger of tanks toppling over due to the unsteady ground, DePolito and the other employees placed the tanks close to the housing units. Bumstead considered this a code violation and informed DePolito of this fact in Nicolette's presence. He said the tanks would have to be moved. Whether DePolito had indeed permitted an unsafe installation to be carried out is immaterial. On various days, including the last day of the trial, many months after the alleged improper installation, witnesses testified that the tanks were still in the same position. I find that if the problem was as serious as is contended by Respondent, the tanks would long since have been moved. Thus, I find that Respondent did not take the problem seriously enough to correct the situation during the months after it first occurred and that it was not a major failing by DePolito. I find that the long list of shortcomings was an afterthought. Nicolette's testimony

[14] Nicolette had discussed the argument of the day before with Paulette Pennachio before DePolito entered the office.

about the alleged failings of DePolito is not reliable and is not supported by Bumstead's testimony.

4. Discussion and conclusions

I find that the motivating factor in the discharge of DePolito was that he was organizing the Union at the Cold Spring branch.

Nicolette admittedly learned of the union organizing by DePolito on 23 January 1987, less than 2 weeks before he fired DePolito. On 30 January, he coercively interrogated DePolito and Collazo about their union activities and told DePolito that headquarters knew of the organizing efforts. Nicolette and Bumstead discussed the Union before Nicolette discharge DePolito. Bumstead knew that DePolito had approached Glen Pennachio about the Union and Nicolette mentioned this fact to DePolito on 30 January. That Nicolette had antiunion animus is made clear by his use of the term "the union bull shit."

I find that the exchange of words between DePolito and Bumstead on 3 February was used as a convenient excuse to discharge DePolito. Both General Counsel's and Respondent's witnesses testified that Glen Pennachio cursed and yelled on various occasions when things did not go his way, yet Pennachio was not fired, Pennachio was allowed to come back after he quit in a huff and Pennachio was given a raise. Thus, I find that DePolito would not have been discharged for the brief episode on 3 February had he not also been engaged in an effort to bring in the Union. See *Wright Line*, 251 NLRB 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); NLRB v. *Transportation Management Corp.*, 462 U.S. 393 (1983).

Bumstead, the immediate supervisor, did not ask Nicolette to discharge DePolito. Indeed, Nicolette said he had no intention of discharging DePolito until he saw that the latter had an "attitude." Yet Nicolette did not explain in any detail what the attitude consisted of and why it justified the termination. Nicolette did not explain why DePolito's "attitude" was worse than Glen Pennachio's. Respondent's official termination report mentions "attitudes and action," but it makes no reference to the long list of purported job-related inadequacies Nicolette described at the hearing. As shown above, these inadequacies were a sham. Thus, I find that the so-called attitude and failings cited to support the discharge were a pretext. See *Wright Line*, supra.

In conclusion, I find that Respondent discharged DePolito because he was organizing the Union at the Cold Spring plant. Respondent thus violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By coercively interrogating its employees concerning their union activities, Respondent violated Section 8(a)(1) of the Act.

2. By discharging Frank DePolito because he supported the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[15]

The Respondent having discriminatorily discharged Frank DePolito, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[16]

Respondent must remove from its records any mention of DePolito's discharge on 4 February 1987.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Synergy Gas Corp., Cold Spring, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union activities.

(b) Discharging its employees because they engage in concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Frank DePolito immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the discharge of 4 February 1987 and notify Frank DePolito in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records nec-

[15] The General Counsel's request for a visitatorial Order is denied.

[16] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

essary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Cold Spring, New York facility copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees for engaging in union activities.

WE WILL NOT interrogate our employees about their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL offer Frank DePolito immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent positon, without prejucice to his seniority or other rights and privileges previously enjoyed and WE WILL make him whole for any loss of earnings, plus interest.

WE WILL remove from our records any mention of the unlawful discharge of Frank DePolito.

SYNERGY GAS CORP.

Security Search and Abstract Company of Philadelphia, Inc. *and* Teamsters Union Local No. 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] Case 4–CA–16421

August 22, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On May 2, 1988, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions [3] and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Security Search and Abstract Company of Philadelphia, Inc., Philadelphia and Norristown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The Respondent did not except to the judge's conclusions that it violated Sec. 8(a)(1) of the Act in several respects, including threatening and interrogating its employees in connection with the Union, and that it violated Sec. 8(a)(3) and (1) of the Act by transferring discriminatee Peggy West because of her union activities. The General Counsel did not except to the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(1) of the Act when Supervisor Patterson questioned employee Snodgrass about the Union.

Because we find that the Respondent unlawfully discharged West after it unlawfully transferred her, we find it unnecessary to pass on the judge's discussion regarding what would be the appropriate remedy should only the transfer have been found unlawful.

[4] The attached notice is substituted for that of the judge in order to correct an inadvertent error.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten, because of your union activities, to dock your wages if you are late, to transfer you because of your union activities, to discharge you if you continue your union activities, or to reduce your wages if a union comes in.

WE WILL NOT tell you that you cannot use company telephones because of your union activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT discourage membership in Teamsters Union Local No. 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, or any other union, by transferring you, changing your terms and conditions of employment, discharging you, or otherwise discriminating against you in regard to your hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Peggy West immediate and full reinstatement to her former job in our Philadelphia office from which she was unlawfully transferred or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful transfer and discharge of Peggy West, and notify her that this has been done and that the

transfer and discharge will not be used against her in any way.

SECURITY SEARCH AND ABSTRACT COMPANY OF PHILADELPHIA, INC.

Margarita Navarro-Rivera, Esq., for the General Counsel.
Steven R. Williams, Esq., of Philadelphia, Pennsylvania, for the Respondent.
Norton H. Brainard III, of Philadelphia, Pennsylvania, for the Union.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Philadelphia, Pennsylvania, on 20–23 July 1987, pursuant to a charge filed on 24 February, and amended on 27 February 1987, by Teamsters Union Local No. 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) and a complaint issued on 28 April and amended on 20 and 21 July 1987. The complaint in its final form alleges that Security Search and Abstract Company of Philadelphia, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening and interrogating employees in connection with the Union; and violated Section 8(a)(1) and (3) of the Act by changing Peggy West's conditions of employment, and by transferring and then discharging her, because of her union activity.

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel) and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Pennsylvania corporation that researches real estate titles at its facilities in Philadelphia and Norristown, Pennsylvania. During the year preceding the issuance of the complaint, Respondent's gross revenues exceeded $500,000 and Respondent provided services valued in excess of $50,000 to several banking firms in Pennsylvania, each of which is engaged in interstate banking under the Federal Reserve System. I find that Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over Respondent's operations will effectuate the policies of the Act. *Siemons Mailing Service*, 122 NLRB 81, 85–86 (1958); *Amalgamated Bank of New York*, 92 NLRB 545 (1950); *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958).

The Union is a labor organization within the meaning of the Act. See *Teamsters Local 115 (Gross Metal)*, 275 NLRB 1547, 1549 (1985), enfd. mem. 800 F.2d 1136 (3d Cir. 1986), of which I take judicial notice.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Peggy West's Employment History*

About August 1976, George Billings, who at that time was running what was then Respondent's largest customer (Provident Consumer Discount Company), asked Jack Hornstein, Respondent's president, to hire as a clerical employee a friend of Billings, Peggy West, who was then working as a waitress and had no clerical experience. Hornstein replied that he could not afford to hire any more employees. Billings told Hornstein to give her $100 a week and build it into Provident's bill. Hornstein did hire West in August 1976. Her wages were paid in the manner proposed by Billings until about early 1978, when Respondent began to pay her from the same source of funds that it used to pay the other employees. At the time West began to work for Respondent, she suffered from a hearing impairment that made it impossible for her to use the telephone without special equipment for which Respondent was reluctant and, perhaps, could not afford to pay. Her initial duties consisted of filing and of "making deliveries" to customers, a function discussed below. In 1978, she underwent ear operations, which enabled her to answer telephones. About 1981, she began to "make deliveries" to city hall, a function discussed below. By 1986, her last full year of employment with Respondent, her principal responsibility was handling the mail in the Philadelphia office, a function discussed infra part II,F,1,a. Between 1976 and her February 1987 discharge, Respondent's personnel complement increased tenfold, from 8 to 80.

At all material times, the functions performed by Respondent's Philadelphia office have included "making deliveries" on foot. At all times since West's hire in 1976, "making deliveries" in the Philadelphia office has included transporting documents between that office and the offices of Respondent's customers on a daily basis. Making a "full delivery route" to customers calls for "deliveries" to 30 to 50 different customers in the downtown Philadelphia area, and consumes 2 to 5 hours. West stopped "making deliveries" to customers in 1982 after she underwent a leg operation necessitated by phlebitis.[1] Since about 1981, "making deliveries" in the Philadelphia office has also included taking deeds, mortgages, and prothonotary filings, on a daily basis, to the recorder of deeds at city hall, obtaining receipts therefore, and picking up documents after they have been recorded. Except for a recuperation period after her 1982 phlebitis operation, West consumed about 2 hours every day making deliveries to the recorder of deeds, about 4 blocks from Respondent's Sansom Street office, between about 1981 and about March 1986, a month or so before Respondent's Philadelphia office moved from Sansom Street to Pine Street.[2] Toward the end of this period, "making de-

[1] This finding is based on credible parts of West's testimony. Hornstein testified that she continued to "make deliveries" to customers "till about '84, '85."

[2] This finding is based on credible parts of the testimony of Hornstein, employee Judith Werner, and Office Manager Denise Patterson. For demeanor reasons, I do not accept West's testimony that she made only one such delivery after her phlebitis operation.

liveries" at city hall required her to make occasional hunts for documents there as well as carrying documents. Hornstein also described as "making deliveries" in the Philadelphia office the occasional task of taking the stamp machine to the post office for filling, and taking documents to Respondent's attorney. The record fails to show how often these errands had to be performed. Hornstein credibly testified that West took the stamp machine to the post office on one occasion after the move to Pine Street.[3] With these exceptions, West made no "deliveries" of any kind after the move to Pine Street.[4]

Since about 1982, Respondent has had a practice of giving to each employee a wage review that, ordinarily, takes place a year after the employee's most recent wage review. Hornstein testified that in determining whether an employee should receive a raise in consequence of the review, he gives weight to absences, and latenesses, without good excuse; but gives little or no weight to absences and latenesses for legitimate reasons. He further testified that he could not recall any wage reviews of West that failed to result in a wage increase. Her last wage review, in February or March 1986, was at her request held several months before her anniversary date, and led to an increase that exceeded 10 percent and raised her weekly wages to $275.

About 1982, West missed an undisclosed amount of time because of her phlebitis operation. On an undisclosed date, perhaps in 1984, she missed an undisclosed amount of time because of major abdominal surgery.

In 1977, West (who as of August 1986 was a single parent) advised Respondent that her daughter, Kelly, was afflicted with cystic fibrosis. For the next 7 or 8 years thereafter, West was 10 or 15 minutes late two or three times a week, because she had to administer therapy to her daughter and sometimes this took longer than at other times. Respondent does not require employees to sign or clock in or out, and does not have a practice of docking employees in the Philadelphia office when they are less than a half hour late. West was never docked for being late. She made up at least some of this missed time by taking shorter lunch periods.

Until 1987, Respondent permitted employees who (like West) had more than 3 years' service to take an annual paid vacation of 2 nonconsecutive weeks.[5] Also, at all relevant times, Respondent has permitted employees who (like West) have more than 1 year's service to take 5 days' annual paid sick or personal leave, which the employee is free to take for any reason he chooses.[6] About 25 June 1986, Kelly became critically ill. When the hospital called West at the office to tell her that Kelly was not expected to live, West broke down in tears. Hornstein took her into the conference room to calm her down, and told her "just leave right away." On the following day, West advised Hornstein that Kelly's condition was very bad, that she needed an operation, and that West would be coming in a few hours late because she wanted to see her daughter in the hospital in the morning. West told Hornstein to deduct from her pay any lost time she could not make up at lunch. He told her that she had been there 10 years, she had been a good employee, and not to worry about anything. Kelly had to undergo surgery, and spent a month or 6 weeks in the hospital. While she was in the hospital, West regularly came in several hours late; on some days, spent only an hour or two at the office; and on at least 1 day, when Kelly was undergoing surgery, did not come in at all. On a couple of occasions during this period, West asked Hornstein to deduct from her pay the lost time she did not make up by working late or during her lunch period. She did thereby make up some of this missed time. Respondent never did dock her pay for the time she lost while Kelly was in the hospital. Moreover, Respondent paid West for a day's vacation, which she took on 28 November 1986, the day after Thanksgiving and several months after Kelly's release from the hospital.[7]

Before Kelly's hospitalization, West had taken 1 week's paid vacation the week of 4 February 1986. As previously noted, after Kelly's discharge from the hospital, West took a day's paid vacation on 28 November 1986. Thereafter, West took a second week of vacation (approved by Hornstein before Kelly's hospitalization) the week between 29 December 1986 and 3 January 1987 inclusive.[8] The rather casually kept attendance record on West's personnel folder states that between the beginning of 1986 and Kelly's hospitalization about 25 June 1986, West was absent about 6 days. This record further states that West was absent on 6 August 1986 (which may or may not have been while Kelly was still in the hospital) and was absent on a Friday (10 October 1986), which preceded a Monday holiday for which, in consequence, she did not get paid. Also, these records state that between 14 August and 26 December 1986, she was 4-1/2 hours late on 14 August, left at 1 p.m. on 28 August, and left at 2 p.m. on 26 November and 26 December, in both cases to catch a plane. Also, during a period when Hornstein, contrary to his usual custom, kept records of West's tardinesses shorter than a half hour, she was 7 to 10 minutes late on 4 days between 15 August and 25 September 1986 inclusive. With the exception described supra at footnote 8, she was not docked for any of these absences or tardinesses. These records further state that

[3] Before the move to Pine Street, the post office and the attorney's office were about 4 blocks and 2 blocks, respectively, from Respondent's office. After the move, the distances were about 7 and 12 blocks, respectively.

[4] This finding is based on credible parts of the testimony of Werner, Hornstein, and West. For demeanor reasons, I do not credit the contrary testimony of employee Mark Russo.

[5] On an undisclosed date between 13 February and 22 July 1987, Respondent began to give 3 weeks' paid vacation to employees who (like West) had more than 10 years' service.

[6] Payment for a particular year's unused personal leave is added to the employee's Christmas bonus.

[7] In view of West's November 1986 receipt of another day of paid vacation and Respondent's failure to dock her for her lost time in the summer of 1986, I credit her denial that Hornstein told her that deductions from her vacation would be made for the time she lost that summer because of Kelly's illness. For similar and demeanor reasons, I accept her testimony (set forth in the text) about her conversations with Hornstein regarding Kelly's illness and West's pay, and reject his testimony that when she told him about Kelly's illness, he told her that Respondent would "collect the time at the end . . . we'll work it out at a future date."

[8] Initially, Respondent refused to pay her for this second week of vacation. See infra, parts II,A and C.

between 5 January and 9 February 1987, she was out sick for 7 days (6 of which she was paid for and was absent for 1 day for which she was not paid) because of a snowstorm. Also, she was a half-hour late on 1 day; and was an hour late on another day. She was not docked for these two tardinesses.

As previously noted, before 29 December 1986 West had taken as formal paid vacation days only 6 of the 10 days she was entitled to. Before her daughter's illness, West had received approval from Hornstein for 3 more days of paid vacation in 1986 (that is, 29, 30, and 31 December) plus 2 days in 1987 (2 and 3 January). About early December 1986, she drew Hornstein's attention to this forthcoming vacation. He told her that she really did not have the time coming. She said that he did not have to pay her. He said that business was really slow at Christmastime and she was welcome to take her vacation, but he could not pay her for it. She said "fine."

On West's return from her December-January vacation, she asked Hornstein for her vacation pay. He said that she had agreed to not being paid for it. She said that she wanted to take the first week of her vacation for 1987. He said that under Respondent's rules, she could not cash in a future vacation; that without special permission, vacations had to be taken after 1 June; and that he was "not moving up a vacation week; you have been out plenty." She said that she was going to the "unemployment board" about the matter. He told her to go ahead and do so. She asked why she had not been paid for her vacation. Hornstein angrily referred her to Company Vice President Marc Lovenworth, who told her that she had not been paid because she had taken a lot of paid time off when her daughter was in the hospital. Inferentially a few days later, while West and other employees were eating lunch in the lunchroom, she saw Hornstein walking by. She stopped him and screamed that her failure to receive vacation pay was unfair, she thought she should be paid "regardless," and her friend George Billings had given and was giving Respondent a lot of business.

B. *West's Union Activity; Alleged Interference, Restraint, and Coercion*

On 4 February 1987,[9] West telephoned Union Representative Bob Henninger and asked about undertaking a union organizing campaign at Respondent's establishment. The two of them arranged for a meeting at the union hall between Henninger and Respondent's employees on 9 February. Because of a snowstorm that day, West telephoned Henninger again and rescheduled the meeting to 10 February, when it was in fact held. This meeting was attended by West and employees Judith Werner and Roberta Snodgrass. Henninger told them about the Union and union elections, had them sign authorization cards, and gave them authorization cards to distribute to Respondent's work force.

Between 8 and 8:30 a.m. on 11 February, just before Respondent's office opened for business, West and Werner stood at a point on the sidewalk four or five doors away from Respondent's establishment. As Respondent's employees approached the office, West and Werner called them over, stated that West and Werner were trying to get a set policy in the office on vacation and sick days and raises, and asked them to sign union cards. Ten or 15 employees accepted cards and at least 1 employee signed a card on the spot. At one point, West and Werner were approached by Irene Leclair, who worked in Respondent's title department. Leclair asked whether this was a union meeting. Werner said that she and West were trying to form a union, and asked Leclair whether she would like to have a card. Leclair said no, that she was management.[10]

Just before the start of the workday, West entered Respondent's establishment. As she approached her desk, a title department employee identified in the record as "Theresa" asked West, "What is this all about the Union?" West said that she could not talk to her about it now because "we were told not to talk about it on office time." Theresa returned to her desk and telephoned West, who said that she would give Theresa a card, and talk to her about the Union at lunchtime. Later that morning, West had a similar conversation with bookkeeping department employee Diane Clemens.

At an undisclosed hour on the morning of 11 February, an employee identified in the record as "JoAnn" approached Office Manager Patterson, admittedly a supervisor in Respondent's Philadelphia office, and told her that there was union activity, that West and Werner were trying to sign up people to join a union, and that JoAnn did not want to join. Thereafter, Patterson went to "plant" Manager Carmen Viola, also admittedly a supervisor in Respondent's Philadelphia office. Patterson told him that "one of the girls had approached me that had been approached about joining the Union." The two supervisors discussed whether to tell Hornstein or Lovenworth. Patterson testified that "We both decided not to because there wasn't enough participation, we didn't think, from talks with fellow employees that there was going to be any union or enough people to join." Viola did not testify, nor was his absence explained.

About 10 a.m. on 11 February, West entered Viola's office and told him that she and other women were trying to organize a union. She asked him whether he would mind if she talked to the title searchers, who were all male and were supervised by Viola, on lunchtime or after work. He said that he did not object. He further said that he could understand the "girls'" situation, because they were not well paid; but that if the "fellows" asked him about a union, he would advise them against it, because the "fellow searchers" were very well paid, Hornstein did not bother them, and if a union came in, their wages would be lowered "right away" to some sort of uniform scale that would be lower than what they were making now. West said that this was not true, that they would not get lower wages.

[9] All dates hereafter are 1987 unless otherwise indicated.

[10] West testified that Leclair was the supervisor of the title department. Hornstein testified that she was "just a clerk, an assistant to" the head of that department. As the General Counsel does not claim that Respondent acquired knowledge of the union movement through Leclair or that she engaged in any unlawful conduct attributable to Respondent, determination of her status is unnecessary.

That same day, during a work-related telephone conversation, West was asked about the Union by Robin Davis, who was the office manager of the Company's Bucks County office and was admittedly a supervisor. West asked if she was interested in the Union. Davis said that she was not, but asked whether West wanted her to call the office managers in the other counties (who were also supervisors; see infra, part II,F,1) to see if they were interested. West said that Davis could do this if she wanted to, and asked whether West could send union cards out there to the employees. Davis did not object.

At lunch that day, West and Werner and/or Snodgrass received signed authorization cards from Theresa and Clemens. Another Philadelphia employee, and an employee in the Montgomery County office in Norristown, Pennsylvania, also gave signed cards to West and Werner and/or Snodgrass.

On 12 or 13 February, during a conversation on the street with employee Snodgrass, Supervisor Patterson asked her what she thought of the Union and whether she wanted to join a union. The record fails to show Snodgrass' reply, if any.

C. *West's Allegedly Unlawful Transfer*

About late January 1987, West told Company Vice President Lovenworth that she had received a trip to Florida as a Valentine's Day gift, and asked whether she could take 2 vacation days. He said yes.[11] She was in Florida between 12 February (a Thursday) and Monday, 16 February (a holiday), inclusive. On the evening of 12 February, she telephoned Werner and Snodgrass at home to ask them "how the cards were going" and encouraged them to continue their organizing activity.

During the week beginning Sunday, 8 February, Company President Hornstein was in Florida on vacation. While taking out-of-town vacation trips, Hornstein had a practice of making frequent collect telephone calls to at least Respondent's Philadelphia office, in order to find out how the business was getting along.[12] He flew back to Philadelphia on Friday, 13 February, and was driven by his wife directly from the airport (where her car was parked) to the office (where his own car was parked). Immediately on entering the building, about 1:30 p.m., he encountered Supervisor Viola. After a conversation with Viola where (Hornstein credibly testified) West was discussed, Hornstein had within earshot of Patterson a conversation with Lovenworth where (Hornstein credibly testified) West was again discussed.[13] A few minutes later, Hornstein drafted, arranged for the typing of, and signed the following letter, which he arranged to have sent to West by registered or certified mail:

> Due to the increase in work load in our Norristown office and the decrease of our work load in our Philadelphia office, you will be transferred immediately to our Norristown office located at 18 W. Airy Street, Suite 403, Norristown, PA 19401
>
> You will report to Andrea Barone as Supervisor. There will be no change in wages because responsibilities will be [similar]. Good luck in your new assignment.

Hornstein laid a copy of this letter on Lovenworth's desk.

Before leaving the office on 13 February, Hornstein telephoned Andrea Barone, the office manager of Respondent's Norristown office and admittedly a supervisor within the meaning of the Act. Hornstein's initial testimony about this conversation implies that he telephoned Barone before drafting the letter transferring West to Norristown, but he later testified that he telephoned Barone after the letter had been typed and while employee Werner was arranging for it to be sent by certified mail. Without stating what West's duties would be, he told Barone that West would start work in Norristown on the next working day—Tuesday, 17 February.[14] Hornstein admittedly knew that West lived in New Jersey and had been commuting to Respondent's office in downtown Philadelphia by driving her car to and then riding public transportation, which consisted of the "high-speed line," admittedly anticipated that her transfer to Norristown (about 20 miles from Philadelphia) would require her to take a train or bus from Philadelphia, and admittedly anticipated that her transfer would probably extend her commuting time. Barone, who had known West for 9 years, testified that because of the distance between Norristown, Pennsylvania, and West's residence in Lindenwold, New Jersey, Barone had not

[11] My finding as to the date of this conversation is based on West's testimony that it occurred on a Wednesday or Thursday about a week before her departure for Florida on 11 or 12 February (a Wednesday and Thursday, respectively) and on Hornstein's testimony that Lovenworth was in Florida during the entire week of 2–6 February. Her testimony that Lovenworth gave her prior permission to take these 2 days off is undisputed. He did not testify, nor was his absence explained. Hornstein testified that on 13 February, Lovenworth told him that Lovenworth and West had discussed her vacation before her departure. Hornstein further testified to a similar report from Supervisor Patterson on an undisclosed date.

[12] This finding is based on West's testimony. In view of the probabilities of the case, and for demeanor reasons, I do not credit Hornstein's denial that he followed this practice, or his denial that he telephoned the Philadelphia office during his Florida vacation. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Respondent failed to produce either its telephone bill for this period, or Hornstein's hotel bill, which would have shown whether any long-distance calls had been made from the phone in his hotel room.

[13] Hornstein's detailed version of these two conversations is discussed infra, part II,F,2. Viola and Lovenworth did not testify, nor was their absence explained. Supervisor Patterson was not asked about this conversation when Respondent called her as a witness. On cross-examination by union counsel, Patterson testified that she had known before West's transfer the reason for the transfer, but could not remember the reason. Then, Patterson testified that she had heard from a "general conversation," which she "might have overheard," on a date which and between persons whose identity she could not remember and who may or may not have been supervisors, that the only reason for West's transfer was that the Norristown office "needed somebody." For demeanor reasons, I do not credit either her professions of forgetfulness, or her testimony regarding the content of this alleged possible conversation.

[14] These findings regarding what he said are based on the testimony of Barone, who testified for Respondent. In view of Hornstein's testimony that he transferred West partly because he was angry at her, because of his testimony at one point that he telephoned Barone after he signed the letter transferring West to Barone's Norristown office, because of the evidence (infra, part II,C) that the Norristown office did not then need any more employees, and for demeanor reasons, I do not credit his testimony that Barone said she needed help, he asked if she would take West, and Barone said that would be fine. See also infra, fn. 15.

thought that West would actually report to work in Norristown.[15]

The customers for whom Respondent performs property searches include First Jersey Financial Corporation, a company that finances mortgages and thereafter sells more of them. Before February 1987, First Jersey Financial had also used Tri-State Appraisal Service, a corporation whose stock is owned by Respondent's president and one of its principal owners (Hornstein) and by Respondent's vice president (Lovenworth), to perform appraisals.[16] About mid-February 1987, First Jersey Financial's president, Frank Pellegrini, engaged in a telephone conversation with Lovenworth about a property search to be performed by Respondent for First Jersey Financial. During this conversation, Lovenworth asked why the volume of appraisals had slowed down. Pellegrini said that his firm was selling a lot of first mortgages to Tri County Savings and Loan, and that Tri County Savings' president, George Billings, had said that First Jersey Financial could no longer use Tri-State Appraisal on transactions involving Tri County Savings because prospective buyers of mortgages that it was trying to sell had been advising Billings that Tri-State Appraisal's appraisals were not right, and Billings had had to buy a few deals back. As previously noted, Billings was the individual who had initially arranged for West's hire by Respondent; moreover, in July 1986, Billings had entertained West, Hornstein, and Hornstein's wife at Billings' house at the seashore and, in August 1986, West had given Billings' name to Respondent as the person to notify in case of an emergency. In response to Pellegrini's remarks, Lovenworth said that he had known that was coming. He went on to say that Respondent had transferred West to Norristown, she was disrupting the office in regards to forming a union.[17]

D. *Alleged Further Interference, Restraint, and Coercion; the Alleged Unlawful Change in West's Working Conditions and Her Allegedly Unlawful Discharge*

On Friday, 14 February, West made a telephone call from Florida to her daughter Kelly, who read to her over the telephone the letter transferring West to Norristown. The Norristown office, like the Philadelphia office, begins work at 8:30 a.m.[18] West reported to work in the Norristown office at that hour on the next working day (Tuesday, 17 February).[19] Barone's first remark was, "I do not believe you really came here." West asked whether Barone had not received a letter that West was coming. Barone said that she had received a telephone call, but had never expected West to come all this distance. Barone went on to say that she had no spot for West, but that Norristown employee Denise Dirkson had not yet arrived, and that West could sit at her desk until Dirkson came in. About 9 a.m., Barone telephoned Dirkson, who said that she was not going to come in any more. Then, Barone told West that Dirkson had quit, "and now we have a spot . . . for you."

That day, West helped the other Norristown personnel to arrange furniture and plants in the office, into which Respondent had just moved. In addition, she took one telephone call and ran off one piece of work. She volunteered to file a foot-high stack of papers waiting to be filed, but was told that this was someone else's job. She spent the rest of the workday reading a newspaper and a magazine. Another employee in the office also read a magazine during working hours.[20]

On the following morning, 18 February, West had not yet arrived when the office opened for business at 8:30 a.m. At 8:45 a.m., Barone telephoned Hornstein and asked whether West was coming in. He said that he did not know, and told Barone to have West call him when she came in. West, who had been delayed because her train had had a signal problem, came in at 9 a.m. Barone told her that Hornstein wanted her to call him right away. At 9:10, West called Hornstein. He said that she was 45 minutes late.[21] She said that she could not help being late, that she was late because her train had had a signal problem, and that she would compensate for her tardiness by shortening her lunchbreak, "we always did it that way in Philadelphia." He said, "We do not do it out there." She remarked, "Oh, you have a double standard now for each of the offices." She said that she would compensate for her tardiness by working late. He told her that she could not do that either because in Norristown only Barone and one of the searchers had keys to the office. Although Hornstein testified that this searcher regularly reported to work before 7 a.m., there is no evidence that Hornstein told her this or suggested that she could make up the lost time by coming in early. He said

[15] Such testimony by Barone is difficult to square with Hornstein's discredited testimony that she asked for additional help and said "fine" to his proposal of West.

[16] Respondent and Tri-State Appraisal are two of the three tenants in a building owned by a partnership consisting of Hornstein and Lovenworth.

[17] My findings as to the remarks by Lovenworth, Respondent's vice president, are based on Pellegrini's uncontradicted testimony. Respondent's posthearing brief errs in contending that such testimony of Pellegrini constituted hearsay, which was not legally probative of Respondent's motive for transferring West. *United Beef Co.*, 277 NLRB 1014, 1022–1025 (1985).

[18] My findings concerning the Norristown office are based on West's testimony and on Hornstein's testimony on direct examination; see also infra, fn. 21.

[19] My finding that she reported to work at this hour is based on West's uncontradicted testimony. Because of such testimony, other reasons summarized infra, fn. 21, and demeanor considerations, I do not credit Hornstein's testimony (denied by West and uncorroborated by Barone) that Barone called him at 8:10 a.m. on 17 February to tell him that West was organizing a union, Barone put West on the telephone at West's request, and he told her not to engage in union activity during working hours because the Norristown office had a lot of work on hand. I note that West's first workday at Norristown did not begin until 20 minutes after this alleged conversation, virtually no work at Norristown was available for West on that day (see infra), and except for the testimony of Hornstein discussed in this footnote, the only evidence of any union activity by West in Norristown before this conversation took place is her testimony that one Norristown employee signed a union card on an undisclosed date.

[20] My findings in this paragraph are based on West's uncontradicted testimony. Cf. supra, fn. 19.

[21] My finding that he told her at 9:10 a.m. that she was 45 minutes late is based on Hornstein's direct testimony, a few minutes after he testified in terms that her Norristown workday began at 8:30 a.m. Accordingly, I do not accept his testimony on cross-examination that her Norristown workday began at 8 a.m. Norristown Office Manager Barone was called by Respondent as a witness, but was not asked about this matter.

that he was going to dock her pay. He went on to say that she was not allowed to use the phones and she was using them for union activities. She told him that she was not using the phones, and if she made any union calls, she made them on lunchtime, on phones outside the office. Hornstein said that he was going to transfer West to the other county offices.[22] She said that she would hand out cards there, too.[23] When West worked in the Philadelphia office, employees were permitted to make up latenesses by shortening their lunch period or working late. As of the July 1987 hearing, at least this former practice was still being followed in that office. In the absence of any testimony about the practice in the Norristown office, other than West's credited but uncorroborated testimony about what Hornstein told her during the foregoing conversation (see supra, fn. 23), I infer that the practice there was the same. The record directly shows that in the Philadelphia office, employees were permitted to make any number of personal calls on company phones, but were forbidden to use company phones for this purpose during the employees' worktime. In the absence of evidence to the contrary, and in view of Norristown Office Manager Barone's testimony that Hornstein did not during his call about West's transfer ask Barone to monitor West's use of the phones, I infer that the Norristown office had a similar practice. Hornstein testified that he made no entry in an employee's personnel folder when the employee was late because the trains were not running, and that attendance records of "county" personnel were made by him on their personnel folders on the basis of reports from the county office managers. In the absence of direct evidence otherwise, I infer that concerning tardiness, he followed the same practice with respect to all employees—Philadelphia or "county."

On Thursday, 19 February, West was absent from work because her daughter, Kelly, was sick. About 11 a.m. on 20 February, Hornstein telephoned the Norristown office. When West answered the telephone, he asked for Barone. West replied that Barone was over at the courthouse. Then, he asked to speak to a Norristown employee identified in the record as "Roxanne." West replied that Roxanne was not in the office that day. He asked West to have Barone call him immediately. West said that she would like her vacation pay. He asked, what vacation pay? She said, the $275. He said that he was not giving her the $275, that she had said she was going to sue him, and that she should go ahead and sue. She said that she and Billings were going to sue Hornstein, that it would cost him "a fortune," but that it would not cost her a penny because Billings had "friends in the Union." Hornstein said that if she did not stop all this union activity, he was going to fire her. She said that she and Billings were going to sue Hornstein on four counts: that she was going to get her vacation pay; that she was going to get fired and get her "unemployment"; that she was going to "get" Hornstein for blocking a union; and that if her daughter died, she and Billings were going to bring Hornstein in for obstructing West, by transferring her to the Norristown office, from giving Kelly therapy. West said that she was going to give Hornstein as much grief as she possibly could. He said that this was ridiculous, "do what you want." she hung up on him.[24]

On the previous day, 19 February, Barone had worked in the Philadelphia office at Hornstein's instance.[25] As previously found, in the Philadelphia office West had made no "deliveries" to customers since her 1982 phlebitis operation, and had made no "deliveries" to city hall since before the Philadelphia office was moved in April 1986. Moreover, Hornstein testified to the belief that at least after that move, West "never wanted—she would never go" on walks to the post office, and that she had taken only one such walk on an occasion when (he suspected) she also had personal business there. About 15 minutes after Hornstein's conversation with West on the morning of 20 February, Lovenworth telephoned the Norristown office and asked to speak to Barone. West, who had answered the telephone, replied that Barone was over at the courthouse. Lovenworth told West to have Barone call him when she came in. West did so, and Barone thereupon returned Lovenworth's call. The record contains no direct evidence about what was said during this conversation; company witness Barone was not asked about it and Lovenworth did not testify.

When this conversation ended, employee Robert Cleghorn, a title searcher, was in the process of getting lunch orders from all the employees. As he was about to head for a local McDonald's to pick up the various lunches, Barone told him to take West with him "to learn the delivery routes." No deliveries had been performed in the Norristown office while West was working there, and she had never heard of deliveries there. She told Barone that West did not do deliveries; that she had not done them in Philadelphia for about 4 years (which was true, as to making a "full delivery route" to customers); and that when she had been transferred to

[22] Hornstein testified that Respondent's Bucks County office, in Doylestown, is 40 miles from Respondent's office. West Chester (where Respondent's Chester County office is located) and Media (where Respondent's Delaware County office is located) are about 14 and 11 miles, respectively, from Philadelphia's west city line. The record fails to show which, if any, of these three cities are served by public transportation from Philadelphia or West's home city of Lindenwold, New Jersey.

[23] My findings concerning this conversation are based on a composite of credible parts of the testimony of West and Hornstein. For demeanor reasons, I do not credit his testimony on direct examination that aside from what he testified to, nothing else happened in that conversation. When asked on cross-examination about whether he said certain things to West during that conversation, he testified, "I don't remember what I told her." I note that he did not testify that he told her she could not make up Norristown tardinesses by taking a shorter lunch period.

[24] My findings concerning the contents of this conversation are based on a composite of credible parts of Hornstein's and West's testimony. I note that although Hornstein initially testified that he hung up on her, he later corroborated her testimony that she hung up on him. Because Hornstein's version of the conversation (which he characterized as "very strange") contains no explanation for her statement (to which he testified) that she was going to get fired, and for demeanor reasons, I do not accept his denial of her testimony that he threatened her with discharge if she continued her union activity. Because Respondent failed to produce the attendance record of Roxanne, who Hornstein's testimony implies was in the office that day but according to West was not, I accept her testimony that this conversation occurred on 20 February, rather than his testimony that it occurred on 18 February.

[25] This finding is based on West's testimony, received without objection or limitation, that Roxanne so advised West when she telephoned the Norristown office on 19 February to say that she was not coming in.

Norristown, her letter had said that she would be doing the same type of job she had been doing in Philadelphia. Barone said, "You are not going to do the deliveries?" West said that it was not part of her job. Barone said that West had left Barone no choice, and she would have to call Hornstein.

Barone thereupon telephoned Hornstein and said, "Jack, I did what you said, and [West] refused." Hornstein said, "Ask her again."[26] Barone then said to West, "Will you do deliveries?" West said, "I do not do deliveries, I have not done them in years." Hornstein told Barone to let West go. Then, Barone told West, "Jack said you are fired, leave." West smiled, got her things, and said to Barone, "Will you put that in writing?" Barone said that West would have to ask Hornstein for that. Still smiling, West left the office. Respondent hired an employee to fill her Norristown job 2 or 3 weeks later.

My findings regarding the events that occurred in the Norristown office after Barone's return are based almost entirely on West's testimony. Barone testified for Respondent that Cleghorn was about to go on a delivery to Commonwealth Federal, she told West to accompany him on this delivery, and the purpose of these instructions was to make West familiar with Commonwealth Federal's location. Giving a consistent but more detailed account of the incident, employee Russo, who overheard the West-Barone conversation, testified for Respondent that Cleghorn was "going on deliveries," West was going out to lunch at McDonald's, and "Since deliveries is right across the street—the delivery was Commonwealth Federal, it is right across the street from McDonald's, Ms. [Barone] asked Ms. West if she would accompany Mr. Cleghorn to the deliveries in case she would have to do them." Russo's testimony in this respect implies that after working in the Norristown office for 3 days, West already knew the location of McDonald's, which is less than 2 blocks from the Norristown office and, according to Hornstein, is where the employees in that office usually eat. Under the circumstances as described by Russo, requiring West to accompany Cleghorn on the delivery would have been rather pointless; for, if and when she had been instructed to make a delivery to Commonwealth Federal herself, she could merely have been advised that it was across the street from McDonald's. Moreover, Hornstein's discredited testimony from time to time that Barone told him that West had refused to make a delivery to Commonwealth Federal is difficult to square with the discredited testimony of company witnesses Barone and Russo that it was Cleghorn who was supposed to make the delivery to Commonwealth Federal,[27] as well as West's credited testimony that no delivery at all was to be made on that occasion. In view of these considerations, and for demeanor reasons, I credit West, and to this incident do not accept the testimony of Barone, Russo, or Hornstein except as reflected in my findings or corroborated by West.

On an undisclosed date after West's discharge, she filed with a Pennsylvania government agency a claim for vacation pay for the week beginning 26 December 1986 (see supra, part II, A and C).[28] About a month later, she received in the mail a check for the amount she had requested. On 19 March 1987, the Pennsylvania office of employment security denied her 22 February application for unemployment compensation, on the ground that she had been discharged for "willful misconduct in connection with her work." On 4 May 1987, this decision was affirmed by a referee of the Pennsylvania unemployment compensation board of review, on the ground that she had refused without good cause to comply with a reasonable directive—namely, to accompany a fellow employee during his delivery in order to learn the route if she was ever required to make the delivery in the future. So far as the record shows, this decision was never appealed.

E. *Alleged Further Interference, Restraint, and Coercion*

As previously noted, employee Werner attended the union meeting organized by West, participated with West in handing out union cards on the sidewalk outside Respondent's office before working hours, and participated with West in obtaining union cards at lunch. On West's transfer, effective 17 February 1987, Werner was given West's job with a concomitant wage increase. A day or two after West's 20 February discharge, President Hornstein asked Werner to go to Company Vice President Lovenworth's office. While only Werner and Lovenworth were in the office, he asked her why she would be interested in a union. She said because she "thought they needed to get . . . some kind of ground with their sick days, vacations and stuff like that." During this conversation, which lasted about 20 minutes, Hornstein came into the room, and asked her why she would want the Union. Werner testified that "we were talking about what the Union is," and that Hornstein "was explaining to me that, you know, things like . . . you would, you know, pay, and you would be starting at minimum wage." She testified that she could not recall the reason, if any, he gave for why she would be starting at minimum wage. Hornstein was not asked about this conversation, and Lovenworth did not testify.[29]

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[26] My finding that he said merely this is based on a composite of credible parts of Barone's testimony and his initial testimony about the conversation. She did not corroborate his testimony that he told her that everyone had to do deliveries. His initial version did not corroborate her testimony that he told her to tell West that she "had to go on the delivery" or she would be terminated; nor did West's credible testimony about Barone's remarks immediately afterward include any such statement. After Hornstein had heard Barone's testimony about this conversation, he gave versions that included the alleged termination threat.

[27] Hornstein so testified at certain points in his testimony. At other points, he testified, instead, that Barone told him West had refused to accompany another emrloyee on a delivery so she could learn where the delivery spot was. I do not believe this latter version either, in view of its inconsistency with his other version and for the reasons why I discredit the testimony of Barone and Russo about her instructions to West.

[28] My finding that this claim was filed after her discharge is based on inferences from her telephone conversation with Hornstein on the day she was discharged.

[29] At the time of the hearing, Werner was still working for Respondent in the position vacated by West's transfer. Werner testified for the General Counsel under subpoena.

F. *Analysis and Conclusions*

1. West's alleged supervisory status

As previously noted, President Hornstein's 13 February letter advising West of her transfer to Respondent's Norristown stated that her wages would not be changed "because responsibilities will be similar." Further, when the General Counsel asked him whether this letter "indicated to her that there would be no change in her job duties," he replied, "Right. She would basically do clerical work in the office."[30] Moreover, Respondent's counsel stated on the record that West occupied employee status after her transfer. In addition, Respondent's answer averred that "Respondent transferred its employee, Peggy West to its Norristown facility on February 13, 1987." Also, Respondent's counsel averred in his opening statement, "There is no question that Ms. West was an employee at Security Search for a period of nine or ten years"; West started working there in August 1976. However, Respondent contends that West occupied supervisory status between early 1986 and her transfer to Norristown. It is convenient to consider this contention at this point in the decision.

a. *Facts*

Vice President Lovenworth, Respondent's financial manager and one of its owners, handles Respondent's investments and real estate holdings, is in charge of Respondent's sales, establishes Respondent's price schedule, and does public relations work on Respondent's behalf. Company President Hornstein, one of Respondent's principal owners, is in charge of production and personnel, prices out the work, checks on complaints about the work, and reviews each title search to look for obvious discrepancies. Hornstein testified that it is he who handles "the personnel hiring, firing, talking," and that he sets the salary of "every employee who works for me," including supervisors.

Respondent employs about 80 persons, 64 of them in the Philadelphia office and the rest of them in Respondent's four branch offices. Respondent's personnel in its main (Philadelphia) office include Viola (the "plant" general manager), Office Manager Patterson, and Bill Webb (the head of the title department). Inferentially, all of these named individuals are directly under Hornstein.[31] Inferentially, the office managers who head each of Respondent's four branch offices are also directly under him. Respondent admits that Viola, Patterson, and Branch Office Managers Davis and Barone were supervisors within the meaning of the Act. Because of Hornstein's testimony that all the branch managers have the power to hire, and that Webb has the power effectively to recommend hiring, I find that all the branch managers and Webb were supervisors. The authority of Viola, Patterson, Webb, and the branch managers does not extend to firing employees.[32] Although Viola has the authority effectively to recommend discharge, the record fails to show whether the others possess this authority. Viola had keys to the Philadelphia office, but neither admitted Supervisor Patterson nor West had keys. All personnel, including supervisors, have the same pension plan, the same type of health care plan, and the same vacation schedule.

At least until about the beginning of 1987, Hornstein was West's immediate supervisor.[33] He testified that West "basically" did clerical work in the office. Her regular work station was at a desk in an unenclosed portion of Respondent's office area, near the desks (also in an unenclosed area) of Hornstein, Patterson, and employee Snodgrass, who was immediately under Supervisor Patterson and whose desk was back-to-back with hers. Werner, who according to Respondent was supervised by West, occupied a desk behind West's desk and to the left of Hornstein's desk. West addressed and sealed the mail; ran the copy machine; made sure the copies were run off; ordered supplies; stamped the recordings; stamped and logged the documents; took the prothonatory receipts, got them recorded, and sent them downstairs to Viola's department; and handled overflow telephone calls from customers and others. In addition, she divided the deliveries; arranged them in proper order; and put them into a basket, 12 to 15 feet from her own desk but near Hornstein's desk and next to the desk of employee Werner (whose duties then included making deliveries), from which the delivery persons removed them before starting delivery routes (see infra fn. 39).[34]

Respondent generally pays supervisors more than line employees. West was paid substantially less than admitted Supervisors Barone, Viola, and Patterson. West was paid $95 a week more than employee Werner, who worked with West, and was not paid less than any of the other employees who allegedly reported to her. When Werner took over West's job, Werner received a $35-per-week wage increase, which fixed her salary at $60 a week less than West had been receiving. Hornstein testified that in deciding the amount of Werner's raise, he took into account the fact that she had been working for Respondent for about 2 years (the last 9 months as a full-time employee), whereas West had worked for Respondent for more than 10 years. West was not invited to, and did not attend, a meeting about pensions, on an undisclosed date after April 1986, which was attended by all the persons whom I have previously found to be supervisors. It is undisputed that she never participated in the interview process, never suspended any employee or recommended such suspension to Hornstein, and never

[30] The quotation is from p. 311 of the transcript, as corrected in my order regarding the General Counsel's motion to correct transcript.

[31] He testified that "I imagine" Patterson "works for me."

[32] This finding is based on Hornstein's testimony. Because I regard him as more knowledgeable in this area, I do not accept Patterson's testimony that she possesses authority to fire.

[33] Hornstein testified, but Patterson denied, that she was West's supervisor when West was transferred in February 1987. I find it unnecessary to resolve this issue.

[34] My findings regarding where West put the "deliveries" after arranging them in proper order are based on her testimony. In view of Hornstein's uncertainty concerning this matter, I do not accept his testimony that she put on a specific spot on her desk the recordings destined for city hall.

issued any warnings or recommended to Hornstein that such warnings be issued. Respondent contends that West had the authority, in Respondent's interest and in the exercise of independent judgment, responsibly to direct employees, effectively to recommend their discharge, and to discharge them. However, Respondent makes no claim that she possessed any of the other indicia of supervisory status specified in Section 2(11) of the Act.

Although Hornstein's testimony is somewhat uncertain as to West's job title, if any,[35] he testified on cross-examination that she was "head of the mail room" by the time of her last wage review, about February or March 1986, several months before Werner was assigned to work with her.[36] He credibly testified that during this interview, she asked for a higher increase than she received, and that she gave as the reason that she was "head of the mail room."[37] Hornstein further credibly testified that he so referred to her when reproaching her for what he regarded as an excessive amount of misaddressed outgoing mail. When asked "why [he had] made her the head of the mail room," he replied, in effect, that she was the only experienced employee who worked in the area, "So I did not have much choice." A few minutes later, when asked, "Did you make her head of the mail room?", he replied, "I did not make her. She did it herself by just getting the knowledge of knowing where all the customers were . . . . When we hired some delivery people and they were trainees, she was the most experienced, so she was the head." (However, Hornstein testified that he made Patterson a supervisor, and took into account her knowledge, her intelligence, her seniority, and her "loyalty" to Respondent—that is, that she was "very concerned" with the work, and "cared about" the work and the clients.) He went on to testify that when Respondent hired new employees to make deliveries, Respondent put West "in charge of them," a status that he described as introducing the new employee to West and saying, "This person will be doing deliveries for you. I think we told the person that they will report to [West] as far as the mails and the deliveries go . . . . [In 1985, we] hired high school students on a work program . . . introduced them and told them that [West] would be responsible for them; they would be able to help her, it would make her job easier." Further, he testified that a series of delivery persons, two or three at a time, "reported to" West, a term that he explained as "asking her where deliveries would go to, asking her how to do this, how to take an order, how to write an envelope up, where do I find this, where do I find this address, where do I find this stationery, should I take lunch, should I take my lunch on delivery, should I come back." He testified that concerning these employees, West had the "same [disciplinary authority] allowed to anybody training people and directing them; if she found mistakes, she corrected . . . . They came to her for questions." Similarly, regarding delivery person Charles Jones, West credibly testified that he would sometimes ask her where a certain place was, and she would tell him. After the April 1986 move to Pine Street, an undisclosed proportion of the "deliveries" consisting of recordings to be brought to and from city hall were made by employees (searchers, clerks, or title clerks) under Viola's supervision. West never worked with Viola in scheduling deliveries. Hornstein testified that Al Carr, a clerk or title clerk whose immediate supervisor was Viola, reported to West, a term that Hornstein explained as "He checked in with her, picked up the recordings from her."

Respondent contends that West responsibly directed, on Respondent's behalf and in the exercise of independent judgment, Werner and certain delivery persons. On a date before the April 1986 move to Pine Street but otherwise not clear in the record, Respondent began to send out from the Philadelphia office much of the mail that had previously been sent out by the branch offices. Hornstein told West that this change was going to affect her the most, and that he was going to get someone to give her a hand with the mail. Thereafter, but still before the office was moved, Werner, who at that time was a part-time employee, told West that Hornstein had sent up Werner to give West a hand with the mail. West credibly testified that thereafter and until her transfer to Norristown, after separating the mail, West would give Werner all the title searches that had to be sent to finance companies; to this extent, I accept Hornstein's testimony that West "decided between her and [Werner], who was going to handle what customers so far as mail goes." Werner was responsible for addressing all these titles searches to the appropriate finance companies, whose addresses were mostly listed on a Rolodex on West's desk.[38] However, West continued to address the title searches intended for banks, and to package the "deliveries" and put them into their basket. When called by the General Counsel as an adverse witness at the outset of the hearing, Hornstein testified that when West was working at the Philadelphia office, "we did have somebody that was working in the mail room with her . . . that did know how to when [West] was not in, do the recordings, address the mail, run the copy machine, make sure the delivery is done, divide the deliveries up into the proper envelopes, stamp the recordings, take the prothonotary receipts, get them recorded. We did have

[35] When called as the first witness by the General Counsel as an adverse witness under Rule 611(c) of the Federal Rules of Evidence, he testified that her job title was "mail room clerk and phone answerer." When testifying for Respondent, Hornstein testified that she was "the supervisor" or "the head" of the "mail room." Office Manager Denise Patterson, who according to Hornstein (but not her) was West's immediate superior when she was transferred, testified that West was head of the mail department. West testified that about 1982, Lovenworth gave her the job title of "customer service representatives." Although her testimony in this respect about what Lovenworth did is uncontradicted, Hornstein denied that this was her job title. Werner, who succeeded to West's job when West was transferred, testified that Werner had never had a title at Security, and had never had the title of supervisor of the mailroom.

[36] Hornstein testified that he gave Patterson a wage increase when she became office manager, but did not give Barone an "immediate raise" when she became manager of the Norristown office, admittedly a supervisory job.

[37] In view of the probabilities of the case, I accept his testimony in this respect, rather than her testimony otherwise. However, I do accept her uncontradicted testimony that she never so described herself to Werner.

[38] Hornstein testified, in effect, that he complained to West in and before January 1987 when Werner made what he regarded as an excessive number of mistakes; but Werner continued to perform such work and, as previously noted, was given West's job on her transfer in February 1987.

somebody that did know the exact same job." I infer that he was referring to Werner.

After the office was moved to Pine Street, the deliveries were made by Werner; by employees (searchers, clerks, and title clerks) supervised by Viola, with whom West did not consult; and by a series of delivery persons among whom there was a rapid turnover, with one or two at a time working for Respondent. Hornstein testified that West stopped making deliveries on the move to Pine Street because "we" (inferentially, referring to persons in management, and not referring to West) thought that "what she knew was more valuable inside than walking around; especially with what we were paying her at that time." However, he credibly testified, in effect, that he raised no objections on one occasion, after the move, when she elected to walk to the post office herself, rather than leave it to a delivery person, in order to have the stamp machine filled; Hornstein testified to the suspicion that she had some personal business to transact there. To this extent, I accept his testimony that when he told her that he needed someome to go to the post office, "it would be up to her discretion as to who to send, or if she wanted to go herself."

Ordinarily, the delivery persons ascertained what to deliver and where to deliver it merely by taking packages of addressed documents from the basket. West would occasionally tell Werner to make deliveries, but did not tell this to any of the other delivery persons (most, if indeed not all, of whom were part time, going to school, and/or with only brief tenures of employment), or to the searchers, clerks, or title clerks.[39] In accordance with instructions issued by Hornstein with respect to anyone in the office who had nothing else to do, on completing their deliveries the delivery persons, ordinarially without specific instructions from West, would seal envelopes, run the meter machine, run the copy machine, or perform filing. However, West occasionally asked Werner, at least, to do certain tasks. Werner credibly testified that West sometimes assisted her by training her or telling her how to do a job in a particular way. Hornstein testified that West used to train employees, a process that he described as physically showing employees where the envelopes and the stamp machine were, and which of Respondent's three Rolodexes listed the addresses of banks, lawyers, and finance companies respectively. He further testified on direct examination that the delivery persons reported directly to West and West reported directly to him. On cross-examination, he explained that by so testifying concerning West, he meant that if she was going to be out sick, she was supposed to notify him. No employee has ever been told specifically to ask for West when calling in sick. I accept West's testimony that the delivery persons reported directly to Hornstein.

[39] My findings in the last two sentences are based on credible parts of West's and Werner's testimony. For demeanor reasons, I discredit West's testimony regarding Werner that she never asked anyone except Anne Marie Kostik (see infra) to make a delivery. Hornstein's testimony that West had authority to send people from place to place, decided whom to send on deliveries, and "directed the delivery people who would take deliveries" is discredited except to the extent indicated in these two sentences and my findings infra in connection with the Kostik incident.

As previously noted, Hornstein testified that the authority to discharge was not possessed by the branch managers, Webb and Patterson, and did not testify that this authority was possessed by Viola or anyone else except Hornstein and Lovenworth. Specifically, Hornstein did not testify in terms that West had the authority to discharge. However, Respondent seems to contend that possession of such authority by West is shown by the circumstances surrounding the separation of employee Tracey Browning (see infra, fn. 40). Regarding the circumstances of her separation, the credible evidence shows as follows: On an undisclosed date before her separation, which took place about early July 1986, Hornstein remarked to West that he wanted to fire Browning because she would not say good morning to him and did not smile. Also, on an undisclosed date or dates before Browning's separation, Supervisor Patterson overheard complaints from employees about Browning's work or uncooperative attitude. On a day in about only July 1986, when Hornstein was absent from the Philadelphia office, West asked Browning to take a particular document with her on her delivery route. When Browning refused, on the ground that she already had too many to take, West asked Vice President Lovenworth whether he wanted Browning to deliver this document notwithstanding her heavy workload. Lovenworth said yes, whereupon West brought the document to Browning and told her that Lovenworth wanted her to take it on her delivery route. After West had briefly left her desk, she returned to find the document there. West reported this to Lovenworth, and went on to say that she could not deal with Browning any more, that she was being uncooperative about making deliveries, and that West wanted to let Browning go and get somebody else. Lovenworth said that he was too busy to bother with "this childish stuff [about] delivering something or not delivering something," and told West that she should take Browning into the conference room, that the two women should work it out, and that West, on his behalf, should tell Browning to take the document with her on her delivery route. Then, West took Browning into the conference room and said, "Tracey, its just one more stop that you have to make today. Would you take it?" After complaining that she had too much work to do, Browning mumbled something, left the conference room, and went downstairs. After she had been unaccountably absent for about a half hour, Lovenworth unsuccessfully had her paged. A few minutes later, he received the report that she had walked out. Lovenworth then asked West what she had said to Browning; West replied that she told Browning what Lovenworth had told her to say. Thereafter, Hornstein, who had been absent from the Philadelphia office during this incident, came over to West's desk and remarked, "I heard Tracey's not here." When West said yes, Hornstein said, "Well, now I don't have to fire her."

My findings regarding this incident are based on a composite of credible parts of the testimony of employee Bob Brown and Supervisor Patterson (both of whom observed some of the events that occurred outside the conference room) and West. Hornstein testified that on his return to the Philadelphia office, West told him,

"They're calling me the hatchet. I'm getting as bad as you," and started to laugh. Hornstein went on to testify that he then turned around to Lovenworth and asked him what happened, to which Lovenworth replied, "I have no idea, I just saw [Browning] bolt out the conference room, down the steps, and we have not seen her since." Respondent contends that I should credit President Hornstein's testimony in this respect, and discredit all inconsistent testimony by West, on the ground that although West eventually testified, in effect, that Browning quit, West initially testified that Hornstein fired Browning for not saying good morning to him. However, Respondent unexplainedly failed to call Vice President Lovenworth as a witness. On balance, and after considering the witnesses' demeanor, I credit West, including her testimony that she did not tell Browning in the conference room that West was firing her, and West's denial of Hornstein's testimony that she told him, in Lovenworth's presence, that she had fired Browning and was being referred to as a "hatchet man."[40]

As previously noted, Hornstein did not testify in terms that any of his subordinates, except Viola, had the authority effectively to recommend discharge. However, Respondent contends that West possessed that authority. Respondent relies on the following incident: On an occasion about late July 1986 when Respondent was short of delivery people, Hornstein asked West to go downstairs and see whether Supervisor Viola could spare anyone to help with deliveries. When she told Viola that "we" needed somebody to help with the deliveries, he said that he too was short-handed, but that she could ask Anne Marie Kostik, whose regular job was a file clerk on the first floor under Viola.[41] Then, West asked Kostik if she would help making deliveries. Kostick, who 2 days earlier had helped in making deliveries, said that she would not, explaining that she got sick when she had to take an elevator. West shook her head, sucked her teeth, and went upstairs, where she told Hornstein that Kostik would not make deliveries because elevators made her sick. Then, Hornstein went downstairs and asked Kostik to please do him a favor and make a delivery for him. She said that she could not, because she got sick on elevators. Pointing to the door, he told her that she would have to leave, that Respondent had no room for her there. Then, he came back up and said that Kostik was no longer with the Company. Kostik had begun working for Respondent about September 1985 as a part-time employee, and had become a full-time employee after the 1985–1986 school year ended.

My findings regarding Kostik incident are based on a composite of credible parts of the testimony of West, Hornstein, and employee Leslie Pogue, who was present during West's and Hornstein's conversations with Kostik. Because Kostik did not ordinarily work with West and had previously helped to make deliveries, and for demeanor reasons, I credit West's denial of Hornstein's testimony that West told him, "I cannot take this any more, these people will not listen, you got to get rid of her." Because Pogue testified that Hornstein "came down" to talk to Kostik, I do not accept Hornstein's testimony that he addressed Kostik from the landing while he was standing with West, and credit West's testimony that she did not accompany him down the steps. Because Pogue's memory appeared superior to West's memory, I accept Pogue's testimony about Kostik's explanation for not doing deliveries, and infer that this explanation (rather than the "not feeling well" explanation to which West testified) was the one that West reported to Hornstein.

b. *Analysis and conclusions*

Section 2(11) of the Act defines the term "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Possession of any one of these enumerated functions is sufficient to confer supervisory status. *NLRB v. Baja's Place*, 773 F.2d 416, 420 (6th Cir. 1984); *Spring Valley Farms*, 272 NLRB 1323, 1324 (1984).

However, the only such function even arguably present under the credited evidence is the power responsibly to direct other employees. I agree with the General Counsel that West's minimal direction of other employees did not constitute a supervisory function. Which other employees were to deliver particular documents, and where they were to be taken, depended almost always on the kinds of and addresses on documents in the basket when an employee was ready to leave on a delivery. Nor did West ordinarily issue any specific instructions to delivery persons to perform particular tasks when they had no delivery work to do. I find that West's division between herself and Werner of the task of addressing title searches, the incident where West elected to go from the Pine Street office to the post office herself to have the stamp machine filled and (perhaps) to perform personal business, rather than leave the stamp-machine errand to a delivery person (although by that time West was supposed to and did remain in the office almost all the time), and her occasional instructions to Werner to make a particular delivery or to perform a particular task, did not require the use of independent judgment, but instead were of a merely routine or clerical nature.[42] Accordingly, I find that West was

[40] Although Respondent's posthearing brief asserts that West fired Browning, the evidence most favorable to Respondent shows at most that West took it on herself to tell Browning that she was fired, whereupon Browning left the premises without consulting anyone else. There is no other evidence that West had the authority to fire anyone, and Respondent's attorney stated during his opening statement that Browning was terminated at West's request.

[41] My findings in these two sentences are based on West's testimony, partly corroborated by Hornstein. Because Viola was not called as a witness, I do not accept the implication in Hornstein's testimony that it was West who selected Kostik as the person to perform deliveries.

[42] *Central Freight Lines v. NLRB*, 653 F.2d 1023, 1025 (5th Cir. 1981); *Gem Urethane Corp.*, 284 NLRB 1349, 1358 (1987); *Laborers Local 341 (Bannister-Joyce Leonard)*, 223 NLRB 917, 919 (1976), enfd. 564 F.2d 834 (9th Cir. 1977); *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1410–1411 (9th Cir. 1985); *Williams Litho Service*, 260 NLRB 773, 791–792 (1982); *Washington Post Co.*, 254 NLRB 168, 178–179 (1981).

an employee within the meaning of Section 2(3) of the Act, rather than a supervisor within the meaning of Section 2(11).

This conclusion gains further support from the evidence that West was paid substantially less than admitted Supervisors Barone, Patterson, and Viola; that West's successor was paid even less because she had been with Respondent for a much shorter time; that when transferring West to an admittedly nonsupervisory job in the Norristown office, Respondent told her that her responsibilities would be similar and that her wages would not be changed; that she was not asked to attend the pension meeting attended by all admitted supervisors; and that when Hornstein testified that Werner, whom West allegedly supervised, knew how to perform West's "exact same job," he described West's job without mentioning any even arguably supervisory duties. West did not, of course, exercise supervisory authority by giving occasional instruction and direction to her fellow employees; or by answering their questions based on her experience, correcting their mistakes, and training them to perform their relatively unskilled duties.[43]

2. The allegedly unlawful transfer

In February or March 1986, West expressed the opinion to Company President Hornstein that the wage increase she was given in consequence of her periodic wage review was inadequate. About early January 1987, she complained to Hornstein and to Company Vice President Lovenworth about Respondent's failure to pay her for her 1-week vacation beginning 26 December 1986, although part of this was her second week of vacation, it had been approved by Respondent several months in advance, and she had otherwise formally received less than the 2 weeks' paid vacation that employees with her seniority normally received. Although about July 1986 Hornstein had at least implied to her that the time which she was losing because of her daughter's hospitalization would not be deducted form her pay, and she had in fact received 1 day's paid vacation in late November 1986 and after her daughter had left the hospital, in January 1987 Lovenworth told West that this lost time was the reason she was not being paid for her December 1986 vacation. During these conversations about her vacation pay, she screamed at Hornstein and told him that she was going to go to the "unemployment board" about the matter.

Thereafter, in early February 1987, West arranged for a meeting between Union Representative Henninger and employees West, Werner, and Snodgrass. This meeting, where all three employees signed authorization cards and received blank cards to distribute to others, was held on the evening of 10 February. On 11 February, before the workday began, West and Werner stationed themselves on the sidewalk near Respondent's place of business. As Respondent's employees approached the office, West and Werner called them over, stated that West and Werner were trying to get a set policy in the office on vacation and sick days and raises, and asked the other employees to sign union cards. In consequence, 10 or 15 of the 64 employees in the Philadelphia office accepted cards, and at least one signed a card on the spot. Later that same day, West, Werner, and Snodgrass met with others during a luncheon gathering where union cards were accepted by two more employees, both of whom had used the office telephone during working hours to ask West about the Union, and both of whom signed union cards. On that same day, during a work-related telephone conversation with Supervisor Davis at Respondent's Bucks County office, West said that she would send union cards out there to the employees. Also on 11 February, Supervisor Patterson learned of the organizing movement and reported it to Supervisor Viola, and West advised Viola that she was one of those who were trying to organize a union and that she wanted to talk about the Union to the title searchers outside working hours.

During this organizing campaign, which took place while Hornstein was on vacation in Florida, he telephoned at least the Philadelphia office to check on the state of the business. When his plane from Florida landed at the Philadelphia airport, he proceeded directly from the airport to Respondent's Philadelphia establishment. Immediately on entering the building, he admittedly discussed West with Supervisor Viola, whom West had told that she was trying to organize a union. Immediately after this discussion with Viola, Hornstein admittedly discussed West with Lovenworth in the presence of Patterson, who had discussed the union campaign with Viola. A few minutes later, Hornstein telephoned Barone, the office manager of Respondent's Norristown office, and told her that on the next working day West would start work in Norristown with duties that he did not specify. The Norristown office did not at that time have a spot for West; and because of the distance between West's home and the Norristown office, Barone admittedly did not think that West would actually report to work there. Moreover, Hornstein had good reason to entertain the same opinion: he believed that her transfer would likely require her to extend her previous commuting time by the time needed for an additional 20-mile trip from Philadelphia by public transportation, and was well aware that West's need to administer therapy required by her daughter's chronic illness had frequently delayed West's arrival at work even in Philadelphia and otherwise placed unusual strain on her time, energy, and emotions. The day after West started to work in the Norristown office, Hornstein accused her of using Respondent's phones for union activities, and forbade her to use Respondent's phones. When her response about using only noncompany phones for "union calls" suggested an intention to continue at Norristown the union activity that she had begun in Philadelphia, he said that he was going to transfer her to the other company offices, whereupon she said that she would hand cards out there, too. A few days later, Vice President Lovenworth, with whom Hornstein had admittedly discussed West immedi-

[43] *Daniel's Pallet Service*, 282 NLRB 34, 37 (1987); *Gem Urethane*, supra at 1358; *Health Care Logistics*, 273 NLRB 822, 824–825 (1984), enfd. in relevant part 784 F.2d 232 (6th Cir. 1986); *Teamsters Local 574*, 259 NLRB 344, 347–349 (1981); *J. J. Newberry Co.*, 249 NLRB 991 (1980), modified with specific approval as to the supervisory issue 645 F.2d 148, 154–155 (2d Cir. 1981); *Cobra Gunskin*, 267 NLRB 264, 266–267 (1983).

ately before transferring her, remarked to a business associate that Respondent had transferred West to Norristown, she was disrupting the office in regards to forming a union. A week or so later, and an hour or two before West's discharge, Hornstein told her that if she did not stop all this union activity he was going to fire her.

Notwithstanding Hornstein's testimony that he and his father had been union men and he himself had "deep respect for unions and their rights," the foregoing sequence of events constitutes a prima facie showing that in transferring West from Philadelphia to Norristown, Respondent was motivated at least in part by her union activity. *Wayne Construction*, 259 NLRB 571, 574 (1981). Although West was replaced by Werner, who had also passed out union cards, there is no evidence that Respondent knew until after promoting Werner that she, too, had been active in the union movement;[44] Werner had been less active than West; and the removal of both of them from the Philadelphia office would have left that office with nobody but Hornstein who knew how to handle the mail. In any event, a discriminatory motive, once established, is not disproved by an employer's proof that it did not weed out all union adherents. *NLRB v. Instrument Corp.*, 714 F.2d 324, 330 (4th Cir. 1983); *Master Security Services*, 270 NLRB 543, 552 (1984); *Wayne Construction*, supra at 574. Accordingly, a finding that this transfer violated Section 8(a)(1) and (3) of the Act is called for unless Respondent can meet the burden of showing that she would have been transferred in any event for lawful reasons.[45] I find that Respondent has failed to sustain that burden.

When called by the General Counsel as an adverse witness at the outset of the hearing, Hornstein testified that he transferred West (1) because she had taken an unauthorized vacation on 12 and 13 February; (2) because her daughter's illness caused West to be constantly late, and from time to time to telephone in the morning that she would not be in that day; (3) because, after she had failed about February 1986 to obtain as great a wage increase as she wanted, her attitude had been deteriorating and "her supervisor" (he elsewhere testified that West's supervisor was Patterson) had told him that in his absence, West was "disruptive" and would stop answering the phones; and (4) because the Norristown office needed "somebody . . . that knew what they were talking about to answer the phone" and during his 13 February conversation with Norristown Manager Barone, she told him that Norristown employee "Denise [Dirkson] just was not doing her job in there, and [Barone] was afraid to leave her alone in the office to answer any calls." When called by Respondent as a witness, Hornstein testified that beginning about February 1986, West's job performance went downhill. More specifically, he testified that in his presence, West failed to answer overflow telephone calls until he told her to do so (as previously noted, he earlier testified to reports from her supervisor that West "would stop answering the phones" in his absence); and that West personally sent to the wrong banks what he believed to be an unreasonably large amount of mail. On cross-examination by the General Counsel, he further testified that he took into account what he believed to be West's failure to make up the time she lost by being late and taking long lunchbreaks.

Regarding West's vacation on 12 and 13 February, the uncontradicted evidence shows that Lovenworth gave West permission to take this vacation.[46] Because of Respondent's unexplained failure to call Lovenworth and Viola as witnesses, and its unexplained failure to ask Patterson about the matter, I do not credit either Hornstein's uncorroborated testimony that Lovenworth untruthfully advised him otherwise in Patterson's presence and just before West's transfer, Hornstein's uncorroborated testimony that Patterson untruthfully so advised him on an undisclosed date, or Hornstein's uncorroborated testimony that just before his conversation with Lovenworth, when asked by Hornstein how things had been going during his 4-1/2 days of vacation, Viola said, "fine, but I [illegible]ted to let you know [West] took another vacation, and [illegible]ovenworth] was short handed." Concerning tardiness and absences because of her daughter's chronic illness, and West's alleged failure to make up the time she lost because of tardiness and extended lunchbreaks, West had been thus missing time for this reason for almost 10 years before her transfer. Regarding the alleged reports from Patterson about West, Patterson did not corroborate Hornstein's testimony about her alleged reports that in his absence West was disruptive and failed to answer the telephone or his testimony that Patterson tried to get West to answer the phones, testified that there was no particular pattern about when she would answer the phone, described merely as "uncooperative" her behavior and her performance during about the last year of her employment,[47] and (contrary to Hornstein) denied being West's supervisor. Moreover, concerning answering practices, Patterson testified that they had been the same throughout the period when she was able to observe West's work—that is, 1977–1987 except for 1985. Regarding the Norristown office's alleged need for someone to answer the phone intelligently in view of Dirkson's alleged deficiencies, Barone did not corrobo-

[44] Indeed, Hornstein testified that his decision to replace West with Werner was made before he learned that a union organizing campaign was going on.

[45] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401–404 (1983); *Hanlon & Wilson Co. v. NLRB*, 738 F.2d 606, 610 (3d Cir. 1984); *Garrison Valley Center*, 277 NLRB 1422 (1985); *Schurpack, Inc.*, 283 NLRB 188 fn. 1 (1987).

[46] Indeed, Respondent paid her for these 2 days of vacation in February 1987 even though she had threatened to "sue" Respondent for vacation pay for a 5-day December 1986–January 1987 vacation, which included 2 days in 1987. In view of Respondent's failure (until after her discharge and her appeal to a government agency) to pay her for any part of this 1986–1987 vacation, I do not accept Hornstein's testimony that she was paid for her 2-day February 1987 vacation because she was entitled to 10 days' vacation pay and 5 days' sick pay a year. Indeed, Hornstein testified that when he denied her request to be paid for this December 1986–January 1987 vacation as part of her 1987 vacation, he told her that without special permission, vacation had to be taken after 1 June.

[47] Although Patterson's direct testimony in this respect is open to the interpretation that she was comparing West's last year of performance (February 1986 to February 1987) with West's performance during the previous year, Patterson elsewhere testified, in effect, that in 1985 she had no opportunity to observe West's work.

rate Hornstein's testimony that she so advised him, or testify to any deficiencies on Dirkson's part; in any event, Hornstein's testimony that West was transferred partly to supply the Norristown office with an intelligent phone-answerer when nobody else was in the office is difficult to reconcile with his further testimony that he transferred her partly because he believed that she was refusing to answer the telephones in Philadelphia. I note, moreover, the testimony of Patterson (who had an opportunity to observe West's work during her last year of employment) that West was good at doing the mail; Hornstein's testimony that doing the mail is a necessary part of his business and West had "made herself invaluable in the mail room," and his further testimony that she was one of the 10 percent of Respondent's staff who came in without pay, to help Respondent rearrange the furniture, on a Saturday following Respondent's April 1986 move to Pine Street.

As previously noted, Respondent's letter of transfer to West stated that she was being immediately transferred to Norristown from Philadelphia "Due to the increase in work load in our Norristown office and the decrease of our work load in our Philadelphia office." Respondent does not appear to contend that this consideration played any part in West's transfer; indeed, Norristown Office Manager Barone did not testify that this office was shorthanded or that she ever so advised Hornstein, and Hornstein at one point testified that he did not receive her alleged report to this effect until after he had had the transfer letter typed and arrangements were being made to send it out as certified mail. Hornstein testified that although the "work" in Norristown had increased, the "work" in Philadelphia had either stayed the same or increased somewhat (although less than in Norristown). He further testified that although the work in the Philadelphia mail room had "decreased a little, compared to Norristown" (owning to the use of Panafax), the Philadelphia office still needed, at the time of West's transfer, at least two employees to handle the mail. Further, he testified that the day West started working in Norristown, Werner started to perform West's old job and Respondent advertised for an employee to perform Werner's old job assisting West, and that such a replacement was obtained "shortly afterwards."[48] In other words, West's transfer to Norristown effective 17 February left the Philadelphia mail operation shorthanded by at least one employee until Werner's replacement was obtained, while on 17 February there was no spot for West in Norristown until after Dirkson's unexpected resignation a half hour after West's arrival and West had practically no work to do that day.

For the foregoing reasons, I find that Respondent violated Section 8(a)(1) and (3) of the Act by transferring West from its Philadelphia office to its Norristown office. I do not credit Horntein's testimony that he did not learn about West's union activity until after her transfer, in view of the uncontradicted testimony that Lovenworth attributed her transfer to her union activity; Respondent's failure to call as witnesses either Lovenworth or Viola, although Hornstein talked to both of them before transferring West and at the time of this conversation Viola knew about her union activity; Respondent's failure to ask Supervisor Patterson about this Hornstein-Lovenworth conversation, although she was within earshot and had previously discussed the union movement with Viola; and demeanor considerations. See *Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

3. The allegedly unlawful change in West's working conditions; her allegedly unlawful discharge

In determining Respondent's motive for its posttransfer actions in changing West's working conditions and then discharging her, I find, as an initial matter, that when advising West for antiunion reasons that she was being transferred to Respondent's Norristown office, Respondent anticipated that she would refuse to accept the transfer and, in consequence, would no longer be in Respondent's employ. I so find because the supervisor of the Norristown office, Barone, admittedly expected West to refuse the transfer for the reason that it called for a 20-mile 1-day increase in her commuting distance; because when West was transferred to and reported to work in Norristown, Respondent had no spot for her there; and because Company President Hornstein, who ordered the transfer, knew that even with the relatively short commute to Philadelphia a good deal of West's time and energy was consumed by her daughter's chronic illness.

I conclude that Hornstein's action on the second day of West's unexpected and unwelcome presence in the Norristown office, in advising her that she would thereafter be docked for tardiness rather than be permitted to make up the lost time by working during her lunch hour, was likewise motivated by a desire to get rid of her because of her union activity. I so conclude because of Hornstein's gratuitous assertion, during that same conversation, that she was using the telephones for union activities; because, when she denied this but tacitly admitted to making "union calls" on noncompany phones, he told her that her need to administer therapy to her daughter for her chronic illness had caused West to be frequently tardy even when she had been commuting only to Philadelphia rather than to the more distant Norristown. Hornstein testified, in effect, that he had not previously been concerned about her frequent tardiness, even when she failed to make it up, because "I was a little sympathetic to [Kelly's] disease. I understood, it was a young kid, so the ten minutes did not seem that important in the Philadelphia office." Moreover, the record indicates that Hornstein had been following the practice of disregarding short tardiness in the branch offices, as well as in Philadelphia; and that in Norristown, as well as in Philadelphia, employees had as a matter of practice been permitted to make up tardiness by shortening their lunch periods.

Further, the credible evidence shows that Respondent discharged West because of her union activity. Because

[48] Initially, he testified that to replace Werner, "we put an ad in right away. We hired Joann Goings." Later, he testified that to replace Werner, he transferred an employee named Anne Marie from "billing." He went on to testify, "I put an ad in the paper. I think I had two ads in the paper. I think we got a clerk, a kid that looked like he would be a good clerk"; and that after "shopping around for a while," Respondent hired a woman named Michelle to fill Anne Marie's slot in "billing."

of her union activity, Respondent had tried to rid itself of West by transferring her effective 17 February to an office whose location substantially increased her commuting time; by telling her on 18 February that her pay would thereafter be docked for tardiness, which Kelly's needed therapy made almost inevitable from time to time; and by threatening on 18 February to transfer West to other county offices at least one of which was twice as far as Norristown from Philadelphia. After West told Hornstein that at these offices she would continue to hand out union cards, and after Kelly's illness had caused West to lose a day of work and she told Hornstein that she was going to use the Union's services to obtain her week's disputed vacation pay, Hornstein told her that if she did not stop all this union activity, he was going to fire her, to which she replied that she was going to "get" him for blocking a union.

President Hornstein knew that West had not performed a "full delivery route" (or, indeed, made any deliveries) to customers since her 1982 phlebitis operation, and that since that operation, she had been reluctant to take long walks.[49] Shortly after his conversation with West, Vice President Lovenworth, and/or Hornstein, instructed Barone to lead West to believe she would be expected to make a "delivery route" at Norristown, and to require West to walk with another employee to McDonald's to learn the "delivery route," even though no delivery had to be made at that time, West already knew McDonald's location, and it was right across the street from Commonwealth Federal, Respondent's customer.[50] Deliveries in Norristown are much less frequent, involve much shorter distances, and are much less time consuming than in Philadelphia; more specifically, in Norristown most deliveries are made to a customer or customers a block or two away from the office; Dirkson, whom West replaced, made deliveries only twice a week; and even the employee who "predominantly" makes the deliveries makes fewer than one a day.[51] Nonetheless, Barone, who before transferring to Norristown had worked in the Philadelphia office for 5 years, described this Norristown function to West as "the delivery route," which in Philadelphia meant deliveries to 30 to 50 customers and took 2 to 5 hours;[52] and made no effort to assure West that Norristown "deliveries" involved walks of two to four blocks less often than once a day. Instead, Barone immediately telephoned Hornstein that she had done "what you said" and that West had refused. Moreover, without asking Barone whether she had explained the limited nature of Norristown deliveries or suggesting that she do so, Hornstein merely told Barone to ask her again, and Barone then merely asked "will you do deliveries?" When West again said no, Hornstein told Barone to discharge West. The foregoing evidence persuades me that Respondent drew the deliveries function to West's attention at an unnaturally early time, and by careful and intentional silence misled her regarding the kind and amount of work it involved in Norristown, in the hope and expectation that she would express the intention not to perform this function, and thereby provide Respondent with a plausible pretext for discharging her immediately, and before she could carry out her intention, which she had expressed to Hornstein 2 days earlier, to solicit union cards in the county offices too. Accordingly, I find that her discharge violated Section 8(a)(1) and (3) of the Act. Although it is true that Hornstein had discharged employee Kostik about 7 months earlier for refusing to help make deliveries in Philadelphia, Respondent had had an immediate and genuine need for such assistance and Kostik had been working for Respondent for less than a year (mostly as a part-time employee), while West had been working for Respondent for more than 10 years.[53]

4. The alleged independent violation of Section 8(a)(1)

I agree with the General Counsel that Respondent violated Section 8(a)(1) of the Act when Supervisor Viola told employee West, on 11 February, that if a union came in, the title searchers' wages would be immediately lowered to some sort of uniform scale that would be lower than what they were making now. Although it is true that West then told Viola that she did not believe it, the record fails to show whether she adhered to this view after mature consideration, and after she was later subjected to unlawful antiunion treatment by President Hornstein and Vice President Lovenworth. In any event, "the test of interference, restraint and coercion under Section 8(a)(1) of the Act does not depend on . . . the successful effect of the coercion. Rather, the illegality of an employer's conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act." *Wago, Inc.*, 273 NLRB 746, 748 (1984). Accord: *El Rancho Market*, 235 NLRB 468, 471 (1978), enfd. 603 F.2d 223 (9th Cir. 1979). A threat to reduce wages in the event of unionization reasonably can be said

[49] He testified that after the office was moved to Pine Street, she "would never go" to the post office to have the stamp machine filled, and that on only one occasion had she taken the stamp machine there herself rather than leaving this task to someone else. The Pine Street office is about seven blocks from the post office. City hall, where West took documents until shortly before the move to Pine Street, is about 4 blocks from the Sansom Street office but about 12 blocks from the Pine Street office.

[50] My findings as to the contents of the Lovenworth-Barone conversation are based on inferences from Barone's conduct immediately thereafter, and from her telephoned report to Hornstein that "I did what you said, and [West] refused." As previously noted, company witness Barone was not asked about the contents of her telephone conversation with Lovenworth, and he did not testify.

[51] No deliveries were made at the Norristown office during West's 3-1/2 days there. Title clerk Russo made five deliveries during 150 days that he worked in the Norristown office. However, Barone testified that he does not make deliveries as frequently as some other employees.

[52] Deliveries of searches made by the Norristown office for customers in central Philadelphia are made by the Philadelphia office.

[53] In connection with the cases cited supra fn. 45, I note that Respondent has tendered no lawful reason for West's discharge other than the reason, which I have found pretextual, that she said she would not perform deliveries. Similarly, Respondent has tendered no lawful reason for changing West's working conditions as to tardiness other than the reason, which I have found pretextual, that Norristown did not follow the Philadelphia practice as to making up tardiness—a claim without evidentiary support. See *Limestone Apparel Corp.*, 255 NLRB 772 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

to have such a tendency. Because Viola was admittedly a supervisor and his subordinates included the title searches whose existing wage scale he threatened, I reject Respondent's contention that he was not Respondent's agent for the purpose of binding Respondent to such threats. *Glenroy Construction Co.*, 215 NLRB 866, 867 (1974), enfd. 527 F.2d 465 (7th Cir. 1975); *Collectramatic, Inc.*, 267 NLRB 866, 871 (1983).

In addition, I find that Respondent violated Section 8(a)(1) of the Act when (1) on 18 February, President Hornstein (a) told employee West, because of her union activity, that her wages would be docked if she was late, (b) told her that she could not use Respondent's phones because of her union activity, and (c) threatened to transfer her to other county offices because of her union activities, and (2) on 20 February, Hornstein threatened to discharge West if she continued to engage in union activities. However, I find the evidence insufficient to support the General Counsel's contention that about 22 February, Hornstein threatened employee Werner that employees' wages would be reduced if the Union came in.

I agree with the General Counsel that Respondent violated Section 8(a)(1) when President Hornstein and Vice President Lovenworth each asked employee Werner why she would want, and be interested in, a union. In so finding, I rely on the fact that Hornstein asked Werner to go to Lovenworth's office for this interview; that Hornstein and Lovenworth are Respondent's principal officers and were the only ones present aside from Werner; that Werner had participated with West in much of West's overt union activity; that Werner had replaced West when her union activity led to West's transfer; that this union activity had thereafter led to West's discharge; and that it was only a day or two later that Hornstein and Lovenworth questioned Werner about her own union activity. See *Morgan Services*, 284 NLRB 862, 863 (1987). For the reasons summarized supra, part II,F,1 in connection with Respondent's contention that West was a statutory supervisor, I find that Werner (her successor) was not a supervisor either and, therefore, reject Respondent's contention that its questioning of Werner was not unlawful because of her alleged supervisory status.

However, I do not find that Respondent violated Section 8(a)(1) when Supervisor Patterson questioned employee Snodgrass about the Union. It is true that Snodgrass was one of the three employees (the others being discriminatee West and the unlawfully interrogated Werner) who attended the union meeting and obtained union cards from other employees. Also, it is true that (unlike West and Werner) Snodgrass did not engage in union activity where management would predictably be able to observe her, that Patterson's relationship to Snodgrass was solely that of a supervisor to an immediate subordinate rather than including personal friendship, and that (as far as the record shows) Patterson did not give Snodgrass any reason for asking her what she thought of the Union and whether she wanted to join a union. However, the conversation occurred on the street, Patterson was a first-line supervisor, and there is no evidence that she either knew about Snodgrass' union activity or professed any such knowledge to Snodgrass. I read the most recent Board precedents as pointing to the conclusion that such questioning did not violate Section 8(a)(1). See *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Bates Nitewear Co.*, 283 NLRB 1128 (1987).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. At all material times, Peggy West has been an employee within the meaning of Section 2(3) of the Act.
4. Respondent has violated Section 8(a)(1) and (3) of the Act by transferring employee West, by changing her terms and conditions of employment with respect to making up lateness, and by discharging her.
5. Respondent has violated Section 8(a)(1) of the Act by threatening, because of West's union activities, to dock her wages if she was late; by threatening to transfer her because of her union activities; by telling West that she could not use Respondent's phones because of her union activities, by threatening to discharge West if she continued her union activities; by threatening to reduce employees' wages if a union came in; by interrogating employee Werner about the Union.
6. The unfair labor practices summarized in Conclusions of Law 5 affect commerce within the meaning of Section 2(6) and (7) of the Act.
7. Respondent has not violated the Act by threatening employee Werner or interrogating employee Snodgrass.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist from such conduct, and like or related conduct, and to take affirmative action to effectuate the policies of the Act.

Respondent suggested at the hearing that West is not entitled to a reinstatement remedy because she allegedly revealed to one of Respondent's competitors, Bankers Search Company, a form used by Respondent to set forth the results of a title search and to bill the individual who requested the search, and Bankers Search thereafter copied and used the form. An earlier version of Respondent's form was developed in 1968 by Jack Hornstein's father (who started the business) and Jack Hornstein, and the form has since been updated every 4 or 5 years. The exact form used by Respondent when West was discharged has been used since 1983. On a date not clear in the record, but no later than 19 March 1987 and inferentially about early March 1987, Respondent learned that Bankers Search was using a form that was virtually identical, except that the name and address of Bankers Search appeared in place of the name and address of Respondent.[54] From a comparison of the two forms, I infer

[54] This finding is based on a comparison between a two-page photocopy of the Bankers Search form (R. Exh. 5) and the first and third pages of Respondent's original form (R. Exh. 4). The photocopy of the Banker's Search form contains nothing corresponding to the second page of Respondent's form, which page is printed on the reverse of the first page.

that the Bankers Search form was copied from Respondent's form. Thousands of filled-out copies of the first page of Respondent's form have been received by other companies and individuals. Further, although copies of the third page are not normally distributed by Respondent to persons unconnected with Respondent, filled-in copies of that page are sent to Respondent's bookkeeping department, which consists of three or four people. In addition, the record suggests that many of the entries on that page are made by employees of Respondent who receive orders for title searches.[55] West testified that she had no association whatever with Bankers Search before she started working for it on 4 May 1987, several weeks after Respondent learned about Bankers Search's use of the copied form, which is not copyrighted. I find that West was not Bankers Search's source of the form. Accordingly, I need not and do not consider whether any such action by West would affect her right to reinstatement, particularly if her alleged disclosure of the form had been made in connection with her search for a job after her discriminatory discharge and/or after such discharge. Cf. *Vought Corp.*, 273 NLRB 1290, 1295 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986), and cases cited.

Accordingly, Respondent will be required to offer to reinstate West to the job that she held in Respondent's Philadelphia office, without prejudice to her seniority and other rights and privileges previously enjoyed, and to make her whole for any loss of pay and benefits she may have suffered on and after 17 February 1987. All payments are to be made with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Backpay is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

When I asked the General Counsel at the hearing whether she sought a reinstatement remedy for West if her transfer was unlawful but her discharge was not, the General Counsel replied no. Although I have found no cases directly in point, the authorities preponderantly suggest that in the absence of unfair prejudice to Respondent, I am not bound by the General Counsel's position regarding remedy.[56] Moreover, Board precedent indicates that such findings would entitle West, at the very least, to an offer of reinstatement to her old job in Philadelphia and, in addition to backpay between her transfer and her discharge, to a make-whole order effective 5 days after Respondent's receipt of this decision. *Anderson-Rooney Operating Co.*, 134 NLRB 1480, 1481–1482 (1961). Indeed, it is at least arguable that she would be entitled to backpay throughout the entire period following her transfer. See *Schott's Bakery*, 164 NLRB 332, and cases cited in fn. 1 of the Board's decision (1967); *John Kinkel & Son*, 157 NLRB 744, 745–746 (1966); *Super Tire Stores*, 236 NLRB 877 (1978). In this connection, I note (1) that because Respondent for antiunion reasons ordered West to transfer to Norristown in the expectation that the increased commuting distance would cause her to resign, if for that reason she had resigned instead of transferring she would likely have been entitled to an order of reinstatement and uninterrupted backpay on the ground that she had been constructively discharged; (2) that particularly because her transfer letter had stated that her wages would not be changed, she would likely have been entitled to such a remedial order for such reasons if she had resigned when and because on 18 February Respondent imposed on her, for antiunion reasons, the new employment condition that she would thereafter be docked for tardiness, which her daughter's chronic illness made almost unavoidable from time to time and which was rendered more likely by the additional railroad commutation trip that Respondent had erroneously believed would in itself be sufficient to bring about her resignation; (3) that because she had not performed a "full delivery route" (or, indeed, made any deliveries) to customers since her phlebitis operation, and because (as Hornstein knew) since that operation she had been reluctant to take long walks, she would likely have been entitled to an order of reinstatement to the Philadelphia office and to backpay if, instead of telling her that her Norristown "responsibilities" would be "similar," her transfer letter had stated (as did Barone after West accepted the transfer) that at Norristown she would be required to make a "delivery route" and, in consequence, she had resigned, rather than accept her discriminatory transfer; (4) because she had not been required to make any deliveries in Philadelphia for the last 10 months she worked there, she might have been entitled to such a remedial order if her transfer letter had clearly stated that she would be expected to make occasional round trips of from two to four blocks on foot to carry documents to customers and, for that reason, she had resigned rather than accept her discriminatory transfer; (5) that when orally ordering her to learn the delivery route in Norristown, Respondent failed to explain (as it almost certainly would have done had Respondent honestly wanted her to stay on the job and perform such duties in Norristown) that deliveries in Norristown merely involved taking documents about twice a week to a customer a block or two away; and (6) that her action in from time to time performing for Bankers Search, where she worked after her discharge by Respondent, the function of taking documents to city hall about a block away indicates that she would likely have been willing to perform such functions in Norristown if their limited nature had been explained to her. Cf. *BMD Sportswear Corp.*, 283 NLRB 142, 159–160 (1987); *Superior Forwarding Co.*, 282 NLRB 806 (1987); *Reno Hilton*, 282 NLRB 819, 834–837 (1987). However, in my view of my finding that both West's transfer and her discharge were unlawfully motivated, I need not and do not consider whether such a finding as to her transfer only would call for more than an *Anderson-Rooney* order.

In the absence of any specific showing need for a visitatorial clause in the circumstances of this case, the Gen-

[55] This third page is preceded by carbon paper and, except for a blank specifying "Price," is identical to the top third of the first page. The format of the form contemplates that except for the "Price" entry, the third page is filled out (through the presence of carbon paper) simultaneously with the upper portion of the first page. Bankers Search used the third page as a bill. It is unclear whether Respondent followed the same practice.

[56] *Dean General Contractors*, 285 NLRB 573 fn. 5 (1987); *Nabco Corp.*, 266 NLRB 687, fn. 1 (1983); *R. J. E. Leasing Corp.*, 262 NLRB 373 fn. 1 of August 1982 order. Cf. *Gabel Tank Co.*, 166 NLRB 902 fn. 1 of Board's decision (1967).

eral Counsel's request for such a clause is denied. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[57]

ORDER

The Respondent, Security Search and Abstract Company of Philadelphia, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening, because of employees' union activities, to dock such employees' wages if they are late; threatening to transfer employees because of their union activities; telling employees that they cannot use company telephones because of their union activities; threatening to discharge employees if they continue their union activities; threatening to reduce employees' wages if a union comes in; and interrogating employees about a union in a manner constituting interference, restraint, or coercion.

(b) Discouraging membership in Teamsters Union Local No. 115 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, or any labor organization, by transfering employees, changing employees' terms and conditions of employment, discharging employees, or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Peggy West reinstatement to the job which she held on and before 13 February 1987 in Respondent's office in Philadelphia, Pennsylvania or, if such a job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges previously enjoyed.

(b) Make Peggy West whole for any loss of earnings or other benefits suffered as a result of the unlawful discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Remove from its files any reference to Peggy West's unlawful transfer and discharge, and notify her in writing that this has been done and that such personnel action will not be held against her in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at Respondent's office in Philadelphia and Norristown, Pennsylvania, copies of the attached notice marked "Appendix."[58] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that paragraphs 6(f) and (g) of the amended complaint be dismissed.

[57] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[58] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Franzia Brothers Winery *and* Winery, Distillery & Allied Workers Union, Local No. 186, Distillery, Rectifying, Wine & Allied Workers International Union, AFL–CIO. Cases 32–CA–8794, 32–CA–8795, and 32–CA–8798

August 22, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 1, 1988, Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Franzia Brothers Winery, Ripon, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Even if the Respondent had established that it had an honest belief that the discriminatees had engaged in picket line misconduct, we agree with the judge that the General Counsel proved that the alleged misconduct did not occur, i.e., that the credited evidence showed that employee Beckerdite was not involved in the incidents relied on by the Respondent and that the incidents involving Treadway and Whitley on which the Respondent relies were purely defensive reactions to actions by others and did not rise to the level of misconduct. Accordingly, on that basis, we adopt the judge's decision that the Respondent violated Sec. 8(a)(1) and (3) of the Act when it suspended, discharged, and refused to reinstate Robert Whitley, Richelle Beckerdite, and Donald Treadway because of their strike-related activities.

David Dominguez, for the General Counsel.
Richard H. Harding and *Mark E. Robson (Littler, Mendelson, Fastiff & Tichy)*, of Walnut Creek, California, for the Respondent.
Victor C. Thuesen, of Petaluma, California, for the Union.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. These cases were tried in hearings held at Ceres, California, on 10 and 11 September 1987 and at Modesto, California, on 15 October 1987. The charges were filed by Winery, Distillery & Allied Workers Union, Local No. 186, Distillery, Rectifying, Wine & Allied Workers International Union, AFL–CIO (the Union), 18 March 1987, and the consolidated complaint was issued 27 May 1987. The primary issues are whether Franzia Brothers Winery (Respondent) suspended and then discharged Robert Whitley, Richelle Beckerdite, and Donald Treadway because of claimed strike misconduct, which the General Counsel asserts was not in fact engaged in or, alternately, not sufficiently serious to warrant their termination or loss of striker reinstatement rights, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of witnesses, and after consideration of briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with an office and place of business in Ripon, California, where it is engaged in the production and nonretail distribution of wine and related products. During a recent past representative 12-month period, Respondent sold and shipped goods valued in excess of $50,000 in the course and conduct of its business operations directly to customers located outside California. On these admitted facts I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and, as is also admitted, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent's facility is situated along the southern side of a mainly rural stretch on east-west running State Highway 120. A continuous flow of general traffic uses this two-lane road, and Respondent's prominent activities for the area results in considerable vehicular turning into its premises by employees and those arriving on business, including truckers. A guardhouse is located somewhat down the entering driveway. At the associated exit point, a stop sign controls departing traffic before any right or left turning onto Highway 120.

As a full-scale producer of wine and related products, Respondent is a member of the Winery Employers Association (WEA), an organization existing for at least collective-bargaining purposes. Pursuant to this membership the WEA, by its designated spokesperson, acted as sole and exclusive bargaining representative for Respondent. In summer 1986, contract renewal negotiations took place between the WEA and the Union. When an existing contract expired on 31 July 1986, negotiations nevertheless continued between the parties.[1]

As a phase of this bargaining process the union-represented employees of Respondent commenced a strike on

[1] All dates and named months are in 1986, unless otherwise indicated.

Tuesday, 26 August. This was a critical seasonal point in Respondent's operations, for the annual "crush" of grapes was underway and major adversity could result from perishable losses. At commencement of the strike there were approximately 250 employees in the plant bargaining unit, and practically all of them went on strike. Respondent also employed approximately 125 salaried employees in supervision, marketing, and clerical functions.

At its inception the strike resulted in the massing of pickets at Respondent's main gate and auxiliary entrance. On Sunday, 31 August, the Union organized its picketing with strike leaders and shift captains. A strike leader's function was to prepare picketing schedules and maintain general communication with those on strike. The shift captain was to oversee a particular 4-hour timespan by maintaining appropriate control over strike activities and be chiefly representative of the Union for that shift.

Respondent reacted to the strike by an immediate campaign of hiring replacement employees, and through their use, coupled with long hours worked by salaried employees, continued to operate. Additionally, it increased the number of security personnel provided by American Protective Services (APS), and generally required closer monitoring of the premises with more detailed reporting of happenings associated with the strike. Respondent's executive and management hierarchy during this period was headed by Arthur Ciocca, its San Francisco-based president who also heads a separate entity called The Wine Group, Ltd. Day-to-day operations at the winery were run by Senior Vice President Lynn Bates, while Personnel Manager Kikuye Joyce Stonehocker fulfilled various employee relations functions including coordination of on-premises food service and dealings with APS. Initially the increased security function called for preparation of daily activity reports by the officers; however, these reports proved too detailed for Respondent's later objective of securing injunctive relief from a state court with respect to occurrences of the picketing. In this vein, a temporary restraining order (TRO) was secured on 9 September, and later that month a superseding preliminary injunction. To support such action by the court, extracts were made from earlier daily activity reports as separately written special incident reports, in which the complained of strike activities were described. These special incident reports thus evolved as the preferred form of recording by APS personnel for noteworthy occurrences. Respondent's chief liaison with APS was to its Modesto-based assistant branch manager, Donald Ferris. In turn, the service at this client's premises was overseen by Security Captain Cruz plus lieutenants John Dawson and Victor Munoz.

The Union ended its strike effective 3 October. Respondent promptly returned its striking employees to work to the extent needed, dismissing temporary replacements in the process. An exception applied to several persons concerning whom suspensions were issued while individual consideration was given to documented reports of their activities as chronically and specifically manifested during the strike. In consequence of this, four persons were denied employment on the assigned basis of strike misconduct. Three of the persons in this group are those to which this proceeding pertains. In each instance, they received a letter dated 8 October from Bates in which the specific accusations found sufficient by Respondent for such action were listed.

B. *Basis of Analysis*

1. Robert Whitley

The described letter to this individual enumerated the following bases for a denial of reinstatement because of claimed "strike misconduct":

> (1) [M]ultiple instances of blocking traffic crossing the picket line and dangerously blocking the view of drivers of vehicles crossing the picket line;
> (2) brandishing your picket sign in a threatening and dangerous manner and intentionally attempting to strike a security guard with the picket sign;
> (3) wielding your picket sign in a dangerous manner and threatening to strike individuals with it; and
> (4) generally harassing, verbally abusing, and/or threatening the well-being of individuals crossing the picket line.

In Whitley's case the evidence principally concerned an episode on 25 September when a sheriff's department officer was called to the scene because of claimedly unauthorized movement by picketers contravening terms of the injunctive order. Discussion ensued between this officer and Whitley, with at least picketer Jean Eisenga participating marginally. As this transpired, security guard Mario Brock, acting at his lieutenant's direction, maneuvered with a video camera to obtain a visual record of Whitley engaging in this discussion. Whitley reacted in equal determination not to be pictured by continuous turning away, ducking, and covering his face with his picket sign. This effort and countereffort lasted nearly 10 minutes, with Whitley becoming increasingly vocal by calling out profane protests about the attempt to clearly show him on film. In the course of Brock's objective, his camera came to within a foot of Whitley's face. The culmination was a flurrying movement by Whitley in which his picket sign was poked toward and up to the lens of Brock's camcorder.

Whitley testified that he had personal objection to the prospect of being so pictured, and felt "intimidated" for an extended time by Brock's relentless pursuit. He denied striking Brock or his camera, and denied any aggressive movements of his picket sign. Whitley testified that his conduct was strictly that of avoidance, and that he coupled the protests voiced to Brock with a running entreaty that the sheriff's department officer with whom he was speaking use police authority to stop the camera. Whitley is corroborated by Eisenga, who added that APS personnel had never before used a camera by approaching so closely to an individual being photographed. Witnesses Darla Bell and Fatima Faria also credibly described that picture-taking had always previously been done from a distance of approximately 20 feet.

Brock testified that his purposes were to fulfill an order that Whitley's face be shown while in conversation with a law enforcement officer at a point in time subse-

quent to issuance of the injunctive relief. In this sense he tried only to find a moment and an angle that would record Whitley's presence. Brock believed that Whitley may have hit the video camera at a point late in the episode, when he suddenly and angrily moved toward Brock while also swinging the picket sign forward. Former APS security guard Louisa Dorton testified to being present and seeing this incident culminate by Whitley swinging his picket sign at Brock.

On a separate general accusation against Whitley, Respondent's eyewitness is Dorton. In her assignment to Respondent's facility during the strike, Dorton had been primarily a recorder of events and activities. In this capacity she had written a special incident report dated 15 September, reporting that Whitley and another male picket had blocked incoming traffic and also blocked the view available to drivers by the positioning of picket signs and standing overly close to the vehicle. Dorton also elaborated on a group of photographs introduced into evidence by Respondent, by testifying that they depicted the different moments that she personally recalled as amounting to the reported blockings in which Whitley participated.

Whitley denied engaging in the "dangerous act" of blocking the vision of drivers attempting to leave the facility. He asserted that to the contrary, and as an assistant strike captain aware of the state court order, his regular picketing activity was proper at all times.

Frank Isaia picketed on the same shift with Whitley. He testified to being in close proximity with Whitley 99 percent of the time and to never seeing him block traffic or attempt to obstruct the view of drivers.

2. Richelle Beckerdite

Beckerdite was a striker who served simultaneously as a strike leader and shift captain when picketing from 4 to 8 p.m. The letter to her enumerated the following bases for a denial of reinstatement because of claimed "strike misconduct":

> (1) Multiple instances of blocking vehicles crossing the picket line and/or dangerously blocking the view or drivers of vehicles crossing the picket line;
> (2) multiple instances of spitting on vehicles crossing the picket line;
> (3) harassing, verbally abusing and/or threatening the well-being of individuals crossing the picket line, including the use of inflammatory racial epithets and threats to the life of individuals crossing the picket line and their families.

In support of its decision here Respondent advanced the testimony of various witnesses, security service reports regarding Beckerdite, and a transcript of testimony by now-unavailable APS guard Homer Cleveland. David Wittig testified that he was employed as a security officer for a month's stint at Respondent's facility while the strike was in progress. He mainly worked a 12-hour shift of 6 p.m. to 6 a.m. He recalled Beckerdite from his first day on the job as most vocal among the numerous picketers. Wittig acquired a familiarity with Beckerdite based on her name being told to him by another guard as he checked in for his first night of work. Wittig testified that from his guard station "quite a distance" from the picketers he could frequently hear Beckerdite yelling profanity at incoming replacement workers and loudly claiming to know the whereabouts of their families. Wittig adopted the contents of daily activity reports dated 31 August and 2 September as his own recollection of Beckerdite's loud vituperation, veiled threats, and sarcastic yelling that arriving "wetback bitches [have] fun filling out those wetbacks applications." Wittig further adopted the recordings of Beckerdite having called persons crossing the picket line "motherfucker" and "fucking assholes [who were] going to get your ass kicked [after having] your nose punched," as well as scathingly asking whether any such "scabies [could] read or speak English [or] like your picture taken." A separate report by APS guard Glenda Gray recited that on 26 August Beckerdite had spat on cars entering the plant. The transcript of Cleveland's testimony at an unemployment insurance appeals hearing showed that Beckerdite had repeatedly blocked the view of a driver at the picket line on 26 August. This testimony was consistent with security reports written by Cleveland on or concerning Beckerdite's conduct on 26 August.

Gwendolyn Lovett testified that she is an experienced employee of APS, and was assigned to Respondent's facility during the strike. Her duty station was the main gate for routine logging and to record unusual events on a shift from 11 p.m. to 7 a.m. Familiarity with Beckerdite originated on her first day of service at this client when "everybody was telling me about her" concerning "how she talked and everything." Lovett adopted the contents of several security service reports regarding Beckerdite, as what she remembered happening by directed statements of Beckerdite to people in the plant or crossing the picket line and occasionally amplified with a bullhorn. These statements included what was adopted by Wittig, as well as numerous obscene insults.

Stephen Robert Corbett testified that he had 2 months of employment with Respondent in the summer of 1986, beginning several weeks before the strike started. As a probationary employee he elected not to join the strike, and remained in his position of wine cellar laborer on what became a 7-day-per-week graveyard shift during the strike. Corbett's practice was to arrive for work around 11:30 p.m. He is a large man, 6 feet in height and weighing 265 pounds at the time. Corbett testified that on about 20 occasions as he would drive through the picket line arriving for work, Beckerdite yelled "abusive" obscenities at him and continued her loud "shouting" or bullhorn-amplified comments as he reached his parking place and proceeded toward the winery building at a point about 1500 feet from where Beckerdite stood with the group of approximately 25 night picketers. The specifics of his recollection was that her "repertoire" of statements included calling him a "fat assed redneck motherfucker," that "your mother and wife suck donkey dicks," and that "I'm going to stick you" and "my brother is going to be out fucking your wife tonight while you're in there working so how do you like that? . . .

we know where you live and we will visit your wife." Corbett's familiarity with Beckerdite arose on the first night of crossing the picket line when he asked his supervisor about "the crazy lady with the big mouth" and was told that this person with long, dark hair was Beckerdite.

Diana Banks testified that she began a marketing position with Respondent on 28 August and, on leaving work at approximately 4:30 p.m. on her first or second day, experienced loud statements made to her by Beckerdite as her car reached the exiting point to the highway. Banks recalled Beckerdite's unsolicited approach to her closed driver's side window, and the shouted insults of "fucking bitch." "cunt [who] liked to fuck dogs," and "low life" whose license plate number they knew and from which Beckerdite "was going to come get me." Banks testified that Beckerdite's outburst lasted 10 or 15 seconds with some of the phrasing repeated, and occurred in the context of 10 to 15 picketers present plus a bearded man also shouting obscenities from the other side of her car. Banks' familiarity with Beckerdite is based on her being "pointed out" by a coworker.

Beckerdite herself denied ever before seeing Corbett or Banks, plus expressly and relatedly denying that she made the statements attributed to her by any of the witnesses for Respondent. Additionally, she denied blocking the view of drivers spitting on cars, or use of language attributed to her at other times in the security service recordings accumulated by Respondent. Contrarily, she testified to being a calming influence on strike activities, intending only to allow permissible picketing conduct on her shift or when present. Regarding attributed epithets recorded as occurring on 4 September at approximately 10:30 p.m. midnight, Beckerdite testified that she was simply not present at such a date and time because of late-night care responsibility for her school-age daughter. On another reported occasion of verbal threats occurring on 31 August at 11:35 p.m., Beckerdite testified that a foot injury of the day before had forced her to go home early in the evening and turn over her assigned picket shift to another striker.

Beckerdite is corroborated in her denial of the charged misconduct by several witnesses. First among these was Sue Michelucci, an 8-year employee who served the strike as a shift captain on alternating nights as this structured scheduling began on 31 August. Michelucci denied that observing that Beckerdite blocked the view of drivers, threatened any person's physical safety, or made racial slurs. Concerning the evening of 31 August Michelucci asserted that Beckerdite simply was not there about the reported 11:35 p.m. time, because she herself had covered as a replacement. Picketer Vera Sumpter also denied ever seeing conduct by Beckerdite of the type for which she was accused, while Theresa Burleson corroborated the unlikelihood that Beckerdite was presently late in the evening of 31 August.

Peter White lives with Beckerdite as her boyfriend. He was also a striking employee of Respondent who briefly took reinstatement when the strike ended. During the strike he functioned as an assistant strike leader and shift captain for the 8 p.m. to midnight assignment. White described this arrangement as one permitting he and Beckerdite to share the total after-school and evening care of her daughter. White testified that after the Union's meeting of 31 August he and Beckerdite stopped briefly at the picket line, but because of her foot injury she left by 7 p.m. at the latest. He also testified concerning Respondent's recorded episode of 4 September, asserting that Beckerdite could not have been present at the stated 10:30 p.m. time because the school year had begun and under their sharing arrangement covering the consecutive picket shifts Beckerdite would not have remained in the vicinity past 9 p.m. White added general denials of the accusations that Beckerdite had made racial slurs: threatened physical harm to anyone's person, wife or family; blocked incoming or outgoing vehicles; or ever obstructed the view of a driver in passage.

3. Donald Treadway

The letter to this individual enumerated the following bases for a denial of reinstatement because of claimed "strike misconduct":

(1) unprovoked physical assault on an individual crossing the picket line about September 2, 1986;
(2) generally harassing, verbally abusing, and/or threatening the well-being of indivuduals crossing the picket line;
(3) photographing and listing the vehicle license numbers of individuals crossing the picket line and threatening their well-being.

Here Respondent's evidence is principally an eyewitness to the momentary episode of 2 September when an altercation developed suddenly as replacement employee Arthur Maldonado arrived for work. According to Wittig he observed the incoming employee unexplainably stop just on the plant driveway and as a beer can lay behind his car. Wittig testified that as he watched from about 20 feet away the driver opened his car door to alight. He recalled strikers congregating around the vehicle, and that as the driver stepped out Treadway forcefully punched his face without provocation. Wittig testified that this caused the person to sit back down in the car holding his face as another guard quickly moved in telling him to drive on inside. After momentary recovery from the punch, Maldonado did so.

Treadway's version is that the arriving individual had turned recklessly off the road in endangerment of pickets. Treadway shouted to "slow your goddamned ass down," and with this the car abruptly stopped and its very large, glasses-wearing driver menacingly emerged. Treadway described the situation as a 2-second-long episode in which he had no retreat movement because of picketers clustered around him, and his reflex action was to hit the person stopping his forward momentum. An APS lieutenant appeared immediately to take a picture of the scene, and when he departed Treadway asserted that he was consolingly congratulated by other security officers, including a guard believed to be Jake Lewallen. Treadway added that during his 14-year employment as a truckdriver with Respondent he had never before been involved in a physical altercation.

Striker Eva Sousa testified that she was present during this incident. She recalled a car's sudden stop after it had

pulled into the driveway overly fast from the highway. Sousa testified that the driver belligerently emerged saying "who is the motherfucker that hit my car?" as he lunged toward Treadway. She saw Treadway hit the person and guards instantly converged to hurry him back into his car and have him drive on inside. Her view of the episode had been from about 10 feet away on the passenger's side of the car in question.

Michelucci also testified as an eyewitness to the Treadway incident. She heard the described exchange of yells between Treadway and the driver, then saw the latter jump out of the stopped car and go "right towards Don." She recalled Treadway being pinned where he was, and that he hit the "huge" adversary leading to the arrival of guards including Lewallen.

C. *Trial Methodology, Issues, and Contentions*

The parties stipulated that for purposes of this litigation the General Counsel possessed a prima facie case in terms of showing an 8(a) (3) violation concerning each of the persons involved. On that basis the opening phase of hearing was conducted by Respondent, as it thus first presented evidence with regard to circumstances of each discharge and the manner of reaching managerial decision for each case.

This approach recognized and utilized Board law on the subject. In *Rubin Bros. Footwear*, 99 NLRB 610 (1951), the nature of each party's burden of proof is delineated. When the instance, as here, is denial of reinstatement because of claimed strike misconduct, an employer burden of going forward with the evidence is then created. The crux of this burden is to demonstrate an honest belief that the individual had engaged in particular strike misconduct. This employer burden of persuasion about an honest belief on the subject does not extend to proving that those discharged did in fact engage in the misconduct. Relatedly, the establishment of this honest belief shifts the burden of persuasion back to the General Counsel to prove that the striker involved did not in fact engage in the claimed misconduct. Should evidence under this shifted burden be lacking on the issue, the matter is resolved favorably to the employer in reflection of the General Counsel's obligation to carry the ultimate burden of proving that unlawful discrimination has occurred. See *Schreiber Mfg. v. NLRB*, 725 F.2d 413 (6th Cir. 1984).

The essence of meeting an employer honest belief burden is found in the following passage from *General Telephone Co. of Michigan*, 251 NLRB 737, 739 (1980):

> [T]he burden of establishing an "honest belief" of misconduct requires more than the employer's mere assertion that an "honest belief" of such misconduct was the motivationg force behind the meting out of discipline. Meeting the burden also requires more than a general statement about the guidelines used in establishing the alleged "honest belief." Rather, it requires some specificity in the record, linking particular employees to particular allegations of misconduct.

From this settled structuring, the issues of the case evolve as (1) whether Respondent has demonstrated its honest belief in the strike misconduct of each dischargee, and (2) if so, whether the General Counsel has effectively proven that such repugnant conduct did not in fact occur.

Respondent contends that the numerous written reports of misconduct, input of eyewitnesses, the viewable videotape,[2] and its orderly deferral of decision until multiple executive or advisory review was completed, leads to the "inescapable conclusion" that a proper harboring of honest belief in each instance has been shown. Relatedly, Respondent contends that the General Counsel has failed to negate the fact of picket line misconduct by each of the three individuals.

The General Counsel contends that Whitley has been easily cleared of all general accusations, and that concerning the videotaped incident he was provoked into animated conduct, which was excusable by its spontaneity and essential lack of aggressiveness. Regarding Beckerdite, the General Counsel contends that any verbalisms that she in fact uttered were not of a nature as reasonably would tend to coerce or restrain the Section 7 rights of other employees. In Treadway's case the General Counsel contends that classic self-defense behavior is all that was involved, and that Respondent should suffer an adverse inference on this issue by failure to call as its witness the apparently available person that was struck.

D. *Credibility*

Resolution of the sharp conflicts in testimony is essential to reaching decision here. Demeanor factors are highly significant in this process, while inferable probabilities become a secondary part of the reasoning. I generally discredit Respondent's witnesses Wittig, Lovett, Dorton, Brock, Corbett, and Banks. Wittig was inexperienced in the security process into which he entered, and I did not find his description of the Treadway incident to be candid, convincing, or free of doubt on his own part. Lovett and Dorton each manifested with a decided uncertainty to their testimony, and an inclination to assume more than pure observation could establish. Lovett, in particular, was unconvincing on standard demeanor grounds of hesitancy and seeming lack of an accurate memory. Brock exhibited a degree of defensiveness regarding his role in the Whitley incident, and tellingly shifted the meaning and emphasis of his testimony as it unfolded during the respective phases of examination. With respect to Corbett and Banks, their identification of Beckerdite as utterer of extreme vituperation was based on insufficient personal knowledge.[3] Undoubtedly each

[2] Consideration of what can be seen on videotaped film has previously been approved in the evaluation of claimed strike misconduct. *Clayton v. Gold Bond Bldg. Products*, 2 IER Cases 1171 (USDC, E.D. Mich. 1987).

[3] The General Counsel renews a motion to strike the testimony of both Corbett and Banks. Contrary to arguments made, I do not find the order in which they were called as irregular. Respondent had no obiligation to advance *all* evidence supportive of its claimed honest belief in strike misconduct, and could properly instead use these witnesses for rebuttal-type purposes. See *Rubin Bros.*, supra at 611.

of these witnesses experienced namecalling of the nastiest variety; however, I am unpersuaded that Beckerdite was the source. Given the unruly context of what their employment situation suddenly became, the hectic clustering of strange and hostile persons at the picket line point, and the limited visibility associated with nighttime incidents, I am convinced that both Corbett and Banks are mistaken in their testimony against Beckerdite. On pure demeanor grounds I am skeptical of Corbett's offerings because of the fanciful manner in which presented and a palpable eagerness to claim more than seems likely. In Banks' case, the resolution is more difficult because of her candid-appearing manner. Nevertheless, I believe she has yielded to suggestibility inherent in this situation, and do not accept the ultimate truth of her testimony.

The credibility resolution above dovetails with my impressions of witnesses for the General Counsel. The dischargees each impressed me as being forthright, alertly correct in their assertions, and honest intentioned. I also accept the integrity of testimony by Michelucci, White,[4] Isaia, and Bell, as most persuasive from among the numerous witnesses called by the General Counsel for the object of defeating Respondent's defense.

E. *Analysis*

There is established doctrine for evaluating the conduct of picket line activity, apart from the technical principles under which cases such as this are litigated. Plainly the strike scene at its outset involved unregulated behavior by the large group of persons that appeared at the facility during the immediate days following inception. Typical techniques of a spirited or inspirational nature were present, such as a daily flag display, use of insignia by pickets, and concentrated efforts to influence arriving persons that the strike's objectives should be preferred. Nor was it a quiet scene, as Beckerdite herself recalled the use of bullhorns and the calling out of obscenities by strikers. Sufficient action and stimulus was generated that countering behavior was also caused, as when Maldonado essentially screeched his car to a stop to alight angrily, and as with Corbett's admission of probably having answered back at his verbal tormenter to "fuck yourself or something."

Additionally, Respondent has presented a detailed reconstruction of the plantsite, the clearance at the highway's edge, and planes of view as drivers might experience them in difficult and fast-changing circumstances of the picketers' conduct. But photographs, stipulations, and episodal description are only a context for fundamental questions of whether particular strikers engaged sufficiently or at all in impermissible conduct. Ultimately the information sources must all coalesce in terms of an employer's honest belief of misconduct as this leads to the issue of whether in fact it occurred.

Regarding the sounds of purposeful strike action, the Supreme Court has noted that Federal labor policy generally contemplates "freewheeling use of the . . . spoken word," "uninhibited, robust, and wide-open debate in labor disputes," and use of "intemperate, abusive or insulting language." *Letter Carriers v. Austin*, 418 U.S. 264, 272, 273, 283 (1974). This reflects the Board's own long-held recognition that a reality of labor relations is its exchanges by heated and bitter language. While not condoning such behavior the Board once characterized this reality in the following passage:

> [I]t is common knowledge that in a strike where vital economic issues are at stake, striking employees resent those who cross the picket line and will express their sentiments in language not altogether suited to the pleasantries of the drawing room or even to courtesies of parliamentary disputation. Thus, we believe that to suggest that employees in the heat of picket-line animosity must trim their expression of disapproval . . . would be to ignore the industrial realities of speech in a work day world. . . . [*Longview Furniture Co.*, 100 NLRB 301, 304 (1952).]

Clear Pine Mouldings, 268 NLRB 1044 (1984), refined the doctrine by specifically holding that utterances could lead to legitimate denial of reinstatement to strikers whose strike-related misconduct under the circumstances reasonably tended to coerce or intimidate other persons in the exercise of their rights protected under Section 7 of the Act.[5] A concurring opinion in *Clear Pine Mouldings* urged that the *McQuaide* test be applied with awareness of the often "tense, angry, and hostile confrontations" of a picket line in which "emotions run high and threats are hurled that connot reasonably be interpreted as auguries of violence." In a comparable vein it has been noted that a truly "serious threat" is one that "may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker." *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977).

I hold that the General Counsel prevails on both issues presented here. The accumulation of materials by Respondent and an initial consideration they were given does not rise to the level of an *honest* belief in the misconduct of each discharged person. There was no attention given to the fact that Beckerdite was generally cooperative and dutiful in response to particular requests of security personnel that some untoward situation be rectified, nor was her version of the facts solicited. Further, the decision-making process is itself suspect, because even though Stonehocker described its sequence, Ciocca contradicted her concerning whether he had been instrumental as final authority on the cases. As with Beckerdite neither Whitley nor Treadway was sought out for a hearing of his version on the unique episodes involved. The security apparatus in place for the strike was itself prone to recordmaking for this sake alone, and I note here that an APS lieutenant, as Treadway credibly recalled, photographed "the vineyard" long after dynamics of his Maldonado altercation had ceased. Nor is there a "linking" of Beckerdite to the more ominous utterances

[4] In White's case I have specifically weighed his personal allegiance to Beckerdite, and puzzling minor vacillations in how he recounted the facts. Overall, however, I am influenced to fully credit his testimony.

[5] This holding took its rationale from *NLRB v. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977), denying enf. in part 220 NLRB 593 (1975).

heard, or a showing that she, in "particular," was the actual speaker rather than a known personality of prominent influence on, and in connection with, the picket line. I believe the evidence showed that Respondent distanced itself from the security function, and artificially relied on drily formalistic documentation in lieu of a sincere wish to obtain the truth. Cf. *Tube Craft, Inc.*, 287 NLRB 491 (1987).

Even should an honest belief have been present, I relatedly hold that the strike misconduct of these accusations did not in fact occur in the three instances. Whitley's case is one in which the subjective experience of having watched the videotape is part of the factfinding process. I can only make an impartial characterization of it, and in doing so describe seeing an increasingly exasperated individual bobbing, twisting, glaring, and shielding himself relative to the picture-taking effort until that one final movement which was more of defiance than of assault. What Respondent has taken from this film excerpt and its other sources of information does not amount to a "brandishing" or "dangerous [wielding]" of a picket sign, and given the nature and time length of what Whitley experienced it would seem his behavior was but a normal reflex following excitable buildup of this type. Cf. *Olympic Limousine Service*, 278 NLRB 932, 943 (1986), and cases cited. In making argument on Whitley's case, Respondent has misplaced a reliance on *Carpenters (Reeves, Inc.)*, 281 NLRB 493 (1986), for this decision applied Section 8(b) of the Act to conduct on behalf of a picketing labor organization and does not address issues of individual strike eligibility for reinstatement. Further, the holdings in *Preterm, Inc.*, 273 NLRB 683 (1984), enfd. in relevant part 784 F.2d 426 (1st Cir. 1986), are unavailing because there are unprovoked grabbing and shaking of a nonstriking employee was "clearly" found to have been "intimidating and coercive conduct." The General Counsel has established that other enumerated accusations against Whitley did not actually occur.

In Beckerdite's case I find from her testimony, and that of credible corroborating witnesses, that she neither blocked the view of drivers of vehicles nor spat on these vehicles. Regarding the more vivid and critical accusation of claimed verbal abuse, I find it was not Beckerdite who so behaved and those persons claiming otherwise do so in error. Cf. *Gem Urethane Corp.*, 284 NLRB 1349 (1987). I recognize that credited testimony toward the unlikelihood of Beckerdite being present at the time of reported incidents on 31 August and 4 September is not fully dispositive. As strike leader she had random comings and goings, consistent even with White's testimony that she might "pop in" at shift change. However, Respondent's own evidence shows that simultaneous yelling by a "male striker" overlapped Beckerdite's own reported words on 31 August at 11:29 p.m. (R. Exh. 19). Cf. *MGM Grand Hotel*, 275 NLRB 1015 (1985).

Regarding Treadway, I credit the composite of evidence showing his striking of Maldonado was a standard act of self-defense, and find no basis for discipline against him. It cannot be said he engaged in strike misconduct when his only notable act was to forcefully repel an apparent attacker. As with Whitley, the other enumerated accusations against Treadway were proven by the General Counsel to be hollow.

On a collateral point the Union, exercising its full standing as Charging Party, made a record on the matter of whether Ciocca had assured assembled employees there would be no strike-misconduct discharges as he met with them in the immediate euphoria when the strike ended on 3 October. This meeting, and a larger one that followed directly, involved Ciocca taking the opportunity to communicate directly to Respondent's employees that he was generally gratified to learn the strike was over. An activating factor here was then-pending advice by the WEA that striking employees of member employers would be permanently replaced on or after 6 October, a tactic that had been withheld up to that point. However, at Respondent's facility a more pointed concern was with rumors that the employer harbored plans to penalize certain individuals for their strike activities.

On this subsidiary issue I credit Sousa, Michelucci, and Bell, who each testified persuasively that Ciocca was asked if discharges were contemplated and he answered in the negative. Ciocca vigorously denied that the subject arose; however, I am satisfied from the demeanor of his testimony that he was in error. It is also highly likely that the subject would have been raised, because Treadway in particular had let it be generally known how he was apprehensive that the earlier Maldonado incident would haunt him. Additionally, Respondent had itself raised this specter in a general letter to striking employees dated 12 September.

I consider the issue academic, however, because there is an insufficient link to what Ciocca might have said under these circumstances and the methodically structured manner in which Stonehocker marshaled, synthesized, and routed those materials seeming to be significant in determining the several terminations. Based on rulings made in the course of trial the Union is not able to raise this matter as a theory of condonation, but instead advances it only for makeweight purposes. Accordingly, I do not rely on this aspect of the record as a reason supportive of the violations found present.

CONCLUSIONS OF LAW

1. Franzia Brothers Winery is an employer engaged in commerce within the meeting of Section 2(2), (6), and (7) of the Act.

2. Winery, Distillery & Allied Workers Union, Local No. 186, Distillery, Rectifying, Wine & Allied Workers International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending, discharging, and denying reinstatement to Robert Whitley, Richelle Beckerdite, and Donald Treadway because of their strike-related activities, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to

cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully suspended, discharged, and refused to reinstate Robert Whitley, Richelle Beckerdite, and Donald Treadway to employment at all times from and after 4 October, I shall recommend that Respondent be required to make them whole for any loss of earnings they may have suffered as a result of the discrimination against them. Backpay shall be computed as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*.[6]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Franzia Brothers Winery, Ripon, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or refusing to reinstate employees for striking or for engaging in strike-related conduct unless such employees engaged in misconduct that under the circumstances may reasonably tend to coerce or intimidate other employees in the exercise of their rights protected under the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Robert Whitley, Richelle Beckerdite, and Donald Treadway immediate and full reinstatement to their former position or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Ripon, California, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.[9]

[6] 283 NLRB 1173 (1987). Interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[9] The General Counsel requests a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil procedure subject to the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, I find it unnecessary to include such a clause. Accordingly, I deny the General Counsel's request. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or discipline employees for engaging in a lawful economic strike or their strike-related activities, unless such employees engage in misconduct that under the circumstances may reasonably tend to coerce or intimidate other employees in the exercise of their rights protected under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Whitley, Richelle Beckerdite, and Donald Treadway immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previous-

ly enjoyed and we will make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to these discharge and that the discipline will not be used against them in any way.

FRANZIA BROTHERS WINERY

Wells Fargo Armored Service Corporation of Puerto Rico *and* Congreso de Uniones Industriales de Puerto Rico. Case 24–CA–5524

August 23, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 25, 1988, Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited exceptions and a brief in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wells Fargo Armored Service Corporation of Puerto Rico, Rio Piedras, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Failing and refusing to recognize and bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with any duly certified representative of its employees in the following appropriate unit:

> All mechanics and mechanic helpers employed by Respondent at its Rio Piedras facility in San Juan, Puerto Rico, excluding all other employees, guards and supervisors as defined in the Act."

2. Substitute the following for paragraphs 2(a) and (b).

"(a) On request, recognize and bargain with any duly certified representative of the employees in the aforesaid appropriate unit with respect to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

"(b) Post at its Rio Piedras, San Juan, Puerto Rico facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material."

3. Substitute the attached notice for that of the adminstrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to recognize and bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with any duly certified representative of the employees in the following appropriate unit:

> All mechanics and mechanic helpers employed at our Rio Piedras facility in San Juan, Puerto Rico, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively with any duly certified representative of all employees in the appropriate unit with respect

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[1] We find merit in the General Counsel's request that the notice be posted in Spanish as well as English. We shall modify the recommended Order accordingly.

On May 20, 1988, the Respondent filed a motion to admit new evidence and dismiss the complaint pursuant to a disclaimer of interest dated May 5, 1988, that it had recieved from the Union. The Union stated in effect that it no longer was interested in representing the unit employees. In its motion, the Respondent contends the Union's disclaimer relieves it of any obligation to bargain with the Union and that the present controversy is moot. The General Counsel's opposition to the motion contends that although the Union's disclaimer relieves the Respondent of bargaining with that particular Union, it does not negate the judge's finding that the Respondent violated the Act and that it has an obligation to bargain in good faith with any other labor organization that is duly selected by the unit employees to represent them. The General Counsel also states that the unit employees are entitled to a Board order and the posting of a notice for without such their Sec. 7 rights will have been chilled. In this regard, the General Counsel requests that the judge's recommended Order be modified to require the Respondent to bargain with any duly certified representative of its employees in the designated appropriate unit. We find merit to the Respondent's motion only to the extent that it requests admission of the Union's disclaimer. However, in agreement with the General Counsel, we find that the issues are not moot and the complaint should not be dismissed. Furthermore, in order to effectuate the purposes of the Act, we shall order the Respondent to bargain with any duly certified representative of its unit employees.

to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WELLS FARGO ARMORED SERVICE CORPORATION OF PUERTO RICO

Virginia Milan Giol, Esq., for the General Counsel.
Thomas Franklin, Esq., of Atlanta, Georgia, for the Respondent.
Arturo Figueroa, for the Union.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On an original charge filed by Congreso de Uniones Industriales de Puerto Rico (the Union) on 10 February 1987 and an amended charge filed on 31 March 1987, the Regional Director for Region 24 of the National Labor Relations Board issued a complaint on 31 March 1987 that alleged, in substance, that by withdrawing its recognition of the Union as the exclusive collective-bargaining representative of specified employees on or about 11 August 1986, Wells Fargo Armored Service Corporation of Puerto Rico (the Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act. By timely answer, Respondent denied it had violated the Act as alleged. Although Respondent admitted in its answer that it withdrew recognition from the Unon on or about 11 August 1986, it pleaded affirmatively that "1. The six month statute of limitations has expired on the basis of this charge. 2. The Union's certification year expired on 9 January 1986. 3. The Union made no effort to represent the employees from October 1985 until March 1986."

The case was heard in Hato Rey, Puerto Rico, on 26 October 1987. All parties appeared and were afforded full opportunity to participate. On the entire record, including posthearing briefs filled by the parties, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Tennessee corporation authorized to do business in the Commonwealth of Puerto Rico, engages in the transportation of money and valuables by means of armored trucks and related security services, and operates a facility located in Rio Piedras, San Juan, Puerto Rico. In the normal course of its business operations, it annually performs services valued in excess of $50,000 for banks and other enterprises within the Commonwealth of Puerto Rico which are engaged in interstate commerce, such as Banco Popular de Puerto Rico and Banco de Ponce. It is admitted, and I find, that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The facts in the instant case are not in dispute.[1] Summarized, the record reveals the following

On 9 January 1985 the Union was certified by the Board as the exclusive collective-bargaining representative of employees in the following unit:

> All mechanics and mechanic helpers employed by the Employer [Respondent] at its San Juan Branch located at Rio Piedras, Puerto Rico, excluding all other employees, guards and supervisors as defined in the Act.[2]

At the time of the certification, Respondent employed two mechanics and one mechanic helper. The unit consisted of two employees at the time of the hearing because one mechanic had left Respondent's employ.

After an exchange of correspondence, the parties engaged in negotiations in Puerto Rico on 19, 20, 21, and 22 August 1985, and 1, 2, and 3 October 1985. Thomas Franklin, assistant vice president of labor relations, and Luis A. Berrios, vice president-general manager of Puerto Rico operations, represented Respondent. Arturo Figueroa, the Union's president, and Charles E. Ayala, an employee and a member of the bargaining unit, represented the Union.

Disagreement on undisclosed economic and noneconomic matters prevented the parties from reaching agreement on a contract during negotiations.

On 7 October 1985 Respondent, through Franklin, sent the Union a final offer. The letter transmitting the final offer was placed in the record, but the final offer was not. The body of Franklin's letter states:[3]

> Enclosed you will find a completed copy of the final offer of Wells Fargo in our collective bargaining. This copy represents the entire contract which includes agreed upon language and nonagreed upon final positions of Wells Fargo.
>
> It has become very evident to me that you do not know how to conduct the art to negotiations. Your continual refusal to make counter proposals or to change positions leaves us at impasse.
>
> This is Wells Fargo's final position on all issues. You are naturally free to pursue whatever course of action you choose. A copy of the final offer has been given to each of the mechanics. Please let Mr.

[1] Counsel for the General Counsel conducted her case-in-chief by adducing testimony through two union representatives and one employee, and through the introduction of certain documentary evidence. The witnesses testified in a straightforward manner and I credit their uncontroverted testimony. Respondent elected to rest without presenting a defense at the conclusion of the General Counsel's case.

[2] Appropriateness of the unit is not in dispute.

[3] G.C. Exh. 11.

> Berrios know what the decision is regarding acceptance or rejection of this contract.

On 10 October 1985, Franklin sent the Union a second letter, which contained essentially the same verbage contained in the above-quoted letter.[4]

The Union did not immediately respond in writing to Franklin's October letters. Instead, its president, A. Figueroa, contacted Respondent General Manager Berrios in November and December 1985, and in January and February 1986, to request that Respondent schedule a meeting at which negotiations whould be continued. The record fails to reveal that the Union made any counterproposals to Respondent's last offer. A. Figueroa credibly testified that Berrios "intertained" him during the above described telephone conversations by telling him negotiations were Franklin's problem and he would attempt to contact Franklin.

By letter dated 10 March 1986, the Union demanded in writing that Respondent meet with it to continue negotiations. Berrios forwarded the letter to Franklin. By letter dated 7 April 1986, Franklin responded to the Union's 10 March letter stating, inter alia:

> I have been informed that you have contacted our San Juan office and that you wish to continue negotiations between your union and our company.
>
> I would like to point out a few factors to you: Your certification began on January 9, 1985. Clearly, one year of presumed representation has expired. Additionally, we last met in October at which time, in essence, you refused to bargain and we declared impasse. We presented you with our final offer in October and heard nothing from you as to whether or not your people had accepted it or not. I do not see that anything has changed between now and then. I do not see what could be accomplished nor do I understand the purpose of continuing negotiations. You have our final offer.
>
> If you wish, you can let me know your opinion as to these items.

The Union responded to Franklin's 7 April 1986 letter by demanding in writing on 15 July 1986 that Respondent meet with the Union to conclude negotiations within 20 days.

Respondent admits in its answer that it withdrew recognition from the Union on or about 11 August 1986. Withdrawal of recognition was accomplished by a letter from Franklin to A. Figueroa dated 8 August 1986. A. Figueroa credibly testified he did not receive the letter until on or after 11 August 1986.[5] The body of Franklin's letter states.[6]

> A copy of your 15 July, 1986 letter has been referred to me. As you are aware, I wrote you a letter on 7 April, 1986 explaining the company's position.
>
> I will remind you of the facts. Your union's certification began on January 9, 1985. The one year of presumed certification expired seven (7) months ago. The company presented you with a final offer and heard nothing from you. If you were willing to accept that offer, you should have signed the contract and returned it. You did not do so. All issues have been discussed and negotiated. There would be no point in further negotiations.
>
> In considering the factors present here:
>
> 1. The union did not accept the final offer.
> 2. The employees did not strike the company.
> 3. The best offer was made in October 1985 and you did not contact the company again until April 1986. Your union abandoned the unit.
> 4. The union's certification year expired in January 1986. Thus, union no longer represents the mechanics.
>
> I hope this clairifies [sic] the issue and our position in this matter.

By letter dated 19 August 1986 A. Figueroa informed Franklin he did not agree with the allegations and or position of Respondent set forth in Franklin's 8 August 1986 letter, and he demanded that Respondent meet with the Union within 15 days to continue negotiations. Respondent did not respond. Subsequently, by letters dated 14 October 1986, 17 February 1987, 13 March 1987, the Union requested that Respondent meet to continue negotiations. Respondent did not reply until 3 April 1987. At that time, Franklin informed the Union, that Respondent would not meet further with it until ordered to do so by the Board.[7]

The original charge was filed in the instant case on 10 February 1987. It alleges that Respondent violated Section 8(a)(1) and (5) of the Act by "refusing to meet to negotiate a collective bargaining agreement alleging the Union no longer represents the employees." The charge was amended on 31 March 1987 to allege specifically that Respondent violated Section 8(a)(5) of the Act on 11 August 1986 by "unlawfully withdrawing recognition from the . . . Union and thereafter refusing to meet to negotiate a collective bargaining agreement."

Analysis and Conclusions

Respondent interposes two defenses in the instant case, i.e., it claims the complaint is time barred by Section 10(b) of the Act and it claims it possessed a good-faith doubt that the Union represented a majority of the unit employees when it withdrew recognition by the letter dated 8 August 1986. I find both contentions to be without merit.

Respondent's contention that the complaint is time barred by Section 10(b) of the Act is grounded on a contention that the original charge, which was filed on 10 February 1987, failed to specifically allege that it had

[4] G.C. Exh. 12.

[5] The date of 8 August was a Friday. The letter was mailed in Atlanta, Georgia, on 8 August, and Figueroa testified his office is closed on Saturday and Sunday and he could not have received the letter until Monday, 11 August, at the earliest.

[6] G.C. Exh. 16(a).

[7] G.C. Exh. 22.

violated Section 8(a)(5) by withdrawing recognition from the Union during the 6-month period preceding the filing of the charge. Respondent contends, in effect, that the complaint is based on the amended charge, which did specifically allege withdrawal of recognition, and was not filed until 31 March 1987, a date more than 6 months after 11 August 1985.

In *National Licorice v. NLRB.*, 309 U.S. 350 (1940), and in *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959), the Supreme Court rejected contentions that the Board is limited in framing complaints to specific matters alleged in a charge. In *Fant Milling*, the Court addressed the issue now before me stating (at 307):

> A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. *Labor Board v. I & M Electric Co.*, 318 U.S. 9, 18. The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act.

More recently, in *NLRB v. Antonio's Restaurant*, 648 F.2d 1206 (9th Cir. 1981), the court discussed sufficiency of a complaint and applicability of Section 10(b), stating (at 1210):

> Actions before the Board are not subject to the technical pleading requirements of a private lawsuit. *North American Rockwell Corp. v. NLRB*, 389 F.2d 866, 870 (10th Cir. 1968). The charge need not be technically precise so long as it generally informs the party charged of the nature of the alleged violations, and the general allegations in the charge may later be supplemented or amplified by more specific allegations which "relate back" to the date the charge was filed.

In sum, it is clear that the complaint allegation that Respondent unlawfully withdrew recognition from the instant Union on 11 August 1986 is closely related to the allegation in the original charge, which asserted Respondent had violated Section 8(a)(1) and (5) by "refusing to meet and negotiate a collective-bargaining agreement alleging the Union no longer represents the employees." The filing of the amended charge, which alleged specifically that Respondent violated Section 8(a)(1) and (5) by withdrawing recognition from the Union, constituted proper, but unnecessary action. Contrary to Respondent, the more specific allegation related back to the date the original charge was filed. Accordingly, Section 10(b) of the Act is not applicable here.

Remaining for resolution is Respondent's claim that the Union's actions from the time Respondent made a final offer on 7 October 1985, until 10 March 1986, the date the Union requested in writing that negotiations be resumed, legally entitled it to withdraw recognition from the Union by letter dated 8 August 1986. As noted, supra, Respondent admits in its answer that it withdrew recognition from the Union on or about 11 August 1986.

In *Terrell Machine Co.*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (4th Cir. (1990)), the Board set forth the legal principles to be applied in situations when an employer seeks to withdraw recognition from an established bargaining representative, stating, inter alia:

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues. This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees. Accordingly, once the presumption is shown to be operative, a prima facie case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The prima facie case may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal the union in fact no longer enjoyed majority representative status; or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status. As to the second of these. As to the second of these, i.e., "good faith doubt," two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations and it must not have been advanced for the purpose of gaining time in which to undermine the Union.

In the instant case, the considerations, which allegedly caused Respondent to withdraw recognition from the Union, are set forth in Franklin's 8 August 1986 letter. They are:

> 1. The union did not accept the final offer.
> 2. The employees did not strike the company.
> 3. The best offer was made in October 1985 and you did not contact the company again until April 1986. Your union abandoned the unit.
> 4. The union's certification year expired in January 1986. Thus, union no longer represents the mechanics.

In its brief (at 4), Respondent clarifies its position concerning the first three numbered items set forth above by contending "The Company believed that the union's lack of action on the final offer and the lapse of time between the final offer on 7 October 1985 and the letter on 10 March 1986 indicated that the union lacked support of its unit members." I find the contention to be without merit. Similar contentions were made and rejected by Judge Michael O. Miller, with subsequent Board approval, in *Flex Plastics*, 262 NLRB 651 (1982). There, it was observed that the Board discussed the duty of an employer during a period of impasse in *International Medication Systems*, 253 NLRB 863 (1980), stating, inter alia, at fn. 3:

> We have long held that, while an impasse may suspend bargaining for a time, it "does not relieve an employer from the continuing duty to take no action . . . which amounts to a withdrawal of recognition of the Union's representative status." *Central Metallic Casket Co.*, 91 NLRB 572, 574 (1950). Thus whether the parties arrived at an impasse is irrelevant to an evaluation of Respondent's asserted good faith and reasonably grounded doubt of the Union's majority status.

Patently, neither the existence of an impasse nor the failure of the Union or the employees to accept the Company's final offer or strike enabled Respondent to legally withdraw recognition from the Union.

Turning to the contention the union inaction entitled Respondent to question the Union's majority status, I reject the argument for two reasons. First, I note that the facts, supra, fail to factually support Respondent's contention. In this regard, I have credited the testimony of the Union's president, which was to the effect that he contacted Respondent's general manager in November and December 1985, and in January and February 1986, to demand a resumption of bargaining. Moreover, I credit the same individual's assertion that Berrios merely "intertained" him by promising to contact Franklin, but accomplishing nothing. Clearly, if there was inaction during the period of impasse, it was respondent rather than union inaction. Assuming, arguendo, however, that the Union was inactive for a period of 4–5 months during late 1985 and early 1986, case precedent reveals that by demanding a resumption of bargaining through its 10 March 1986 letter, which reached Franklin, it engaged in activity that negated any inference to be drawn from alleged inactivity. *Flex Plastics*, supra at 657.[8]

Finally, the principles enunciated in *Terrell Machine* clearly reveal the mere expiration of the Union's certification year could not serve as the basis for Respondent's alleged formation of a good-faith doubt that the Union did not enjoy majority status on or about 11 August 1986.

In sum, I find, for the above-stated reasons, that Respondent has failed to rebut the presumption that the Union represented a majority of its employees in the unit admitted to be appropriate when Respondent withdrew recognition from the Union on or about 11 August 1986. Accordingly, I find, as alleged, that by engaging in such action, Respondent violated Section 8(a)(5) and (1) of the Act as alleged.

CONCLUSIONS OF LAW

1. Wells Fargo Armored Service Corporation of Puerto Rico is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(6) of the Act.

3. All mechanics and mechanic helpers employed by Wells Fargo Armored Service Corporation of Puerto Rico at its Rio Piedras facility in San Juan, excluding all other employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. By withdrawing recognition from Congreso de Uniones Industriales de Puerto Rico as the exclusive bargaining agent of Respondent's employees in the aforesaid appropriate unit on or about 11 August 1986, Respondent violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully withdrew recognition from the Union as the exclusive bargaining agent of employees in the appropriate unit described above, and that it, on request, bargain collectively with the Union regarding the rates of pay, wages, hours of employment, and other conditions of employment of unit employees and, if an understanding is reached, embody such understanding in a signed agreement.

Finally, although the General Counsel requests that a visitatorial clause be included in any order issued in this case, I note the Board has declined to include such clauses in cases that do not appear to pose complicated compliance problems. See, for example, *Cherokee terminal*, 287 NLRB 1080 (1988). In my view, the order in this case will pose no significant compliance problems.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Wells Fargo Armored Service Corporation of Rio Piedras, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Congreso de Uniones Industriales de Puerto Rico as the exclusive bargaining representative of employees in the following appropriate unit.

> All mechanics and mechanic helpers employed by Respondent at its Rio Piedras facility in San Juan, Puerto Rico, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain collectively with the Union as the exclusive representative of all employ-

[8] See also *Pioneer Inn*, 228 NLRB 1263, 1265 (1979), enfd. 578 F.2d 835 (9th Cir. 1978); *Road Materials*, 193 NLRB 990 (1971).

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ees in the appropriate unit with respect to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Rio Piedras, Puerto Rico facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Monotech of Mississippi *and* International Union of Operating Engineers, Local Union 624, AFL–CIO. Case 26–CA–12635

August 23, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On May 27, 1988, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 26–RC–6929. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On June 27, 1988, the General Counsel filed a motion to transfer case to Board and for Summary Judgment. On June 29, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's disposition of certain challenged ballots in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).[1] Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Iuka, Mississippi, has been engaged in the fabrication of steel products. During the past 12 months, a representative period, the Respondent, in the course and conduct of its business operations, sold and shipped from its facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Mississippi. During the same period, the Respondent, in the course and conduct of its business operations, purchased and received at its facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Mississippi. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held May 7, 1987, the Union was certified on April 20, 1988, as the collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees employed by the Respondent at its Route 4, Box 650, Iuka, Mississippi facilities, excluding all other employees, office clericals, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since about May 9, 1988, the Union has requested the Respondent to bargain, and since about May 19, 1988, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing since about May 19, 1988, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor

[1] In its answer, the Respondent denies, inter alia, par. 1 of the complaint that alleges that the instant charge was filed by the Union on May 24, 1988, and a copy was served by certified mail on the Respondent on May 24, 1988. The General Counsel, however, has submitted the affidavit of service of the charge and the post office return receipt that indicates that the charge was received by the Respondent on May 26, 1988. Accordingly, we find that the Respondent's denial raises no material issue of fact warranting a hearing.

The Respondent also denies par. 5 of the complaint that alleges that at all times material, the Union has been a labor organization within the meaning of Sec. 2(5) of the Act. Because this denial raises an issue that could have been litigated in the prior representation proceeding, we find that it does not warrant a hearing.

practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Monotech of Mississippi, Iuka, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union of Operating Engineers, Local Union 624, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed by the Respondent at its Route 4, Box 650, Iuka, Mississippi facilities, excluding all other employees, office clericals, guards and supervisors as defined in the Act.

(b) Post at its facility in Iuka, Mississippi, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union of Operating Engineers, Local Union 624, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All production and maintenance employees employed by us at our Route 4, Box 650, Iuka, Mississippi facilities, excluding all other employees, office clericals, guards and supervisors as defined in the Act.

MONOTECH OF MISSISSIPPI

Clemson Bros., Inc. *and* Local Lodge 1835, International Association of Machinists & Aerospace Workers, AFL–CIO. Case 2–CA–18592

August 24, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On January 28, 1983, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the judge's recommended Order.

1. The judge found that the Respondent violated its good-faith bargaining obligation under *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), first by rejecting the Union's economic bargaining demands based on a claim that the business was losing money and then refusing to grant the Union's demands for verification of that claim.

The Respondent's exceptions contend that no *Truitt* disclosure obligation arose because rather than claiming inability to pay it gave repeated assurances that the Respondent could afford to grant the Union's bargaining demands. We find the Respondent's exceptions lacking in merit.

When the entire course of conduct is examined, the Respondent's disclaimer of having made a financial inability claim rings hollow. The Respondent reiterated that because of losses incurred and continuing in the manufacturing operation, it needed to cut unit costs by 30 percent over 3 years and it emphasized at the bargaining table that in the prior 4 years it had sustained large losses, reciting the loss figures for each of those years. The Board does not require an express plea of poverty to invoke the application of *Truitt*. It is sufficient if the employer's words and conduct specifically link its bargaining position to economic hardship.[2] Here, it is plain from the statements concerning continued annual losses and the need to substantially reduce unit labor costs over the next 3 years that the Respondent, despite its incantation of an ability to afford higher wages, was basing its rejections on its business losses. In fact, its statement of "unwillingness," i.e., that it did not make sense to pay higher wages, was admittedly predicated on the same asserted manufacturing losses.[3] Thus, the Respondent's statements specifically linked its bargaining position to economic hardship.

Moreover, the Respondent's rejection of the Union's demands was solely predicated on the poor financial health of this, its only business. Its reiteration of its claim concerning the profitability of its business as a ground for rejecting the Union's demands put the validity of *that* claim into issue. It is immaterial whether the Respondent also revealed that it had other resources, unconnected with its business, that it chose not to use in meeting the Union's demands. The Union might reasonably assume that the Respondent expected the business to pay for itself.[4] Therefore, the Respondent's repeated claims that, because of the plant's unprofitability, it needed concessions, including a wage freeze, and elimination of the February 1 COLA, amounted to an assertion of inability rather than unwillingness to pay for the Union's demands. Thus the Union was entitled under *Truitt* to substantiation of the Respondent's claims, which likely would have furthered the bargaining process.[5] We,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] *E. I. duPont & Co.*, 276 NLRB 335, 336 (1985). See also *Cowin & Co.*, 277 NLRB 802 fn. 1 (1985) (despite its assertions to the contrary, the employer "was in fact expressing financial inability to pay"). *Nielsen Lithographing Co.*, 279 NLRB 877 fn. 3 (1986) ("by its words and conduct" the employer "conveyed to the Union an inability to pay . . . and thus triggered a duty to disclose financial information"). *Coast Engraving*, 282 NLRB 1236 fn. 1 (1987) (employer had to have a wage freeze "in order to stay in business and recoup some bad losses they had [in] the first few months of the year").

[3] The relevant test, as recently reiterated by the Seventh Circuit in *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d 570, 575 (7th Cir. 1986), "is to ascertain whether the employer said it 'would not' as opposed to 'could not' pay the employees' proposed demands." (Citing *United Fire Proof Warehouse Co. v. NLRB*, 356 F.2d 494, 498 (7th Cir. 1966).)

The court in *Harvstone* found the seeking of concessions because of the competitiveness of the market was not an assertion of financial inability. In contrast, the Respondent has asserted no claim of competitive disadvantage in the instant case.

[4] See *United States Steel Corp.*, 122 NLRB 1519, 1525–1526 (1959) (where employer (U.S. Steel) said it was financially able to meet the union's demands (for zinc mine employees) but claimed the zinc mine was operating at a loss), and *Celotex Corp.*, 146 NLRB 48, 52–54 (1964) (in which the employer's statement that it had the ability to pay whatever it thought was right, was evaluated in light of the additional statements that the plant was not being operated profitably and that the negotiations would be on the basis of the labor costs which the plant, not the entire corporate operations, could afford).

[5] The objective of the disclosure obligation is to enable the parties to perform their statutory function responsibly and "to promote an intelligent resolution of issues at an early stage and without industrial strife." *Monarch Machine Tool Co.*, 227 NLRB 1265, 1268 (1977). Compare the Board's recent decisions in *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984), and *Advertisers Mfg. Co.*, 275 NLRB 100 (1985), in which numerous employer reasons for refusing union bargaining demands were found to have demonstrated unwillingness rather than financial inability, and where requiring production of demanded financial information would therefore not have served the bargaining process.

therefore, find that the Respondent's repeated refusals to allow verification of its asserted financial inability contravened its duty to bargain in good faith, in violation of Section 8(a)(5) of the Act.[6]

2. The judge found that the Respondent's lockout of its bargaining unit employees before reaching a bargaining impasse on February 1, 1982, was motivated by a desire to avoid paying the COLA or bargaining further with the Union, in violation of Section 8(a)(3) and (1). In light of this finding, the judge also found similar violations in the Respondent's use of temporary replacements for the locked-out employees and the offers of reinstatement conditioned on the discriminatorily locked-out employees' waiving the COLA and pension and dental plan payments provided by the contract. Further, the Respondent's reinstatement offer constituted direct dealing with employees in violation of Section 8(a)(5) and (1) because the offer differed from the contract agreed to by the parties. And similarly, the Respondent's cessation of contractual payments, including pension and dental plan contributions and the COLA payment, concurrent with the lockout, constituted unlawful unilateral changes.

The Respondent excepts to the above findings of the judge because the parties had reached impasse and thus the lockout and other events that followed were lawful. In support of these exceptions, the Respondent contends that the judge's finding of no bargaining impasse is erroneous and based solely on her unsupportable refusal-to-bargain finding. The Respondent further argues that it had the right, under article 33 of its contract,[7] to lock out its employees if no new agreement was reached within 60 days after negotiations were reopened.

We disagree with the Respondent. We concur in the judge's finding that the Respondent failed to bargain in good faith because it refused to allow the Union to verify its asserted inability to pay for the Union's demands. We, therefore, conclude that there can be no impasse because the cause of the alleged deadlock was the Respondent's own failure to bargain in good faith.[8] Thus the Respondent was engaged in bad-faith bargaining at the point when it initiated the lockout and it maintained the lockout while continuing to refuse to bargain in good faith with the Union.[9] And it is the Respondent's avoidance of its bargaining obligation in instituting the lockout,[10] rather than the absence of a lawful impasse, which renders the lockout violative of Section 8(a)(3) and (1).[11] Furthermore, the Respondent's reliance on its contractual right to terminate the contract and lock out employees is unavailing because article 33 states that such actions are dependent on the parties' good-faith bargaining.

Finally, the Respondent thereafter conditioned rehiring of the laid-off employees on their willingness to waive contractual COLA and pension and dental benefits. Such actions, as found by the judge, were clearly discriminatory as well as inimical to the collective-bargaining process. We, therefore, adopt the judge's findings that the Respondent unlawfully locked out and temporarily replaced its employees[12] as well as her other findings of violations flowing from that unlawful lockout, and we adopt her "make-whole" Order.[13]

ORDER

The National Labor Relations Board adopts as its Order the recommended Order of the administrative law judge and orders that the Respondent, Clemson Brothers, Inc., Middleton, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the at-

[6] The judge found the Respondent's reneging on Schrade's promise to offer a wage increase to be evidence of bad-faith bargaining. Contrary to the judge, in light of the Respondent's consistent bargaining position that it would grant increases only if total labor costs did not increase, we do not infer bad faith from the Respondent's decision to overrule the promise to offer a wage increase that was not tied to any commensurate benefit reduction.

[7] The contract provides as follows:

(33.0) . . . Either party may serve a written notice upon the other sixty (60) days prior to November 1, 1981 to amend the wage rates and fringe benefits provided for in this agreement. Upon receipt of such notice, the other party will meet immediately and negotiate in good faith concerning the modifications proposed.

(33.1) In the event that the parties fail to agree on the modifications proposed within sixty (60) days after receipt of the aforesaid notice, any limitation upon the right of the union to strike established by the terms expressed or implied of this agreement shall terminate on and after the sixtieth (60th) day following the receipt of the aforesaid notice. In the event of a strike or lockout the contract shall terminate.

[8] *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1963).

[9] *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *Vore Cinema Corp.*, 254 NLRB 1288 (1981).

[10] "Proper analysis of the problem [lockout] demands that the simple intention to support the employer's bargaining position . . . be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful." *American Ship Building Co.*, 380 U.S. at 309. Here, as the judge found, the lockout was motivated by the Respondent's wish to avoid the COLA payment, a matter about which we have found the Respondent refused to bargain in good faith.

[11] *Darling & Co.*, 171 NLRB 801, 803 (1968), enfd. sub nom. *Lane v. NLRB*, 418 F.2d 1208 (D.C. Cir. 1969).

[12] We note that the Board's recent decision in *Harter Equipment*, 280 NLRB 597 (1986), is inapplicable in this case which involves replacement of employees who were locked out unlawfully.

[13] We shall amend the judge's remedy by providing that the compliance proceeding herein address the question of whether the Respondent must pay any additional sums into employee benefit funds in order to satisfy the "make-whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

General Electric Company *and* Anthony Kandow, Gilbert Lapoint, Robert Ash, *and* Local 947, United Electrical, Radio and Machine Workers of America (UE). Cases 7–CA–25874 and 7–CA–26535

September 20, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 9, 1988, Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, General Electric Company, Riverview, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 1(d).

"(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act."

[1] The General Counsel also filed a motion to strike the Respondent's supporting brief.

[2] We agree with the General Counsel that the backpay and reinstatement issues raised by the Respondent's exceptions are matters that are appropriate for determination at the compliance stage of this proceeding. See *Dean General Contractors*, 285 NLRB 573 (1987). We thus find it unnecessary to pass on the General Counsel's motion to strike the Respondent's supporting brief.

[3] We shall modify the recommended Order to include the narrow cease-and-desist language customarily used by the Board and to conform to the notice.

Joseph P. Canfield, Esq., for the General Counsel.
John Corbett O'Meara, Esq. and *Kathleen M. Hates, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. On charges of unfair labor practices filed on 30 May 1986 and 7 January 1987, respectively, by Anthony Kandow, Gilbert LaPoint, and Robert Ash, and Local 947, United Electrical, Radio and Machine Workers of America (UE), respectively, complaints were issued by the Regional Director for Region 7 on behalf of the General Counsel on 18 July 1986 and 12 February 1987, respectively. Both cases were consolidated for hearing on 18 February 1987.

The consolidated complaint alleged in substance that Respondent interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act, by laying off employees Anthony Kandow, Gilbert LaPoint, and Robert Ash on 16 December 1985 and thereafter failing and refusing to recall them because of their sympathies for the Union, their roles as union officials, and their participation in a strike, in violation of Section 8(a)(1) of the Act; that by this conduct, the Respondent also discriminated against the four-named employees for the same reasons, in violation of Section 8(a)(3) of the Act; and that the Respondent further interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, and failed and refused to bargain with the Union as the exclusive bargaining representative of the employees, by failing to furnish relevant information requested by the Union, in violation of Section 8(a)(1) and (5) of the Act.

The hearing in the above matter was held before me in Detroit, Michigan, on 18, 19, and 20 May 1987. Briefs have been received from counsel for the General Counsel and counsel for the Respondent, respectively, which have been carefully considered.

On the entire record in this case, including my observation of the demeanor of the witnesses and my consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent has maintained an office and place of business at One River Road in the City of Schenectady, New York (Respondent's place of business). The Respondent also maintains other plants in various States including the State of Michigan. Respondent's Riverview facility, located in Michigan, has been at all times engaged in the repair of industrial and commercial apparatus, and its Michigan facility is the only facility involved in this proceeding.

During the year ending 31 December 1985, a representative period, the Respondent at all times material had gross revenues in excess of $500,000 and purchased and caused to be transported and delivered at its Riverview facility, goods and materials valued in excess of $50,000 that were transported and delivered to it directly from points located outside the State of Michigan.

The complaint alleges, the answer admits, and I find that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Local 947, United Electircal, Radio and Machine Workers of America (UE) (the Union) is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent operates two business facilities, one located at Riverview, Michigan, and the other at Dearborn, Michigan. The Riverview facility is essentially a repair business operation. It prepares large electrical equipment such as generators, transformers, motors, and switchgears. The duration of such repair work varies from several hours to months, and the timing of intake orders for the work depends on equipment of business or other institutions breaking down or falling into ill repair. Consequently, some of the work is prescheduled and other work is occasioned by an emergency, sometimes necessitating the repairman to go to the jobsite of the equipment.

The Riverview facility consists of the following four departments: (1) *The Inspection and Test Department*—where equipment such as generators, motors, and power relays (switchgears, switches, and breakers) are tested. The facility is a diagnostic and repair center. (2) *The Winding Department*—where motors are rewound. (3) *The Machine Department*—where machine parts needed and repair work are made or modified, such as turning shafts. (4) *The Repair Department*—cleans the repaired equipment and performs assemly work.

The work performed at the Dearborn facility involves the repair of small instrumentations and requires different skills and equipment.

For many years, Respondent's employees at both facilities (Riverview and Dearborn) were represented by Local 947, United Electrical, Radio and Machine Workers of America (UE). In November 1985, Respondent was performing an outside job to which it had assigned some of its employees from its Riverview facility. Respondent made a change in the method of pay to these employees which, the employees and the Union contend, was contrary to past practice and the Local contract in effect between the parties, which resulted in substantial monetary losses to the employees assigned to the outside job. Consequently, one of the employees assigned to the outside job filed a second-step grievance on the matter, which was denied. The grievance was advanced to the third step, where it was also denied.

The Local Union called a strike and pursuant to the contract, filed a 24-hour notice on management of the Riverview facility, for both the Riverview and Dearborn facilities and the employees assigned to the outside job, and the Riverview facility went on strike on Friday, 6 December 1985. The Dearborn facility went on strike Monday, 9 December 1985. On 15 December, the Union notified Respondent that the employees had voted to return to work. About 1 hour later, two of the employees who participated in the strike were called by their foreman and informed that they and another employee were laid off for lack of work. On 30 May 1986, the three laid-off employees filed a charge with the Board alleging that they were discriminated against by Respondent for their leadership roles in the strike; and that by Respondent commencing to assign more overtime work, and staffing jobs with employees who were outside the job classification and/or with less seniority than the laid-off employees.

Respondent admitted that at all times material the following named persons, and their positions, have been and are now supervisors of Respondent, within the meaning of Section 2(11) of the Act, and are its agents: Ed McGivern, manager until approximately 31 December 1985; Carl Spevetz, manager since approximately 1 January 1986; and George Hudguins, foreman.[1]

Respondent admitted that the appropriate unit for collective bargaining is as follows:

> All full-time and regular part-time production and maintenance employees employed by Respondent at its Riverview, Michigan, facility; but excluding office clerical employees, guards and supervisors as defined in the Act, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

A. *The Financial Status of Respondent's Business and its Management-Employee Relations*

In or about 1975 there were approximately 160 employees employed at Respondent's Riverview facility. However, commensurate with declining business in the Detroit vicinity, Respondent was forced to reduce its work force to a unit of 25 employees, where it was stablized since approximately 1979.

The uncontroverted and credited evidence of record established that Anthony Kandow was employed by Respondent from 1963 until 16 December 1985, when he was laid off indefinitely. Although employed by Respondent, Kandow worked in the inspection, test, and switch and gear departments, which work experiences involved inspecting and testing voltage switchgears and maintaining switches at customer locations. Requirements for the performance of these jobs, Kandow said, were some mechanical skills and common sense. He worked under the supervision of Foreman George Hudgins, who reported to Plant Manager Carl Spevetz.

During his working tenure with Respondent, Kandow has served as recording secretary, secretary, steward, chief steward, and since 1984, president of the Union. While serving as president, Kandow filed twice as many grievances as any previous union administration. Other officers of the Union during his late presidency were Gil LaPoint, vice president; Ray Young, financial secretary; George Vesich, chief steward; Leo Kandow (brother of Anthony Kandow), steward; and Bynum Callahan. The union trustees were Agnes DeMuth, Roger Ash, and Dave Carter.

On approximately 25 November 1985, Kandow was assigned to a job at the Pontiac Motor Truck and Bus

[1] The facts set forth above are not disputed and are not in conflict in the record.

Company, performing preventive maintenance work. This work involved testing, cleaning and repairing switches and gear equipment. With him on this assignment were fellow workers Jim Christini, Dave Poleznski, and Robert Johnson.

At the time of the work assignment to the Pontiac job, Foreman McGivern told Kandow and his fellow workers that they would be paid "in lieu of the regular practice of overtime for out-of-town work," a difference of about $300 less in pay. The Union expressed its objection to the announced pay method, and Kandow filed a second-step grievance, but it was denied by management. The Union processed the grievance to the third step on an emergency basis where it was also denied. Kandow explained that the Union's national agreement contains an arbitration clause, but it applies only to grievances for discipline and not for hours pay procedure.

The Union's executive board, which included Gil LaPoint, met and decided to give a 24-hour notice to the Company of its anticipated strike. Two notices were delivered to Foreman Ed McGivern, plant manager, on that same date, 5 December. Plant Manager McGivern said only one notice was necessary, and he accepted one notice and destroyed the other notice for the Dearborn facility.

On 6 December 1985 the Union's executive committee approached Plant Manager McGivern and Foreman Hudgins and informed them the strike would begin immediately. Thereafter Kandow and other members of the union committee went to the Riverview employees and told them, "Let's walk out," and they walked out and established a picket line in front of the plant. Kandow went to the Dearborn facility and asked the employees there to walk out, but he was informed they could not walk out legally because the Dearborn management had not been given the 24-hour notice. After consulting with the International, Kandow delivered a letter to Joseph Daily, manager of the Dearborn facility, advising of the strike. On Monday morning, 9 December 1985, Kandow went to the Dearborn employees and called them out on strike. The employees heeded his call.

Picketing

Kandow and LaPoint picketed Riverview on Saturday and Sunday, 7 and 8 December, respectively. On Monday, 9 December, most of the Riverview employees picketed in the morning and left, while Kandow, Roger Ash, Leo Kandow, and George Vesich continued picketing the remainder of the day, except when Anthony Kandow and LaPoint went to the Dearborn plant to see about the strikers there. Both Anthony Kandow and Gil LaPoint testified that as they picketed they saw management (Hudgins and Spevetz) looking out of the windows and doors at them in front of the shop and also on the parking lot. Management also observed them (LaPoint, Tony Kandow, Leo Kandow, Roger Ash, and sometimes George Vesich) picketing as they (member of management) went out of the plant and returned from lunch.

About 4 p.m. on 15 December 1985, the Union sent management a telegram advising that the strike had been terminated. A few minutes later, Foreman Hudgins called Anthony Kandow on the telephone and informed him he was laid off. Kandow asked Hudgins was he the only one laid off and Hudgins said, "Gil LaPoint, and he was going to call LaPoint and Roger Ash to notify them that they were laid off." LaPoint verified that he had been called by Foreman Hudgins on 15 December at 7 or 8 p.m. and informed that he was going to be laid off and should not report for work the next day. He said he did not receive a written notification, which was the usual practice. However, the record contains a written notice (G.C. Exh. 20) dated 16 December 1985 to Gil LaPoint indicating indefinite layoff. It was signed by George Hudgins.

The Union filed a grievance for the Company's failure to give the employees 5 days notice or 5 days pay before they were laid off on 15 December 1985. Approximately seven other grievances were subsequently filed regarding work being performed by persons out of classification or lacking in seniority. During a grievance meeting in early January 1986, Foreman Hudgins told Anthony Kandow and the union representative it was all right to lay off the employees without notice at the end of the strike because a notice was not necessary under those circumstances.

On the second grievance the Union (Kandow) complained to management about junior employees working in the switchgear department, and management said it "had the right people." Kandow said the union contract provides that layoffs will be by seniority, except management is allowed to take into consideration the ability of the worker, and the Company's past practice was layoff by seniority.

Before the strike the Union grieved the fact that employee Melton was performing machinist Ash's welding job. McGivern said the Company felt it had to keep Roger Ash because of his welding experience. The Union then requested management to keep Ash as a welder, but the Company said no, because the Company might need him as a welder and it would have him there.

The Union grieved the fact that Gil LaPoint had not been recalled and management said it "kept the right people."

After the strike on 16 December 1985, Union Steward Kandow stated that there was 25 to 50 percent overtime work performed at the Riverview facility. Leo Kandow, brother of Anthony Kandow, was a union steward in 1983 and 1984. After the strike Leo Kandow returned to work. He corroborated the unrebutted testimony of Anthony Kandow that after the strike there was a lot of work at Riverview, which lasted until about March 1986. Some of the work involved work to correct citations issued by OSHA against Respondent in January or February 1986, and the employees with overtime performed the work that made the corrections. Leo Kandow continued working and filing grievances until he was laid off 5 August 1986.

Gil LaPoint was employed by the Respondent for 30 years until he was laid off on 15 December 1985. He was classified repair "A." Previously he worked in receiving and shipping as repair "B" 4 years; inspection and test "B" 1-1/2 years; transformer "B," transformer repair "A" for 10 years; and repair "A" from then on. He worked in every department except machinery. Before

the strike, Gil LaPoint, "A" repairman, worked on the Cadillac motor job, which required an "A" classified repairman. After the strike LaPoint was replaced on that job by Charlie Poumb, a "B" repairman.

The workers returned to work on Monday (16 December 1985). Layoff notices were given to (1) Leo Kandow, (2) George Vesich, (3) Ray Young, (4) Charles Plumb, and (5) Carl Wessman (see G.C. Exh. 10). Anthony Kandow told Manager Spevetz he thought the layoff notices were a punitive action against the employees for participating in the union strike. Kandow also reminded Spevetz that layoff employees were not given a 5-day notice as required by the contract between the parties. Spevetz did not respond. After effectuation of the layoff, there were no union officials on the job at the Riverview plant.

On the next day, Tuesday (17 December 1985), Respondent issued a notice of temporary layoff to the employees laid off on Monday, 16 December, directing them to return to work the following Tuesday, 25 December. The Union filed a grievance with the Company and charges with the Board against Respondent, charging discrimination against employees for engaging in union activity (strike). Respondent offered to pay all of the laid-off employees for loss of work, if the Union would withdraw the charges, because Respondent acknowledged it made an error in their layoff notifications.

The same union executive board made a decision to strike 10 January 1986 under a continuing strike vote by the membership. All employees walked out at the end of the work shift, and the picket line consisted of Anthony Kandow, Gil LaPoint, and Leo Kandow. The strike lasted only for the weekend—that Saturday and Sunday. When the strikers returned Monday and entered the Riverview plant, Manager Carl Spevetz and Foreman Hudgins were by the timeclock stopping certain people from punching in and informing them that they were laid off.

In late January or February 1986, McCall, an inspection and test employee, was killed in the plant. Respondent called Dave Polezynski to replace him, and the Union grieved the replacement because Polezynski was low in seniority and other more senior persons should have been called, such as himself, Tom Umphenour, and Travis Wooten.

Analysis and Conclusions

The ultimate issues presented for determination are (1) whether Respondent's layoff and subsequent refusal to recall Anthony Kandow, Gilbert LaPoint, and Roger Ash violated Section 8(a)(3) of the Act; and (2) whether Respondent failed and refused to furnish the Union with information relevant and necessary to the Union's function as exclusive bargaining representative of Respondent's employees. The subordinate issues are (1) whether the Charging party employees have established a prima facie case that protected union activity by them was the determining factor in Respondent's layoff of them; and (2) if the evidence established a prima facie case that the union activities of the Charging Parties was a determining factor in their layoff, has Respondent demonstrated that the Charging Parties would have been laid off regardless of their union activities because of a legitimate business reason?

As to whether the Charging Parties have established a prima facie case that their protected strike activity was a determining factor in Respondent's layoff of them on 16 December, the record shows that the bargaining relationship between the parties has existed since 1939; that there have been many disputes between the parties regarding the Respondent's interpretation and application of the layoff provision in the national agreement; that many antiunion statements uttered during the period 1982–1985 have been attributed to management personnel and that Respondent knew Anthony Kandow and Gilbert LaPoint were very active and rather zealous union officers who filed or processed many grievances, and participated in prior strikes including the December one against Respondent.

In support of their allegations that Respondent manifested union animus toward its employees, Anthony Kandow testified that about 1982—1983, Foreman Ed Hastings told him that Plant Manager Brown complained that Anthony Kandow gets in his way because Kandow tries to run the business; then in or about 1982 Foreman Hendricks told Kandow and LaPoint that management was out to get them because of their union activities, and that management had a hit list and that the names of Anthony Kandow, LaPoint, and Leo Kandow were on it.

Gilbert LaPoint testified that Foreman Hendricks told him that he (Hendricks) was instructed by management to watch everything Kandow and LaPoint do, to try to document it when they come in late, to catch them in the act of doing something for which they could be disciplined; to put them under surveillance when they worked outside; and that Hendricks told him (LaPoint) that Labor Relations Representative Hooey generally referred to them (Kandow and LaPoint) in an obscene manner whenever union activities were discussed. Hooey appeared and testified in this proceeding, but she did not deny the conduct attributed to her.

Kandow further testified that in about 1983–1984, former Plant Manager Crane told him he was going to get him (Kandow), and when Kandow left his employment, Crane said he wanted him to know it was he (Crane) who got him; and that in about March 1984, Foreman Don Barnoff went around the shop urging employees not to vote for him (Kandow) for union president, telling them if Kandow won the election, the plant would close. LaPoint further testified that in or about 1984, Foreman Hudgins told him that he (LaPoint) was the most dangerous man in the shop because of his union activities, and that some scars had not healed from a prior union campaign when both Hudgins and Kandow were running for president in the bargaining unit; that after LaPoint filed a charge with the Board in 1985, because his rating had been reduced to "B" in violation of the Act, Foreman Hudgins told LaPoint he (LaPoint) was in trouble (inferentially) with management for filing the charge.

Also, during a grievance meeting in June 1986 regarding the recall of Anthony Kandow, LaPoint said Foreman Hudgins told him Anthony Kandow was not being

recalled because he had some scars that had not healed from the time when he (Hudgins) was a bargaining unit employee, that he (Hudgins) had bitter disputes with Kandow and other employees, and that he has deep animosity for Kandow, whom he disliked and thought was a bad example for a union officer.

It is especially noted that neither former Company Foreman Hastings, Hendricks, Barnoff, nor Crane appeared and testified in this proceeding. Nevertheless, while I credit the somewhat negative statements about the Union or union activities attributed to Hastings, Hendricks, and Hooey, I do not attribute much weight to their statements because I find them too remote in time to have any significant bearing on the dispute between the parties in December 1985. Neither Hastings nor Hendricks was in Respondent's employ in December 1985. Also, I find some of the statements rather ambiguous and not sufficiently definitive to characterize as interfering with, restraining, or having a coercive effect on the protected union activity of the employees.

I credit the testimony of the undisputed statements attributed to former Plant Manager Crane and Foreman Barnoff by Kandow, not only because I was persuaded by his demeanor that he was testifying truthfully, but also because the statements were made more proximate in time to the strike in December 1985, were relatively consistent with antiunion statements attributed to management by other witneses, and therefore bore more relevance to the reasons Respondent laid off the Charging Parties. I credit the 1984 and 1985 statements attributed to Foreman Hudgins by LaPoint because I was persuaded by his demeanor that he was testifying truthfully, because Foreman Hudgins did not testify and no explanation was made for his nonappearance, and because the statements attributed to him were uttered more recently, and were therefore more relevant to Respondent's December 1985 layoff and refusal to recall the Charging Party employees.

I therefore find on the foregoing credited testimony that former Manager Crane's statement that he was going to get Kandow for his diligent union activities was a threat to fire Kandow and consequently evidenced an antiunion attitude. Similarly, Foreman Barnoff's conduct in urging employees to vote against Kandow for president, was conduct manifesting an antiunion attitude. Barnoff's telling employees that if Kandow won the election the plant would close was threatening conduct also manifesting union animus.

Likewise, Foreman Hudgins' telling LaPoint he was the most dangerous man in the shop because of his union activities, and telling him he was in a lot of trouble with management because he filed a charge with the Board, constituted union animus. All of these statements by management personnel (Crane, Barnoff, and Hudgins) were made either in 1984 or 1985, and were not too remote in time to have had significant relevance to Respondent's motive in laying off the Charging Parties in December 1985, thereafter refusing to call them. Moreover, I further find that the antiunion statements by management (Crane, Barnoff, and Hudgins) are consistent with the evidence of the abrupt manner in which the Charging Parties were laid off at the end of the strike and not recalled by Respondent, infra.

Consequently, when the union activism of Anthony Kandow and Gilbert LaPoint is considered along with the union animus manifested by Respondent's foremen (Crane, Barnoff, and Hudgins), the precipitous nature of the layoff (only a few hours after the Union notified the Respondent the strike had ended and the employees would return to work the next day), the fact that the layoffs were so precipitous that Respondent neglected to comply with the National Agreement's 5-day or 1 week's notice of layoff; and the reluctance and refusal of Respondent to recall the leading strike participants (Kandow, LaPoint, and Ash) to work, infra, it becomes abundantly clear that the Charging Parties have established a prima facie case that their union activities, including their participation in the December 1985 strike, were a determining factor in Respondent's reason for laying them off on 16 December.

I therefore conclude and find that the Charging Parties have established a prima facie case that their union activities were a determining factor for their layoff by the Respondent.

Respondent contends that Charging Parties would have been laid off even if they were not engaged in union activities.

In addressing the question whether the Charging Parties would have been laid off even if they were not engaged in union activities (including the December strike), the record shows that the parties had a long history of grievance disputes over Respondent laying off and recalling employees according to classification and seniority.

At the trial, management contended that in December 1985 it reviewed its manpower needs for the foreseeable future and decided it needed one less worker in each of three classifications (repair, inspection and test, and machinist).

Former Plant Manager McGivern testified that before December 1985, he had been pressured by Respondent to lay off employees, but he was reluctant to do so because of the approaching Christmas holidays, the usual yearend customer demands, the custom of senior employees taking unused paid leave during the holiday season, and the usual need for fill-in employees for employees on leave. However, McGivern said he learned that the shop was going to lose two jobs (two KWW generators for Rouge Steel and also repair of 600 hp motors for Wittar Steel Company), which were to arrive 18 and 22 December 1985, respectively. McGivern said he estimated the Rouge Steel job would take 72 hours, using two to four employees in welding and repair or winding work. It was difficult to estimate the time the Wittar job order would take until the motors were opened, but replacing bearings would be done in the repair department. He said when he learned the strike was over at 5 p.m. on 15 December 1985, he met with Manager Spevetz and Foreman Hudgins to discuss the layoffs. Foreman Hudgins recommended laying off Anthony Kandow, Gilbert LaPoint, and Roger Ash.

McGivern further stated that the Company decided to send the Rouge Steel job to its Cleveland, Ohio facility because it feared the employees might go back on strike. He admitted on cross-examination, however, that the employees had never struck near the Christmas holidays because they would lose two paid holidays. Nor had they ever returned to a strike immediately after a strike in the past. Thus, it was unlikely that they would have done so on this occasion.

Before the December 1985 strike, Respondent had always assured the Union that employees would be recalled from layoff whenever there was 40 hours or more work to be performed. However, several witnesses testified without dispute that after strikes in the past, there was generally an excess of work occasioned by the strike; that generally there was work in December occasioned by a number of senior employees taking unused paid leave during the Christmas season; that December 1985 was not different in this regard than prior December; that shop employees worked overtime until March 1986, and a slow period did not occur until April 1986; and that work picked up again in May 1986 when overtime resumed. Some of the latter overtime work is substantiated by the Respondent's overtime records (G.C. Exh. 7), revealing 188 hours of overtime work performed the last week in 1985.

In January 1986 an employee was killed in the shop, which highlighted some deficiencies in safety standards. In order to bring the shop in compliance with higher safety standards, Respondent had 360 hours of overtime general plant maintenance work performed in March 1986. Moreover, General Counsel's Exhibit 22 (a) shows that 150 hours of work out of classification was performed during the first half of May 1986. Also, in November to December 1986, Respondent had 300 hours of overtime general plant work performed in preparation for closing down the plant 31 December 1986. Much of such work was performed by employees junior to Anthony Kandow, Gilbert LaPoint, and Roger Ash. After their layoff in December 1985, Respondent transferred employees Dardini and Breathour from its Dearborn facility to the Riverview shop. Both of these employees had performed different work at the Dearborn facility. Nonetheless, Respondent's records (G.C. Exh. 29(c)) show that on 17 February 1986, Breathour's rating was changed from master inspection repair "A" to inspection and test "A." Respondent's records do not show when Dardini was given the rating inspection test "A." Authorization for the transfer of Breathour and Dardini to the Riverview shop is signed 14 February 1986, but the upper right-hand corner of the documents (G.C. Exhs. 29(a) and 31(a)) indicate they were prepared 16 December 1985, and it may be reasonably inferred that the latter date (16 December 1985) represents at least the date Respondent decided to transfer both employees from Dearborn to Riverview.[8]

I therefore conclude and find on the foregoing credited evidence that Respondent had sufficient work available, which could have been performed by recalling the Charging Party employees who participated in the December strike; but that Respondent elected to have such work performed by shop employees on overtime, and by transferring two employees from its Dearborn facility and accommodating their work skill classification to the work to be performed at Riverview during January–May 1986, as well as November and December 1986.

December Layoffs

Kandow

Former Foreman McGivern testified that Kandow was elected for layoff because the Pontiac job where he was working was cut to two employees, both of who had to be safety certified. Kandow did not hold a safety certificate so he could not be returned to the Pontiac job. Instead, he said two employees who were safety certified were assigned to the job because they had to work on energized equipment. Notwithstanding, on cross-examination, the undisputed evidence established that the safety certification work required less than 1 hour of work a day and only one person could perform it at a time. McGivern also acknowledged that in the past, George Gentiliuni, who is not safety certified, has worked on energized equipment. He said Kandow was also selected for layoff among test and repair employees because although two employees were his junior, Kandow was only a test "B" while the others were classification "A".

McGivern acknowledged on cross-examination that the Pontiac job on which Anthony Kandow and Gilbert LaPoint worked before the strike, commenced on 19 November 1985 and was not completed until 18 February 1986, which shows that the work was available during the period of time that the Charging Parties were laid off.

LaPoint

Former Foreman McGivern said Gilbert LaPoint was laid off because the shop retained four repair employees, three in class "A" and one in class "B," but all were senior to LaPoint. LaPoint was assembling motors when the strike ensued and according to LaPoint, there was at least 2 weeks' work left when they went on strike. LaPoint testified without dispute that before the strike he worked with Frank Gierack at the Cadillac Motor Company on an annual job that usually lasted 4 or 5 months. He was on this job a week before the strike when it was held up pending approval of a matter by the customer. Gierack and employee Plumb were assigned to that job after the strike, even though Plumb has only a "B" rating. In the past, Respondent has argued to keep junior

[8] I credit the witnesses testifying on behalf of the Charging Parties that sufficient work was available after the December strike to recall strike employees, but that such work was performed by shop employees on overtime during December 1985–March, or May and late 1986. I credit the testimony of these witnesses not only because I was persuaded by their demeanor that they were telling the truth, but also because their version is substantiated by Respondent's work records, and partially corroborated and at least not disputed, by the testimony of Respondent's manager, McGivern, that overtime work was performed by shop employees during the above-stated months.

"A" employees and layoff "B" employees because of their ability.

Ash

McGivern also testified that machinist Roger Ash was selected for layoff although there were two machinists with less seniority, because Ash was a skilled welder and not a general purpose machinist. Welding was not needed but machinist were needed. He said Ash was not capable of doing the machine work and on prior occasions the Union had demanded that management lay him off because he was performing neither welding nor machining. However, other testimony in the record indicates that for several years prior to 6 December 1985 Respondent would lay off other employees in lieu of Ash because it said it needed Ash for his welding expertise and could not afford to lose him to other welding employment. Respondent did not show any reduction in welding work in or after December 1985.

Conclusions

In considering whether Anthony Kandow, Gilbert LaPoint, and Roger Ash would have been laid off 16 December 1985 absent any union activity (strike) by them, I am persuaded by the overwhelming credited and essentially uncontroverted circumstantial evidence of record that Respondent would not have laid them off 16 December 1985. Although Respondent has had a decline in business in the late 1970s and very early 1980s its business and employee complement stabilized with about 25 employees over the next 4 years prior to 16 December 1985. Respondent's testimony at the trial that it recently reviewed its work force in November or December 1985 and decided it needed one less employee in three different departments is supported only by the uncorroborated and self-serving testimony of Respondent's foreman, McGivern. However, even this contention would be credible if it were not for so many other contradictory circumstances, such as Respondent's need for fill-in employees during the approaching Christmas season, the transfer of the scheduled Rouge steel job to Respondent's Cleveland, Ohio facility, and Respondent's transfer of Breathour and Dardini from its Dearborn facility to the Riverview shop, when both employees were classified differently and had actually performed different work in Dearborn. I consider the timing of all these events occurring in mid-December 1985 too much to attribute to coincidence.

Additionally, when all of the above factors are considered along with the fact that Respondent had 300 and some hours of overtime work in late December and considerable overtime hours of work in January–March 1986, and also November–December 1986, and it did not recall either of the laid-off Charging Parties (Kandow, LaPoint, or Ash), I find that it may be reasonably inferred from the timing of these circumstances and the timing of the layoffs and Respondent's refusal to recall them, that Respondent would not have laid off Kandow, LaPoint, or Ash on 16 December 1985 if they were not engaged in the union strike 6–16 December 1985. This conclusion is further supported by the evidence that Respondent failed and refused to recall any of the three employees to work when it had general maintenance work that they could have performed during December 1985–May 1986. Consequently, I do not credit Respondent's business justification defense for not recalling Kandow, LaPoint, and Ash. The above conclusion is especially true when it is further considered that it was Formeman Hudgins, who selected Kandow, LaPoint, and Ash for layoff when he had previously manifested union animus toward Kandow and LaPoint. Hudgins knew Ash was one of the strikers and also a union official, and he saw Ash on the picket line. Specifically, in 1984 Foreman Hudgins told LaPoint that Anthony Kandow was the most dangerous man in the plant because of his union activities; that when LaPoint filed a charge with the Board in 1985, Hudgins told Kandow and LaPoint that LaPoint was in a lot of trouble with management; and that during a grievance meeting in February 1986 Hudgins told Leo Kandow he would love to recall Anthony Kandow and LaPoint to work but people on the floor were telling him Anthony and LaPoint were spending too much time on union business.

Respondent's posthearing brief to the counsel for Respondent alludes to the long bargaining history of the parties since 1939 and the many disputes they had over the interpretation and application of the layoff and recall policy (art. XII) of the national agreement. Counsel then argues that Respondent would not have waited until this late date to discriminate against the striking Charging Parties. However, as logical as this argument appears, when I review all the evidence of record, considering the decline in business of the Riverview shop and the numerous grievances filed by the Union, I am reminded that there is a first time for everything. The circumstances being what they were before 6 December 1985, it is not difficult to believe that Respondent was not aggravated by the numerous grievances and strike union activity of the Charging Parties to the extent that it tried to end the persistent and aggravating activity of the Union by laying off its most zealous leaders (the Charging Parties).

This conclusion is further supported when it is noted, and I find, that Respondent neglected to recall either of the Charging Party employees to perform available work, but instead transferred work to Cleveland, Ohio, transferred two employees from its Dearborn facility to the Riverview shop, and systematically worked other employees out of classification and order of seniority, as well as Respondent's failure and refusal to furnish the Union with necessary and relevant information requested by the Union, infra.

Although the evidence indicates that there was personal dissension between Kandow and Hudgins emanating from union office rivalry when Hudgins was a member of the bargaining unit, I also sense union animus by Hudgins aside from his personal relationship with Kandow. This is especially true when Hudgins vented some of his animus toward LaPoint, with whom the record does not show Hudgins had any personal conflict. Under these circumstances I find that Hudgins' union animus would probably have manifested itself independent of the per-

sonal conflict between himself and Kandow. In any event, Hudgins was no longer a member of the bargaining unit, but a member of management at the time he made his antiunion remarks to Anthony Kandow and Gilbert LaPoint, and also at the time of his 1986 antiunion explanation to Leo Kandow for not recalling Anthony Kandow and LaPoint (assertedly because unnamed employees in the shop told him Anthony spent too much time on union business).

Respondent also argues that in Kandow's affidavit to the Board in June 1986, he said he did not have any concrete evidence that he was laid off by the Respondent for his union activities, but during the trial he suggested a statement by Hudgins made during a second-step grievance constituted such evidence. Although Kandow did make the above statements, I do not conceive them as contradictory or untruthful, as the Respondent urges, because Kandow may not have remembered Hudgins' antiunion statement at the time he submitted his affidavit. It is also possible he was not asked whether he had such evidence, or his memory might have been thereafter jogged by additional questions of the General Counsel during the investigation in preparation of the case. Respondent's state of mind at the time it laid off the Charging Parties is determined on the record evidence as a whole, and not on isolated incidents on which inferences and speculation may be made. The Respondent's conduct subsequent to the layoffs (relative to recall) and refusal to furnish information, infra, is very much a part of the total evidence in determining its state of mind or attitude at the time of the layoffs and failure to recall the laid-off Charging Parties. *Bartels & Shores Chemical Co.*, 274 NLRB 1034, 1040 (1985).

Finally since the evidence has clearly demonstrated that Respondent had considerable classified, general maintenance, and overtime work during December 1985–May 1986, and also November–December 1986, which Kandow, LaPoint, Ash, and nearly any of its skilled employees could have performed, and some did in fact perform I find that Respondent failed and refused to recall the Charging Party employees because of their union activities, including their participation in the December strike; that the December 1985 strike was an unfair labor practice strike protected under the Act; that the layoff and refusal to recall the Charging Parties in the order of seniority, work classification, and ability to perform would not have occurred if the employees were not engaged in union activity (strike); that Respondent has not established any credible business justification for laying off or refusing to recall them in the order of a consistently followed practice of the National Agreement; and that Respondent's layoff and refusal to recall the Charging Parties were based on the same reasons, their grievance union activity and engaging in the December strike, which were discriminatory acts by Respondent in violation of Section 8(a)(1) of the Act. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *NLRB v. Wright Line*, 251 NLRB 1083, 1091 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

B. *The Union's Request for Information*

The Union had filed many grievances about employees either with less seniority and/or working out of their classification in March 1986, because Respondent was not recalling employees on layoff. In early 1986, employees Breathour and Dardini were transferred from the Dearborn to the Riverview facility. Their prior classifications were meter instruments "A," and they were given an "A" rating and assigned work in the inspection and gear department at Riverview, although the work they performed at Dearborn was different and unrelated to the work at Riverview. Prior to their transfers there had not been any such interchange of employees. The Union protested the transfers in view of the laid-off employees. Respondent said it had the right to transfer them because the meter instrument reading work previously performed by Breathour and Dardini was transferred elsewhere, and both employees had seniority over the laid-off employees. The Dearborn plant is still in operation with four or five employees.

Conclusion

It has been long held that an employer has a duty under the Act to supply, on request, such information that is probably relevant, in fact relevant, necessary, and useful to a union's effective and intelligent evaluation in determining whether to process employee grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 438 (1967)

In the instant case, the evidence is uncontroverted that Respondent and the Union have had numerous grievance disputes over the years about employees working out of their classification or with less seniority. Such was the case in early March 1986 when Respondent transferred two employees from their meter instruments work in Dearborn to its Riverview facility, while employees from the Riverview facility were on layoff. Their Dearborn meter instruments "A" ratings were immediately changed to "A" ratings in inspection and test at the Riverview shop, and they were assigned inspection and test work.

In an effort to avoid discriminatory work assignments against employees in their proper classification after the 16 December 1985 strike, or against employees with more seniority, or employees on layoff, the Union in February 1986 verbally requested Respondent to furnish it with a list of all work from the date of the layoff (16 December 1985). Respondent said it "would look into that possibility." The Union periodically repeated its request in subsequent grievance meetings with Respondent until 9 July 1986, when it submitted the following written request to Respondent:

> The Union requests a list of all work performed by active shop employees since December 16, 1985 to date. This list should consist of descriptions of work performed, time spent on work performed, dates of work performed, and names of employees performing said work. Straight time hours, and overtime hours to be specified.
>
> The Union also requests a list of any work performed by outside employees, i.e. other G.E. shops,

and any work farmed out to outside vendors, and any work performed in the plant by outside vendors during this period.

The above list criteria should also be included in this information.

The Union further requests, the company keep the local informed on a weekly basis, on the above information from date to Plant closing.

In a letter signed by Carl Spevetz (manager) dated 23 July 1986, Respondent replied as follows:

This is in reply to your request on July 9, 1987, of certain information.

1. Without some further elaboration from you, the Company is unable to determine that all or any of the information requested is relevant to any outstanding issues (i.e., grievances which are still in the grievance procedure or issues which are the subject of current or proposed negotiations). If you will identify what items of information you believe are relevant to what the outstanding issues are, the Company will give further consideration to your request.

2. Your request asks for lists or other compilations of information. Such a compilation would involve considerable cost and administrative burden to the Company. Therefore, if the Company determines that any request for information are relevant to any outstanding issues, the Company may allow the Union the opportunity to review relevant and existing Company records. If the Union desires to make copies of such records, the Company may impose a reasonable charge for the use of its copying facilities.

If you wish to discuss any aspect of this letter, please contact me.

In a letter dated 5 August 1986 the Union responded to Respondent's 23 July 1986 letter as follows:

The information requested on 7/9/86, is necessary to pursue the N.L.R.B. charges filed in regards to the strike in 1985, which concluded on December 16, 1985, and the Co's, subsequent lock out of certain employees, Anthony Kandow, Gilbert LaPoint, and Roger Ash.

The Co's, position that said lock out was due to a lack of work, does not coincide with some of the information, the Local has received from other sources during the period. Some of the instances have been documented in grievance form.

The union requests the information, to determine if the Co's, position 'That there is not enough full time work available, to justify recalling employees,' is valid.

We expect the Co. to make this information available to the Local in a timely manner.

The undisputed and credited testimony of record further established that Respondent's labor relations representative, Marie Hooey, sat in on grievances for the Respondent. She told the Union whenever junior employees worked out of their classification, there was always less than 40 hours of work to be done, and Respondent did not recall laid-off employees for such work. However, when the Union presented Respondent with documentary evidence of more that 40 hours worked in one grievance, laid-off employee Gary Besonen was recalled to work.

Because the dispute between the parties after the December 1985 strike involved availability of work (classified and general maintenance) to recall laid-off employees on the basis of seniority, their classification and ability to perform such work, the Union's February 1986 verbal request for a list of all work performed after 16 December 1985 was clearly relevant and necessary to the Union's obligation to process grievances for evaluation, and to determine whether there was any discrimination in the assignment of classified work to junior employees, or employees out of their work classification. Likewise, the Union's written request for a list of the description of all such work, the time spent in performing it, the date it was performed, the names of the employees performing such work, work performed outside the shop or farmed out to vendors, and the number of straight-time and overtime hours during which the work was performed, is clearly relevant and necessary for the Union's evaluation and determination whether laid-off employees were discriminated against regarding recall, or whether employees working were discriminated against in the assignment work in accordance with their classification and order of seniority.

It is abundantly clear from the above-described nature of the dispute between the parties that the information requested by the Union was not only relevant, necessary, and useful for the Union's evaluation and determination regarding whether Respondent was discriminating in assigning available work to junior employees or employees out of classification, rather than recalling the laid-off employees to perform such work. Consequently, I find that all of the information requested by the Union was relevant, necessary, and useful to the Union in its representative function of the unit employees in investigating and processing grievances. *NLRB v. Acme Industrial Co.*, supra; *Florida Steel Corp.*, 235 NLRB 941, 942 (1978), enfd. 101 LRRM 2671, 2674 (4th Cir. 1979), and *Anheuser Busch, Inc.*, 237 NLRB 982, 984–985 (1978).

Although Respondent's letter of 23 July 1986 to the Union requested the Union to elaborate on its requests in order for Respondent to determine whether the Union's request was irrelevant to any grievance issues pending; and that compliance with the Union's request would be a burden on Respondent at considerable costs, I find Respondent's request is without merit. The Union's verbal request of February 1986, and especially its more specific written request of 9 July 1986, were both sufficiently explicit for Respondent to understand and recognize its relevance to the recall of the laid-off employees. After all, Respondent was not a stranger to the layoff dispute, or to the long-standing occurrence of disputes arising out of work assignments out of classifications or without conflict in employee seniority or ability to perform work. But even if there were some merit in Respondent's re-

quest for elaboration by the Union on its request, I find that the Union furnished Respondent with additional specificity of its request in its 5 August 1986 reply to Respondent, even though, I further find such a reply was cumulative and unnecessary.

Consequently, I find on the foregoing documentary evidence and reasons that although Respondent untimely furnished the requested information to the Union 1 year and 3 months after its verbal request and 10 months after its written request, that its action was a dilatory and unreasonable delay by Respondent, consistent with its oral and written responses to the Union (it "would look into that possibility," and its unnecessary request for further clarification). I find that such delay constituted a failure and refusal by Respondent to furnish the requested information. I further find that Respondent's failure and refusal to furnish the requested information constituted a failure and refusal to bargain in good faith, in violation of Section 8(a)(1) and (5) of the Act. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153–154 (1956).

Article XXIX, p. 95 (G.C. Exh. 3) of the nationally negotiated agreement between the parties contains the following management rights clause:

> Management Authority
>
> The Union and the locals recognize that subject only to the expressed provisions of this Agreement, the supervision, management and control of the Company's business, operations and plants are exclusively the function of the Company.

Article XII of the agreement, p. 44, provides in part as follows:

> Reduction or Increase in Forces
>
> 1. (a) In all cases of layoff or transfer due to lack of work, total length of continuous service shall be the major factor determining the employees to be laid off or transferred (exclusively of upgrading). However, ability will be given consideration.
>
> (b) Similarly, in all cases of rehiring after layoff, such total length of continuous service shall be the major factor determining such rehiring if the employee is able to do the available work in a satisfactory manner after a minimum amount of training.

Counsel for Respondent cites the management rights clause and the reduction or increase in work force provisions of the national agreement. It is not shown, however, how these provisions apply to the facts in the instant case. In my judgement, the management rights clause has not been placed in issue by the evidence, and although I find the reduction in work force provision not entirely precise, I find that it was not uniformly applied in the instant case. Although provisions (a) and (b) clearly state that total length of continuous service shall be a major determining factor for recall, it is particularly noted that Charging Party Gilbert LaPoint was in Respondent's employ for 30 years. Apparently, the length of continuous service provision was not given consideration for recall in his case. It is therefore clear from this example, and the selective exclusion of recalling the striking union officers, that Respondent was not indiscriminately recalling employees after the December 1985 strike.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that it be ordered to cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent laid off and refused to recall employees who participated in protected union activity, including a strike, Respondent violated Section 8(a)(1) of the Act; and that by failing and refusing to timely furnish the Union with necessary and relevant information requested by the Union, Respondent also violated Section 8(a)(1) and (5) of the Act, the recommended Order will provide that Respondent cease and desist from engaging in such unlawful conduct; that it be ordered to recognize and on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit; that it furnish the Union with the information requested by the Union; and that it make whole the three unit employees for any loss of earnings they may have suffered as a result of their discriminatory layoff, and Respondent's discriminatory failure and refusal to recall them, within the meaning and in accord with the Board's Decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[3] except as specifically modified by the wording of such recommended Order.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

Conclusion of Law

1. By the following acts and conduct the Respondent has violated Section 8(a)(5) and (1) of the Act.

(a) Discriminatorily laying off employees Anthony Kandow, Gilbert LaPoint, and Roger Ash, and failing and refusing to recall them because they, as union officers, engaged in protected grievance filing union activity, including their participation in a strike.

(b) By failing and refusing to furnish the Union with necessary and relevant information requested by the Union, Respondent has failed and refused to bargain in good faith with the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

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[3] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, General Electric Company, Riverview, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off and failing and refusing to recall employees because they engaged in protected union activity, including a strike.

(b) Failing and refusing to furnish the Union with necessary and relevant information requested by the Union.

(c) Refusing to bargain collectively with the Union as the exclusive representative of the employees.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to recall Anthony Kandow, Gilbert LaPoint, and Roger Ash for immediate and full reinstatement to their former positions as of 16 December 1985 or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make whole Anthony Kandow, Gilbert LaPoint, and Roger Ash, from 16 December 1985, for any losses they have suffered as a result of their layoff because of their union activity, including participating in a strike.

(c) Offer to bargain, or on request, bargain with the Union as the exclusive representative of the unit employees.

(d) Furnish the Union with the information it requested.

(e) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at Respondent's Riverview facility, located at 18075 Krause Avenue, Riverview, Michigan, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choosing
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain in good faith with the Union by failing an refusing to supply information requested by the Union.

WE WILL NOT discriminate against our employees in regard to hire or tenure of employment, or term or condition of employment to discourage membership in, assistance to, or any other activity on behalf of the Union or any other labor organization.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the appropriate unit described below:

> All full-time and regular part-time production and maintenance employees employed by Respondent at its Riverview, Michigan facility; but excluding office clerical employees, guards and supervisors as defined in the Act, constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

WE WILL recall and offer Anthony Kandow, Gilbert LaPoint, and Roger Ash immediate and full reinstatement to their former positions as of 16 December 1985 or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights previously enjoyed, and make them whole for any loss of pay suffered by reason of our discrimination against them, with interest.

All our employees are free to become or remain, or refuse to become or remain, members of Local 947, United Electrical, Radio and Machine Workers of America (UE), or any other labor organization.

GENERAL ELECTRIC COMPANY

Eagle Aviation, Inc., and Executive Air Terminal, Inc. *and* Chauffeurs, Teamsters and Helpers Local Union No. 175, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO,[1] Petitioner. Case 9–RC–15151

September 20, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On July 17, 1987, the Regional Director issued a Decision and Direction of Election in which he found that assertion of jurisdiction was warranted. On August 13, 1987, the National Labor Relations Board granted the Employers' request for review of that decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in the case, the Board finds:

Executive Air Terminal, Inc. is a West Virginia corporation engaged in the service and maintenance of aircraft and furnishes aircraft fueling and storage services at the Yeager Airport in Charleston, West Virginia. It also operates an air taxi and charter service and provides flight training. Executive Air Terminal, Inc.'s gross revenues exceed $500,000 annually, and its direct out-of-state purchases exceed $50,000 annually.

Eagle Aviation, Inc. is a West Virginia corporation engaged in the service and maintenance of aircraft at the Yeager Airport. It furnishes fueling and storage services and maintains and repairs aircraft.

The Employers contend that jurisdiction over their operations should be with the National Mediation Board under the Railway Labor Act. The Petitioner, on the other hand, contends that jurisdiction is properly with the National Labor Relations Board.

Section 2(2) of the National Labor Relations Act provides in pertinent part that the term "employer" as used in the National Labor Relations Act should exclude any person subject to the Railway Labor Act.

Accordingly, because of the nature of the jurisdictional question, we requested the National Mediation Board to study the record in this case and to determine the applicability of the Railway Labor Act to Executive Air Terminal, Inc. and Eagle Aviation, Inc. In reply we were advised by the National Mediation Board that it had concluded as follows:

> First, with regard to Executive [Air Terminal, Inc.], air taxi and charter operations engaged in interstate common carriage are subject to the jurisdiction of the Railway Labor Act. . . . In addition, Executive's provision of fueling to common carriers is also a function which is traditionally performed by employees in the airline industry. The Board, therefore, finds that Executive Air Terminal and its employees are subject to the jurisdiction of the Railway Labor Act.
>
> Turning to Eagle Aviation, the Board finds that Eagle's employees, like those of Executive, perform work which is traditionally performed by employees in the airline industry. . . . [T]he record reveals that there is a significant degree of control exercised over Eagle employees by Executive employees. . . . The Board, therefore, finds that Eagle Aviation and its employees are also subject to the jurisdiction of the Railway Labor Act.[2]

In view of the foregoing, we shall dismiss the petition.

ORDER

It is ordered that the petition in Case 9–RC–15151 is dismissed.

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] *Eagle Aviation*, 15 NMB 285, 287–288 (1988).

Milwhite Company, Inc. *and* **Eddie Lowery.** Case 10–CA–23256

September 21, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On June 30, 1988, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Milwhite Company, Inc., Attapulgus, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Gaye Nell Hymon, Esq., for the General Counsel.
Ralph C. Smith, Jr., Esq. (Smith, Perry & Epps), of Bainbridge, Georgia, for the Respondent.
Eddie Lowery, of Albany, Georgia, Staff Representative.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This matter was heard in Bainbridge, Georgia, on 3 June 1988 pursuant to a complaint that issued on 21 April 1988, alleging that Respondent engaged in conduct violative of Section 8(a)(5) and (1) of the Act.

The issue presented is whether Respondent violated Section 8(a)(5) and (1) by refusing to negotiate with its employees' bargaining representative in the presence of two members of the Union's negotiating committee. One of those two, the president of the Union, is an employee of a business competitor of Respondent. The other objectionable committee member is an employee of Respondent whose involvement in negotiations would, according to Respondent, seriously interfere with Respondent's production.

Respondent admitted complaint allegations regarding the charge; that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act; that United Steelworkers of America, AFL–CIO–CLC, Local Union 170–02 is a labor organization (Union); that the Union is, and has been, the exclusive representative of the employees in a described production and maintenance bargaining unit at Respondent's Attaplugus, Georgia facility since about 1963; that it and the Union have been parties to successive bargaining agreements since 1963; and that the Union requested Respondent to bargain collectively on 29 January 1988.

The complaint alleges that Respondent refused to bargain on 5 and 10 February 1988. Respondent in its answer alleged:

> Respondent denies that it refuses and continues to refuse to bargain collectively in good faith with the Union, but admits that Respondent refuses to bargain with a Committee which includes James Mitchell an employee of a competitor in the local area, and Raymond Anderson, an employee of Respondent because of the detrimental effect his inclusion on the Committee would cause to the Company's production.

Respondent's plant manager, Morey White, testified that Respondent has two competitors in the area of its facility, Flordine Company in Quincy, Florida, and Engelhard Corporation in Attapulgus, Georgia. According to White all three companies compete in business and in recruiting employees because they all engage in the mining of the same product—Attapulgite Clay.

According to White, Respondent has consistently resisted bargaining when the Union wished to include on its bargaining committee an employee or employees of one of its competitors. From 1963 until 1988 the Union had agreed not to include an employee of a competitor on its bargaining committee. Morey White described Respondent's basis for resisting a competitor employee on the union committee:

> Because of the real stiff competition. I'm sure that we have, are trying to develop products and they are too, specialty products to upgrade the quality of our material in order to keep our customers. And we feel like a competitior sitting in, things come out in negotiations that, you know, we don't particularly want our competitor to know about.

James Mitchell has been president of the Union for 9 years. During that time—in fact for the last 14 years—Mitchell has been a rank-in-file employee of Engelhard Corporation—one of Respondent's two competitors. Mitchell testified that he was elected by the union membership to serve as chairman on the 1988 bargaining committee.

As to Raymond Anderson, who was elected to the 1988 negotiating committee when the Union realized that none of the employee representatives on that committee were in Anderson's division at Respondent's facility—Morey White testified that Anderson is one of two bulldozer operators at Respondent's facility, that the bulldozer operators remove the overburden from the clay and that Anderson's absence from work would throw about 50 percent of the production employees with no work to perform (i.e., the production employees' work depends on the bulldozer operators remaining ahead of them in removing the overburden). Respondent contends that it could not afford to have Anderson out of work.

When the Union on 13 April 1988 offered to bargain during nonwork periods, Respondent contended that long bargaining sessions would likely result in Anderson not being able to perform his work in an acceptable fashion the next workday. Respondent continued to refuse to negotiate with Anderson present in negotiations.

Conclusions

The general rule in this area finds its genesis in Section 7 of the National Labor Relations Act:

> Employees shall have the right to . . . bargain collectively through representatives of their own choosing.

The Second Circuit, United States Court of Appeals, recognized employees' right to select their own representatives, in the following language:

> Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, guarantees certain rights to employees, including the right to join together in labor organizations and "to bargain collectively through representatives of their own choosing." This right of employees and the corresponding right of employers, see section 8(b)(1)(B) of the Act, 29 U.S.C. § 158 (b)(1)(B), to choose whomever they wish to represent them in formal labor negotiations is fundamental to the statutory scheme. In general, either side can choose as it sees fit and neither can control the other's selection, a proposition confirmed in a number of opinions, some of fairly ancient vintage. For example, the following asserted objections to bargaining representatives have all been rejected as defenses to charges of refusal to bargain: that a local union president could not act for the international union in grievance handling, see *Prudential Insurance Co. of America v. NLRB*, 278 F.2d 181, 182–183 (3d Cir. 1960); that an AFL "general organizer," not a member or officer of the union, could not bargain for the latter, see *NLRB v. Deena Artware, Inc.*, 198 F.2d 645, 650–651 (6th Cir. 1952), cert. denied, 345 U.S. 906, 73 S.Ct. 644, 97 L.Ed. 1342 (1953); that employees could not be represented by a local union, a majority of whose members were employed by a rival industry and which the employees were not eligible to join, see *Pueblo Gas & Fuel Co. v. NLRB*, 118 F.2d 304, 307–308 (10th Cir. 1941); and that an international union representative could not negotiate for a local, see *Oliver Corp.*, 74 NLRB 483 (1947). [*General Electric Company v. NLRB*, 412 F.2d 512, 516, 517 (2d Cir. 1969).]

However, as set out by the Fourth Circuit, the employees' right is not absolute:

> At the outset, we note that section 7 of the Act, 29 U.S.C. § 157, guarantees employees the right 'to bargain collectively through representatives of their own choosing. . . .' While the Supreme Court has recognized this right as fundamental to the statutory scheme, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33, 57 S.Ct. 615, 622, 81 L.Ed. 893 (1937), it is not absolute; the employer may refuse to negotiate with the union bargaining committee if he can carry the heavy burden of showing that the selected representatives present a clear and present danger to the collective bargaining process. *IBEW v. NLRB*, 557 F.2d 995, 998 (2d Cir. 1977); *NLRB v. David Butterick Co.*, 399 F.2d 505, 507 (1st Cir. 1968); *Harley Davidson Motor Co.*, 214 N.L.R.B. 433 (1974). This rule requires the employer to show exceptional circumstances—such as bad faith or ulterior motive—underlying the union's choice of its bargaining team members. Mere inclusion of persons outside the negotiating unit does not constitute exceptional circumstances. *Indiana & Michigan Electric*, 599 F.2d 185 (other units); *Minnesota Mining & Manufacturing Co. v. NLRB*, 415 F.2d 174, 177–78 (8th Cir. 1969) (other locals); *General Electric Co. v. NLRB*, 412 F.2d 512, 517–20 (2d Cir. 1969) (other international unions); *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44 (6th Cir. 1963) (other locals). Further, the employer's claim that the union's use of outsiders is an unlawful attempt to compel companywide or multiplant bargaining also is insufficient unless the employer can demonstrate that the union actually attempted to bargain outside unit boundaries. *Indiana & Michigan Electric*, 599 F.2d at 191; *Minnesota Mining*, 415 F.2d at 178; *General Eelctric*, 412 F.2d at 519–20. [*Procter & Gamble Mfg. Co. v. NLRB*, 658 F.2d 968, 976, 977 (4th Cir. 1981).]

Therefore, the question is whether the members selection of James Mitchell and Raymond Anderson presented a "clear and present danger to the collective bargaining process" or, as the Board has held in subsequent cases, whether the evidence shows that the presence of the other party would create ill will and make bargaining impossible.

Respondent argued that it was necessary for the General Counsel to prove that it acted without animus in refusing to negotiate. The cases cited by Respondent are inapposite to an 8(a)(5) allegation. None of the cases dealing with an issue similar to the instant case concerns itself with whether the Employer was motivated because of union animus.

This case presents a question, inter alia, of whether Respondent directly interfered with its employees' Section 7 rights. If proven, that act alone constitutes a violation and it is not necessary to question Respondent's motive.

While "motive" is a matter of concern, it is of concern only in determining whether Respondent's motivation was backed by evidence showing the existence of "clear and present danger" or "ill will."

As to James Mitchell, at first blush Respondent's concern appears reasonable.

However, the hearing revealed consideration beyond the initial reaction stages. The testimony of Morey White appeared to raise two areas of concern by Respondent. (1) White felt he could not negotiate in good faith with

James Mitchel present;[1] and (2) matters would surely arise during negotiations that Respondent would not wish to reveal to its business competitors.[2]

Both the above concerns are significant. However, neither survived the hearing as substantial obstacles to bargaining.

Although White felt he could not negotiate in good faith with Mitchell present, he was unable to articulate a sound basis for his discomfort other than to show concern for confidential knowledge. Moreover, White's testimony did not show that, whatever his concerns, those concerns could not have been resolved through discussion with the Union.

As to his concern with confidential knowledge, Respondent admitted that it fully expected the bargaining committee of the Union to discuss all matters that arose in negotiations with the union president. What Respondent feared was the union president getting information first hand while being present during negotiations.

In view of the testimony, it is apparent that Respondent's asserted basis to not negotiate in the presence of committee chairman and President James Mitchell does not present clear and present danger to the negotiating process.

Perhaps issues concerning confidential information will arise during negotiation. However, there has been no showing that the parties could not handle such problems during negotiations and, in any event, Respondent illustrated that it had no concern with the Union discussing whatever it learned during negotiations with the union president. That testimony reveals that Respondent's concern with confidentiality is merely a surface reaction without there existing true and substantial danger. The mere fear that negotiations will result in compromising confidentiality is insufficient. See *General Electric Co.*, 173 NLRB 253, 255 (1968).

As to the question of ill will, Respondent admitted that it has nothing personally against either James Mitchell or Raymond Anderson. Only their particular positions make their presence in negotiations objectionable. Therefore, the record fails to show the existence of ill will that would make bargaining impossible. *Fitzsimmons Mfg. Co.*, 251 NLRB 375 (1980).

I find that Respondent violated Section 8(a)(5) and (1) by refusing to negotiate with a committee that included Union President James Mitchell. *Missouri Portland Cement Co.*, 284 NLRB 432 (1987); *Colfor Inc.*, 282 NLRB 1173 (1987); *Independent Drug Store Owners of Santa Clara County*, 170 NLRB 1699 (1968).

Regarding Raymond Anderson, Respondent demonstrated an unwillingness to negotiate with Anderson present as a member of the Union's negotiations committee, regardless of the Union's expression that it would meet during nonworking times if Respondent desired. In *Indiana & Michigan Electric Co.*, 229 NLRB 576 (1977), the Board had occasion to consider a similar question:

> The General Counsel alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by (1) refusing to meet with the union representatives ouside working hours, and by (2) *simultaneously* refusing to allow members of the bargaining committee leave without pay to travel to and participate in negotiations with respect to units in which they are not employed. The Respondent defended its actions principally on the theory that at least one "traveler" and member of the committee, VanAman, was a troubleshooter whose presence could not be spared for the aggregate of 11 days requested to participate in these negotiations. The alleged violation was not pinned to one or the other of the Respondent's actions, but resulted from the application of both actions together, which effectively deprived the Union of the assistance of the bargaining representatives it desired. We find that the Respondent's refusal to grant members of the Union's negotiation committee uncompensated leave to permit them to engage in bargaining during working hours, while at the same time refusing the Union's request to bargain during nonworking hours, is an unlawful interference with the Union's selection of its bargaining representatives.
>
> We do not suggest that an employer is compelled to yield to a union's request for negotiations outside normal business hours. It is free to insist on bargaining during the working day, if it prefers, as the Respondent did here. If it makes this choice, however, it cannot at the same time refuse to allow unpaid time off to union representatives on the bargaining committee because they are employed in another unit. Alternatively, the Employer is free to acquiesce in the Union's request to bargain during nonworking hours in order to reduce the amount of uncompensated leave for travelers and to minimize the effects of the unavailability during their regular working hours of emergency troubleshooters.
>
> However, the Respondent cannot have it both ways. That is, if, as here, the Respondent makes the choice to bargain during the working day, it cannot lawfully refuse to allow union employee representatives time off. But, if it does refuse to give such employees time off, then it is obligated to make itself available for negotiations at a time—even outside working hours—when the representatives can attend. It is the Respondent's attempt here to have it both ways that constitutes the violation of the Act.

If, as here, an employer is concerned with loss of an employee's services because of the employee's presence at negotiations, there exist a possibility that the employer may insist on a reasonable alternative. However, the employer may not simply refuse to negotiate on the grounds that a valuable employee is included on the negotiating committee. Here, the Union attempted to reconcile the Respondent's problem with the loss of Ander-

[1] When asked what effect inclusion of a competitor on the committee would have, Morey White testified, "I don't feel like I could bargain in good faith."

[2] As shown above, Morey White testified that Respondent historically resisted inclusion on the Union's bargaining committee of employees of competitors because "we feel like that a competitor sitting in, things come out in negotiations that, you know, we don't particularly want our competitors to know about."

son's services as one of its two bulldozer operators, by offering to meet and negotiate during nonwork times.

As noted above, the Respondent cannot have it both ways. It cannot refuse to meet both during work and nonwork times on its assertions that it cannot afford to lose Anderson during work.

Respondent's argument that negotiations would interfere with production if Anderson is present regardless of whether the negotiations occurred during work or nonwork times is unreasonable. I find that Respondent also engaged in 8(a)(5) and (1) conduct by refusing to bargain while Anderson is present as a member of the Union's negotiation committee.

CONCLUSIONS OF LAW

1. Respondent Milwhite Company, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Steelworkers of America, AFL–CIO–CLC, Local Union 170–02 is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to bargain collectively with United Steelworkers of America, AFL–CIO–CLC, Local Union 170–02 because of the presence at bargaining of James Mitchell and Raymond Anderson, Respondent has engaged in conduct violative of Section 8(a)(5) and (1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Milwhite Company, Inc., Attapulgus, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) On request from the Union continuing to refuse to meet and negotiate a collective-bargaining agreement even though the Union's negotiation committee may include James Mitchell and/or Raymond Anderson.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request meet and negotiate with the Union even though the Union may, at its election include James Mitchell and/or Raymond Anderson on its bargaining committee, as the exclusive collective-bargaining representative of its employees in the appropriate unit:

> All production and maintenance employees employed by Respondent at its facility in Attapulgus, Georgia excluding all clerical, technical and laboratory employees, watchmen, guards and supervisors as defined in the Act.

(b) Post at its Attapulgus, Georgia facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to meet and negotiate in good faith with designated representatives of United Steelworkers of America, AFL–CIO–CLC, Local Union 170–02 as exclusive bargaining representative of our employees in the following appropriate bargaining unit:

> All production and maintenance employees employed by Respondent at its facility in Attapulgus, Georgia excluding all clerical, technical and labora-

tory employees, watchmen, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, meet and negotiate in good faith with designated representatives of the Union including, if the union desires, James Mitchell and/or Raymond Anderson.

MILWHITE COMPANY, INC.

Local No. 6–18, Oil, Chemical and Atomic Workers International Union, AFL–CIO–CLC *and* Wisconsin Gas Company. Case 30–CE–23

September 21, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On a charge filed by the Employer on June 16, 1987, the General Counsel of the National Labor Relations Board issued a complaint against Local No. 6–18, Oil, Chemical and Atomic Workers International Union, AFL–CIO–CLC, the Respondent, alleging that it had violated Section 8(e) of the National Labor Relations Act by entering into and maintaining an illegal "union signatory" clause in its collective-bargaining agreement with the Employer. The Respondent admitted the factual allegations contained in the complaint while denying the unlawfulness of the allegations.

Thereafter, the General Counsel filed with the Board in Washington, D.C., a Motion for Summary Judgment. On January 20, 1988, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on the Motion for Summary Judgment

We will grant the General Counsel's Motion for Summary Judgment for the reasons stated below.

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation with an office and place of business in Milwaukee, Wisconsin, is a public utility furnishing natural gas services with annual gross revenues in excess of $250,000, and with annual purchases of products, goods, and materials valued in excess of $50,000, which it received at its facility directly from points located outside the State of Wisconsin.

We find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

The following facts are undisputed. The Respondent and the Employer have had a collective-bargaining relationship for approximately 30 years. The most recent agreement is effective for the period June 1, 1986, through May 31, 1989. Article 2, section 7, paragraph (d) states

> Whenever the Company shall contract work normally performed by employees in the Production and Maintenance Units, the work so contracted shall be done by Union labor.

On March 9, 1987, the Respondent filed and commenced processing its grievance number 3–87–9 alleging a violation of the specified clause of the labor agreement. The grievance specifically stated:

> On 3/9/87 you violated 6-18 contract by hiring non-union contractor for locating. We want this stopped immediately and for all hours worked by the contractor we want our locator payed [sic] 1-1/2 times there [sic] wages.

The General Counsel alleges that the specified clause is violative of Section 8(e) of the National Labor Relations Act on its face, and that the Respondent's filing of the pertinent grievance reaffirmed this illegal clause within the 10(b) period. The Respondent alleges that the specified clause is a lawful work-preservation clause that will be demonstrated by an examination of all the surrounding circumstances during an evidentiary hearing.

Section 8(e) of the National Labor Relations Act states in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to . . . cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .

The Board has routinely interpreted this section so as not to ban contracts that are intended to preserve, for the employees within the bargaining unit, work that they have traditionally performed.[1] Nevertheless, we agree with the General Counsel that the clause at issue here is facially invalid. It clearly does more than protect or preserve traditional bargaining-unit work for bargaining-unit employees. It

[1] *Painters Orange Belt District Council 48 (Maloney Specialties)*, 276 NLRB 1372, 1387 (1985); *Mine Workers (Bituminous Coal)*, 144 NLRB 228, 234 (1963).

does not prohibit the Employer from subcontracting work that its own employees perform. And it does not limit such subcontracting to employers who, regardless of their bargaining relationship with unions, pay their employees wages and fringe benefits commensurate with those of the Respondent's labor agreement. Rather the clause permits subcontracting, but only to those employers who have labor agreements with unions. It therefore evinces neither a valid work preservation nor a valid union standards requirement objective. Instead, the clause precludes the Employer from doing business with any other employer who does not have a labor agreement with a union. It is, therefore, a classic union-signatory clause and clearly contravenes Section 8(e).[2]

We also agree with the General Counsel that the Respondent's filing of the grievance pursuant to the illegal clause constitutes entering into the unlawful provision within the 10(b) period.[3]

Because the language of the clause itself reveals an object other than work preservation, we conclude, contrary to the Repsondent's contention, that there is no need for a hearing and that the General Counsel is entitled to judgment as a matter of law. Accordingly, we grant the General Counsel's Motion for Summary Judgment.

CONCLUSIONS OF LAW

1. Wisconsin Gas Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Local No. 6–18, Oil, Chemical and Atomic Workers International Union, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. Article 2, section 7, paragraph (d) of the collective-bargaining agreement between the Respondent and the Employer violates Section 8(e) of the Act.

4. By filing and commencing to process a grievance pursuant to article 2, section 7, paragraph (d) of the collective-bargaining agreement, Respondent entered into an agreement in violation of Section 8(e) of the Act.

5. The above unfair labor practice is an unfair labor practice affecting commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

[2] *Machinists Local 9 (St. Louis Automotive)*, 134 NLRB 1354, 1358 (1961), enfd. 315 F.2d 33 (D.C. Cir. 1962).

[3] *Mine Workers Local 2428 (Garland Coal)*, 258 NLRB 56, 58 (1981), enfd. 727 F.2d 954 (10th Cir. 1984).

ORDER

The Respondent, Local No. 6–18, Oil, Chemical and Atomic Workers International Union, AFL–CIO–CLC, Milwaukee, Wisconsin, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining, enforcing, or giving effect to article 2, section 7, paragraph (d) of the 1986–1989 labor agreement.

(b) In any like or related manner violating Section 8(e) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Furnish the Regional Director for Region 30 sufficient signed copies of the attached notice that the Regional Director may furnish to Wisconsin Gas Company for posting, should the Company be willing, in places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain, enforce, or give effect to article 2, section 7, paragraph (d) of our 1986–1989 labor agreement with Wisconsin Gas Company.

WE WILL NOT in any like or related matter violate Section 8(e) of the Act.

LOCAL NO. 6-18, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

Gulf Oil Company *and* Gary Offenburg, Sr. *and* Norman Kamann *and* Jacquelyn Obergon *and* Glenn Eversole *and* Walter Eckhart *and* Robert F. Carsten. Cases 8–CA–13895–1, 8–CA–13895–2, 8–CA–13895–3, 8–CA–13895–4, 8–CA–13895–5, and 8–CA–13895–6

September 21, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On December 30, 1982, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

Since 1950 OCAW Local 7-346 (the Union) has represented certain hourly paid employees at the Respondent's Toledo, Ohio refinery. The most recent collective-bargaining agreement was effective from January 8, 1979, to January 7, 1981. The agreement provided that negotiations could be reopened on certain economic items (not involved here) if the Union gave timely notice. It also preserved the Union's right to strike no earlier than January 8, 1980,[2] if the parties failed to reach agreement on the reopened items. The Union invoked the reopener, agreement was not reached by January 8, and the Union began a lawful economic strike at 4 p.m. on that date. The Respondent thereupon suspended, because of the strike and for its duration, payment of sickness and accident (S & A) benefits to five disabled employees who had been receiving them at the time the strike began and for a sixth otherwise eligible employee who entered the hospital on January 8, 1980, but before the 4 p.m. strike commencement. On April 14[3] the Respondent and the Union settled the strike and executed a letter of agreement and a separate return to work agreement and understanding. Pursuant to the agreements, the Union withdrew an unfair labor practice charge filed concerning the denial of S & A benefits. On June 5 and 6, the Charging Parties individually filed the charges that led to the instant complaint.

The judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by withholding benefits under its S & A plan from the six disabled employees during the strike for the periods in which they were otherwise eligible for the benefits.[4] We agree with many of the judge's findings underlying this conclusion for the reasons set forth in section I, below. However, we shall dismiss the complaint based on our further finding, contrary to that of the judge, that the settlement agreement constituted an effective waiver by the Union of the affected employees' entitlements to the S & A benefits at issue. The fact and analysis supporting the dismissal are set forth in section II of this Decision and Order.

I.

The judge found no merit in the Respondent's contentions that benefits provided for the S & A plan were not accrued benefits and that neither a specific provision in the collective-bargaining agreement nor past practice under similar or identical provisions in earlier contracts entitled it to suspend S & A benefits to the six Charging Parties because they were "striking employees." In doing so, the judge relied on the *Emerson Electric Co.*[5] "coercive effects" theory as reaffirmed in *Conoco, Inc.*[6] and on the *Conoco* holding, which reversed the *Emerson Electric* "remedial limitation." (In *Conoco*, the Board held that even if disabled employees supported or participated in a lawful strike their employer could not eliminate or limit their entitlement to reimbursement for accrued S & A benefits simply because of the strike.) In agreeing with these findings of the judge we rely on *Texaco, Inc.*, 285 NLRB 241 (1987), which issued subse-

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] All dates are in 1980 unless otherwise specified.

[3] The judge inadvertently referred to the settlement date as April 8.

[4] We agree with the judge's finding that the Board's jurisdiction in this proceeding is not preempted by the Employee Retirement Income Act of 1974 (ERISA), Pub. L. 93–406, 88 Stat. 829 (codified as amended), 29 U.S.C. § 1001 et seq. The Respondent cites secs. 502(e)(1) and 502(a)(1)(B) of ERISA, which provide that state and Federal courts exercise concurrent jurisdiction over claims by a participant in an ERISA-covered plan—such as the sickness and accident plan in issue here—"to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." However, sec. 514(d) of ERISA further states that "[N]othing in this title shall be construed to alter, amend, modify, invalidate, impair or *supersede* any law of the United States . . . or any rule or regulation issued under any such law." (Emphasis added.) Indeed, as the Supreme Court recently held, after a collective-bargaining agreement expires, the Board's jurisdiction is exclusive insofar as recovery rests on the finding of an unfair labor practice. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 108 S.Ct. 830 (1988).

We also agree with the judge that the Charging Parties' failure to meet the ERISA requirement that plan participants exhaust their plan's internal appeal procedures before seeking relief in the courts neither precludes them from filing charges under the Act nor ousts the Board of jurisdiction.

[5] 246 NLRB 1143 (1979).

[6] 265 NLRB 819 (1982).

quent to the judge's decision, and which modified the applicable test.

In *Texaco*, the Board set forth new principles for determining when an employer's suspension of benefits for disabled employees on commencement of a strike violates the Act. The Board there held that the lawfulness of the discontinuance of benefit payments to disabled employees on commencement of a strike will be resolved by application of the test set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). Thus, the General Counsel can meet the *Great Dane* burden of showing an adverse effect on employee rights by showing that a benefit withheld because of a strike was an accrued benefit. At that point the employer may be able to defend its action by showing that it had a legitimate and substantial business justification for cutting off the benefits, such as an explicit waiver by the union, or the employer's reliance on a nondiscriminatory contract interpretation that is reasonably and arguably correct. See *Texaco, Inc.*, supra at 247–248.

Applying these principles in this case, we find that the General Counsel has proven a prima facie 8(a)(3) and (1) case concerning the Respondent's discontinuance of S & A payments to employees Offenburg, Kamann, Obergon, Eversole, and Eckhart and its refusal to make any S & A payments to employee Carsten.

Based on the judge's specific findings and the S & A plan considered in its entirety, we find the Respondent withheld accrued benefits on the basis of a strike. We note that the S & A plan provides that an employee becomes eligible for benefits after at least 26 weeks of continuous active service and that benefits "will be paid" in accordance with a schedule of maximum benefits based on the number of years of continuous service at the time the disability occurs. Benefits are thus due and payable based on past performance with no further work required for continuing receipt.[7] All Charging Parties except Carsten[8] were actually receiving these S & A benefits prior to the beginning of the strike on January 8, 1980. It is not disputed that the Respondent's only reason for ceasing to meet its obligations under the S & A plan was its policy, based on its interpretation of both the collective-bargaining agreement and its past practice, of not paying these benefits during a strike.

Like the judge, we find no merit in the Respondent's argument that benefits are not accrued because the plan provides that it "shall not be construed as creating any binding obligation on [the Respondent] to give, or as giving, anyone any enforceable rights to disability assistance, the right being hereby expressly reserved to grant, or not to grant, any such assistance in any cases as [the Respondent] in its discretion sees fit." This statement is included within the plan provision referring to "Termination of Employment" and directly following the statement to the effect that the plan gives an employee entitled to benefits neither a right to continued employment nor any right to assistance he may be owed in the event his employment is terminated. Thus the quoted provision could reasonably be read as reserving to the Respondent discretion to "grant or not to grant" assistance only in termination situations. Nevertheless, to the extent this provision is intended to provide the Respondent a more general degree of discretion, we find, reading the S & A plan as a whole, that such discretion covers only the Respondent's initial unilateral decision concerning whether claimed disabilities are compensable under the plan. In this regard, the plan provides that certain conditions must be met before assistance will be given to otherwise eligible employees.[9] The record, however, does not show, nor does the Respondent claim, that any of the plan requirements that either disqualify an employee from initial coverage or divest him of coverage already granted applies to any of the Charging Parties in this case.

Thus, because none of the discretionary determinations leading to possible disqualification specifically included in the S & A plan were considered relevant by the Respondent in this case, and because the plan itself contains no reference to loss of benefits in the event of a strike, we find that, under

[7] The S & A plan is noncontributory and is paid for by the Respondent as a current operating expense. The Respondent explicitly reserved the right, without prior notice, to "alter, modify, or terminate" the plan. However, the plan also provides that in the event of withdrawal or modification, "All assistance due an employee will be paid in accordance with the provisions of the plan in effect at the beginning of disability."

[8] Employee Carsten, having been hospitalized only several hours before the strike began, had not yet received any benefit payments based on his disability, as of 4 p.m. on January 8, 1980. In addition to its general contentions covering all the Charging Parties, the Respondent argues that Carsten is not entitled to benefits under the S & A plan because his *eligibility* did not arise until *after* the strike began. The Respondent relies on sec. 3(c) of the plan, which provides that "assistance for sickness . . . will begin with the second regularly scheduled work day following the last day worked, assuming that proper notification (to the employee's supervisor) was given." It is not disputed that Carsten gave the required notice. Moreover, the plan's provisions on eligibility referred to above clearly show that, once an employee meets the 26 weeks of work test, assistance is to be provided based on continuous service time at the time of disability, that is, when the employee is no longer able to work. In Carsten's case this occurred before the strike began. Sec. 3(c) of the S & A plan therefore does not render Carsten ineligible for benefits, but merely sets the date on which payments are to begin.

[9] For example, the plan explicitly provides that assistance will not be allowed if an employee fails to give notice of his impending absence because of disability, if a claim is not made within 30 days, if the disability is related to the use of alcohol, drugs, unlawful acts, willful intent to injure himself or another, venereal disease, horseplay, or, under certain circumstances, fighting. Further, the plan provides that payments may not begin or may cease if the employee fails to obtain or continue proper medical care as determined by the Respondent or to provide the Respondent with required medical reports.

any reasonable and arguably correct interpretation of the plan, the withholding from the Charging Parties of their accrued S & A benefits because of the strike warrants the inference of unlawful discriminatory conduct. Consequently, under *Texaco* the burden shifts to the Respondent to prove a legitimate and substantial business justification.

The Respondent argues that the Union had expressly waived the right of disabled employees to receive S & A benefits in the event of protected strike activity. It relies first on the 1979 Supplemental Agreement to the collective-bargaining agreement that provides in pertinent part that

> . . . it is understood and agreed that for the duration of [a] strike, no employer or employee contributions shall be made to any welfare benefit fund for striking employees, and no service credits shall be accrued by such striking employees who are represented by the Union.

The Respondent supports this waiver argument by pointing out that this same contract language has been included in all collective-bargaining agreements negotiated with individual OCAW Locals at its various refineries across the country. The Respondent stresses that pursuant to this provision it has had a consistent past practice of suspending S & A benefits during seven strikes, both industrywide and at individual facilities, from 1959 to 1979. On this basis, the Respondent argues, in essence, that the relevant Locals, including Local 7-346 at Toledo in 1969, waived by acquiescence the rights of their represented disabled employees to continue receiving S & A payments during strikes because no Local had ever, in the words of the judge, "taken legal action to recover [such suspended] benefits."

The judge found it difficult to accept, as do we, the Respondent's argument that the contract language referring to the suspension, during a strike, of "contributions" to any "welfare benefit fund" applies to the S & A plan, which was a noncontributory plan. (See fn. 7, supra.) But, as the judge also reasoned, even assuming for the sake of argument that the language was intended to cover the S & A plan, the Respondent's designation of the six employees as "striking employees" is contrary to the *Emerson Electric* holding, overruling *Southwestern Electric Power Co.*, 216 NLRB 522 (1975), that an employer may not presume that employees unable to work on and after the commencement of a strike are affirmatively supporting the strike and can therefore have benefits terminated as if they were strikers. The judge further noted that, under *Conoco*, not even evidence of affirmative acts showing public support for the strike would change these Charging Parties into "striking employees."

We agree with the judge's finding that the Charging Parties were not striking employees. In doing so, however, we do not rely on the judge's use of *Emerson's* theory of coercion, overruled in *Texaco*, but only on *Conoco's* reasoning, affirmed in *Texaco*, that an employee who is so disabled as to be unable to withhold services from his employer in support of a labor dispute will not ordinarily be classified as a striker. Since the Charging Parties were not "striking employees," the Respondent's argument for contractual waiver fails.[10] We similarly find no merit in the Respondent's argument based on past practice. The judge suggested that the Union's reason for not filing a charge in 1969—when its only previous strike since 1959 occurred—may have been due to the Union's realization that the Respondent was then privileged, under *Southwestern Electric*, to terminate S & A benefits to disabled employees at the commencement of a strike. However, notwithstanding the Respondent's past practice, *Emerson Electric* was the law at the time of the 1980 strike.[11] The record shows that at the last negotiating session on the reopened issues held just before the strike began on January 8, 1980, the Union specifically asked the Respondent whether payment to the six disabled employees would continue during the strike. The Respondent answered that it was "still considering the matter." The Respondent's manager of labor relations testified that as of January 8, 1980, he had not yet decided "whether or not we should be guided by the new law under the *Emerson* decision." After the strike began the Respondent announced that the benefits in question were suspended as of January 8, 1980, without even investigating whether, under the then applicable *Emerson Electric* remedial limitation, it would have been entitled to do so by showing that the six employees affirmatively supported the strike at its inception.

In short, the purported waiver was not clearly and unmistakably based either on the terms of the collective-bargaining agreement or on past practice. Thus far, the Respondent's positions do not support its claim of a legitimate and substantial business justification for its cessation of benefits.[12]

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[10] Of course a union and an employer could expressly *agree* to include all such persons within the class of those called strikers, but no such agreement was shown here.

[11] *Emerson Electric* issued on December 19, 1979, approximately 3 weeks before the strike.

[12] The Respondent argues that a legitimate business reason to suspend benefits during a strike was its effort to avoid fraudulent employee claims or claims by employees seeking to take advantage of the S & A plan by going on medical disability for nonemergency reasons just before a strike. The judge correctly noted that, although this certainly may constitute a

Continued

II.

We do find merit, however, in the Respondent's claim that the Union, in the April 14 strike settlement, clearly and unmistakably waived the Charging Parties' statutory rights to be free of discrimination or coercion in the denial to them of the contractual S & A benefits.

The letter of agreement "settle[d] all matters negotiated between the parties," extended the collective-bargaining agreement for 1 year, and provided for increases in wages and benefits. Further, in paragraph 7, the Respondent agreed to pay each employee a "one time lump sum payment . . . as a subsidy" for certain insurance premiums assumed by the employees during the strike and the Union agreed to "withdraw its unfair labor practice charges, lawsuits and grievances related to all benefit plans" covered by the 1979 supplemental agreement to the collective-bargaining agreement entitled "Stipulation Covering Welfare Benefit Plans."[13] The Respondent and the Union further provided, in their back-to-work agreement and understanding of April 14 that

> [t]he Company and Union agree to withdraw and cause to be dismissed with prejudice all civil actions, unfair labor practice charges, and grievances related to matters that arose during the strike with the exception of [certain specified grievances not here relevant]. It is further agreed that no further civil actions, unfair labor practice charges, or grievances will be initiated by either party, for activity which has occurred during the strike.

In *Energy Cooperative*, 290 NLRB 635 (1988), the Board addressed a question left open in *Texaco* and held that waivers of contractual benefits contained in strike settlements may result in dismissal of charges filed by individual employees over the denial of such benefits. Thus, a collective-bargaining representative may waive its individual members' statutory right to receive contractual benefits free from discrimination or coercion. See the discussion of *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), and *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), in *Energy Cooperative*, supra at 636. *Energy Cooperative* emphasized *Texaco's* holding that such a waiver is effective only if it is clear and unmistakable. For the following reasons, we find such a clear and unmistakable waiver here.

The letter of agreement purported to "settle all matters negotiated between the parties."[14] Among those issues was the Respondent's administration of its employee benefit plans, including the S & A plan at issue in this case. Thus, in return for the Union's relinquishment of all its existing claims with respect to employee benefits during the strike, specifically including S & A benefits, the Respondent provided a limited payment to all employees, including those who were sick or disabled during the strike, for certain insurance contributions under the provision of the settlement entitled "Lump Sum Payment."

In the back-to-work agreement and understanding, the parties supplemented and extended this clear resolution of the Union's claim asserted in the unfair labor practice charge it had already filed. By their agreement to "withdraw and cause to be dismissed with prejudice all civil actions, unfair labor practice charges and grievances related to matters that arose during the strike," the Respondent and the Union clearly intended to waive any possible contractual claim the Union or individual employees might otherwise have to S & A benefits denied during the strike. Thus, we conclude that the parties' settlement agreements establish that the Union clearly and unmistakably waived its sick and disabled employees' rights to receive contractual S & A benefits during the strike.

Finally, for the reasons set forth in *Texaco* and *Energy Cooperative*, we shall give effect to this strike settlement agreement that we have found has met the demanding standard of clearly and unmistakably waiving the statutory right of individual employees to receive contractual benefits free from discrimination. It effectuates the purposes and policies of the Act to give effect to a private settlement amicably resolving a labor dispute when the Union was entitled to waive individual rights in securing the good of the entire unit and was empowered to bind unit members wholly apart from their separate consent.[15] Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

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legitimate business concern, the Respondent made no argument that the Charging Parties had been such employees. In any event, under the terms of the S & A plan discussed above, the Respondent was entitled to make nondiscriminatory determinations as to whether any particular claim would be compensable.

[13] The sickness and accident plan was among those covered by the stipulation.

[14] Member Cracraft would not rely on the zipper clause contained in the letter of agreement as evidence of the parties' intent that individuals' rights to S & A benefits were waived.

[15] Chairman Stephens notes that none of the factors discussed in his concurring opinion in *Energy Cooperative* as possible barriers to the Board's reliance on a settlement are present in this case.

Richard F. Mack, Esq., for the General Counsel.
Deborah O. Cantrell, Esq., Fred F. Bates, Esq. and *W. H. Locke*, of Houston, Texas, for the Respondent.
Gary Offenburg Sr., of Freemont, Ohio, *Norman Kamann*, of Toledo, Ohio, and *Robert F. Carsten*, of Oregon, Ohio, for the Charging Parties, pro se.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. This proceeding was heard before me in Toledo, Ohio, on June 28, 1982. The principal issue presented is whether Respondent Gulf Oil Company violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by suspending or not paying health benefits to certain of its employees during the course of a strike called by Oil, Chemical and Atomic Workers International Union Local No. 7-346 (the Union).[1]

Respondent and the Union were parties to a collective-bargaining agreement that, although in effect from January 8, 1979, to January 7, 1981, provided for a reopener on wage increases, fully paid health care benefits, and vacation improvements on the Union's written notice to Respondent no earlier than November 1, 1979. If the parties failed to reach agreement thereafter, the Union was entitled to strike no earlier than January 8, 1980. Notice was given, negotiations failed, and a strike commenced on January 8, 1980, at 4 p.m. Respondent refused for any period after 4 p.m. on January 8, and until April 19, 1980, the day after Respondent resumed operations, to pay sickness and accident benefits to six employees who were qualified for and of whom five were paid benefits prior to the commencement of the strike.[2] None of the employees affirmatively participated in any strike activities at the commencement of the strike, although the names of some of them were included on a union picket duty roster.

In *Conoco, Inc.*, 265 NLRB 819 (1982), the Board reaffirmed its decision in *Emerson Electric Co.*, 246 NLRB 1143 (1979), enfd. as modified 650 F.2d 463 (3d Cir. 1981), that an employer violates Section 8(a)(1) and (3) of the Act by terminating "certain sick[ness] and accident benefits that it had been paying to disabled employees solely because other employees then actively employed [by] the employer had gone out on strike." *Conoco*, supra at 820. The Board continued (id. at 820):

> [D]isabled employees had a Section 7 right to refrain from declaring their position on a strike while they [are] medically excused, and . . . an employer could no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits. . . . [T]o allow the termination of such benefits to certain employees as a result solely of the strike activities of others was to penalize employees who had not yet acted in support of the strike.

As a result of this most recent adherence to the rule in *Emerson*, Respondent's contention that the rule in *Emerson* is "unreasonable and in conflict with well-established principles of labor law" must be rejected. Further, unless there are some distinguishing facts requiring a contrary conclusion, *Emerson* holds that Respondent's suspension of sickness and accident benefits is a violation of Section 8(a)(1) and (3) of the Act. The principal thrust of Respondent's defense is bottomed on its assumptions that it and the Union contractually agreed that these payments would be suspended during a strike, that the parties had applied that principle in their past practice, and that in any event the Union expressly waived any claim to such benefits by negotiating a $150 lump-sum payment in settlement of the issue. I reject all these claims.

The parties' various agreements state: "[I]t is understood and agreed that for the duration of [a] strike, no employer or employee contributions shall be made to any welfare benefit plan *for striking employees*, and no service credits shall be accrued by *union striking employees* who are represented by the Union." (Emphasis added.) No contributions were ever paid by Respondent into its sickness and accident plan; instead, when an employee became ill or suffered an accident, the employee was paid from Respondent's general funds. It is difficult to argue, therefore, as Respondent does, that this language cut off all its responsibilities for the payment of sickness or accident benefits. But, assuming, arguendo, that it was intended to cover the sickness and accident plan as well, I nonetheless conclude, as the Board did in *Conoco*, supra at 819, 823 fn. 11, that the parties' agreement extended only to withholding sickness and accident benefits from those employees who were on strike. The

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[1] Respondent admits, and I find, that it has been at all times material a corporation duly authorized to do business under the laws of the Commonwealth of Pennsylvania and has and does maintain offices in the State of Ohio. Respondent is engaged in the processing, nonretail sale, and distribution of petroleum and related products. During the year ending December 31, 1979, it manufactured, sold, and distributed from its Toledo, Ohio facility (that closed in 1981) products valued in excess of $50,000, of which amount products in excess of $50,000 were shipped from its Toledo, Ohio location directly to points located outside the State of Ohio. I conclude, and Respondent admits, that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

The relevant docket entries are as follows: All the charges, except the one filed in Case 8-CA-13895-6, were filed by the respective Charging Parties on June 5, 1980. The other was filed on June 6, 1980. An order consolidating the cases and the consolidated complaint issued on October 31, 1980.

[2] Gary Offenberg Sr. suffered a torn knee ligament on November 12, 1979, received benefits commencing November 13 (when he had surgery), was hospitalized for about 3 weeks, had a cast on his leg until the end of February 1980, and was released from his doctor's care to return to work on May 1, 1980. Respondent resumed paying benefits to Offenburg on April 19. Norman Kamann suffered from amnesia and was hospitalized for a week commencing on January 7, 1980, received benefits from 2:30 p.m. on January 8, and was allowed to return to work on January 18, 1980. Jacquelyn Obergon went on pregnancy sick leave, received benefits from November 1, 1979, and was allowed to return to work on March 17, 1980. Glenn Eversole suffered from vascular insufficiency, received benefits from January 3, 1980, and was allowed to return to work on January 21, 1980. Walter Eckhart suffered from sinusitis, received benefits commencing on December 10, 1979, and was released to return to work on January 10, 1980. Robert F. Carsten suffered from benign prostatic hypertrophy, was hospitalized on January 8, 1980 (before the beginning of the strike), received no sickness benefits, and was released by his physician to return to work commencing on March 10, 1980.

six employees here, who were sick or otherwise disabled on January 8, 1980, were not on strike or "striking employees"; they were sick or disabled employees incapable of working or striking. It is true that the Union had listed some of them for picket line duty, but that indicated only the Union's desire that they should actively participate in the strike, and not the employees' acquiescence or participation in the other employees' concerted activities. The record is otherwise barren of any attempt by Respondent to ascertain whether the six employees supported the strike at its commencement.

There is some record evidence that the Union had never taken legal action to recover benefits that had been suspended on the commencement of a strike. That may have been due, in part, to the Union's agreement that denials of benefits were not arbitrable and the Board's prior rule in *Southwestern Electric Power Co.*, 216 NLRB 522 (1975), overruled in *Emerson* in 1979, that an employer could reasonably presume that employees on sick leave before the commencement of a strike supported it merely because it was effective and the employees were union members. On the other hand, there is evidence that certain employees' sick benefits were continued during the course of a strike in 1952, and that the Union often requested that Respondent continue to pay benefits to employees who were receiving benefits at the commencement of the strike. I do not find that the Union agreed with Respondent's actions. In any event, it appears Respondent's primary concern was with fraudulent employee claims for benefits or, at least, employees taking advantage of a scheduled strike by undergoing voluntary surgery immediately prior to the strike in order to maintain continued benefits during the strike. Whatever legitimacy there may be in Respondent's position,[3] here there is no claim that any of the six employees took advantage of the situation by claiming illness immediately prior to the strike.

Respondent also claims that the benefits due under its sickness and accident plans are not accrued benefits but are wages. The type of specific benefits was not discussed in *Conoco* but was in *Emerson*, both by the Board and the court of appeals. The term "accrued" may be used to indicate a variety of situations; it appears clear that both *Conoco* and *Emerson* defined them as benefits that did not depend on any return to work or on any future services to the employer. Rather, they were earned by reason of prior work performed and became due by reason of the event of a sickness and accident. Once the precondition was met, the benefit accrued to the employee.[4] Here, benefits are paid only to employees who were employed for 26 weeks and are paid in accordance with a schedule that is based on an employee's past years of continuous service. An employee with less than 1 year may receive 2 weeks of full pay and 2 weeks of half pay, and an employee with 10 or more years of service may receive 12 weeks full pay and 40 weeks of half pay. Employees with 1 year or more (up to 10 years of service) receive varying amounts of benefits depending on their exact length of service. I conclude that, once the precondition of sickness or accident had occurred, the benefit not only accrued, but also vested for the number of full and half weeks' wages to which each employee was entitled, contingent, of course, on the length of time the employee was unable to work.[5]

Respondent contends that the Union waived any claim for the sickness and accident benefits sought here. During the strike, the Union filed an unfair labor practice charge on behalf of the employees whose benefits had been suspended. In a letter agreement, dated April 8, 1980, settling the strike, the Union agreed to "withdraw its unfair labor practice charges, lawsuits and grievances related to all benefit plans in recognition of STIPULATION COVERING WELFARE BENEFITS PLANS (SUPPLEMENTAL AGREEMENT) dated the 29th of January, 1979." The Union complied with this agreement, but the individual employees filed their own charges. I find that there was no agreement that the employees were barred from doing so or that the Union waived their right to do so (or was empowered to do so). Furthermore, I reject Respondent's argument that the six employees received $150 in settlement of their claims for sickness and accident claims. The agreement recites only that *all* of Respondent's employees would receive that amount for contributions which employees apparently had made to retain their coverage during the strike under other group fringe benefit funds, and the reimbursement was unrelated to the claims of the six employees in this proceeding for sickness and accident benefits. In any event, a waiver of *Emerson* rights must be clear and unmistakable; here, it was not. *Texaco*, supra at 1222; *Conoco*, supra at 834 fn. 11.

I have considered and reject the numerous other defenses interposed by Respondent. First, no authority has been cited, and I find no logic in its position that the Employment Retirement Income Security Act, 29 U.S.C. § 1001 et seq., in any way preempts the Board from its jurisdiction over correcting violations of the Act, merely because the discrimination adversely affects rights that to some extent may also be protected under ERISA. See 29 U.S.C. § 1144. Second, Board law does not require that an affected employee must pursue internal appeals procedures before filing a claim under the Act. Even if that were so, the appeal would have had to be presented to

[3] In any event, see *Conoco*, supra at 834 fn. 9; *Texaco, Inc.*, 259 NLRB 1217, 1222 (1982).

[4] *Emerson*, supra at 469. Respondent appears to argue that payments of benefits were merely voluntary. Although that may have been so years ago, when Respondent and the Union began to negotiate the terms and conditions of employment of Respondent's employees, including fringe benefit plans, Respondent agreed with the Union that it would not change or modify its commitment to "continue" its plans "in effect." The gist of Respondent's argument is that it may discontinue benefits for reasons that violate the Act and unilaterally change terms and conditions of employment. Board law is too well settled to require any comment.

[5] Further support for this conclusion is found in the agreements and various stipulations between Respondent and the Union requiring the continuation of the various fringe benefit plans. The latter uniformly provide that in the event the Union ceases to represent the employees, any rights "accruing to any individual employees" shall continue in effect. The former provide that in the event of a strike, no service credits shall accrue. The necessary implication is that the parties recognized that there were rights and credits that accrued.

Respondent's refinery manager,[6] clearly not a neutral, but one who would have reflected Respondent's position that the instant claims here should be suspended. Accordingly, any appeal would have been meaningless. Third, the claims arose when benefits were suspended (formal notification was given by Respondent on January 13, 1980), well within the 6 months prior to the filing of the unfair labor practice charges. Fourth, and finally, the claim that the General Counsel is barred by laches has no foundation in law or fact. *Preston H. Haskell Co.*, 238 NLRB 943, 949 fn. 20 (1978), enf. denied on other grounds 616 F.2d 136 (5th Cir. 1980).

I conclude that Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act. I shall therefore recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall recommend that Respondent pay to the Charging Parties the sickness and accident benefits for the period commencing on January 8, 1980 at 4 p.m. (except Carsten, whose benefits shall commence on January 9, 1980)[7] through the date each employee was able to return to work or the date on which the benefits that each terminated employee was entitled, whichever date is earlier,[8] and that interest be paid thereon, to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[9] Because Respondent has closed its Toledo, Ohio facility, I shall also order that the notice to its former employees be mailed, and in the event Respondent reopens its Toledo facility, then post the notice. *Sturgis-Newport Business Forms*, 227 NLRB 1426 (1977), enfd. 563 F.2d 1252 (5th Cir. 1977).

[Recommended Order omitted from publication.]

[6] Respondent claims that an appeal would have to be filed with the administrator of the plan, who is its area manager of human resources of the East Coast area. The description of the plan states otherwise. In any event, the administrator testified that he, too, would have denied an appeal from the suspension of these claims.

[7] The sickness and accident plan provides for a 1-day waiting period for the payment of benefits. Carsten's claim, however, accrued prior to the strike.

[8] *Conoco*, supra. Whether the employees actually participated in strike activities after the commencement of the strike is immaterial for the purposes of the remedy recommended here. Id. at 820–823.

[9] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Fishbach/Lord Electric Company *and* Jack L. Marsh

International Brotherhood of Electrical Workers, Local Union 112, AFL–CIO *and* Michael S. June *and* Robert L. Albert Knapp, *and* Thomas E. McKenzie *and* Jack L. Marsh, *and* Jimmy M. Scott. Cases 19–CA–15220,[1] 19–CB–4486, 19–CB–4496, 19–CB–4501, 19–CB–4636, and 19–CB–4650

September 21, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On May 23, 1984, the National Labor Relations Board issued a Decision and Order in this proceeding[2] in which the Board, inter alia, ordered the Respondent, International Brotherhood of Electrical Workers, Local Union 112, AFL–CIO (Local 112) to make whole Charging Parties June, Knapp, McKenzie, and Scott for any losses suffered as a result of Local 112's discrimination against them in hiring hall dispatch decisions. On September 4, 1987, the U.S. Court of Appeals for the Ninth Circuit affirmed the Board's finding that Local 112 thereby violated Section 8(b)(1)(A) and (2), and on November 13, 1987, the court entered a judgment enforcing, in relevant part, the Board's Order.[3] A controversy having arisen over the amount of backpay due under the Board's Order, as enforced by the court, the Regional Director for Region 19 issued and duly served on Local 112 a backpay and an amended backpay specification and notice of hearing alleging the amount of backpay due the discriminatees. Local 112 filed a timely answer to the amended backpay specification generally denying each allegation of the specification and, in addition, stating several affirmative defenses.

On June 20, 1988, the General Counsel filed with the Board a motion to strike answer of Local 112 and for summary judgment in favor of the General Counsel, with exhibits attached. On June 23, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On July 6, 1988, Local 112 filed a response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this case, the Board makes the following

Ruling on the Motion for Summary Judgment

Section 102.54(b) and (c) of the Board's Rules and Regulations states:

> (b) *Contents of the answer to specification.*—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of its as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.
>
> (c) *Effect of failure to answer or to plead specifically and in detail to the specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

In its answer to the backpay specification, Local 112 offered a general denial to each of the allega-

[1] About May 11, 1988, the parties mutually resolved the issues in dispute in Case 19–CA–15220.

[2] 270 NLRB 856, affd. in relevant part 827 F.2d 530 (9th Cir. 1987).

[3] No. 84–7556.

tions of the specification. Thus, Local 112 has generally denied the accuracy of the General Counsel's allegations concerning the backpay periods for each discriminatee, the formula used to compute gross backpay (including benefits owned both to individual discriminatees and to various benefit funds), the computation of gross backpay for each discriminatee, the amount of interim earnings for each discriminatee, the method of computing net backpay, and the computation of net backpay for each discriminatee. The General Counsel asserts that information regarding each of these matters is within Local 112's knowledge, and that it has failed to state the basis for its disagreement with any of the allegations in the specification. Accordingly, the General Counsel contends that Local 112's general denials do not comply with the requirements of Section 102.54(b), the answer should be stricken and the allegations of the specification be deemed admitted as true, and summary judgment should be granted regarding the backpay specification in its entirety.

We agree with the General Counsel regarding all allegations of the backpay specification involving the formula for gross backpay and the resulting computations as well as the formula for net backpay. Because all data at issue concerning gross backpay is within Local 112's knowledge and control, its failure to set forth fully its position as to the applicable premises or to furnish appropriate supporting figures is contrary to the specificity requirements of Section 102.54(b). We find, however, that Local 112's general denial is sufficient to place interim earnings into issue for all the discriminatees because that information is generally not within the knowledge of a respondent.[4]

Accordingly, concerning all allegations in the backpay specification except as to amounts of interim earnings, we grant the General Counsel's motion to strike Local 112's answer and we deem such allegations to be admitted as true.[5] Therefore, we shall grant the General Counsel's Motion for Summary Judgment only in part and shall direct a hearing limited to the determination of a discriminatees' interim earnings, including the availability to the discriminatees of interim employment and their efforts to seek and retain such interim employment.

ORDER

It is ordered that the General Counsel's motion to strike the Respondent's answer to the amended backpay specification is granted, except regarding the allegation concerning the amounts of interim earnings by the discriminatees.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is granted except concerning the allegation concerning the amounts of interim earnings by the discriminatees.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 19 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge for the purpose of taking evidence as to the alleged interim earnings of Michael June, Robert Knapp, Thomas McKenzie, and Jimmy Scott. The judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the judge's supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

[4] *Tiffany Handbags*, 271 NLRB 621 (1984); *Dews Construction Corp.*, 246 NLRB 945 (1979).

[5] In its answer, Local 112 states two "affirmative defenses" not directly related to the issue of interim earnings in addition to its general denials. First, it argues that discriminatees Knapp and McKenzie were not entitled to hiring hall referrals in the first instance because they did not possess electrician licenses required under state law. However, this issue has been fully litigated, see 270 NLRB 856 at fn. 3, and the court enforced the Board's Order as to all four discriminatees. Second, regarding Local 112's assertion that it is financially unable to satisfy the backpay order, it is well settled that "the issue in a backpay proceeding is the amount due and not whether [the Respondent is] able to pay." *Columbia Engineers*, 268 NLRB 337 (1983); *Star Grocery Co.*, 245 NLRB 196, 197 (1979). Accordingly, we grant the General Counsel's motion to strike these "defenses" from the answer to the backpay specification.

Community Transit Services, Inc. *and* Amalgamated Transit Union, AFL–CIO–CLC, Local 256, Petitioner. Case 20–RC–16015

September 21, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On May 23, 1986 the Regional Director for Region 20 issued a Decision and Direction of Election in this proceeding, in which he asserted jurisdiction over the Employer under the test set forth in *National Transportation Service*, 240 NLRB 565 (1979). The Employer filed a timely request for review, and on June 30, 1986, the Board issued an Order granting the request for review and remanding the above-captioned proceeding to the Regional Director for further consideration in light of the decisions in *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986), "including a reopening of the record, if necessary, and the issuance of a Supplemental Decision, if appropriate." On September 11, 1986, the Regional Director issued an Order reopening the record and remanding the proceeding for further hearing pursuant to the Board's remand order. On November 5, 1986, a hearing was held pursuant to the Regional Director's order.

On May 18, 1987, the Acting Regional Director issued a Supplemental Decision and Order rescinding the initial Decision and Direction of Election and directing that the petition be dismissed. The Acting Regional Director, applying the standards set forth in *Res-Care*, supra, and *Long Stretch*, supra, concluded that the Employer did not have the final say over the employees' wages and benefits and, therefore, was precluded from engaging in meaningful bargaining with the Union. Pursuant to Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review of the Acting Regional Director's Supplemental Decision and Order, which the Board granted by mailgram dated November 6, 1987.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the entire record in this proceeding with respect to the issues under review. We find that the Employer retains control over sufficient terms and conditions of employment and that the limitations imposed by the exempt entity are insufficient to preclude the Employer from engaging in meaningful bargaining. Accordingly, we conclude, contrary to the Acting Regional Director, that jurisdiction should be asserted.

The Employer, Community Transit Services, Inc. (CTS) is a California corporation that provides public transportation in Yuba City, California, pursuant to a series of contracts negotiated with the the Hub Area Transit Authority (HATA). HATA is a governmental entity that operates under a joint powers agreement among Sutter County, Yuba County, the city of Marysville, and Yuba City to provide transportation services. The Employer has contracted with HATA since 1978, and the most recent agreement negotiated was in effect from July 1, 1986, through June 30, 1987. HATA owns the buses as well as the fares collected, and the name HATA appears on the side of the to the routes determined by HATA. HATA approves the uniforms that are worn by the CTS drivers.

In 1984, a performance audit was conducted by an independent consultant of HATA's costs and expenditures, which resulted in HATA's adoption and incorporation in its contract with CTS of certain measures to reduce HATA's operating costs. The first of these modifications was an agreement that CTS would bill HATA for actual costs rather than HATA compensating CTS for projected expenditures. Another important change incorporated in the 1985–1986 CTS/HATA contract was a provision whereby CTS agreed not to exceed the maximum hourly wage for the employee classifications set forth in an attachment to the contract. The consultant also suggested that HATA solicit bids from other contractors to reduce its costs. To dissuade HATA from soliciting bids from other contractors, CTS agreed to freeze its wage rates at the previous year's scale and thus ensure the continuity of the contract. The wage scales CTS attached to the contract had not been previously negotiated with HATA.

The wage attachment lists starting wages and periodic increases for the classifications of vehicle operators, controllers/dispatchers, vehicle washers/janitors, maintenance/helper, and mechanics. The wage rate attachment provides for merit increases for the classifications of vehicle operators and controllers/dispatchers. Jon Monson, the Employer's vice president of operations, testified that no merit increases had been granted after 1985. The wages of a number of employees who received merit increases of 5 to 15 cents an hour prior to the 1985 freeze and who are still being paid in excess of the corresponding wage rate for their classification are not reflected in the attachment. There is no maximum hourly rate set forth for employees who have been employed more than 6 years. The wage scale and rates of the 1985–1986 agreement were incorporated in the 1986–1987 contract without change.

The contract does not require that CTS' wages be comparable to those of city or county employees, or set forth any guidelines or restrictions that wages must conform to any minimum standards. According to both William Harper, HATA chairman, and Allen Eager, a HATA board member, the purpose of attaching the wage scale to the contract is to provide information and to serve as a check by HATA on CTS' billings. According to Harper, HATA does not approve the actual wages, promotions, or overtime pay given to employees. Further, Harper stated, CTS could pay higher wages as long as it does not affect what CTS bills HATA. If, however, CTS wanted to obtain reimbursement for amounts in excess of those set forth in the wage scale for a certain classification, it must obtain prior HATA approval.

The 1986–1987 contract awards CTS a total annual sum of $602,077, which is divided into three principal areas. The contract awards $320,477 for fixed costs, an amount distributed as a weekly fee of $6163. This weekly fee compensates CTS for vehicle operators' nonservice wages, management's controllers' and maintenance employees' wages, those employees' fringe benefits and indirect labor costs, bus washing and cleaning supplies, uniforms, report reproduction, dispatch office supplies, radio maintenance, vehicle insurance, vehicle preventive maintenance, project telephones, and all other operating costs. The contract also awards CTS $299,100 a year in variable costs for "Vehicle Operator Revenue Labor." This amount is divided by a maximum of 38,922 vehicle service hours for an hourly amount per vehicle service hour of $7.685. The hourly rate compensates CTS for vehicle operators' wages, fringe benefits, and indirect labor costs. Finally, the contract gives CTS $62,500 as a management fee. There are no provisions in the contract specifying the manner in which this amount shall be used.

The fixed and variable costs for a 12-month period are described in the contract as projected costs, and the contract requires that CTS present HATA with a summary of its actual costs for each calendar quarter. CTS submits to HATA monthly a labor distribution report showing the hours worked and the gross wages earned by each employee. If the actual costs are lower than the projected costs, the contract provides that the sums owed for vehicle service hours and the weekly fee shall be adjusted downward to the actual costs. However, if a downward adjustment is made and a refund paid to HATA in a particular quarter, HATA will reimburse CTS for actual costs in excess of projected costs in the following quarter in an amount not to exceed the prior quarterly adjustment. Other than this provision, the contract does not obligate HATA to pay CTS for expenditures incurred in excess of projected costs. Although HATA's primary concern is that CTS not exceed the total contract price, the record is unclear whether HATA would allow CTS to transfer funds allotted for one purpose to cover expenses incurred in another area.

The contract defines the relationship of CTS with HATA as that of an independent contractor. In a policy statement issued on April 22, 1986, HATA reaffirmed its position that it views CTS as an independent contractor and stated that HATA will not intervene in the employer-employee relationship between CTS and its employees. According to Harper, the intent of both the contract and the policy statement is that HATA will not be involved in CTS' labor relations. Eager also stated that HATA is not to be involved in setting terms and conditions of employment for CTS employees.

The CTS Yuba City location is managed by a site supervisor, who in turn reports to a regional manager headquartered in Fairfield, California. CTS follows a companywide uniform policy regarding all its fringe benefits, i.e., health and life insurance, holidays, and vacations, as well as a stock ownership plan. The contract with HATA is silent concerning CTS' employee fringe benefits and HATA sets no standards, limitations, or review procedures on the fringe benefits CTS awards its employees. CTS has changed health insurance carriers without notifying HATA or seeking prior approval.

Similarly, CTS also maintains a uniform companywide policy in other personnel areas through the use of an employee handbook that covers areas such as discipline, grievances, promotions, performance appraisals, probationary periods, and overtime. In order to ensure compliance with the manual and enforcement of CTS' policies, monthly meetings are conducted with the different area supervisors and CTS' manager of labor relations. There is no HATA intervention in any of the above-stated areas.

CTS conducts all its hiring at the Yuba City facility, with the exception of the site supervisor, without intervention from HATA.[1] The contract specifically provides that HATA will not interfere in the disciplining and firing of CTS employees although HATA may advise CTS of any employee's inadequate performance and demand, in extreme cases, the removal of an employee. There is evi-

[1] The contract requires that the site supervisor be approved by HATA. According to Monson, the resume of the Yuba facility site supervisor was submitted to HATA at the time of his hire.

dence of one instance in which CTS terminated an employee at HATA's request, although the circumstances are not set forth in the record. The training of new employees at the Yuba City location is conducted by CTS. The contract with HATA does require that CTS submit its training program for HATA's review and approval, as well as submit a list of the drivers who have completed the training. CTS must also, according to the contract, conduct monthly safety meetings that have been attended by the HATA manager.

In *Res-Care*, supra, and in *Long Stretch*, supra, the Board reaffirmed and refined the principles set forth in *National Transportation Service*, supra, for determining whether assertion of jurisdiction over an employer providing services to or for an exempt entity is warranted. Under *National Transportation Service*, supra, once it is determined that an employer meets the definition of "employer" in Section 2(b) of the Act the inquiry is whether the employer retains sufficient control over the employment conditions of its employees to engage in meaningful and effective bargaining with a union. In *Res-Care*, the Board complemented this inquiry by setting forth its counterpart, an examination of the amount of control exercised by the exempt entity over an employer, particularly in the areas of wages and fringe benefits. In *Res-Care*, the Board concluded that it was the exempt entity, the Department of Labor (DOL), that retained the ultimate discretion for setting wage and benefit levels, thus effectively precluding the employer from meaningful bargaining.

In the instant case, the Acting Regional Director found that the control exercised by HATA was similar to the control exercised by the exempt entity over the employer in *Res-Care*, and therefore precluded meaningful bargaining. The Acting Regional Director relied on HATA's ability to set direct limitations on the maximum amounts of employee compensation as well as the need for prior HATA approval, and concluded that HATA effectively controlled the wages and benefits CTS could provide its employees.

We find that the Acting Regional Director erred in including benefits as items controlled by HATA. The contract contains no mention of limits on the fringe benefits that CTS may accord its employees. Further, there is no evidence that HATA has reviewed or has knowledge of the benefits offered by TS. Although the contract lists fringe benefits as one of the items for which CTS is compensated, no restrictions are attached, and their inclusion is only part of a general description of the overall items for which CTS is awarded moneys. The contract offers compensation for costs CTS might incur in the area of fringe benefits but it is not tantamount to finding that HATA exercises direct monetary control in these areas. CTS grants and implements fringe benefits based on companywide policy and financial considerations relating to its whole operation, not just the Yuba City facility. Based on these considerations, CTS alone determines health and life insurance, vacations, paid holidays, and the stock ownership plan for its employees.

However, as regards wages, the HATA contract does impose limitations by effectively precluding CTS from raising its wage rates above the amounts set forth in the attachment to the contract. Although the salary rates are initially set by CTS, once they are incorporated into the contract they become an integral part of the contract price and cannot be modified without HATA's prior approval if CTS wishes to ensure reimbursement. Thus, HATA, by requiring prior approval for payment of wages beyond a specified amount, controls the salaries of CTS' employees and impedes meaningful bargaining over this subject.[2]

In contrast to the employer in *Res-Care*, however, CTS retains control over all other economic and noneconomic bargainable subjects.[3] The Employer controls a myriad of economic terms and conditions of employment, i.e., health and life insurance, vacations, paid holidays, overtime, sick and annual leave, and the stock ownership plan, as well as all other noneconomic personnel related matters.[4] CTS exclusively handles, in conformity with its employee handbook and its policy of central labor relations, all its personnel-related matters in the areas of grievances, discipline, promotions, performance appraisals, leaves of absence, and overtime. CTS also conducts all its hiring, firing, and training. HATA's limited control is directed at ensuring the minimum qualifications of the employees. Although the site supervisor's resume must be approved by HATA, there is no evidence that HATA has actually participated in the hiring decision or opposed any candidate selected by CTS.

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[2] *Res-Care*, supra, fns. 12 and 14. See *PHP Healthcare Corp.*, 285 NLRB 182 (1987).

[3] Res-Care had to submit for DOL's approval its personnel policies concerning compensatory-time, overtime, severance pay, holidays, vacations, probationary employment, sick leave, cost of living increases, incentives, and equal employment opportunities. DOL also imposed restrictions in other personnel related matters. Res-Care had to submit its selection criteria and hiring procedures for DOL approval. Further, DOL had to specifically approve the hiring of the center director, all senior staff and supervisors, all the employees who made more than $15,000 a year, and relatives of currently employed employees.

[4] Although *Res-Care* held that wages and benefits are the primary elements which must be examined in the employer-exempt entity relationship, *Res-Care* recognized the importance of evaluating the controls exercised by the exempt entity and the employer in other personnel related areas, i.e. discipline, hiring, and grievances, in order to determine whether meaningful bargaining is possible. *Res-Care*, supra.

The limitations on wages, along with the very limited controls by HATA, are insufficient, in and of themselves, to warrant a finding that the employer is precluded from engaging in any meaningful bargaining. To decline jurisidiction in this case based solely on the basis of these limitations would understate all the other areas over which the Employer exercises effective control, and would ignore the underlying premise of both *National Transportation* and *Res-Care*, that the Board will assert jurisdiction unless the employer cannot effectively bargain with the union over the terms and conditions of employment of its employees.[5]

Based on the foregoing, we find, after examining the degree of control exercised by CTS as well as by HATA over CTS' labor relations, that CTS retains sufficient control over the essential terms and conditions of employment of its employees to enable it to engage in meaningful bargaining. Accordingly, the Acting Regional Director's Supplemental Decision and Order is reversed and we shall reinstate the petition and remand to the Regional Director for further appropriate action.

ORDER

The petition in Case 20–RC–16015 is reinstated and remanded to the Regional Director for appropriate action.

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[5] In *Res-Care*, supra, the Board at one point stated that if an employer does not have the final say on the entire package of employee compensation, i.e., wages and benefits, meaningful bargaining is not possible. Id. Viewed in isolation, this statement could arguably stand for the proposition that the employer must retain control over each of the economic aspects of its labor relations if meaningful bargaining is to be possible. This statement, however, read in the context of the decision, merely stressed the Board's position that to ensure meaningful bargaining the employer must exercise control over economic terms and conditions of employment, rather than control over solely noneconomic terms.

Chairman Stephens agrees that this case is distinguishable from *Res-Care* on this point, and he also finds this position consistent with his concurring view in *Res-Care*.

News/Sun-Sentinel Company *and* Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO. Case 12–CA–11916

September 21, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 11, 1988, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed cross-exceptions and supporting and answering briefs, and the Respondent filed a brief in opposition to the Charging Party's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, News/Sun-Sentinel Company, Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Refusing to recognize and bargain collectively with Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO as the exclusive bargaining unit representative of employees employed by the Respondent performing composing room work at its Fort Lauderdale, Florida newspaper in Broward County, Florida."

2. Substitute the following for paragraph 2(a).

"(a) Recognize and bargain collectively with Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO as the exclusive collective-bargaining representative of employees employed by the Respondent performing composing room work at its Fort Lauderdale, Florida newspaper in Broward County, Florida, exclusive of office clerical employees, professional employees, and supervisors as defined in the Act."

3. Substitute the attached notice for that of the administrative law judge.[3]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO as

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[1] The General Counsel excepts to the judge's description of a stipulation entered into by the Respondent and the General Counsel as consisting of facts and conclusions contained in the Regional Director's original dismissal of charges. The General Counsel stipulated only to the facts contained in the Regional Director's dismissal letter, not to the conclusions reached by the Regional Director. This error does not affect the judge's conclusions.

In sec. IV,A,1, par. 4, the judge refers to employee Norma Scheer. The reference should be to Irene Scherer. The judge finds that the tally of ballots from the ballot box in the composing room was 41 for merger, 13 against merger; the correct tally was 41 for merger, 3 against. We correct these errors, which do not affect the judge's conclusions.

In adopting the judge's finding that the merger between Local 895 and Local 430 was valid, we find it unnecessary to rely on the judge's discussion of the Respondent's January 28, 1986 speech to employees and the subsequent decertification petition filed by an employee on February 11, 1986.

We agree with the judge's finding that there was substantial continuity of representative between premerger Local 895 and postmerger Local 430. The change effected here by the merger of Local 895 with Local 430 is unlike the change at issue in *Western Commercial Transport*, 288 NLRB 214 (1988), in which a small, completely autonomous independent union was replaced by an 8500-member organization, 1 of whose business agents essentially assumed control of collective bargaining and day-to-day contract administration for the unit employees. As the judge found here, some of Local 895's officers became officers in postmerger Local 430 and the chapel's own authority over collective bargaining and contract administration matters remained substantially unaltered by the merger of the Locals. The change was not "*sufficiently dramatic* to alter the union's identity" so as to raise a question concerning representation. See *May Department Stores Co.*, 289 NLRB 661, 665 (1988), citing *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192, 206 (1986). We do not rely on *Quemetco, Inc.*, 226 NLRB 1398 (1976), which *Western Commercial Transport*, overruled to the extent that it held that an amendment of certification may be granted notwithstanding evidence showing the absence of continuity of representation.

Member Johansen agrees with his colleagues, for reasons stated by him in his dissent in *Western Commercial Transport*, 288 NLRB 214 (1988), that the merger in this case did not give rise to a question concerning representation.

[2] Although the judge correctly described the unit in the body of his decision, he misdescribed the unit in his recommended Order and notice. We shall conform the recommended Order and notice with the judge's findings.

the exclusive representative of the unit employees described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain collectively with Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO, as the exclusive collective-bargaining representative of employees performing composing room work at our Fort Lauderdale, Florida newspaper facility, exclusive of office clerical employees, professional employees, and supervisors as defined in the Act.

NEWS/SUN-SENTINEL COMPANY

Andreas Rivera-Ortiz, Esq., for the General Counsel.
Bonnie A. Glatzer, Esq. (Seyfarth, Shaw, Fairweather, & Geraldson), of New York, New York, and *Dennis R. Homerin, Esq.*, of Chicago, Illinois, for the Respondent.
Richard Rosenblatt, Esq., of Colorado Springs, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on 15 and 16 June 1987 at Miami, Florida, pursuant to a complaint filed by the Regional Director for Region 12 of the National Labor Relations Board (the Board) against News/Sun-Sentinel Company (the Respondent or the Employer or the Sun/Sentinel). The complaint, as amended at the hearing, is based on an unfair labor practice charge filed on 18 February 1986 by Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO (Local 430 or the Charging Party) and alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by the withdrawal of recognition from the Charging Party and by failing and refusing to bargain with the Charging Party. The complaint is joined by Respondent's answer in which Respondent denies the commission of any violations of the Act.

On the entire record in this case, including my observations of the demeanor of the witnesses and after due consideration of the briefs filed by counsel for the General Counsel, the Charging Party, and Respondent, I make the following

FINDINGS OF FACT AND ANALYSIS[1]

I. BUSINESS OF THE RESPONDENT

Respondent, a Delaware corporation, with an office and principal place of business in Fort Lauderdale, Florida, has been engaged in the publication, circulation, and distribution of a daily newspaper in Broward County, Florida. During the past 12 months, a representative period of time, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000, and during the same period of time purchased and received at its Fort Lauderdale, Florida facility goods and materials valued in excess of $50,000, which were shipped to it directly from points located outside the State of Florida. Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION

The complaint alleges, Respondent denies, and I find, that Local 430 is a labor organization within the meaning of Section 2(5) of the Act. This finding is made on the basis of unrebutted testimony presented by the General Counsel and Charging Party through the testimony of International Typographical Union Representative Wimbley Waters[2] and Local 430 Secretary-Treasurer Irwin Radin, concerning the functions of former Local 895 and postmerger Local 430 and their representation of employees in their relationship with employers concerning wages, hours, and other terms and conditions of employment.

III. THE APPROPRIATE BARGAINING UNIT

The complaint, as amended at the hearing, alleges, Respondent admits, and I find that the appropriate bargaining unit is as follows:

> All full-time and regular part-time employees employed by Respondent performing composing room work, excluding all office clerical employees, guards and supervisors as defined in the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES[3]

Fort Lauderdale Typographical Union Local 895 (Local 895) had a collective-bargaining relationship with Respondent over a period of more than 30 years. The parties had entered into successive labor agreements throughout that period, the most recent of which expired on 30 June 1984. Local 895 and Respondent had held 30 bargaining sessions to negotiate a successor to the agreement that expired in 1984 until impasse was reached in March 1985. On 10 March, Respondent imposed its final bargaining proposal following the impasse after these unsuccessful contract negotiations. The parties next met to negotiate a contract in April 1985 and did not thereafter meet to negotiate a contract until December 1985. In the interim, officers of Local 895 met with International Representative Wimbley Waters in October 1985 and asked that a trusteeship be imposed on Local 895 to

[1] The following includes a composite of the testimony of the witnesses, which is credited except as specific credibility resolutions are made.

[2] Waters is also president of Daytona Beach, Florida Local 892, affiliated with the International Typographical Union.

[3] The General Counsel's unopposed motion to correct the record is granted, and the record is amended as shown on "Appendix A." (Appendix A is omitted from publication.)

commence contract negotiations again with Respondent, to obtain new leadership for Local 895, and also to facilitate a merger of Local 895 with Local 430, according to the unrebutted testimony of Local 85's former secretary-treasurer, Walter Sakowski, who is now a retired member of Local 895. Sakowski testified that Local 895 officers were worn out, and the trusteeship and merger of Local 895 with Local 430 were also sought for the purpose of obtaining new leadership. According to the unrebutted testimony of Sakowski and Local 430's secretary-treasurer, Irwin Radin, the two local unions had also discussed merger in 1983. With the approval of the International Union, the trusteeship was imposed on Local 895 on 9 October 1985 with Wimbley Waters, president of the Daytona local and a part-time international representative, appointed trustee of Local 895, at which time Waters asked all the officers of Local 895 and members of its negotiating committee to remain in their offices, which they did. Within the various locals of the International Union, there are "chapels" that are local committees at particular employers, which form the local. There was such a chapel at the Sun/Sentinel, which had its own dues and maintained its own funds apart and distinct from the local, handled grievances in the early stages, and presented contract proposals for consideration by the Local in preparation for negotiations with Respondent. The chapel chairman served in the role of a chief steward for the chapel members.

On 6 December 1985, Respondent and Local 895 met to engage in negotiations and, at that time, Waters informed Respondent's vice president and director of employee relations, John T. Spran, that he was the trustee of Local 895 and requested and received permission to conduct a merger vote on Respondent's premises on 11 December 1985. The International sent mail ballots to members of Local 895, and Local 895 posted a notice of the merger vote[4] in the composing room of Respondent. The merger was discussed at meetings of Local 895 on 3 November and 8 December 1985. The mail-vote of members of Local 895 yielded a tally of 74 in favor of the merger and 29 opposed to the merger. In addition, nonunion members of the bargaining unit were given ballots and permitted to vote in the composing room on 11 December by placing a ballot in a padlocked box kept by Local 895 Secretary-Treasurer Sakowski at his workplace during the first-day shift, but left unattended for a period 3-1/2 to 4 hours when Sakowski left work and before he returned to collect the ballots after the first shift. One nonunion member employee testified that she gave her ballot to Sakowski to place in the box and assumed that he had done so. The employee testified she trusted Sakowski completely. Sakowski did not recall the incident. I credit the employee's testimony that she gave her ballot to Sakowski. The tally of the jobsite balloting of nonunion members in Local 895's bargaining unit was 41 in favor of the merger and 13 opposed to the merger. The total tally of the vote by Local 895 was 115 in favor of and 32 opposed to the merger. The tally of Local 430's votes on the merger was 79 in favor of and 10 opposed to the merger.

Waters informed Respondent by letter of 17 December 1985 to John T. Spran, Respondent's vice president and employee relations director, that the employees in the bargaining unit had voted in favor of merging with Local 430 by a vote of 115 in favor of the merger and 32 opposed to the merger. In this letter, Waters also requested a meeting to negotiate a new agreement. Waters testified that between 17 December and 27 January 1986, when Respondent sent a letter to him withdrawing recognition from Local 430, he had telephone discussions with Spran and Debbie Dodds, a member of Respondent's negotiating committee, in attempting to set up meeting dates to resume negotiations. During one of these telephone conversations, Waters talked to Spran and asked whether Spran had received the 17 December 1985 letter and whether he had any problems with it. Spran replied that he had received the letter and told Waters that he had no problems with it. Spran told Waters he would send the letter to San Francisco and would have Dodds place Local 430 on the calendar. On 27 January 1986, Spran sent Waters a letter withdrawing recognition as follows:

January 27, 1986

Mr. Wimbley Waters
I.T.U. Appointed Trustee
Ft. Lauderdale Typographical Union
Local #895
P. O. Box 84
Ft. Lauderdale, Fl 33302

Dear Mr. Waters:

We are in receipt of your letter dated December 17, 1985. We understand from your letter that as of January 1, 1986, Fort Lauderdale Typographical Union #895 no longer exists and will no longer represent Composing Room employees of the News/-Sun-Sentinel Company.

We do not believe that Miami Typographical Union #430 legally represents the Composing Room employees of News/Sun-Sentinel Company and, as a consequence, we refuse to recognize and bargain with Local #430 as a representative of those employees.

JTS/dd

/s/ John T. Spran

[4] The notice read as follows:

NOTICE
OF ELECTION
REFERENDUM VOTE
FOR MERGER BETWEEN
MIAMI TYPOGRAPHICAL
UNION NO. 430
and
Fort Lauderdale Typographical
Union No. 895

The agreement would merge Fort Lauderdale Typographical Union No. 895 into Miami Typographical Union No. 430.

The election date is Wednesday December 11, 1985—Mail Ballots must be post marked by midnight Wednesday December 11, 1985—Chapel voting must be completed by Midnight Wednesday, December 11, 1985.

On 28 January 1986, Respondent President T. O'Donnell delivered a speech to the composing room employees, he stated as follows:

> On December 17, 1985 we received the following letter from Wimberly [sic] Waters, I.T.U. Appointed Trustee for Fort Lauderdale Typographical Union #895. [Overhead I]
>
> As you can see from this letter, after January 1, 1986 your Union, Fort Lauderdale Typographical Union #895 ceased to exist and, as a consequence, no longer can represent Composing Room employees.
>
> We have sent a letter to Wimberly [sic] Waters acknowledging his letter and telling him that since your Union no longer exists, we consider Composing Room employees to be independent employees. [Overhead II]
>
> We also told Wimberly [sic] Waters, as you can see, that we are not going to accept an outside group from Miami to represent our Composing Room.
>
> As far as I am concerned, the Composing Room should now be like any other independent department of our paper and should receive *wage and benefit improvements* like other independent departments. As you know, we have had similar situations for the Warehouse, Mailroom, Engravers, Machine Shop and Teamster drivers. *In each of these cases, when the department became independent, employees got new dental insurance, increased life insurance options, reduced health insurance and group life costs to employees, improved long term disability benefits, improved Christmas bonus, etc.—benefits that apply to all other independent employees.* (Of course those of you with job guarantees would still keep them.)
>
> *However, Jack tells me there are still legal questions that need to be sorted out and we have to wait until they are sorted out.*
>
> In the meantime, any questions you may have regarding independent employee benefits and policies, talk to Jack. We intend to operate the room as it has operated in the past. However, now your foreman and supervisor will deal directly with you.
>
> We are in the middle of some exciting changes at our paper and I would like to share them with you.
>
> [Insert]
>
> Hopefully, this will all be sorted out soon and I look forward to working with each of you. [Emphasis added.]

Respondent has since refused to recognize and bargain with Local 430 as the collective-bargaining representative of its employees.

At the hearing, the General Counsel and Respondent entered into a stipulation of facts concerning the conduct of the election, which consists of facts and conclusions contained in the Regional Director's original dismissal of the charges following an investigation, and which was received over the objection of the Charging Party and is as follows:

> On December 11, 1985, unit employees, among others, voted to determine whether or not they wanted their collective bargaining representative, Typographical Union Local No. 895 to merge with Miami Typographical Union No. 430, AFL–CIO. Some of the eligible voters (including retirees) received mail ballots directly from the International Union Headquarters in Colorado and other employees voted personally in the December 11 election. The Charging Party maintains the employees, by a vote of 115 to 32, voted in favor of merger and thus it requested the Employer to bargain with Local 430. By letter dated January 27, 1985, the Employer refused the Union's request, stating it did not believe Local 430 legally represented the unit (composing room) employees. The investigation revealed several improprieties in the voting procedure, and although no employee made a specific complaint concerning the conduct of the election, some employees did testify with respect to those improprieties. For example, the eligibility list used by the Union reveals that 40 composing room employees were given ballots and 36 returned them and placed them in the ballot box. However, the tally of ballots for the composing room shows 41 for merger and 3 against. Further, by the union official's admission, there is no way of knowing if employees in the composing room who voted in person also received a mail ballot from the Union's Headquarters in Colorado, thereby creating the possibility of permitting one voter to cast two ballots. One employee testified he was given a ballot by the union official holding the election and that he placed his ballot in the box, but according to the eligibility list he did not personally cast a ballot but rather he received a mail ballot from the International Union. Further, one employee stated that she chose not to vote, and therefore did not cast a ballot, but the eligibility list indicates that the employee was given a ballot and did vote. In addition, the ballot box with only a piece of tape over the opening was left in the Employer's maintenance room unattended from approximately 3:50 p.m. to 7 or 8 p.m. on the day the voting took place. Under these circumstances, it is concluded that irregularities in the voting procedure preclude conferral of representative status upon Local 430 on the basis of the December 11 election and that, therefore, the Employer did not violate the Act by refusing to recognize and bargain with the Charging Party.

A. *Analysis*

The complaint alleges that Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 430, the exclusive collective-bargaining representative of its employees engaged in composing room work following the merger of Local 430 and Local 895 effective 1 Januray 1986. Several issues concerning this allegations were litigated at the hearing as follows:

1. Whether the 11 December 1985 merger was subject to due process safeguards which had been previously imposed by the Board or whether the recent Supreme Court decision of *NLRB v. Financial Institution Employees (Seattle-First National Bank)*, 475 U.S. 192, 121 LRRM 2741 (1986), hereinafter referred to as *Seattle-First*, precludes the Board from conducting its due process inquiry into internal union matters such as mergers.

2. Whether the merger should be upheld in the event the Board has the authority to inquire into the due process requirements and in the event that the Board's due process standards are found not to have been met.

3. Whether there was substantial continuity of identity between pre-merger union, Local 895, and post-merger union, Local 430, sufficient to give rise to a continuing duty by Respondent to recognize and bargain with Local 430.

Respondent has also raised as a defense that Local 895 was defunct prior to the alleged merger with Local 430 and that there was therefore no union in existence to be merged with Local 430 and thus no continuity and no valid merger.

1. The due process issue

The General Counsel and Charging Party contend that the Board is precluded from inquiring into whether the merger election met due process safeguards as part of its traditional two-prong test to determine whether an employer is required to bargain with a union following a merger, but is now limited to the second part of the test (i.e., whether there was substantial "continuity" of identity between the pre and postmerger unions). Both the General Counsel and Charging Party contend that *Seattle-First* stands for the proposition that the Board has no authority under the Act to inquire into union affiliations and other "internal union matters," such as mergers, but rather is limited to determining whether there was a lack of substantial continuity of identity between the pre and postmerger unions that give rise to a question of representation under the Act in order to invoke the Board's authority under the Act to hold elections and certify collective-bargaining representatives. Respondent contends that *Seattle-First* is limited to its facts and holding that the Board may not relieve the employer of its bargaining liability on the basis of a lack of due process finding because nonmembers were not allowed to vote in an affiliation election, and the Supreme Court expressly declined to address the question whether other due process requirements had been met by the affiliating unions in that case, thus giving support to the argument that the Supreme Court recognized that other due process standards must be met in matters such as affiliations, and particularly mergers that were not involved in that case. Respondent also cites a recent Board case, *Fimco, Inc.*, 282 NLRB 653 (1987), in which the Board states that the Supreme Court "has recently held that the Act does not require that nonmembers be allowed to vote in affiliation elections. We, accordingly, reject the Respondent's contention as without merit. *The Respondent presents no other basis for contending that the Union did not provide adequate due process safeguard.*" (Emphasis added.) From the underlined sentence, Respondent contends that the Board, itself, has given a more limited reading of *Seattle-First* and suggests that it will continue to consider alleged due process violations other than contentions concerning the voting rights of nonmembers.

In its recent supplemental decision on review in *Hammond Publishers*, 286 NLRB 49 (1987), which involved an employer's challenge to an amendment of certification following an affiliation election on due process grounds and on a lack of continuity between a pre and postaffiliation bargaining representative, the Board applied its traditional two-prong test, concluded that the due process and continuity requirements had been met, and found it unnecessary to address the issue whether both parts of the test must be met in affiliation cases. The Board stated at 50:

> The Board has traditionally required that two conditions be met before it will grant a petition for the amendment of certification based on an affiliation or *merger*. First, the Board requires that the vote itself occur under circumstances satisfying minimum due process and . . . continuity between the pre- and post-affiliation bargaining representative. [Emphasis added.]

In the *Hammond* case at fn. 8, the Board also noted that the Supreme Court in *Seattle-First* "acknowledged the Board's traditional two-part test but did not have to reach the question of whether both continuity of representation and due process must be satisfied in all affiliation cases." In the *Hammond* case, the Board likewise found it unnecessary to address this issue as it found that both the due process and continuity requirements had been satisfied. Under the facts of the instant case, I find that the due process and continuity of representation requirements have been met as set out, and I thus find it unecessary to address the issue of whether both continuity of representation and due process must be satisfied in a merger case.

With respect to whether the merger election satisfies minimum due process, Respondent has the burden of establishing an irregularity in the voting process as it is Respondent that is relying on the irregularity as justification for its refusal to bargain. *Insulfab Plastics*, 274 NLRB 817 (1985). In the instant case, I find that Respondent has failed to establish that the procedures used in the vote were so irregular or so unmindful of due process as to invalidate the election. *Hammond Publishers*, supra; *East Dayton Tool & Die Co.*, 190 NLRB 577 (1971). Thus, the evidence in this case established that both members and nonmembers were permitted to vote at the merger election, that notice of the merger vote was posted on the bulletin board in the composing room where all employees worked, that union meetings were in November and December before the merger vote on 11 December 1985 at which the merger was discussed, and that Local 895 Trustee Waters obtained permission of Respondent's representative, Vice President of Personnel Spran, to conduct the vote on its premises. Ballots were mailed to

members by the International, and nonmembers were given ballots for voting in the composing room by Local 895 Secretary-Treasurer Sakowski. The vote was overwhelmingly in favor of merger. Although the ballot box for in-person voting of nonmembers was left unattended, It was padlocked according to the testimony of Sakowski, which I credit in this regard over that of Composing Room Manager John McClusky who testified that he did not recall seeing a padlock. Respondent offered no evidence even suggesting that the ballot box or its contents had been tampered with. The only employee who allegedly refused the right to vote was a supervisor, and he had not presented himself to vote but, rather, merely called out to Sakowski and inquired as Sakowski was leaving why he had not been permitted to vote, to which Sakowski replied, "because you are a supervisor."

I find that none of the alleged discrepancies affected the outcome of the election. It is clear that the overwhelming majority of members of Local 895 voted in favor of the merger by returning the mailed ballots in sealed envelopes that were counted separately, according to the unrebutted testimony of Sakowski, which I credit and which showed a total of 74 in favor of the merger and 29 opposed to the merger. Thus, even if all the ballots cast in the composing room were not counted, there was an overwhelming majority in favor of the merger. Moreover, as discussed supra under *Seattle-First*, there was no requirement that nonmembers be permitted to vote to validate the merger election, and the composing room balloting was for the purpose of allowing nonmembers who did not receive mailed ballots to vote. Assuming that one or more members may have voted in the composing room rather than utilize their mail ballot, or even assuming arguendo, they voted in the composing room in addition to voting by mail, the election outcome would not have been affected. Further, there was no evidence that any member did not receive his ballot or was otherwise deprived of the right to cast his ballot. There was no evidence presented that the mail balloting was tainted in any manner whatsoever. Further, with the possible exception of Norma Scheer, a nonmember who gave her ballot to Sakowski whom she stated she trusted completely, although she did not observe him place it in the ballot box, there was no evidence presented that the vote was not secret. I place no reliance or credit on the testimony of Personnel Vice President Spran who testified that he heard the vote was not secret from McClusky and others. Furthermore, McClusky did not contend that the vote was not secret in his own testimony.

With respect to Respondent's contention that it has met its burden of proof sufficiently to shift the burden of proof to the General Counsel in order to prove that the vote occurred under circumstances satisfying minimum due process, I find that this contention is without merit. Initially, I do not find that the alleged discrepancies were so egregious as to shift the burden of proof. In the recent *Hammond Publishers* case, the Board addressed an allegation that an unattended ballot was sufficient to support a finding that an election did not meet due process and, rejecting that contention, specifically noted, as in the instant case, that there was no evidence of any tampering with the ballot box. I similarly do not find the other alleged due process deficiencies, such as the refusal to permit an admitted supervisor to vote or the handling of a single ballot of a single employee, to cast doubt on the election process. Nor do I find that the alleged defunctness, discussed infra, of Local 895 casts doubt on Local 430's majority status. I thus do not find *Royal Coach Lines v. NLRB*, 838 F.2d 47 (2d Cir. 1988),[6] to be controlling under the facts of this case even assuming the Board adopts the rationale of that case with respect to the shifting of burden of proof from Respondent to the General Counsel.

The record also shows no evidence of any challenge by any employee to the conduct of the election. Respondent's attempt to inject a decertification petition filed by an employee in February 1986 was rejected. It is clear that at the time of Respondent's refusal to recognize and bargain with Local 430 there was no evidence of employee dissatisfaction with the merger election process. Furthermore, the decertification petition was filed following a speech by Respondent's president after Respondent's refusal to recognize and bargain with Local president after Respondent's refusal to recognize and bargain with Local 430, and in that speech Respondent's president made implicit promises of improvements in the unit employees' wages and benefits once Respondent no longer had to deal with a union, but could deal independently with the employees.

2. Respondent's defunctness defense

As part of its defense to its refusal to bargain, Respondent has alleged that Local 895 was defunct and thus there was no union for Local 430 to merge with. I find no merit to this defense as the evidence clearly shows that Local 895 and Respondent had an ongoing bargaining relationship for a period of over 30 years, entering into a series of successive collective-bargaining agreements until they reached impasse in January 1985 and met again in April 1985 without success. Local 895's alleged lack of activity between April and 6 December 1985, when Waters (who had been appointed trustee of Local 895 in October 1985) met with the Respondent, did not establish that the Union was defunct. Former secretary-treasurer, Sakowski, testified that the current union leadership was tired and no new leadership could be found. The Local thus sought a trusteeship in order to eliminate the contract stalemate, better serve the members, and to facilitate a merger. Merger discussions were held between officials of Local 895 and Local 430 in October 1986, and approval was obtained from the International organization to commerce preparing for and to conducting merger elections, which were duly conducted. None of the foregoing establishes that the Union was defunct or unwilling or unable to represent its membership. Rather, the evidence discloses that the Union sought the trusteeship and the merger in order to bring fresh leadership to the Union and to eliminate the impasse in contractual negotiations and work for a new contract. Moreover, Respondent carries the burden of

[6] Respondent brought this case to my attention by a postbrief letter.

proof in the assertion of its defense and failed to present any evidence of the unwillingness or inability of Local 895 to serve its members, such as to shift this burden of proof to the General Counsel or to otherwise prove its defense. *Yates Industries*, 264 NLRB 1237, 1250 (1982); *Pioneer Inn Associates*, 228 NLRB 1263, 1264 (1977); *Hershey Chocolate Corp.*, 121 NLRB 901, 911 (1958); *Kent Corp.*, 272 NLRB 735 (1984).

3. The continuity issue

I find that the evidence establishes that Local 430 is the legitimate successor and collective-bargaining representative of Local 895 as the result of the valid merger vote of Local 430 and Local 895 on 11 December 1985 and their subsequent merger effective on 1 January 1986.

I find that the evidence supports a finding of continuity between premerger Local 895 and postmerger Local 430. It is undisputed that two members of Local 895's executive board were appointed members of the executive board of Local 430 on the effective date of the merger, and that less than a month later former Local 895 recording secretary Mel Field was appointed as recording secretary of Local 430 on the resignation of the incumbent secretary. In addition, the chapel, composed of Sun-Sentinel bargaining unit employees, remained in existence and continued in its role to have responsibility for the processing of grievances and the administration of the labor agreement. I make this determination notwithstanding the lack of recognition accorded Local 430 by Respondent and lack of a collective-bargaining agreement in existence. Moreover, the chapel continued to elect its own officers, collect its own dues, and maintain its own assets, savings, and checking accounts. In addition, the chapel continued to have responsibility for input into the collective-bargaining process. Waters testified contract ratification votes, while a Local 430 matter, would routinely be voted on only by the employees of the particular employer with whom a contract is being negotiated. In addition, while the constitution and bylaws of premerger Local 895 became those of postmerger Local 430, they were substantially similar to those of premerger Local 895. The dues structure of Local 895 was also identical to that of postmerger Local 430. Moreover, members of Local 895 were accorded the same rights and privileges of membership after the merger as they had before the merger.

In making its determination whether there has been substantial continuity between a premerger and postmerger union, the Board makes its determination on the "totality of a situation" rather than reliance on "the presence or absence of certain cited criteria." *Yates Industries*, supra. I find that the totality of the circumstances in this case fully supports a finding of substantial continuity between premerger Local 895 and postmerger Local 430. I find that the General Counsel has shown that there was substantial continuity between Locals 895 and 430 following the merger. Conversely, I find Respondent has failed to demonstrate a lack of continuity between Local 895 and Local 430. *Insulfab Plastics*, supra at 821. See also *Quemetco, Inc.*, 226 NLRB 1398 (1976), in which the Board held the choice of representation by employees is of paramount importance over the continuity of representation.

CONCLUSIONS OF LAW

1. The Respondent, News/Sun-Sentinel Company, is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party, Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO has been the exclusive representative for purposes of collective bargaining in the following described appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by Respondent performing composing room work, excluding all office clerical employees, guards and supervisors as defined in the Act.

4. By its withdrawal of recognition from Local 430 and its refusal to bargain with Local 430, Respondent violated Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has committed certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act, including the posting of an appropriate notice. I shall recommend it be required to recognize and bargain collectively with Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO. In the absence of a showing of any special circumstances that would warrant the inclusion of a visitatorial clause, I decline the General Counsel's request to include one as part of the remedy. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, News/Sun-Sentinel Company, Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Miami Typographical Union No. 430 a/w International

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Typographical Union, AFL–CIO as the exclusive bargaining unit representative of its composing room employees employed by Respondent at its Fort Lauderdale, Florida newspaper in Broward County, Florida.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies and purposes of the Act.

(a) Recognize and bargain collectively with Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO, as the exclusive collective-bargaining representative of the composing room employees employed by Respondent at its newspaper facility in Fort Lauderdale, Broward County, Florida.

(b) Post at its Fort Lauderdale, Florida newspaper facility copies of the attached notice marked "Appendix B."[7] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Sil-Base Company *and* Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC, Petitioner. Case 6–RC–9899

September 21, 1988

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

The National Labor Relations Board, by a three-member panel, has considered objections to an election held September 14, 1987, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 13 for and 2 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

On September 28, 1987, the Employer filed timely objections and on October 9, 1987, the Acting Regional Director for Region 6 issued an order directing hearing on objections and notice of hearing. A hearing was held on October 28 and November 2, 1987. On December 11, 1987, the hearing officer filed his report recommending that the objections be overruled and that a certification of representative be issued. The Employer filed exceptions and a supporting brief and the Petitioner filed a brief in opposition to the Employer's exceptions.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings [1] and recommendations, as modified, and finds that a certification of representative should be issued.

In his report, the hearing officer erred by stating that DiPerna's union activity was limited to attending organizational meetings.[2] The testimony shows that DiPerna also made prounion statements at the meetings.[3] Even assuming that DiPerna is a supervisor, however, his prounion conduct does not warrant setting aside the election.

There are three situations in which a supervisor's prounion conduct may warrant setting aside an election. The first is when the employer takes no stand contrary to the supervisor's prounion conduct, and employees may be led to believe the employer favors the union.[4] The second involves the possibility that a supervisor's prounion conduct could coerce employees into supporting the union out of fear of future retaliation by that supervisor.[5] The third is similar to the second situation except that instead of coercion by fear of retaliation the employees could be coerced out of a hope of reward by the supervisor.[6] In assessing whether a supervisor's conduct could reasonably tend to coerce employees in the exercise of their Section 7 rights the Board evaluates "the ability of a supervisor both to reward and retaliate against employees"[7] and the extent of the supervisor's prounion conduct.

The Employer claims that DiPerna's prounion conduct, combined with his alleged ability to discipline employees and assign employees to the undesirable work of fiberglassing, coerced the employees into supporting the Union.[8] We disagree.

The Employer's argument that DiPerna exercised authority over the entire unit by virtue of his ability to transfer employees into the departments [9] he allegedly supervised[10] is without foundation.[11]

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[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] The testimony shows there were approximately six meetings and that DiPerna attended approximately four of the six.

[3] Additionally, employee Wall stated DiPerna was one of the most active union supporters. He also stated, however, that DiPerna was not a leader of the union movement. DiPerna also admitted that he had offered employee VanNatta a ride to one of the union meetings.

[4] There is no such allegation in this case.

[5] *Cal-Western Transport*, 283 NLRB 453 (1987).

[6] Ibid.

[7] Ibid.

[8] The Employer also asserts that DiPerna had the authority to effectively recommend hiring. That is not proved. DiPerna denied he had this authority and stated that he merely showed applicants around the pattern department and, on instructions from owner Suey, had applicants cut a pattern to see how comfortable they were performing the cutting. DiPerna stated he gave his opinion as to which applicant was most comfortable cutting the pattern only on being asked by Suey. He also testified that he did not recommend the hiring of any particular employee. Given DiPerna's position as the only employee in the pattern shop and as the employee with the experience at pattern cutting, DiPerna's role in the hiring process, like his role in the shop generally, could just as well have derived from his experiences and skills as it could from any supervisory authority that might have been granted to him by the Employer. In short, a finding that he is a leadman is as tenable as one that he is a supervisor, based on the evidence here.

[9] The Employer claims that DiPerna was a supervisor in both its pattern and quality control departments. DiPerna denied that he was a supervisor in either department. Again, it appears that any authority he may have exercised in the pattern department could have stemmed from his position as the longest serving employee in that department—which consisted of one or two permanently assigned employees (including DiPerna). See infra, fn. 14. Even if we assume that DiPerna was the supervisor of the employees permanently assigned to both the pattern and quality control departments, however, DiPerna still would have had supervisory authority over, at most, two employees out of an approximately 16-employee unit. In this regard, we note that many of the Employer's examples of DiPerna's exercise of supervisory authority involve employees who, at the time DiPerna is alleged to have exercised his supervisory authority, were assigned permanently to the pattern department.

[10] Shop Supervisor Holmes testified that approximately six or seven employees had helped DiPerna in the pattern department during the previous year.

[11] Although evidence that DiPerna could transfer employees into the departments he allegedly supervised would show a greater potential for coercion by him, it would not be determinative in this case, given DiPerna's limited prounion conduct. See infra, 7–9.

It appears that on occasion employees are transferred into the department in which DiPerna worked to assist DiPerna. However, the testimony indicates that one of the other departmental supervisors—not DiPerna—selected the employee who would assist DiPerna.[12] Also, DiPerna credibly denied that he had veto power over the employees chosen to help him.[13] Consequently, DiPerna's inability to select the employees he might want to reward or punish diminishes any coercive impact his alleged supervisory authority might otherwise have had.

Regarding the assignment of fiberglassing work, while DiPerna stated he had the authority to assign employees to fiberglassing or patternmaking,[14] he also testified that he rarely was given help for anything other than fiberglassing. The record reveals that fiberglassing requires only 5 minutes of training, whereas patternmaking requires greater skill. Because DiPerna was given help only to speed up production, as a practical matter he had virtually no discretion to assign work in order to retaliate against or reward employees based on their union views.

Regarding discipline, the Employer does not claim that DiPerna can take disciplinary action himself but instead asserts that DiPerna can recommend discipline.[15] In this regard the only example cited by the Employer is Holmes' testimony that DiPerna recommended that employee Flohr be fired. DiPerna denied having such authority and explained his purported recommendation to have Flohr fired as nothing more than a description of Flohr's work, from which he himself drew no conclusions concerning Flohr's retention.[16] Moreover, Supervisor Holmes stated that he would review any disciplinary recommendation made by DiPerna "to make sure everything was fair." Consequently, even examining the evidence in the light most favorable to the Employer, we find that the limited number of employees DiPerna controlled because of his inability to select employees for transfer, his lack of real choice in assigning work, and his lack of independent authority to punish employees diminish the coercive impact of whatever supervisory authority DiPerna held.

Nor does it appear that DiPerna had any significant authority to reward employees, which in turn might coerce them into voting for the Union to seek favor with DiPerna. Thus, the employees' wage rates were set by Owner Suey and remained the same when employees transferred among departments.[17] Further, the one example the Employer cited of DiPerna's authority to send employees home early was denied by DiPerna.[18] Moreover, Plant Supervisor Holmes stated that supervisors usually cleared an "early out" with him before letting an employee go home. The Employer also stated that although DiPerna could not grant overtime he could effectively recommend it. Again, DiPerna denies this; in any event, Holmes stated that the recommendation had to be cleared through Suey. Thus, it appears that to the extent DiPerna had authority to reward employees, that authority could be exercised only in circumstances that would effectively minimize any hope on the part of an employee of unmerited reward.

Even if it is true that DiPerna had the supervisory authority ascribed to him by the Employer, in order for that authority to reasonably create fear of retaliation or hope of reward, the employees would have to be aware that DiPerna had that authority. As the hearing officer found, however, there is no indication that the employees had been advised of such authority.[19]

Further, even if we assume that DiPerna had supervisory authority and that the employees were aware of his authority, DiPerna's prounion actions have not been "so marked or inordinate as to lead

[12] DiPerna testified that if management pressed him to get a job done he would ask for help. Sometimes he got help, sometimes he did not. He also stated that even when he received help the other departmental supervisors could recall their employees from the pattern department even though the employees had not completed their work in that department.

[13] DiPerna explained the one example of this alleged veto power cited by the Employer by noting that he merely had asked employee Beyers' supervisor, after Beyers had been selected to help DiPerna, to tell Beyers about the mistake he had made while fiberglassing during an earlier stint in the pattern department. Beyers subsequently has helped DiPerna in the pattern department.

[14] DiPerna attributed this authority to his experience in the pattern department.

[15] Plant Supervisor Holmes did state that DiPerna could take disciplinary action on his own "for something real serious." Holmes also testified, however, that no "real serious" incidents occurred in which DiPerna used this purported authority.

[16] DiPerna specifically denied recommending that Flohr (who at the time was assigned permanently to the pattern department) be fired. DiPerna stated that Holmes asked him how Flohr was doing and that DiPerna told Holmes that Flohr did a pretty good job on some things and that he was lacking in others. DiPerna denied saying anything to Holmes about whether Flohr should continue to work in the department. Holmes' questioning of DiPerna about Flohr, again, can be attributed to DiPerna's experience in the pattern department and that he was the only other employee in the department. The hearing officer did not discuss this evidence. We note, however, that the hearing officer found DiPerna "to be a truthful and forthright witness."

[17] In this regard, Plant Supervisor Holmes stated that DiPerna could recommend pay raises. He also stated that DiPerna had evaluated Flohr—citing the same incident he used to demonstrate DiPerna's alleged authority to recommend discipline of employees (see fn. 16 above). Holmes further stated, however, that he was not sure if DiPerna had ever been told he was supposed to evaluate employees.

[18] Holmes stated that DiPerna had requested that employee Vitale (who at the time was assigned permanently to the pattern department) be allowed to leave work early because his father was dying. According to DiPerna's version, however, DiPerna merely informed Holmes that Vitale was leaving because of his father's health status. DiPerna denied ever telling Vitale that he could go home early.

[19] Employee Wall testified that DiPerna's job was to build patterns and that he was unaware of DiPerna ever disciplining or hiring employees.

the employees to fear possible retribution at [DiPerna's] hands in the event that they reject the Union."[20] The testimony shows that DiPerna's statements[21] made at union meetings were in response to employee questions asking what DiPerna thought of the organizing effort. DiPerna stated that the employees were interested in his opinion on this matter because he had worked for the Employer longer than any other employee. In these circumstances, the prounion statements are nothing more than personal opinions that were expressed without any hint of retaliation or reward.[22] Nor does the assessment of employee Wall, given in response to a leading question, that DiPerna was one of the most active employees supporting the Union require us to set aside the election. Despite that assessment, Wall's testimony indicates only that DiPerna attended union meetings and made the statements described at length in footnote 21, supra. Finally, DiPerna's offer to give a fellow employee a ride to one of the union meetings is not the type of activity that requires invalidating the election.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees employed by Sil-Base Company at its Juniper Street, McKeesport, Pennsylvania facility, who were employed during the payroll period ending August 14, 1987, excluding all office clerical employees, salespersons and guards, professional employees and supervisors as defined in the Act.

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[20] *Stevenson Equipment Co.*, 174 NLRB 865, 866 (1969).

[21] DiPerna's testimony regarding the statements he made is as follows:

Q. Did you make statements in favor of the union to people who worked at Sil-Base?

A. Yes.

Q. Okay. What did you tell them.

A. I just told them, I says, hey, you know, they were—see, they asked me because I had the most time in, they just says, you know, what do you think. I says, hey, just, you know, look how long I've been here and we don't have much to go on. I mean, we should be making more than what we are as far as wages and, you know. Everybody feels the same way, you know, that's all there is to it.

Q. Well, did you tell them anything else?

A. No. That's, you know, basically . . . .

Q. Did you give them any other reasons why they should join the union?

A. No.

Q. You just left it with . . . .

A. The only thing—I just said, hey, if, you know,—they came to me and said they were starting, okay, and I just—I says find, I'll show up at meeting. And I went and then, like I said, they were asking me and I just says I've been there a long time and it's just what I saw. And they all felt that—the way they feel about their wage and everything, that's their own opinion, I. . . .

Q. I am asking you what you said?

A. I just told them the only thing is make sure, if you want this, that everybody sticks together.

Q. Did you tell them why not—why they had to stick together?

A. No. I just says because if you don't stick together then it's not going to go through. If you start it and don't finish it, then nothing's ever going to get accomplished.

Q. Okay, Now, did you do anything else in support of the union?

A. No.

[22] See *NLRB v. Hawaiian Flour Mill*, 792 F.2d 1459, 1464 (9th Cir. 1986), enfg. 274 NLRB 1108 (1985). See also *Fall River Savings Bank*, 246 NLRB 831, 832 (1979) ("Speculation is not to be substituted for evidence of coercion or fear in finding an improper effect on an election."), enfd. 649 F.2d 50 (1st Cir. 1981). Compare *Sheraton Motor Inn*, 194 NLRB 733 (1971) (Board set aside election where supervisor, inter alia, was union's "contact man" during the organizational campaign and told employees that management intended to cut wages if employees did not vote for the union); *Delchamps, Inc.*, 210 NLRB 179 (1974) (Board vacated election when supervisors, inter alia, solicited employees under their control to join the union, sat on the petitioner's organizing committee, and urged employees to attend union meetings and vote for the petitioner.)

Texaco, Inc. *and* John T. Dumesnil, W. P. Schulze, Jack Hart, and Melvin R. Laughlin *and* Oil, Chemical and Atomic Workers International Union, AFL–CIO, and Locals 4–23 and 4–367, Parties to the Contracts. Cases 23–CA–7929, 23–CA–7938–1, 23–CA–7938–2, and 23–CA–7938–4

September 22, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On September 14, 1981, Administrative Law Judge Richard D. Taplitz issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Since the early 1940s OCAW Locals 4–367 and 4–23 have represented certain hourly paid employees at, respectively, the Respondent's Houston and Port Arthur facilities. The most recent collective-bargaining agreements involved here were effective from January 8, 1979, to January 7, 1981. The agreements provided that negotiations could be reopened on certain items. They also preserved the Locals' right to strike no earlier than January 8, 1980,[1] if the parties failed to reach agreement on the reopened items. Each Local invoked the reopener but agreements were not reached by January 8. Local 4–23, on January 8, and Local 4–367, on January 30, began lawful economic strikes. The Respondent thereupon suspended, because of the strikes, payment of accident and sick (A&S) benefits to disabled employees who had been receiving them when the strikes began.

On February 11, the Respondent gave the Houston employees written notice of information previously given Local 4–367 regarding its last prestrike offers as to a number of employee benefits. Concerning the discontinued A&S benefits, the notice contained the following announcement:

> Decision will . . . be reserved regarding the resumption of A&S benefits which were discontinued at the beginning of the strike for those employees who are still disabled after the termination of the strike.

On April 28, the Respondent and Local 4–23 signed a "Memorandum of Agreement" that memorialized their settlement of the economic dispute that had led to the strike and, in addition, their settlement of disputes over the Respondent's administration of its employee benefit plans during the strike. They also signed a separate "Strike Settlement Agreement." A few days earlier, the Respondent and Local 4–367 had settled the Houston strike by means of a similar "Memorandum of Agreement." The charges that led to the instant complaint were filed by the individual Charging Parties on various dates in May.

The judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by withholding benefits under its A&S benefit plan from employees on the commencement of the lawful economic strikes when such employees were eligible for those benefits. We agree with the judge's findings underlying this conclusion for the reasons set forth in section I, below. However, we shall dismiss the complaint based on our finding that the settlement agreements constituted effective waivers by the Locals of the affected employees' entitlements to the A&S benefits at issue. The facts and analysis supporting the dismissal are set forth in section II of this Decision and Order.

I.

The judge, relying on *Emerson Electric Co.*, 246 NLRB 1143 (1979), found a violation based in part on the fact that the disabled employees had not enmeshed themselves in the strikes. In *Conoco, Inc.*, 265 NLRB 819 (1982), however, decided after the judge's decision, the Board held that a disabled employee's participation in a strike no longer disqualifies or limits entitlement to reimbursement for accident or sick benefits withheld by an employer because of a lawful strike.

In *Texaco, Inc.*, 285 NLRB 241 (1987), the Board reaffirmed the abandonment in *Conoco* of the *Emerson Electric* remedial limitation and, going further, overruled the *Emerson Electric* theory of 8(a)(3) and (1) violations. We held in *Texaco* that the lawfulness of the discontinuance of benefit payments to disabled employees on commencement of a strike will be resolved by application of the test set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). Thus, the General Counsel can meet the *Great Dane* burden of showing an adverse effect on employee rights by showing that a benefit withheld because of a strike was an accrued benefit. At that point the employer may be able to defend its action by showing that it had a legitimate and substantial business justification for the cutting off of benefits such as an explicit waiver by the union or the em-

[1] All dates are in 1980 unless otherwise specified.

ployer's reliance on a nondiscriminatory contract interpretation that is reasonable and arguably correct. See *Texaco, Inc.*, supra at 244–246.

We find that here the Respondent withheld an accrued benefit and did so on the basis of the strike to the detriment of the employees' right to engage in a lawful economic strike. The Respondent's A&S benefit plan exists independent of any collective-bargaining agreement and covers all of its regular employees (with exceptions not pertinent here), whether represented by a union or not. The collective-bargaining agreements that were in effect at the facilities involved in this proceeding at the time of the strikes incorporated the A&S benefit plan and obligated the Respondent not to discontinue or reduce benefits under the plan, for employees covered by the agreements, during the term of the agreements.

Eligibility for nonoccupational illness or injury benefits under the plan was established by a minimum of 1 year of "active, continuous, and exclusive service with the Company." The employees whose withheld A&S benefits are the subject of this proceeding were all covered by the collective-bargaining agreement and were actually receiving benefits when the Respondent discontinued them under a general policy of not paying these benefits during a strike. As we found in *Texaco, Inc.*, supra at 246–247, which involved the same A&S benefits plan as the one at issue here, the benefits withheld were accrued benefits. Their discontinuance on the basis of the strikes warrants the inference of discriminatory intent and this constitutes a violation of Section 8(a)(3) and (1) unless the Respondent has sustained its burden of proving a legitimate and substantial business justification. *Texaco, Inc.* is also controlling on the validity of the principal business justification asserted in both cases, a nondiscriminatory contract interpretation. As in *Texaco, Inc.* (at 247–248), we here reject the contention that any reasonable and arguably correct interpretation of the A&S benefits plan permitted the Respondent to disqualify those employees acknowledged to have been eligible for A&S benefits pending their notifying the Respondent and establishing that their continued absence was not due to the strikes. Thus far, then, the Respondent's position does not support a claim of a legitimate and substantial business justification for the cessation of benefits.

II.

We find merit, however, in that portion of the Respondent's defense to the General Counsel's prima facie case that claims that the strike settlement agreements executed by the Locals, and then ratified by the employees, clearly and unmistakably waived the employees' statutory right to be free of discrimination or coercion in the receipt of contractual benefits.

Each of the two memoranda of agreement was "in full and complete settlement of all issues negotiated." Each settlement included a provision entitled "Lump Sum Payment" that stated that:

> In consideration of the Union's agreement to withdraw all contractual grievances and NLRB charges and court proceedings arising out of the Company's administration of employee plans during the strike, and the Union's agreement not to institute any further actions arising out of said circumstances, the Company agrees to provide [a payment of up to $150 to all employees to cover premiums for the hospital-surgical-major medical benefits plan assumed by the employees during the strike].

Immediately following this provision, under the heading "Accident and Sick Benefits," the parties agreed, in relevant part, that:

> . . . for employees who were disabled before the strike began and receiving A&S benefits, such benefits shall be resumed at the time the strike is officially discontinued if satisfactory evidence of continuing disability is established.

An additional "Strike Settlement Agreement" admitted into evidence with respect to the Port Arthur unit obligated each party to dismiss any litigation pending against the other, specifically including "arbitrations, unfair labor practice charges, law suits and grievances" related to any of the benefit plans, and to promise that "no new litigation growing out of or related to the strike will be filed."

In *Energy Cooperative*, 290 NLRB 635 (1988), the Board addresses a question left open in *Texaco* and held that waivers of contractual benefits contained in strike settlements may result in dismissal of charges filed by individual employees over the denial of such benefits. Thus, a collective-bargaining representative may waive its individual members' statutory rights to receive contractual benefits free from discrimination or coercion. See the discussion of *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), and *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), in *Energy Cooperative*, supra at 636. *Energy Cooperative* emphasized *Texaco's* holding that such a waiver is effective only if it is clear and unmistakable. For the following reasons, we find such a clear and unmistakable waiver here.

According to the parties, their memorandum of agreement was "in full and complete settlement of all issues negotiated." Among these issues was the

Respondent's administration of its employee benefit plans, which included the A&S benefits plan at issue in this case. It was expressly in return for the Union's relinquishment of all existing or future claims with regard to employee benefits during the strike that the Respondent provided a limited payment to all employees (including those who were sick or disabled during the strike) for certain insurance contributions under the provision of the agreement entitled "Lump Sum Payment." Thus this provision clearly resolves any claims with respect to employee benefits for the period of the strike.

Further, the "Lump Sum Payment" provision is followed immediately by the one entitled "Accident and Sick Benefits" in which the parties agreed that receipt of normal disability benefits would resume after the strike ended. With this provision they resolved any differences they might have had concerning the employees' entitlement to disability pay during the strike. The parties' agreement that benefits would be resumed after the strike ended clearly reflects the assumption that these benefits were not payable during the strike. That provision must be read in conjunction with the provision that precedes it and with the memorandum as a whole. Thus, the A&S provision makes sense only as part of the complete resolution of all matters regarding contractual employee benefits affected by the strike.[2]

This understanding is reinforced as to the Port Arthur Local by the language of the additional "Strike Settlement Agreement" forswearing "any and all litigation . . . including [that] related to any of the benefit plans," as well as "new litigation growing out of or related to the strike."[3]

Thus, we conclude that the parties' settlement agreements establish that the Locals clearly and unmistakably waived their sick and disabled employees' right to receive contractual A&S benefits for the duration of the strike.[4]

Finally, for the reasons set forth in *Texaco* and *Energy Cooperative*, we shall give effect to these strike settlement agreements that we have found met the demanding standard of clearly and unmistakably waiving the statutory right of individual employees to receive contractual benefits free from discrimination. It effectuates the purposes and policies of the Act to give effect to a private settlement amicably resolving a labor dispute where the union was entitled to waive individual rights in securing the good of the entire unit and was empowered to bind unit members wholly apart from their separate consent. Accordingly, we shall dismiss the complaint.[5]

ORDER

The complaint is dismissed.

[2] We note that no extrinsic evidence was offered regarding the bargaining history of the A&S settlement provision.

[3] As stated above, all the instant charges were filed after the date of the Port Arthur "Strike Settlement Agreement."

[4] That the Houston Local was aware of the A&S issue and understood that the settlement agreement was intended to resolve it is reinforced by the close relationship between the employee benefits language in the memorandum of agreement and the Respondent's earlier notice to the Local and the employees concerning discontinuance of a number of employee benefits, specifically including A&S benefits, during the strike.

Member Cracraft would not rely on either the zipper clause contained in the letter of agreement, or the provision providing for resumption of benefits at the end of the strike as evidence of the parties' intent that individuals' rights to A&S benefits were waived. Rather, in agreeing with her colleagues that the Union waived the employees' contractually provided A&S benefits during the term of the strike, Member Cracraft relies on the language of the lump-sum payment section of the strike settlement agreement in which the parties agreed on a specific lump-sum payment in consideration for the Union's relinquishment of all claims arising from the Respondent's "administration of employee plans during the strike" to find such a waiver.

[5] Given our disposition of this case, we find it unnecessary to address the General Counsel's exception to the judge's denial of the motion to amend the complaint to include approximately 120 names as employees who were affected by the withholding of A&S benefits in a manner similar to the effect on those named in the amended complaint.

Chairman Stephens notes that none of the factors discussed in his concurring opinion in *Energy Cooperative* as possible barriers to the Board's reliance on a settlement are present in this case.

Robert G. Levy II, Esq., for the General Counsel.
Randall N. Finley, Esq., of Houston, Texas, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge. This case was tried in Houston, Texas, on April 14 and 28, 1981. The charge in Case 23–CA–7929 was filed on May 7, 1980, by John T. Dumesnil, an individual. The charges in Cases 23–CA–7938–1 and 23–CA–7938–2 were filed on May 12, 1980, by W. P. Schulze, an individual, and Jack Hart, an individual, respectively. The charge in Case 23–CA–7938–4 was filed on May 20, 1980, by Melvin R. Laughlin, an individual. On July 1, 1980, an order consolidating cases and a complaint issued. The complaint alleged that five individuals,[1] whose names were set forth as discriminatees in the unfair labor practice charges, were discriminated against in violation of Section 8(a)(3) and (1) of the National Labor Relations Act when Texaco, Inc. (the Company) terminated certain employee benefits under its Accident and Sick Benefit Plan (A&S benefits) at the outset of a lawful economic strike. On September 10, 1980, the Regional Director for Region 23 of the Board issued an amended complaint adding the names of five other employees, none of whom had been named in the charges,

[1] A sixth individual, W. A. Bartlett, the Charging Party in Case 23–CA–7938–3 was also named in the complaint. His name and that charge are deleted from the amended complaint.

as discriminatees. At the opening of the hearing, the Company moved to dismiss that part of the complaint that named the five additional discriminatees. That motion was denied. Also at the outset of the hearing, counsel for the General Counsel moved to add approximately 120 names to the complaint. Although, as set forth in detail below, the controlling Board law provides that it is lawful for an employer to withhold A&S benefits from employees who affirmatively demonstrate support of a strike by picketing or otherwise showing public support, counsel for the General Counsel acknowledged that he was in no position to know whether all or any of the employees he intended to amend into the complaint had participated in the strike. For the reasons set forth on the record (Tr. 41–44 and fn. 2 below), I denied the General Counsel's motion to amend. The General Counsel sought special permission to appeal that ruling and by telegram dated April 22, 1981, the Board denied the General Counsel's request without prejudice to the General Counsel's right to renew his contention through the filing of an appropriate exception. In his brief, counsel for the General Counsel in effect moves that I reverse my ruling with regard to the proposed amendment. That motion is denied for the same reasons that the original motion was denied.

Issues

The primary issue is whether the Company violated Section 8(a)(3) and (1) of the Act by discontinuing the accident and sick (A&S) benefits that John T. Dumesnil, Richard M. Holt, Arthur Henry Sr., Chester F. Portier, Percy A. Bland Jr., Charles O. Broussard, Miguel J. Herbert, William P. Schulze, Jack Hart, and Melvin R. Laughlin had been receiving when the Company's employees went out on strike. Subsidiary questions are raised whether some of those employees came off A&S status during the strike because they were well enough to return to work and whether some of the employees disqualified themselves from A&S benefits by affirmatively demonstrating support of the strike by picketing or otherwise showing public support.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Company.

On the entire record[2] of the case and from my observation of the witnesses and their demeanor, I make the following

Findings of Fact

I. THE BUSINESS OF THE COMPANY

The Company, a Delaware corporation with plants and facilities located in Port Arthur and Houston, Texas, is engaged in the production, refining, and distribution of petroleum products throughout many States of the United States. During the 12 months immediately preceding the issuance of the complaint, the Company sold and shipped petroleum products valued in excess of $50,000 directly from its Port Arthur and Houston, Texas locations to places located outside of Texas. During the same period, the Company purchased goods valued in excess of $50,000, which had been shipped from points outside of Texas directly to its Port Arthur and Houston facilities. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Oil, Chemical and Atomic Workers International Union, AFL–CIO (OCAW), and its Locals 4–23 and 4–367 are, and each is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Sequence of Events*

Two of the Company's facilities are involved in this proceeding. One is in Port Arthur and the other is in Houston, Texas.

The Port Arthur facility is Texaco's largest refinery in the United States. It covers about 5000 acres and employs about 6000 people, of whom about 4000 are hourly rated employees. OCAW Local 4–23 has been those employees' collective-bargaining representative since 1942. The strike that gave rise to the issues in this case began on January 8, 1980, and ended at 2:30 p.m. on April 28, 1980. The Port Arthur facility had a long history of strikes. Between January 4, 1969, and the present time there were 10 strikes, all but 2 of which were authorized by Local 4–23. All the authorized strikes were honored by 100 percent of the bargaining unit employees and none of them crossed the picket line. Throughout those strikes, the facility continued to operate through the use of nonbargaining unit personnel. Even during the two nonauthorized wildcat strikes, only a handful of employees crossed the picket line. In 1 of them about 5 employees came to work and the other about 10.

The Houston facility employs about 279 employees. Those employees actually worked out of 25 or 30 different small field offices. OCAW Local 4–367 has been the collective-bargaining representative of those employees since 1944. The strike at that facility began on January 30, 1980, and ended on February 14, 1980. That was the first strike that had ever occurred at the Houston facility. About 202 of the approximately 279 employees at the Houston facility honored the strike and about 77 employees went to work. During the course of the strike, some of the employees went back to work until about 55 percent of the original employee complement remained on strike. Operations continued during the strike with the use of supervisors, exempt personnel, and the hourly employees who did not observe the strike.

At the conclusion of the strike, the Company entered into strike settlement agreements with both Local 4–23 at Port Arthur and Local 4–367 at Houston. The Port Arthur agreement provided for the payment of various sums of money to the employees who did not receive company contributions to health plans. The agreement

[2] Certain errors in the transcript are noted and corrected.

specifically stated that the money was to be paid "in consideration of the Union's agreement to withdraw all contractual grievances and NLRB charges and court proceedings arising out of the Company's administration of employee benefit plans during the strike, and the Union's agreement not to institute any further actions arising out of said circumstances." The Company entered into a similar strike settlement agreement with Local 4–367 at the Houston facility. The parties stipulated that $150 was given to all employees at the Port Arthur facility as part of the overall settlement. The Unions are named in the complaint as parties to the contract, but they are not charging parties. The charges were filed by four individual employees.

The Company had collective-bargaining agreements with OCAW and Locals 4–23 and 4–367 that were effective by their terms from January 8, 1979, to January 7, 1981. About January 19, 1979, they entered into a memorandum of agreement, which provided for a reopener on certain issues. The memorandum also provided that if agreement was not reached on the matters subject to the reopener, the Unions would have the right to strike any time after January 8, 1980. No agreement was reached on such matters in negotiations prior to January 8. Local 4–23 went out on strike on January 8 and Local 4–367 went out on strike on January 30, 1980. The complaint alleges, the answer admits, and I find that the strikes were in accordance with the terms and provisions of the memorandum of agreement. The strikes were, therefore, lawful economic strikes. The parties also stipulated, and I find, that the accident and sickness plans that are described below were in effect during the time of the strike at Port Arthur.[3]

The 1979 to 1981 contract covering the Port Arthur facility employees provided that existing employee benefit plans including the "accident and sick benefit plan" were incorporated in the agreement and that the Company agreed that it would not voluntarily "discontinue, change or modify such Plans during the term of this Agreement in such a way as to decrease the benefits under the said Plans to any employee covered by this Agreement." The 1979 to 1981 contract covering the Houston facility employees provides that existing employee benefit plans including "accident and sick benefit plan" are made a part of the contract. The Company's A&S plan covers both facilities. It sets forth, among other things, a schedule of benefits for nonoccupational illness or injury that starts at 4 weeks' benefits equivalent to full pay and 2 weeks' benefits equivalent to half pay after 1 year of completed service and gradually increases to 13 weeks' benefits equivalent to full pay and 39 weeks' benefits equivalent to half pay after 10 or more years of completed service. The plan provides that in order to qualify for benefits an employee must, if required, present evidence that is satisfactory to the Company showing that the absence is due to illness or accident. It further provides that illness or accident occurring when an employee is not on duty will not serve to disqualify the employee from benefits except where the illness or accident occurs while the employee is on military leave, personnel business leave, layoff, or vacation.

At the time of the January 8, 1980 strike at Port Arthur, the following company employees had qualified for and were receiving A&S benefits: John T. Dumesnil, Richard M. Holt, Arthur Henry Sr., Chester F. Portier, Percy A. Bland Jr., Charles O. Broussard, and Miguel J. Herbert. At the time of the January 30, 1980 strike at Houston, the following company employees had qualified for and were receiving A&S benefits: William P. Schulze, Jack Hart, and Melvin R. Laughlin. All of those employees were on off-duty status under doctor's care when the strikes began. Prior to the beginning of each strike, the Company notified the Unions that A&S benefits would be discontinued for the duration of the strike.

A&S benefits were discontinued for the duration of the strike. That discontinuation was based on a longstanding policy of the Company to refrain from paying A&S benefits during a strike. The Company made no inquiry whether employees who had been on A&S immediately before the strike engaged in any picketing or other strike-related conduct during the strike. None of the named employees ever notified the Company that they were disavowing the strike and none of them protested to the Company during the strike about the cutoff of the A&S benefits. The Company's policy of not making A&S payments during a strike was instituted following a strike in 1967. Since that time no payments of A&S benefits have been made during a strike, with exceptions not applicable here.

The parties stipulated and I find that as to the 10 employees named above: each was a member of OCAW during his employment with the Company; each was a member of the Union in good standing throughout that time; each supported the Union generally throughout that time; each accepted the monetary compensation that was part of the strike settlement agreement between OCAW and the Company in 1980; no release was obtained in connection therewith; and the constitution and bylaws of OCAW provide that members who hinder a lawfully called strike are subject to fines and/or expulsion.

Before discussing the individual situations of the alleged discriminatees, it is helpful to review the applicable law.

B. *The Controlling Principles of Law*

The controlling law applicable to this case is set forth in *Emerson Electric Co.*, 246 NLRB 1143 (1979), enfd. as modified 650 F.2d 463 (3d Cir. 1981).[4] That case involves facts strikingly similar to the ones in issue here. In that case the employer had an A&S benefit plan in which benefits were based on length of employment. The employer made the decision to discontinue payment of benefits in the event of a strike before the strike action was taken. The employees engaged in a lawful economic strike that was 100percent effective. No employees went to work. Upon the commencement of the strike, the em-

[3] The strike at Houston began later and ended earlier than the Port Arthur strike, and this finding therefore also covers that strike.

[4] See also *Walter Motor Truck Co.*, 256 NLRB 1059 (1981).

ployer discontinued A&S benefits to employees who had been receiving them at the time the strike began and no such payments were made for the duration of the strike. At the conclusion of the strike, the employer and the employees' collective-bargaining representative entered into an agreement under which they both undertook to withdraw all pending charges arising out of the strike, including proceedings brought by or against individuals. The Board held that the A&S benefits had accrued as a result of the past work performed and that the employer had violated Section 8(a)(3) and (1) of the Act by discontinuing the A&S benefits. In substance, the Board held that the employer had imposed sanctions on some employees because other employees engaged in a lawful strike. The Board did not find significant the fact that the strike was 100-percent effective or that the union agreed to the withdrawal of all charges.[5] It also did not consider significant the fact that none of the employees on A&S notified the company that they disavowed the strike.[6] However, the Board went on to hold that an employee on A&S could lose his benefits if he enmeshed himself in the ongoing strike by picketing or otherwise showing public support for the strike. As the Board stated in *Emerson*, supra, 1143–1144:

> However, while disabled employees need not affirmatively disavow the strike action, neither can they participate in the strike without running the risk of forfeiting benefits prospectively. In this regard, the Administrative Law Judge has incorrectly concluded that Respondent may not rely on evidence that some of its employees who had been receiving disability benefits prior to the strike were later seen participating in the strike by their appearance on the picket line. Although a showing of participation in the strike does not justify *post hoc* Respondent's initial termination of benefits to these employees, we nevertheless do not consider participation in the strike to be protected expressions of opinion, as found by the Administrative Law Judge. For all practical purposes, any employee, disabled or sound, who affirmatively demonstrates his support of the strike by picketing or otherwise showing public support for the strike, has enmeshed himself in the ongoing strike activity to such an extent as to terminate his right to continued disability benefits. This result represents a fair accommodation between the rights of employees and the interests of employers. For, while employees have the protected right to receive disability benefits without disavowing the strike, an employer should not be obligated to finance a strike against itself, as would be the case if we ordered Respondent to pay such benefits for the period during which the disabled individuals participated in strike activity.
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> Accordingly, we now hold that for an employer to be justified in terminating any disability benefits to employees who are unable to work at the start of a strike it must show that it has acquired information which indicates that the employee whose benefits are to be terminated has affirmatively acted to show public support for the strike. Barring such affirmative action, of course, we agree with the Administrative Law Judge that the disabled employees found herein to have been discriminated against are entitled to S and A benefits for the full length of their sickness or disability. [Footnotes omitted.]

The Third Circuit Court of Appeals agreed with the Board's finding that the discontinuation of A & S benefits violated the Act. The court's reasoning is particularly relevant with relation to certain arguments made in the instant case by the Company. The court held (650 F.2d 463, 468–469):

> The relevant precedents establish the posts between which this issue falls. On one side, as the employer argues, it is not required to finance a strike against itself by paying wages or other similar expenses *General Electric Co.*, 80 N.L.R.B. 510 (1948) (wages); *Towne Chevrolet*, 230 N.L.R.B. 479 (1977) (insurance policy premiums); *Ace Tank and Heater Co.*, 167 N.L.R.B. 663 (1967) (medical insurance premiums). On the other side, an employer may not withhold payment of already earned or accrued benefits contingent upon the cessation by employees of a legitimate economic strike. This situation has arisen most frequently in the context of accrued vacation benefits. See *N.L.R.B. v. Great Dane Trailers, Inc.* [388 U.S. 26 at 32 (1967)]; *Allied Industrial Workers, Local 289 v. NLRB*, 476 F.2d 868, 875–876, 878 (D.C. Cir. 1973); *NLRB v. Jemco, Inc.*, 465 F.2d 1148 (6th Cir. 1972), *cert. denied*, 409 U.S. 1109, 93 S. Ct. 911, 34 L.Ed. 2d 696 (1973); *NLRB v. Frick Co.*, 397 F.2d 956 (3d Cir. 1968). Accord, *Indiana & Michigan Electric Co.*, 236 N.L.R.B. 986 (1978) (employer unlawfully withheld accumulated leave pay until employee ceased strike), *enforced without opinion*, 610 F.2d 812 (4th Cir. 1979).

[5] Regarding the strike settlement agreement in which the employer and the union agreed to withdraw all charges, the Board affirmed the ruling of the administrative law judge that the Board enforces public and not private rights and that the Board's power to prevent unfair labor practices cannot be divested by a private contractual agreement of the parties. While the Board certainly is not precluded from jurisdiction by a private agreement, a serious argument can be made that the Board should, as a discretionary matter, decline to assert its jurisdiction where a strike settlement agreement resolves all issues between the parties and the union has fairly represented the employees in the bargaining unit. A union can, in some circumstances, trade away statutorily granted rights in return for other benefits. Even the fundamental right to strike can be given up by execution of a contract containing a no-strike clause. Where after a bitter strike a company, on behalf of itself, and a union, on behalf of the employees it has a statutory duty to represent, resolve all their differences and agree to a stable contractual relation, their further agreement that all litigation be discontinued does go a long way toward fostering the goal of industrial harmony. However, the Board and the Third Circuit Court of Appeals have not viewed the problem in those terms.

[6] To that extent, the Board overruled one of its earlier cases, holding: Consequently, an employer may no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits. To allow the termination of such benefits to certain employees as a result solely of the strike activities of others is to penalize the employees who have not yet acted in support of the strike. To the extent that *Southwestern Electric Power Company* [216 NLRB 522], is inconsistent with our decision herein, it is hereby overruled. [Fn. omitted.]

In determining whether the S and A benefits in question fall most closely to one side or the other, the Board adopted the findings and conclusions of the ALJ that:

> the benefits being paid the sick people were not compensation for contemporaneous delivery of services at all, but rather payment for past work performed. Their entitlement to that money depended not one wit upon their working at that time. That it was deferred payment for work—albeit conditional upon their being sick and disabled—is true, but for work performed by them in the past, not in the present. Indeed, this is why the man who worked 30 years received more weeks of S and A benefits while sick than the man who had only performed as an employee a year, or two, or three. If the sick man must come out of the hospital and work during a strike to receive a benefit he sweated for in prior years, must the retiree, who is collecting the pension he earned over 35 years, also come back, merely because the working complement is striking at the moment? To ask the question is to answer it.

Accrued benefits, in contrast to wages, are deferred compensation for work already done. They may take the forms of wages due for past work, vacation time, seniority rights and other conditions of employment linked to past service. E.g., *NLRB v. Darling & Co.*, 420 F.2d 63 (7th Cir. 1970), *enforcing* 170 N.L.R.B. 1068 (1968) (severance pay); *Swift Service Stores, Inc.*, 169 N.L.R.B. 359 (1968) (Christmas bonus). Such benefits may be defeasible; for example, vacation time may be forfeited if not taken within a calendar year. The test in deciding if benefits have accrued is whether they are due and payable on the date on which the employer denied them. *Allied Industrial Workers, Local 289 v. NLRB, supra*, 476 F.2d at 876.

The S and A benefits in this case have the distinguishing characteristic of accrued benefits. As the ALJ and the Board found, the right to and the total amount of benefits are tied to the duration of past services and the wages paid for them. Although they are conditional on the employee suffering and continuing to suffer a disabling illness or injury, they do not depend on any return to work or on any future services to the employer.

Wiegand contends that the continued payment of benefits is conditional also on no strike occurring because the applicable benefit plan defines disability as the condition of being unable to work "solely because of" illness or injury. It argues that here the employees would not have worked during the strike because they were union members and because the strike was fully effective. Since they were not absent from their jobs solely because of physical disability, it claims they are not entitled to benefits.

We agree with the Board that the employer's reading of the disability definition is not tenable. The plan defines disability in terms of the employee being prevented from engaging in his or her "regular and customary occupation" because of illness or injury. This definition turns on the physical capacity to carry on one's occupation. Nor can we accept the employer's suggestion that payment of S and A benefits is dependent upon the availability of work for that particular employee. It has pointed to no language limiting the right to benefits in such a way.

In short, nothing in the record of this case indicates that the benefit plan contemplated that employees who were incapable of performing their usual occupations for the employer would not be deemed disabled for the purposes of receiving benefits. Rather, if an employee is certified as disabled, the only relevant consideration within the period for which benefits are due is whether the employee has again become able to work. Therefore, we find substantial basis supporting the Board's conclusion that the S and A benefits were accrued benefits and not wages, and were due and payable within the period of the strike.

However, the court disagreed with the Board's holding to the extent that the Board had found that benefits could be withheld for periods after the employees actually participated in strike activity or showed public support of the strike. On that issue, the court modified the Board's Order to authorize payment of A&S benefits "for the maximum period of each disabled employees' eligibility or for such employees' period of disability as defined in the plan, whichever is shorter." The court reasoned as follows (640 F.2d 463, 473–474):

> The Board asserts that its remedy serves the well established policy of protecting an employer from financing a strike against itself. E.g., *General Electric Co.*, 80 N.L.R.B. 510 (1948). However, the entire basis of the Board's decision was that the S and A payments were to be considered as accrued benefits. Since an employer may not deny a striking employee accrued benefits, such as vacation pay, because of his or her active participation in a strike, it follows that the employer may not deny the S and A benefits merely because of the disabled employee's approval of or participation in strike activity.
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> . . . . .
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> Furthermore, the Board's order in this case is inconsistent with its holding, still viable, that an employee who pickets during off-duty time cannot be regarded as a "striker" against whom an employer can act.

The logic behind the court of appeals' decision is persuasive. Employees who strike engage in a protected activity. The strike also involves a withholding by employees of present services and as their pay is remuneration for present services the employer has no duty to compensate them for the time when they are out on strike. In that sense an employer need not finance a strike against itself. However, the employees on A&S are unable to work through physical disability and therefore they are not voluntarily withholding services from an employer in

support of a labor dispute as are the strikers. They are not strikers and the A&S benefits they receive are not geared to present services. Under the A&S plan, the benefits accrue as a result of past work performed. There is no nexus between present services and pay the way there is with strikers. Under Section 7 of the Act, employees have the right to engage in concerted activities and also have the right to refrain from engaging in such activities. Employees who are not strikers such as those here who received A&S benefits because of their physical incapacity to work, engage in protected concerted activity when they either assist or refrain from assisting in a strike. However, as their benefits are not keyed to current pay for current work, a serious argument can be made that their benefits cannot be terminated for engaging in such activity. Under current Board law an employer can discontinue A&S benefits to employees who actively support a strike, even though the effect of that discrimination would be to discourage union activity. The employer is not only permitted but is required to continue A&S benefits to employees who refrain from actively supporting the strike. That also would be a discrimination that would discourage union activity. The employees' right to actively support or to refrain from actively supporting a strike is equally protected. Yet, under current Board law, an employee who actively supports a strike loses his right to receive A&S benefits while an employee who chooses to refrain from such action continues his entitlement. Under the court of appeals' analysis of the law, such an incongruity could not occur. Disabled employees who chose to actively support a strike would be treated the same as those who chose to refrain from such action. However, when there is a conflict between the Board and a court of appeals, an administrative law judge is required to follow the Board law. *Regency at the Rodeway Inn*, 255 NLRB 961 (1981). As the Board held in *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964):

> In numerous instances, in connection with his consideration of the allegations of the complaint that the Respondent violated Section 8(a)(2) and (3) of the Act, the Trial Examiner [now administrative law judge] relied, not on applicable Board precedent, but instead on certain decisions of U.S. Courts of Appeals which expressed views contrary to those of the Board, and which the Board has not accepted. The Trial Examiner's reliance on such court decisions constitutes fundamental error. As the Board has stated and reiterated:[2]
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> > It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. But it is not for a Trial Examiner to speculate as to what course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the Trial Examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

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[1] *Insurance Agents' International Union, AFL–CIO (The Prudential Insurance Company of America)*, 119 NLRB 768, 773.

[2] E.g., *Novak Logging Company*, 119 NLRB 1573, 1575–1576. See also *Local 1426, International Longshoremen's Association, AFL–CIO (Heide and Company, Inc.)*, 128 NLRB 198, 205–206; *Reliance Fuel Oil Corp.*, 129 NLRB 1166, 1177; *North Country Motors, Ltd.*, 133 NLRB 1479, 1485.

C. *The Alleged Discriminatees*

1. Background

As is set forth above all 10 of the alleged discriminatees named in the complaint were qualified for and were receiving A&S benefits at the time the strike occurred at the plant in which each was working. Upon the commencement of the strike and for the duration thereof, A&S benefits were discontinued. Under the controlling Board law set forth above, there are only two questions remaining to be considered. The first is whether any of the alleged discriminatees should have been removed from the A&S rolls during the course of the strike because their physical condition permitted them to return to work. The second question is whether any of them enmeshed themselves in ongoing strike activity by affirmatively demonstrating support of the strike by picketing or otherwise showing public support for the strike. At such time as an employee became ineligible for A&S benefits because of his physical condition or because of his active strike support, the Company would have no further obligation to pay A&S benefits. Until that time the Company would have such an obligation.

2. The individual situations at Port Arthur

a. *John T. Dumesnil*

Dumesnil is an employee at Port Arthur facility. At the time of the strike on January 8, 1980, he was on A&S because of a hernia-type operation that had been performed on January 3, 1980. On February 18, 1980, he was released by his doctor to return to work. He did not return to work because of the strike. The General Counsel concedes in his brief that Dumesnil's A&S benefits terminated on February 18 when he was released by his doctor. Between January 8 and February 17, Dumesnil did not attend any union meetings and did not engage in any picketing. About 20 days after the strike began, which would place it about January 28, Dumesnil went to the union hall to tell them about his physical condition and to visit with the other union members. That action did not enmesh him in the ongoing strike activity to such an extent as to terminate his right to continued disability benefits. About 20 days later (which would place it about February 17, 1980), Dumesnil was scheduled for strike duty a second time. On that occasion he drove to the picket line with another employee and de-

livered coffee to the pickets. There is no need to consider whether that conduct enmeshed Dumesnil in the union activity because his A&S benefit eligibility terminated on February 18, 1980. The February 17 date was only an approximation based on adding two 20-day periods together from the commencement of the strike and in any event, there was no indication of what time of day Dumesnil delivered coffee to the picketers. If he became disqualified from A&S benefit late on January 17, it probably would have become effective as of January 18.

I find that the Company violated Section 8(a)(1) and (3) of the Act by failing to make A&S benefits payments to Dumesnil from January 8 to February 18, 1980.

b. *Richard M. Holt*

Holt is an employee at the Port Arthur facility. At the time of the strike on January 8, 1980. Holt was receiving A&S benefits because of an upper respiratory infection and mononucleosis. He was released by his doctor to return to work on February 29, 1980, but he did not return to work because from that time on he was on strike. Between January 8 and February 29, 1980, he did not attend any union meetings and did not serve on the picket line. There was no evidence he engaged in any strike-related activities during that time.

I find that the Company violated Section 8(a)(1) and (3) of the Act by failing to make A&S benefit payments to Holt from January 8 to February 29, 1980.

c. *Arthur Henry Sr.*

Henry did not testify and there is no evidence in the record concerning him except to establish that he was a Port Arthur employee who was on A&S at the time of the January 8, 1980 strike. As all A&S benefits were discontinued on January 8, 1980, his benefits also ended. There is no evidence that he engaged in any strike-related activity. I find that discontinuation of A&S benefits to Henry on January 8, 1980, was in violation of Section 8(a)(1) and (3) of the Act. The question of whether Henry could have been removed from A&S thereafter either because he was physically able to return to work or because he engaged in strike-related activity is still open. Counsel for the General Counsel, in his brief, states that the Company's counsel has represented that Henry was a person who converted to longterm disability and who the Company already made whole. Counsel for the General Counsel urges in his brief that those matters be left to the compliance stage of the proceeding. The Company, in its brief, urges as a general matter that if the finding is made that any employee is entitled to A&S benefits, the question of when such employee recovered from illness or otherwise acted in a manner disqualifying him from benefits should be left to the compliance stage of the proceeding. In view of those positions and the state of the record, I recommend that a determination as to the amount of money, if any, due to Henry be determined in a compliance proceeding.

d. *Chester F. Portier*

Portier underwent a double bypass heart operation on August 17, 1979. At that time his doctor told him he would be able to return to work in about 3 months. Portier's testimony was so confused and internally inconsistent that it is difficult to make clear findings of fact. The following description of events is synthesized from certain parts of Portier's testimony that appeared credible and from various company records.

Sometime prior to the January 8, 1980 strike, one of Portier's doctors told him that he could go back to work. He called the Company and spoke to company nurse Liz Dorray. When he told her what the doctor said the nurse said that she would get in touch with his doctor. An entry on the company nurse's record dated January 3, 1980, states "Doctor Elster's office says this man has been released to R.W. [return to work] 1/7/80." The nurse called Portier and told him that the doctor did not want him to pick up things over a certain weight. She said that she would get in touch with his supervisor and would call him back but he was not to work until his supervisor spoke to him. The Company's visiting nurse record shows that on January 8 the Company mailed out another medical certificate concerning Portier and that on January 12 it received the medical certificate back with a return-to-work date of February 1, 1980. A claim statement in the Company's file signed by a Dr. E. K. Massin states that he last saw Portier on January 10, 1980, that Portier's condition and prognosis were good, and that, in his opinion, Portier could resume work on February 1, 1980. No restrictions on work were indicated. Portier testified that he was released by Dr. Massin to return to work on February 1, 1980, but that he did not go to work because he thought the Company was supposed to call him whenever they were ready for him. I do not credit Portier in that regard. There was some question about his return to work before the strike began, but that had nothing to do with the February 1, 1980 date. Portier's doctor told both Portier and the Company that Portier could return to work on February 1, 1980, but Portier, for his own reasons, decided no to do so. I find that Portier was physically able to return to work on February 1 and that as of that date he was no longer entitled to receive A&S benefits. The day the strike was over, Portier went to his doctor and obtained a note saying that he could return to work on the following day. Though the note was on a form that had a blank to be filled in to show when the patient was under the doctor's care, that blank was not filled in.

Portier did not visit the picket line during the strike. He only visited the union hall on one occasion and he went there to have his name removed from the striker list.

I find that the Company violated Section 8(a)(1) and (3) of the Act by failing to make A&S benefit payments to Portier from January 8, when the strike began, to February 1, 1980, when Portier no longer qualified for A&S benefits because his physical condition was such to allow him to return to work.

e. *Percy A. Bland Jr.*

Bland is an employee at the Port Arthur facility. At the time of the strike on January 8, 1980, he was on A&S because of a stomach ulcer. He was not released to return to work by his doctor until May 9, 1980, which was after the strike ended on April 28, 1980. During the course of the strike, Bland did not engage in any picketing or visit the picket line. The only time he visited the union hall was to attend an arbitration proceeding about April 1. There is no evidence he engaged in any strike-related activity.

I find that the Company violated Section 8(a)(1) and (3) of the Act by failing to make A&S benefit payments to Bland from January 8 to April 28, 1980.

f. *Charles O. Broussard*

Broussard is an employee at the Port Arthur facility. At the time of the strike on January 8, 1980, he was on A&S because of a cataract operation he underwent on December 17, 1979. On April 27, 1980, the day before the strike ended, Broussard saw his doctor and was released to return to work the following day. He returned on April 28, which was the day the strike ended. It could be merely a coincidence that Broussard's physical condition was so improved that he could return to work on the same day that the strike ended. I am extremely suspicious of such coincidences. However, Broussard appeared to be a credible witness and I am unprepared to discredit him merely on the basis of suspicious circumstances.

During the strike Broussard did not take part in the picketing, visit the picket line or the union hall, and did not engage in any activity for the Union.

I find that the Company violated Section 8(a)(1) and (3) of the Act by failing to make A&S benefit payments to Broussard from January 8 to April 28, 1980.

g. *Miguel J. Herbert*

Herbert is employed at the Port Arthur facility. At the time of the strike on January 8, 1980, he was on A&S because of a ruptured appendix he had suffered on November 30, 1979. He was released by his doctor to return to work on April 21, 1980, but he did not report for work at that time because he wanted to honor the picket line. From the time the strike began until April 21, he did not visit the union hall or the picket line.

I find that the Company violated Section 8(a)(1) and (3) of the Act by failing to make A&S benefit payments to Herbert from January 8 to April 21, 1980.

3. The individual situations at Houston

a. *William P. Schulze*

Schulze is employed at the Houston facility. At the time of the Houston strike on January 30, 1980, Schulze was on A&S because of heart disease. He was released by his doctor to return to work on March 4, 1980, which was after the strike ended on February 14, 1980. Schulze had been a member of the workmen's committee that negotiated the 1980 contract, but he resigned before the strike began. During the strike he did not visit the picket line, take part in the picket line, or visit the union hall.

I find that the Company violated Section 8(a)(1) and (3) of the Act by failing to make A&S benefit payments to Schulze from January 30, which was the commencement of the strike, through February 14, which was the end of the strike.

b. *Jack Hart*

Hart was employed at the Houston facility. He did not testify at this proceeding. The evidence does establish that he was receiving A&S benefits at the time of the January 30 strike and that all such benefits were discontinued for the duration of the strike.

The Company's division superintendent of employee relations, Robert E. McVey, testified that Hart retired February 1. However, the record does not indicate whether that was February 1, 1980, or February 1, 1981. There is no evidence in the record regarding whether Hart's physical condition allowed him to come off A&S after the strike began on January 30 and no evidence relating to whether Hart engaged in any strike-related activity. In his brief, the General Counsel states that the Company maintains through its counsel that Hart retired in February but that no representations were made concerning what benefits, if any, were paid to him. As with Henry, as discussed above, I find that the Company violated Section 8(a)(1) and (3) of the Act by discontinuing Hart's A&S benefits on January 30 but I leave to the compliance stage of this proceeding whether Hart is entitled to any monetary payment and, if so, the amount of such payment.

c. *Melvin R. Laughlin*

Laughlin is employed at the Houston facility. At the time of the strike at Houston on January 30, 1980, he was on A&S because of a lower back pain. He was released by his doctor to return to work on February 20, 1980, which was after the strike ended on February 14, 1980. During the strike he did not engage in any picketing or visit the picket line. He did not visit the union hall. There was no evidence to indicate that he had engaged in any strike-related activity. He had been on the Union's negotiating committee at one time, but he left that position befor the strike began.

I find that the Company violated Section 8(a)(1) and (3) of the Act by failing to make A&S benefit payments to Laughlin from January 30 through February 14, 1980.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Company, as set forth in section III, above, occurring in connection with the operation of the Company described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Company has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company unlawfully withheld payments under its accident and sick benefit plan to the employees named below, I recommend that the Company be ordered to make them whole for the loss of benefits by payment to each of them the sum of money equal to the amount he normally would have received under the accident and sick benefit plan between the dates set forth below. Interest is to be paid thereon and is to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[7]

Payments are to be made for the following periods:

John T. Dumesnil	January 8 to February 18, 1980
Richard M. Holt	January 8 to February 29, 1980
Arthur Henry Sr.	Amount due, if any, to be determined in a compliance proceeding
Chester F. Portier	January 8 to February 1, 1980
Percy A. Bland Jr.	January 8 to April 28, 1980
Charles O. Broussard	January 8 to April 28, 1980
Miguel J. Herbert	January 8 to April 21, 1980
William P. Schulze	January 30 through February 14, 1980
Jack Hart	Amount due, if any, to be determined in a compliance proceeding
Melvin R. Laughlin	January 30 through February 14, 1980

[7] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. OCAW and its Locals 4–23 and 4–367 are, and each is, a labor organization within the meaning of Section 2(5) of the Act.
3. The Company violated Section 8(a)(1) and (3) of the Act by withholding benefits under its accident and sick benefit plan from employees during a strike when such employees were eligible for coverage under that plan because of physical disability and such employees had not enmeshed themselves in ongoing strike activity by picketing or otherwise showing public support for the strike.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Owens Illinois, Inc. *and* Louise M. Colarusso. Case 4–CA–16071

September 22, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On February 5, 1988, Administrative Law Judge Robert W. Leiner issued the attached decision. The General Counsel filed exceptions and a brief in support of the exceptions and in support of the decision, and the Respondent filed cross-exceptions and a brief in support of the cross-exceptions and in support of the decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

We agree, for the reasons set forth by the judge, that the Respondent violated Section 8(a)(1) of the Act by denying employee Louise Colarusso a pay raise scheduled to begin on April 1, 1986,[3] by suspending her on March 20, and by discharging her on April 8. We disagree, however, with the judge's recommendation that the Respondent not be ordered to reinstate Colarusso to her previous position with full backpay.

The judge based his recommendation on Colarusso's "examples of untruthfulness" in her testimony at the hearing. The specific examples enumerated by the judge were: (1) Colarusso's testimony that Maintenance Supervisor McHale told her on March 10 that the vents in the medical department had been cleaned and her subsequent accusation that Safety Director Guffrovich had had the vents cleaned; (2) Colarusso's "evasive" testimony concerning whether Industrial Relations Director Shank asked her on March 20 for a copy of the Kirby Health Center report; (3) Colarusso's testimony that Union Shop Steward Slavoski told her that employees were complaining of tiredness, burning eyes, or headaches due to air quality; (4) Colarusso's statement to Shank [4] on March 19 that she had torn up and thrown away the Kirby Health Center report when in fact she had other copies of it; and (5) Colarusso's testimony that she made entries in her diary regarding the significant events in this case at the time the events occurred.

The Board has stated that it will withhold its usual remedy of reinstatement and backpay from a discriminatee who makes false statements at a hearing when the discriminatee's conduct "amount[s] to a malicious abuse of the Board's processes under circumstances which require forfeiture of remedy to effectuate the purposes of the Act." *Service Garage*, 256 NLRB 931 (1981). We find, for the reasons explained below, that it would not effectuate the purposes of the Act to deny Colarusso a full remedy.

The judge did not find Colarusso to be a generally untrustworthy witness. Although he discredited those portions of her testimony listed above, he credited the major portion of her testimony and relied on this credited testimony in finding that the Respondent violated Section 8(a)(1) as alleged in the complaint by the General Counsel and in the charge by Colarusso.

In light of the fact that Colarusso was a generally trustworthy witness, we find the judge's recommended remedy unnecessarily harsh. In fashioning an appropriate remedy, we must be mindful that "[t]he Board . . . does not exist for the 'adjudication of private rights'; it 'acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining.'" *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941), quoting *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940). The judge's recommended remedy disregards this principle. In fact, his denial of the normal remedy leaves the effects of the Respondent's unlawful conduct unremedied and thus fails to effectuate the policies of the Act. See *Multi-Hydromatic Welding Co.*, 113 NLRB 755, 757 (1955).

Other factors also support the ordering of reinstatement and backpay in this case. The Respondent has completely failed to meet its burden of establishing that Colarusso is unfit for further employment with the Respondent.[5] The Respondent

[1] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Member Johansen, who did not participate in *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (1987), agrees with the judge's conclusion that employee Colarusso was engaged in protected, concerted activity.

[3] All dates are in 1986 unless otherwise noted.

[4] The judge mistakenly recited that this statement was made to Guffrovich rather than to Shank.

[5] The Board has described a respondent's burden in such cases as follows:

> When seeking to be excused from his obligation to reinstate or to pay backpay to a discriminatee because of misconduct which was not a factor in the discriminatory action, an employer has a heavier

Continued

never contended to the judge, either at the hearing or in its posthearing brief, that if the judge found the violations as alleged, Colarusso should be denied reinstatement and backpay because of her false statements in her testimony. Nor did the Respondent introduce any evidence to establish that Colarusso's false testimony would have any impact on her performance if reinstated.

The judge's speculation, based on no record evidence, that reinstatement would negatively impact on Colarusso's performance because she "occupies a delicate position in the health field where employer and employee confidence are concerned" neither meets the Respondent's burden nor nullifies the need for the Respondent to meet this burden. Further, the soundness of the speculation is suspect, given the fact that the Respondent's officials who testified were also discredited by the judge, at least in part, and there is no indication in the record that the Respondent took any action whatsoever against these officials. Cf. *Service Garage*, supra (reinstatement not ordered when the respondent affirmatively established that it would not have hired the discriminatee if it had been aware that the discriminatee falsified his employment application). Also, we note that it is undisputed that during her employment Colarusso had been rated as a "highly effective" employee.[6]

For all these reasons, we find, contrary to the judge, that it will not effectuate the purposes of the Act to require forfeiture of the traditional remedy of reinstatement with full backpay.[7] Although we do not condone Colarusso's false testimony at the hearing, we do not find that conduct, under the circumstances present in this case, justifies the penalties imposed on Colarusso by the judge. See generally *American Navigation Co.*, 268 NLRB 426 (1983).[8] Accordingly, we will modify the judge's recommended Order to provide reinstatement and full backpay for Colarusso.

AMENDED REMEDY

We will order the Respondent to offer discriminatee Louise M. Colarusso immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination practiced against her with backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*.[9]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Owens Illinois, Inc., Pittston, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer Louise M. Colarusso immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination practiced against her with backpay to be computed in the manner set forth in the amended remedy section of this decision."

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burden than when he is merely seeking to justify the original discrimination. In the former case, he has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to "efficiency in the plant." [*Mandarin*, 228 NLRB 930, 931–932 (1977), quoting *O'Daniel Oldsmobile*, 179 NLRB 398, 405 (1969).]

[6] The circuit court cases relied on by the judge to deny reinstatement and backpay to Colarusso are distinguishable. In *NLRB v. Magnusen*, 523 F.2d 643 (9th Cir. 1975), the court denied reinstatement to a discriminatee who admitted after the hearing that he had given false testimony and that he had in fact claimed and been paid for work that he had not performed. The court emphasized that the discriminatee had "stole[n] from his employer and . . . severely impeded the vital fact-finding process by repeated[ly] lying . . . ." (Id. at 646.) In the instant case, however, Colarusso has engaged in no egregious conduct against the Respondent. Nor, in light of her general credibility, has she "severely impeded" the factfinding process. Similarly, unlike here, the discirminatee in *NLRB v. Jacob E. Decker & Sons*, 636 F.2d 129 (5th Cir. 1981), was convicted of a felony after his discharge, and the respondent in *NLRB v. Western Clinical Laboratory*, 571 F.2d 457 (9th Cir. 1978), introduced evidence that the discriminatee was incompetent to perform his laboratory duties and might thereby endanger the health and safety of patients. Finally, the court in *Iowa Beef Packers v. NLRB*, 331 F.2d 176 (8th Cir. 1964), denied reinstatement to a discriminatee whose testimony the judge discredited in toto and who the judge found lied on the face of the charge that was filed. In the instant case, however, Colarusso was generally credible and the charge allegations were found to be supported by her testimony.

[7] Even if we were to agree with the judge that reinstatement was not warranted, the judge incorrectly cut off the backpay period on the date of Colarusso's discharge. See *East Island Swiss Products*, 220 NLRB 175 (1975).

[8] In *American Navigation*, the Board distinguished the situation in which a discriminatee in compliance proceedings concealed interim earnings for certain quarters from that in which the concealment cut across all backpay quarters. In the former situation, the Board found that a remedy that denied backpay only for the quarters in which concealed employment occurred would effectuate the purposes of the Act, whereas in the latter situation the discriminatee would be denied all backpay. In fashioning these different remedies, the Board was guided, as we are here, by considerations of the public interest in both assuring the intergrity of its proceedings and seeing that unfair labor practices are remedied.

[9] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly.

"(b) Remove from its files any reference to the unlawful discharge and notify her in writing that this has been done and that the discharge will not be used against her in any way."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT deprive any employee of a pay raise, or suspend or discharge employees because they engage in concerted activities protected under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Louise M. Colarusso immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify her that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

OWENS ILLINOIS, INC.

Joel H. Levinson, Esq., for the General Counsel.
Richard M. Goldberg, Esq. (Hourigan, Kluger, Spohrer & Quinn), of Wilkes-Barre, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard on and between 28–30 September 1987 in Wilkes-Barre, Pennsylvania, on the General Counsel's complaint[1] alleging, in substance, that Owens Illinois, Inc. (the Company or Respondent) violated Section 8(a)(1) of the National Labor Relations Act, by (a) on or about 18 March 1986 denying its employee, Louise M. Colarusso, a wage increase, and (b) on or about 20 March 1986 suspending, and on or about 8 April 1986, terminating her employment, all because she engaged in concerted activities for the mutual aid or protection of employees while collecting certain dust samples and submitting the samples for independent analysis. In the alternative, the General Counsel alleges violation of Section 8(a)(1) of the Act because Respondent engaged in the above conduct because it believed that Colarusso had spoken with employees concerning the results of the independent laboratory analysis of the dust samples. Respondent's timely answer admits certain allegations of the complaint, denies others, and denies the commission of any unfair labor practices. In particular, Respondent alleges that the Charging Party was not engaged in protected concerted activities and alleges that she was discharged and otherwise disciplined because of insubordination.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived the right to present final argument and elected to submit briefs. Thereafter, the General Counsel and Respondent filed timely posthearing briefs that have been carefully considered.

On the entire record, including the briefs, and from my particular observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. JURISDICTION: RESPONDENT AS STATUTORY EMPLOYER

The complaint alleges, Respondent admits, and I find that at all material times, Respondent, an Ohio corporation, manufactures at its production facility in Pittston, Pennsylvania, television face panels, and during the year prior to May 1987, in the course and conduct of its business operations, sold and shipped products from its Pittston plant valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS A STATUTORY LABOR ORGANIZATION

The complaint alleges, the Respondent admits, and I find that at all material times Glass, Pottery, Plastics and Allied Workers International Union, Local 243 (the Union) at all material times is and has been a labor organization within the meaning of Section 2(5) of the Act.[2]

[1] The underlying unfair labor practice charge was filed by Louise M. Colarusso on 8 September 1987 and served on Respondent on or about 9 September 1986. The complaint is dated 1 May 1987.

[2] Louise Colarusso is not a member of the production and maintenance bargaining unit of which the Union is the collective-bargaining representative. Colarusso, a registered nurse, Respondent's head nurse, is a salaried rather than an hourly paid employee. There is no contention that she is a

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III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent's Pittston plant, about 10 miles from Wilkes-Barre, Pennsylvania, occupies about 800,000 square feet, employs about 850 employees in its production and maintenance unit together with approximately 150 administrative employees, and manufactures the glass face plates for color television tubes and cathode ray tubes. Among the chemical ingredients used in the manufacture of glass for these tubes are arsenic, antimony, and lead, exposure to each of which is highly toxic under certain conditions. These chemicals, and other ingredients, are mixed in the plant area called the batchhouse. Batchhouse employees and employees who work in the furnace area where the chemical and glass ingredients are introduced into furnaces, wear filter respirators in order to avoid inhaling these chemicals. The respirators are worn because of the danger that the air ventilation system in the plant production area will be insufficient to carry away the airborne corrosive dust materials which the employees handle. It is the inhalation of airborne toxic dust that Respondent seeks its employees specifically avoid. The employees are further protected from undue exposure by restrictive regulations promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (84 Stat. 1593) (OSHA) and particularly 29 CFR § 1910.1018 relating to the protection of employees from exposure to inorganic arsenic.

Monitoring of the air with special air pumps and filters is performed on a regular basis by Respondent in the areas where the employees wear respirators, the batchhouse and the furnace area. Monitoring was not performed in administrative areas. Although the plant, through its own safety department, tests and monitors the corrosive possibilities of airborne dust perhaps several hundred times per year (Tr. 467–468), Respondent, on a corporate divisional basis, also monitors air in the plant. Thus Respondent's divisional industrial hygiene department, covering 4 plants and 3000 employees, employs a divisional industrial hygienist (Terrance L. Richardson) who, on a quarterly basis, monitors the air quality at the Pittston plant where the employees wear respirators. In particular, he does dust monitoring for airborne dust levels of lead, antimony, arsenic, silicon, and welding fumes. He also monitors noise and chemical solvent exposure along with routine physical examinations of employees in the batch and furnace department, including urine analysis and blood testing.

Respondent's particular interest and concern is airborne dust rather than the appearance of corrosive chemicals in dust itself. Notwithstanding that dust itself is of lesser consequence and interest, the place where the dust is found, particularly if the dust might be carried in the ventilation system, is significant. The plant administrative area and offices enjoy a forced-air, vented, ventilation system. The production area does not have such a system.

As above noted, 29 CRF § 1910, the Code of Federal Regulations, particularizing the OSHA statute, contains about 1000 subparts governing and regulating chemical toxic substances in industrial settings. In particular, subpart 1018 is the standard relating to inorganic arsenic. The "Permissible Exposure Limit" under subpart 1018, is 10 micrograms of inorganic airborne arsenic per cubic meter in an 8-hour period. The regulation also establishes an "Action Level." If monitoring shows that the airborne arsenic level is below 5 micrograms per cubic meter in the 8-hour period, then there is no need to continually monitor the area by the air filter method. As a general proposition, however, the OSHA regulation requires employer action if there is a change in levels of airborne arsenic suggesting that additional exposure is present.

As will be seen, the evidence demonstrates Respondent's serious concern with the possibility of detrimental effects among its employees because of the toxicity of airborne arsenic. Consistent with this interest, Respondent maintains a laboratory in Toledo, Ohio, where it analyzes samples of toxic materials sent to it from its various plants. The analytical techniques used in the Toledo laboratory may not be and, on this record, sometimes were not, as delicate as those techniques in other laboratories (Tr. 360–362).

B. *Colarusso's Submission of Dust Samples to Kirby Health Center*

Respondent's machine shop employees were moved from their upstairs location to the basement around April 1985. Joseph Slavoski, a machine shop employee of 19 years and, in the summer of 1985, a union-shop steward and member of the union business committee, held meetings with Respondent's plant manager (Townsend) and industrial relations director (John "Jack" Shank) about once a month concerning grievances and other plant problems. As plant nurse, Colarusso was often present. By the summer of 1985, more than half of the dozen employees in the machine shop were complaining of tiredness, dizziness, and sore throats. As a result, Slavoski took these complaints to the joint union-management (business committee) meetings and complained of employee health problems on several occasions in the early fall of 1985. In response, the plant manager and the industrial relations director said they would investigate the problems. In one conversation in the fall of 1985, Slavoski asked Industrial Relations Director Shank to have someone come down to the machine shop and answer employee complaints concerning the air environment in the basement machine shop. Shank, however, said that it was mostly a problem of the employees' change of scenery, going from upstairs to downstairs. There is however, no dispute that in the summer and fall of 1985, Respondent was engaged in a construction program at the Pittston plant that resulted in high levels of dust in the ventilation system that serves the administrative offices of the plant. Slavoski twice specifically denied mentioning employee complaints over air quality or physical symptoms to Louise Colarusso, or to Deborah (Debbie) Savoia, Colarusso's lunchtime companion. (Tr. 32; 38–

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supervisor and Respondent does not argue that by professional status or otherwise she is not an "employee" protected by the Act.

40.) Colarusso contradicted Slavoski and testified that she did have a conversation with him concerning the machine shop employees' complaints and symptoms of tiredness, burning eyes, and headaches (Tr. 50). In view of this contradiction, I do not credit Colarusso's testimony of such a conversation with Slavoski.[3]

In the summer of 1985, Savoia, secretary to Shank in the personnel department, regularly complained to head nurse Louise Colarusso, an employee of Respondent for 19 years. She complained of burning of the eyes, sore throat, coughing, and tiredness, symptoms and complaints that Colarusso herself testified she had experienced in the same period. In addition, Colarusso testified that commencing in the fall of 1985 and into the spring of 1986, she had several times fallen, had experienced nausea and diarrhea, also suffering from neuritis and pains of the feet. No independent medical evidence supports this testimony. I nevertheless credit such testimony.

By November 1985, Deborah Savoia had consulted a physician (Dr. Casterline) and submitted a urine sample because of these symptoms. At the beginning of December 1985, Savoia received the laboratory report on her urine sample. It showed abnormally high readings of both arsenic and iron.[4] Having received the urinalysis report around December 5, Savoia gave the report to Colarusso. Colarusso told Savoia to discuss the report with Dr. Joseph Campanella, Respondent's plant physician. Colarusso read the Savoia medical reports and gave them to Dr. Campanella. Sometime immediately thereafter, Savoia saw Dr. Campanella about the report and, although the matter was never discussed in Colarusso's presence, Dr. Campanella did discuss the matter with Respondent's plant director of health and safety, Colarusso's supervisor, Margaret (Peggy) Guffrovich (Tr. 135–136).

In January 1986, Savoia, who worked down the hall from Colarusso in the medical department, gave Colarusso a Pennsylvania Department of Health article on arsenic (G.C. Exh. 3). Knowing of Savoia's urine sample showing an abnormal arsenic level, and having read this literature, Colarusso, sometime in early January 1986, spoke to Safety Director Peggy Guffrovich about dust in the administrative area and asked Guffrovich to take samples. Guffrovich sent over Plant Chemist Del Cragle. In January, Del Cragle did perform dust tests in the medical department and, thereafter, Guffrovich showed Colarusso the test results. The results showed that the levels of arsenic and lead, according to Respondent's Toledo, Ohio laboratory, were of a nondetectable level. Guffrovich said that dust accumulations came from construction in the plant and the results showed various trace quantities of elements but no arsenic (Tr. 231; 450–452). She also credibly testified that after she had given permission for Cragle to do the January dust sampling, another laboratory technician told her that Colarusso wanted to do further dust sampling and he asked Guffrovich for permission. Guffrovich gave the laboratory technician permission to perform the further test that was apparently not performed (Tr. 452–453, 464).

In early February, Colarusso testified that a machinist (Richard Zabrovian) told Colarusso of many employees in the machine shop who were sick.[5] Thereafter, in February 1986, Colarusso told Safety Director Guffrovich that employees in the machine shop were complaining about the air and dust.

Particularly as a result of her own and Savoia's symptoms, and having read the arsenic literature given to her by Savoia, Colarusso on 12 February 1986, collected a sample of dust from an air exhaust vent in the medical department. Since Colarusso's automobile was in the repair shop, Colarusso asked Savoia to take this dust sample to the nearby Kirby Health Center for analysis, and Savoia agreed.

On 13 February, during the morning coffeebreak in the company cafeteria, Savoia mentioned to a coemployee that she was going to drop off the sample. Slavoski overheard the conversation and asked Savoia if she would be willing to take a dust sample which he would collect over to the Kirby Health Center for analysis. Savoia agreed. Later in the morning, Slavoski asked a coemployee in the machine shop to gather a dust sample from the machine shop area, place it in a plastic bag, and return it to him. Slavoski told the employee (Zabrovian) that he wanted to send the dust out as a sample (Tr. 22). Zabrovian then gave him the dust sample in the plastic bag and Slavoski turned it over to Savoia.[6]

Savoia then brought the two dust samples to the Kirby Health Center and presented them under her own name. She paid $30 to the hospital for the analysis of Slavoski's sample; and $30 for analysis of Colarusso's sample. This second $30 had been given to her by Colarusso for that purpose.

Savoia received a 27 February 1986 report on the two samples from the Kirby Health Center (G.C. Exh. 7) on 5 March 1986. On the same day, Savoia gave a copy of the report, bearing Savoia's name, to Colarusso. When Colarusso got the copy from Savoia, she deleted Savoia's name and address from the report and made copies of it.

C. *The Kirby Health Center Report (G.C. Exh. 7)*

The hospital report showed analysis of dust from two bags for both arsenic and antimony. The Colarusso dust sample from the medical area showed 22 micrograms of arsenic and 190 micrograms of antimony per gram of

[3] Although this matter does not dispose of the question of whether, as noted, Colarusso was engaged, with other employees, in concerted protected activities, I find it important to note my discrediting of Colarusso in this testimony because of repeated lapses of credibility on her part. Although the General Counsel now suggests that Slovoski simply did not recall complaining to Colarusso (Br. 2–3), he originally argued that Slavoski's original denial was a result of confusion (Tr. 38–39). Slavoski nevertheless again denied discussing complaints with Colarusso (Tr. 40).

[4] The laboratory's normal value for arsenic was "below 25," whereas Savoia's urine showed a reading of 39 units of arsenic. (G.C. Exh. 8.)

[5] Zabrovian did not testify.

[6] In early December, Savoia took a second urine test and it showed that her arsenic and iron levels had decreased significantly and were within normal limits. She told Dr. Campenella of this 2 December urinalysis when she saw him on 2 January. She spoke of the result of the test to Colarusso on the next day, 3 January 1986. Savoia also testified that when she complained to the Company about the volume of the airflow in the administrative area on 6 December, it was adjusted and her symptoms decreased. At a later date she had been told (Tr. 236) that the air system had been working at an increased capacity during the period of new construction.

dust. The Slavoski sample showed 105 micrograms of arsenic and 570 micrograms of antimony per gram of dust.

Although Colarusso was able to read and understand the weights assigned to the arsenic and antimony findings, she did not know their significance in terms of possible health effects.

On the next day, 6 March 1986, Colarusso encountered her old friend, Jorge Garcia-Pons, the industrial engineering supervisor (a peer of Industrial Relations Director Shank in the hierarchy) in the Pittston plant. As a matter of coincidence, Garcia-Pons had been assigned the new duties of plant purchasing agent and a secretary was to be assigned to the purchasing department to assist him. The secretary to be transferred was Debbie Savoia who was to leave her job as secretary to the industrial relations director and become Garcia-Pons' clerical assistant. Garcia-Pons knew of the regular lunchtime relationship between Savoia and Colarusso and wanted information as to what type of clerical was being assigned to him. Colarusso told him that Savoia was sick with arsenic toxicity and that Colarusso, herself, had been sick with similar symptoms. She also told him that she had collected a dust sample from the medical department, had submitted it to the Kirby Health Center, and that the report showed arsenic in the dust. Colarusso also told him, however, that she did not know what the reported "numbers" meant and wanted to show Garcia-Pons the report to discover its health significance. She also told him that the report showed arsenic in the dust in the machine shop as well as in the medical administrative office. Colarusso invited him to her office and told him that she would show him the report, which she did. Garcia-Pons looked over the report (Tr. 80; 396).

Garcia-Pons recalls seeing the Kirby Health Center letterhead and told Colarusso that he could not interpret the values listed in the report. The testimony of Colarusso and Garcia-Pons then becomes contradictory. According to Colarusso, Garcia-Pons read the report and said: "Jesus Christ. I told [Machine Shop Supervisor Gerald] Dean to make sure that there's no arsenic there." On the other hand, Garcia-Pons testified that he told her that not only could he not interpret the values, but that because of Respondent's continued air and blood testing, the values were "meaningless"; that Colarusso was "entering into a witch hunt"; that her investigation was a waste of time; and that she should forget about the whole thing. However, he testified that he added that, if she insisted on interpreting the Kirby Health Center's figures, she should see Plant Health Engineer Joseph Nardone or Plant Physician Dr. Joseph Campenella. At this point, according to Colarusso, she told Garcia-Pons that she wanted the information held in the strictest confidence until she received an interpretation of the "numbers." Garcia-Pons told her that his "lips are sealed" (Tr. 83).

Contrary to Garcia-Pons' assertion that he told her to speak to Supervisor Nardone or Dr. Campenella, Colarusso testified that Garcia-Pons then told her to call OSHA for an interpretation of the arsenic values. Colarusso says that she asked him for advice about what she should ask OSHA concerning the figures; that Garcia-Pons told her to ask OSHA what were the permissible air levels; and that if OSHA reported that it was insignificant, she should just forget about it (Tr. 83).

Colarusso then telephoned OSHA, described the dimensions of the area in which she obtained the sample, and read the Kirby Health Center report directly to the OSHA official She mentioned only the arsenic level of 220 micrograms per gram and did not mention the antimony (Tr. 86). The OSHA official told her that the acceptable or permissible *air level* of arsenic was 10 micrograms per cubic meter in the air and that her *dust* sample of 220 micrograms per gram was a negligible amount of arsenic (Tr. 86–87).

I credit Colarusso's version and discredit Garcia-Pons. I find that he told her to contact OSHA and did not tell her to speak only with Plant Supervisor Nardone and Dr. Campenella. I also do not credit his denial of telling Colarusso that he had told Mechanical Area Supervisor Dean[7] to be careful of arsenic in the machine department. Furthermore, I also credit Colarusso, over Garcia-Pons' denial, that she telephoned him on the same day, 6 March, to tell him of the result of her OSHA conversation, in substance, that OSHA said the arsenic level was negligible.[8] I make these credibility resolutions both on the basis of my observation of the demeanor of Garcia-Pons and Colarusso and on the reasonableness of the testimony. There is no explanation on the record why Colarusso would have called OSHA but for Garcia-Pons' suggestion, the suggestion of an old friend and a trained engineer. Indeed, if Garcia-Pons had suggested that she contact only Nardone and Campenella, it would appear to me that Colarusso would have done so. It was, however, on Garcia-Pons' suggestion that she called OSHA. She did so. In retrospect, in view of the consequences (described below) that flowed from his apparently unthinking suggestion that she call OSHA, I can readily see why Garcia-Pons would deny his making that suggestion to Colarusso notwithstanding their long friendship. The evidence of record concerning Respondent's attitude relating to any of its employees taking dust samples to an outside agency for testing, much less actually contacting OSHA concerning these samples, demonstrates the reason for Garcia-Pons' untruthful testimony. I do not credit his denials. In reaching this conclusion, I have considered and rejected the counterargument: that Supervisor Garcia-Pons, an employee of 29 years (Tr. 383), aware of Respondent's rigid chain of hierarchical command and its distaste for OSHA, would not make such a suggestion.[9]

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[7] Dean did not testify.

[8] On the same day that she spoke to Garcia-Pons and had also spoken to OSHA, Colarusso fell again and collected another dust sample, which she brought to the Kirby Health Center for testing on 14 March. The second Kirby Health Center report is dated 21 March (G.C. Exh. 5) and plays no role in this case.

[9] Though this credibility resolution appears to me to be fully supportable, I nevertheless have made it in the face of other vital credibility resolutions that directly and consistently undermine Colarusso's veracity. In this case, I was guided by Judge Hand's famous dictum that: "nothing is more common in all kinds of judicial decisions than to believe some and not all [of a witness'] testimony." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), vacated and remanded on other grounds 340 U.S. 474 (1951).

D. *The Events of 13 March 1986*

The events of 13 March 1986 are in dispute regarding Colarusso's conversations in the maintenance department office. I nevertheless find that on the morning of 13 March, in the maintenance department office, she spoke with Assistant Plant Engineer Bill McHale and asked him if he knew anything about the plant being fined by OSHA for dust in the ventilation system. When McHale answered that he knew nothing about it, Respondent's environmental foreman, George Potak, said that there had been no OSHA fine or citation but that there was a fine imposed by the Pennsylvania Department of Environmental Resources (DER) and that it was a result of a short shut down of Respondent's smokestack electrostatic precipitator. After Potak told her that the Respondent had been fined by DER rather than OSHA (Tr. 385), Colarusso said that Respondent, bypassing its filters, was pumping polutants into the air that were being sucked into the plant air intakes; and that employees were getting sick in the plant, complaining of red eyes and sore throats.

Colarusso, in substance, denies the above conversation: that she was accusing the Company of anything, but, rather, was asking questions of what was going on. I do not credit her version even if her assertions were in the form of questions. As I observed her, such questions, forcefully put, implied company inaction.

Furthermore, there is an alleged dispute concerning the reaction of a secretary in the office, Diane Gubiotti. Supervisor Potak testified that Gubiotti asked him, after Colarusso left the office, "do we have a problem?" and Potak answered that there was no problem that he was aware of. He then explained to Gubiotti the operation of the smokestack electrostatic precipitators. According to Colarusso, Gubiotti told her, as Colarusso was leaving, that Gubiotti's cousin had been exposed to chemicals and died of Hodgkins disease. I do not find any actual dispute here. I find that all the above occurred because there is no inconsistency.

Although I have found that Colarusso made the above accusations—whether in question form or not—I reject Respondent's argument that such accusations constituted one of the reasons for later discharging Colarusso, notwithstanding that it appears in its letter of termination (G.C. Exh. 6).[10] It is enough to find, as I do, that Colarusso stated that the plant's ventilation system, perhaps bypassing filters, did not filter out harmful chemicals.

E. *Later events of 13 March 1986*

Later in the day, Safety Director Peggy Guffrovich called Colarusso into her office in the presence of the plant environmental engineer, Joe Nardone. The events precipitating this meeting are as follows.

After Colarusso had earlier visited the plant maintenance office (speaking to Supervisors McHale and Potak concerning the DER citation and fine), Plant Supervising Engineer Ostrowski telephoned Guffrovich and told her that Colarusso had been in the maintenance office that morning asking questions about the DER citation and making statements that upset the secretary, Diane Gubiotti. Guffrovich reported this telephone call to Industrial Relations Director Shank who told her to get a copy of the DER citation and review it with Colarusso.

Guffrovich then called Environmental Engineer Nardone and asked him to bring a copy of the DER citation to her office. When he did so, she telephoned Colarusso and told her of the complaint from the plant engineer (Ostrowski): that Colarusso had not only upset Gubiotti but had made accusations inconsistent with the DER citation.

Colarusso entered Guffrovich's office and knew that Nardone was an environmental specialist. Guffrovich asked her why she was questioning Supervisor McHale about the DER fine. Colarusso told her she was only interested in the dust in the ventilation system and thought that if the fine had something to do with that situation, the employees would not get any more dust through the system. Guffrovich then asked Colarusso why she questioned McHale about the fine in view of Del Cragle's earlier testing that showed, as Colarusso knew, no arsenic or other toxins. Colarusso told her that she thought that there were chemicals present in the dust; that the employees should be concerned about it; and that she herself was showing symptoms of arsenic toxicity. Nardone said that he had similar complaints and had been to see Dr. Campanella. Colarusso said not only that she knew that he had been down to see Campanella but that she was going to see her family doctor to be tested for chemicals. She told Guffrovich that there were four new cases of cancer together with mental health and heart problems in the plant and that she did not believe that the Respondent's tests for harmful chemicals were conclusive.

After Guffrovich told Colarusso that she had upset Gubiotti by her statements concerning the inadequate ventilation system, Nardone and Guffrovich told Colarusso that the plant ventilation system contained two separate sets of filters for effluent from the furnaces that filtered the air coming into the office ventilation system. Guffrovich told her not to make statements in the form of accusations in front of people like Gubiotti who did not understand the ventilation system. When Colarusso replied that these matters should not be hidden from the employees, Guffrovich answered that she did not ask Colarusso to hide anything.

Colarusso then said that she did not believe that Respondent's tests were conclusive and told them that she had taken a dust sample from her office and sent it to the Kirby Health Center for testing; that she contacted OSHA; that the analysis, unlike the Del Cragle test, showed the presence of arsenic; but that the arsenic was not shown to be at a toxic level. Colarusso also stated that Respondent had never had continuing monitoring of the air in the medical department. Guffrovich testified that Colarusso's statement—that Colarusso had sent a sample of dust to the Kirby Health Center and had contacted OSHA "stunned" her (Tr. 284; 444). When Guf-

[10] The next morning, 14 March, George Potak told Colarusso by phone that he and Guffrovich were doing tests on filters in the ventilation system. Colarusso asked him to let her know what the results were. Potak evidently made the phone call because of what Guffrovich learned later in the prior afternoon (13 March).

frovich asked why she had taken a sample without asking or telling Guffrovich or anybody else what she was doing, Colarusso answered that she submitted the sample because she was having symptoms, feeling sick and she just wanted to see what the testing results would be from an independent laboratory.

Nardone then asked Colarusso what the test results showed. Colarusso told him that it showed arsenic of 220 micrograms per gram of dust (Tr. 595) and that OSHA said this was negligible when she telephoned (Tr. 284). Nardone tried to describe the type of test that Kirby Hospital Center must have used and Colarusso said that she did not know what kind of test Kirby had used. Guffrovich then asked Colarusso for a copy of the test results and, when Colarusso said she did not have one at the plant, Guffrovich asked her to bring a copy in the next day. Colarusso agreed (Tr. 445).

Guffrovich and Nardone then reported the results of their conversation with Colarusso to Industrial Relations Director Shank (Tr. 284). In particular, they told him that Colarusso had taken a dust sample and submitted it to an outside laboratory, had contacted OSHA about it, and that Guffrovich asked for a copy of the results. Shank testified that between his 13 March receipt of this information from Guffrovich and Nardone and 17 March, he had at least two phone conversations with the divisional office in Toledo, in one of which a company lawyer was involved. Other participants in the conversations were Plant Manager "Skip" Townsend and the Respondent's divisional industrial relations director in Toledo, George Herron. He told all three of them of the results of the Colarusso conversation including her contacting OSHA (Tr. 285–287). One element of the conversations (Tr. 480) was the form of discipline to be administered to Colarusso. The possibilities discussed by these supervisors ranged from a written warning to discharge.[11] None of these decision-makers appeared as witnesses. Shank could not recall who raised the possibility of discharge in these conversations. By 17 March, according to Shank, as a result of the various conversations, the group decision was to limit discipline only to a rescission of Colarusso's approaching 6-percent pay raise that was to be effective on 1 April 1986. (Tr. 303–304.)

A first result of Shank speaking with Respondent's divisional industrial relations director, George Herron, was that Herron notified the divisional industrial hygienist, Terrence L. Richardson, to fly to the Pittston plant and do air sampling because the plant nurse had a dust sample analyzed that showed arsenic (Tr. 335–337). No other Herron instructions appear in the record. Richardson ultimately arrived on 18 March.

On the next day (14 March after the Colarusso-Nardone-Guffrovich conversation, Guffrovich told her that she had not. When Guffrovich asked her why she had not brought it in, Colarusso told her that she did not know if she was going to give a copy to Guffrovich and that she would have to "see" about it.

[11] It is essential to an understanding of the conclusions here that the discharge of Colarusso was raised as a disciplinary possibility resulting from her conduct on 13 March, alone.

F. *Events of 18 March*

About 8:30 a.m. on 18 March, Richardson and Guffrovich came to the medical office and told Colarusso that Richardson had come to do air sampling. Colarusso's assistant, nurse Michaelene Lyons, was also present at this time. Colarusso suggested that a dust sample be taken below one of the ventilation grills. When Colarusso said that someone had cleaned the grills in her office, Guffrovich denied that the vents had been cleaned. Colarusso insisted that Guffrovich had had the vents cleaned.[12] Colarusso told Guffrovich that Supervisor McHale had told her that the laborers had cleaned the vents over the weekend. Colarusso told Guffrovich of seeing threads of cloth on the grating on the vent showing that some cloth had been used to clean the vents. When Guffrovich said she knew nothing of it, Colarusso said that Guffrovich had cleaned the grills over the weekend but Guffrovich denied it (Tr. 338–340; 447–449). I do not credit Colarusso's testimony that she only said that McHale told her he had cleaned the vents. I find that she accused Guffrovich of cleaning the vents (Tr. 108–109). At this time, Richardson was using air pumps in the medical department testing for arsenic.

Later in the day, Richardson (without Guffrovich) came to the medical office to check the air pumps. Michaelene Lyons, the assistant nurse, was present. Richardson and Colarusso spoke of the tests in January that Del Cragle had taken and Colarusso asked Richardson why Respondent's Toledo laboratory, a high quality laboratory, could not detect arsenic whereas the Kirby Health Center could. Richardson said that the older equipment at the Toledo laboratory was not sensitive enough to pick up the arsenic. I do not credit Richardson's further testimony that Colarusso, half whispering, then told him that she and Michaelene Lyons had come

[12] Colarusso testified that she noticed that the vents had been cleaned in the medical department on the morning of 10 March (Monday). She said she telephoned Maintenance Supervisor McHale that morning and asked him to stop by. She testified that, on the same morning, when he came to her office, she asked him whether the vents were all cleaned in the medical department and who had cleaned them (Tr. 580–582). According to Colarusso, McHale told her that the laborers had cleaned the vents and that they were starting to clean all the vents in the plant. As will be noted in the text, when Shank, on 18 March, later summoned McHale to confront Colarusso concerning whether the laborers or McHale had cleaned the vents or whether he had told Colarusso that he had cleaned the vents, McHale credibly testified that (a) Colarusso had asked him whether he had cleaned the vents over the weekend and he had told her that he had not (Tr. 376); that (b) apparently about 1 week later, at 10 a.m. on 18 March 1986, Peggy Guffrovich telephoned him and asked him if he had cleaned the vents in the medical office and he had told her that he had not (Tr. 375–376); and that (c) later in the day, on 18 March 1986, he told Shank, Colarusso, and Guffrovich, for the third time, when he was called into Shank's office, that he had not cleaned the vents in the medical office and, looking directly at Colarusso, said that he had told Colarusso that he had not cleaned the vents (Tr. 298; 375). Shank testified that Colarusso then said that she must have "misunderstood" and that the confrontation ended (Tr. 298). When Colarusso testified in rebuttal, she did not deny Shank's testimony or attempt to explain it away. For instance, she did not say that she told Shank that she "misunderstood," only to save McHale embarrassment or that McHale was untruthful. On this record, I credit Shank and find that McHale never told Colarusso that he cleaned the vents; nor did Guffrovich ever tell Colarusso that McHale cleaned the vents or that she had ordered him to do so. I make no finding regarding who actually cleaned the vents. This McHale testimony appears again later in the text.

in early over the weekend and cleaned the grills on the air vents. I do not credit Richardson in such testimony (although I find that he immediately told this to Guffrovich who then told Shank) because nurse Michaelene Lyons, an employee presently employed by Respondent and a witness called by Respondent, credibly testified contrary to Richardson's testimony: whereas Richardson testified that Colarusso had whispered, in a serious tone, that she and Michaelene Lyons had cleaned the vents, Michaelene Loyons testified that Colarusso actually told him, in a facetious tone: "Well, Michaelene and I must have come in to clean the vents over the weekend" (Tr. 557). Richardson, in rebuttal, testified that Colarusso did not use a facetious tone (Tr. 648) and specifically stated that he thought that Michaelene Lyons was mistaken in her testimony. He could not explain how she came to the conclusion that Colarusso was facetious in making her statement to Richardson (Tr. 649).[13]

Still later on 18 March, or on the next morning, there was a third conversation between Richardson and Colarusso. In this third conversation, not mentioned by Colarusso but testified particularly to by Richardson, Colarusso allegedly told him that employees other than Debbie Savoia had arsenic poisoning and not to trust Guffrovich and Shank concerning the arsenic exposures, the arsenic levels, and test results. Richardson testified that Colarusso told him that "they" had been out to get her since 1971; and that she was the only person in the plant who was truly concerned about the health and welfare of the employees. Richardson allegedly told her that he could not believe that Shank and Guffrovich were not concerned with the health and welfare of the employees in the plant; and that although Richardson knew them only for 8 months, he considered them trustworthy (Tr. 344–345). In rebuttal, Colarusso denied most of this testimony (Tr. 588 et seq.) and asserted that to make such statements to a high divisional supervisor, but a stranger to the rigid plant "chain of command," would be "putting her head in the guillotine" (Tr. 617).

I specifically discredit Richardson's testimony concerning this alleged conversation except that Colarusso said that Savoia and other employees had symptoms of arsenic poisoning, and I cannot credit his testimony, nor Shank's lame corroboration, that he mentioned such a conversation to Shank (except that Savoia and other employees had arsenic symptoms) sometime between 18 and 20 March. Had such an underlying conversation been reported to Shank—from a divisional official—as I view the evidence developed in this case and the analysis hereafter made, Shank would have disciplined or even discharged Colarusso on the spot or at least thereafter mentioned such a devastating show of disloyalty to her in one of several subsequent disciplinary interviews. He would not silently tolerate such derrogatory statements concerning (even truthful) accusations of untrustworthiness of Guffrovich and himself regarding the health and welfare of the 1000 employees in the plant. Nothing in Shank's testimony in later disciplinary interviews relates to a Colarusso accusation of untrustworthiness, and Guffrovich, who was present at various subsequent disciplinary interviews with Colarusso, does not suggest the existence of such an alleged statement by Colarusso. On the other hand, as noted here, I have credited Shank covering a later "tirade" by Colarusso concerning actions showing Respondent's alleged historic desire to "get" Colarusso. This later matter was never denied by Colarusso in rebuttal.

G. *The Disciplinary Interview on the Afternoon of 18 March*[14]

In the afternoon of 18 March, Guffrovich telephoned Colarusso and told her that Shank wanted to see her in his office. When Colarusso got there, she found Guffrovich in the office. Shank told her that disciplinary action was going to be taken against her for insubordination; and that the discipline would be that the 6-percent April pay raise would be denied to her. He told her that she was a valuable asset to the Company and he did not want to lose her. Colarusso credibly testified that he then told her that he might have to take further action against her and would let her think about it (Tr. 114). I credit Colarusso and do not credit Shank's assertion that he wanted to put the whole matter to rest ("put the whole issue to bed") (Tr. 293) and did not mention that even with Colarusso's false accusations against Guffrovich (cleaning the vents), and her going outside the chain of command to OSHA, he had no intention of discharging her—even with the "lies"—prior to the 18 March meeting (Tr. 291–293). It was the events that arose during the 18 March meeting, including her false assertion that she acted on Garcia-Pons' suggestion in contacting OSHA, that, Shank testified, caused the suspension and discharge commencing 20 March. It was the "lies" that came out at the 18 March interview that caused him to notify Plant Manager Townsend and tell him that the Colarusso matter had not been "put to bed." Townsend did not testify and did not corroborate such a Shank phone call.

Shank testified that as a result of the 18 March interview, however, he decided to investigate further (a) why Colarusso called OSHA; (b) why she went outside with the samples; and (c) the cleaning of the air vents.

After the meeting, apparently on the morning of 19 March, Richardson told him that Colarusso said other employees had arsenic symptoms (Tr. 305–306) and Garcia-Pons, in the late afternoon of 19 March, was called in by Shank and denied advising her to call OSHA (Tr. 478–495).[15]

[13] Richardson testified that he made notes (later destroyed but used to support a later memorandum) of this conversation with Colarusso and thereafter immediately told Guffrovich of what Colarusso had allegedly whispered and also mentioned it to Shank after telling Guffrovich (Tr. 405–406; 342). Guffrovich, a credible witness, corroborated that Richardson told her what Colarusso allegedly said (Tr. 449) but, of course, was not present at the event. Shank could not explain why he failed to testify about this matter at a later state unemployment compensation hearing where he testified to various Colarusso untruths (Tr. 517–519).

[14] The dating and chronology of events occurring in interviews 18–20 March involving Colarusso, Shank, and Guffrovich are in some dispute. The above chronology is an attempt to resolve certain inconsistencies. In any case, I conclude that the precise dates of the occurrences are not decisive.

[15] Garcia-Pons denied advising her to contact OSHA but admitted that she showed him the Kirby Hospital report. Shank, when asked if he

Continued

H. *The Disciplinary Interview of 19 March*

In the afternoon of 19 March, Guffrovich called Colarusso again and told her to come to Shank's office. Guffrovich was present. Shank told her that not only was she going to lose the pay raise, but she would be possibly terminated. He asked her why she had gone to OSHA in spite of Respondent's formidable in-house expertise (Tr. 297) and had spoken to Garcia-Pons concerning the Kirby Hospital Center test which showed 220 micrograms of arsenic and had not discussed it with Shank. Colarusso said that she had spoken to Garcia-Pons because he was "logical and methodical" and that he had told her to speak to OSHA to find out what the numbers meant and then to drop the matter if there was a negligible showing. Colarusso added that although she had been very discreet in contacting OSHA, she had a right to do so and even to accompany an OSHA inspector to the place of plant contamination (Tr. 120).

When Shank asked her for the names of other employees suffering from arsenic symptoms (Richardson had informed him of his 18 March conversations with Colarusso), she said she had heard of it but knew no names. Shank then said that he wanted a copy of the Kirby Hospital Center results; that she had shown a copy to Garcia-Pons; and that Colarusso had promised to give a copy to Guffrovich but had failed to deliver. Colarusso told Shank that she had not promised to give it to Guffrovich but only said that she would "see about it" (Tr. 117). Shank then asked why Colarusso had called Guffrovich a liar concerning Guffrovich cleaning the vents and Colarusso said that she had not accused her of lying about the cleaning of the vents. Turning to Guffrovich, Colarusso said that if Guffrovich told Shank of an accusation of Guffrovich being a liar, Guffrovich herself was lying.

Colarusso said that Maintenance Supervisor McHale told her that his laborers had cleaned the vents in the medical office and the cafeteria. Guffrovich then said that she had spoken to McHale and he had denied cleaning the vents. When Colarusso insisted that McHale told her that he had cleaned the vents, Shank telephoned for McHale's presence. Shank then asked him if he told Colarusso that he had cleaned the vents. McHale, speaking directly to Colarusso, said—with force—that he had not cleaned the vents and earlier had told that to Colarusso (Tr. 298; 374). McHale testified that at 9 a.m. Colarusso asked him if he had cleaned the vents over the weekend and he told her he had not (Tr. 375–376); that at 10 a.m., Guffrovich asked him if he had cleaned the vents in the medical department and he told her that he had not (Tr. 372–373); and that, in the afternoon, when, in the presence of Colarusso and Guffrovich, Shank asked if Colarusso was correct when she said that McHale cleaned the vents, McHale said to Colarusso (Tr. 298; 374): "No, G—d damn it. No. And I told you so."

This confrontation does not appear in Colarusso's direct examination and, more significantly, is not denied in her extensive rebuttal. Moreover, in rebuttal, she failed to deny Shank's testimony that, at this point, she told Shank that: "I must have misunderstood [McHale]." (Tr. 298.) Under these circumstances, I credit McHale, Guffrovich, and Shank regarding this incident and conclude that Colarusso was not credible in testifying that McHale told her that he had cleaned the vents (Tr. 581–582). McHale credibly testified that vents in the medical area had not been cleaned for 5 years (Tr. 378). As noted above, I make no findings about who cleaned the vents.

When Shank then asked her for a copy of the Kirby Health Center test results, Colarusso told him that she had torn up the copy and thrown it away. In fact, while this was technically true, Colarusso admitted that she had other copies.

It was after this meeting, as noted above, that Shank called in Garcia-Pons who denied advising her to go to OSHA.

I. *Disciplinary Meeting of 20 March*

On the morning of 20 March, Guffrovich and Shank came to Colarusso's office and Shank asked her what the 220 micrograms meant. Colarusso said that the 220 micrograms showed a negligible amount of arsenic in the dust according to what OSHA had told her. Colarusso told Shank that he was harassing her;[16] that ever since 1971, Shank and his two predecessors (Tr. 496) had been out to "get her" concerning an incident involving a 1971 industrial injury.

Shank told her that he did not know what she was talking about insofar as the 1971 incident went. He told her that if there had been a plot to fire her and if that plot had been passed from one industrial relations director to each successor, they had somehow omitted informing Shank because he knew nothing about it. Colarusso then told him (Tr. 496–497) that she wished the whole thing would end and that it would be better for her to die from arsenic.

In a second meeting of 20 March, in the afternoon (Tr. 497), Guffrovich called Colarusso into Shank's office where Shank told her that he was bringing the matter to a conclusion; that her behavior in the past week had been insubordinate, improper, and unethical; that the

would have fired Garcia-Pons or retaliated against him if he believed that he had told Colarusso to contact OSHA testified that he could not answer that question and that he did not know whether he would fire or retaliate against him (Tr. 514–515). His demeanor leads me to conclude, and the record shows, that Respondent was not pleased with Colarusso's or any other employee's contact of OSHA. Although Garcia-Pons testified concerning his 6 March conversation with Colarusso, he failed to testify concerning his 19 March conversation with Shanks.

[16] Colarusso told Shank and Guffrovich that they were harassing her, and had been constantly harassing her. Although she did not then tell the alleged real reason for such conduct to them, she testified that it was because of her refusal to take early retirement, Respondent, prior to this time, had been seeking to reduce its payroll by 20 percent. Respondent was offering eligible employees early retirement complete with a bonus system which, in Colarusso's case, would provide full salary for a year. Shank credibly testified that it was Respondent's plan to seek voluntary early retirement from certain employees but that, failing this, there would be involuntary layoffs in order to meet the mandated 20-percent reduction in payroll. Shank also credibly testified that he had earlier told Colarusso to stop advising employees to reject Respondent's offer of voluntary retirement because they could receive severence pay and unemployment compensation if they were involuntarily separated. Shank told Colarusso to stop giving such advice to employees because it was contrary to company goals (Tr. 295–297).

Company had patiently waited for a copy of the test results which had not been forthcoming; that based on her actions, the Company could no longer entrust her with the duties of head nurse; and that Shank was placing her on suspension and that she should report back in 2 weeks for further disposition. He also told her that Respondent would take legal means to get the Kirby Health Center results. Shank apparently did not discharge her on 20 March in order to permit an interval in which he might get a copy of the report.

Thereafter on 31 March, Shank sent a letter to the Kirby Health Center (R. Exh. 6)[17] asking for the results, but on 19 May, Kirby Health Center (R. Exh. 7) refused to divulge them because of the absence of Colarusso's consent.

At the same time, as one of the reasons for discharge, Shank told Colarusso that he could not trust her because she had written an anonymous letter to a local newspaper accusing the Company of nepotism. Colarusso denied ever having written the letter. Respondent has neither pursued this assertion nor mentioned it in its 8 April letter terminating her nor in its brief. It no longer mentions the letter as a basis for discipline.

Two weeks later, on 4 April, Colarusso reported to the plant but was told that she was still on suspension and, on 8 April, Colarusso went to the plant for work but she was handed a letter of termination (G.C. Exh. 6), the substance of which appears infra.

According to Colarusso, in the 20 March afternoon interview, Shank gave three reasons for terminating and suspending her: (a) for writing the anonymous letter; (b) for calling Guffrovich a liar; and (c) because he "wanted that [arsenic] dust. That dust belongs to me." Colarusso told him that the Kirby Health Center had the dust. She particularly testified that Shank, at that time, did not again ask for a copy of the Kirby Health Center report. I find Colarusso's testimony irrelevant, if true, because Colarusso had previously testified (Tr. 118–119) that Shank, at least on 19 March, had asked for a copy of the test results and that Colarusso had told him that she had torn up the copy and thrown it away, a deceptive answer since she had other copies.

Colarusso testified that in the 19 years she had been employed as a nurse by the Company,[18] she knew that the Company regularly monitored the environment inside and outside the plant for hazardous substances. She also testified that she was acting in her professional capacity as a nurse for Owens Illinois in collecting, and then sending, the sample to the Kirby Health Center notwithstanding she did not send or submit a bill to the Company for this conduct; and that she took the dust sample of 12 February because she was concerned about her own symptoms and because Debbie Savoia was sick (Tr. 160). Colarusso also testified she did not show Shanks a copy of the Kirby Health Center report because she believed that it would be evidence to support Shank in his effort to force her to take early retirement (Tr. 210). Colarusso knew that 13 employees were slotted to take early retirement (Tr. 210).

I have substantially credited Colarusso's testimony over that of Richardson, especially regarding the alleged whispering of her admission of cleaning the vents and also regarding Colarusso telling Richardson that Guffrovich and Shanks were not to be trusted. Such an accusation does not appear in either Shank's testimony (to whom Richardson allegedly relayed this information) or in the termination letter that Shank sent to Colarusso listing the reasons for her being terminated or in Shank's subsequent testimony in an unemployment compensation hearing. As I have mentioned above, had Colarusso made such a defamatory statement about Guffrovich and Shank, I believe that she would have been disciplined if not discharged on the spot on 19 March after Richardson reported it.

J. Elements of Colarusso's Rebuttal Testimony

1. Among other things in her rebuttal, Colarusso testified that Shank had made particular issues of both her saying that there was arsenic in the plant and her failure to seek him out, particularly to tell him of her finding. She was asked why, in the disciplinary interviews, she said to him (Tr. 624): "Why would you say [to Shank] 'is this what you don't want me to tell you about'—referring to the presence of arsenic—when, at the same time, Shank was admittedly asking her for a copy of the Kirby Hospital test results. She answered that Shank was making "such a do about my having that sample and that 220 [microgram analysis]" (Tr. 623). When particularly asked why she was asserting that Shank did not want to hear about arsenic in the plant at the same time that he was asking for, and she was refusing to submit an available copy of, the test results, she answered (Tr. 624): "Well, I felt he should have trusted me. I told him what the figure was. . . . Jorge [Garcia-Pons] had seen this." When asked whether she did not think that giving a copy of the report to Shank, her supervisor, was a matter of importance to Respondent, Colarusso admitted that she thought it was important. In particular, she admitted that notwithstanding her opinion, based on the OSHA contact, that the 220 micrograms of arsenic per gram of dust was a "negligible" amount of arsenic in the dust, she was sure that Shank should have seen a copy of the report (Tr. 626). Such a Colarusso statement is tantamount to an admission of insubordination.

2. In rebuttal, on the third day of the hearing, in attempting to support her credibility, Colarusso for the first time testified that she had forgotten that she had kept a daily log of events commencing 6 March and ending with her termination. Since her testimony and credibility had been continuously and sometimes successfully attacked, the evident intent of using the log (G.C. Exh 15) was to bolster her veracity and overall credibility after attack. Regarding this daily log, she testified, obdurately and falsely, that (1) the back of the log was kept on a daily basis when the evidence showed that she had kept the back of the log, not on a daily basis, but had written it as a summation at a time other than on a

[17] In particular, the letter shows that Shank was aware by 13 March (apparently based on the Guffrovich-Nardone report of Colarusso's statements of that morning) that Colarusso "or other salaried employees . . . presented . . . [unauthorized] samples . . . for analysis."

[18] Respondent consistently rated Colarusso as a "highly effective" employee (Tr. 307).

daily basis; (2) in keeping the log she had no intention of using it as evidence (Tr. 610) but, almost at the same time, she testified that she knew that whatever happened, she was going to record the events for use "as a main source" (Tr. 611); and (3) she evenly spaced the events recorded at the back of the log to get them on a single page when it was evident that she did not know, when she started recording them on the back page, how many events were to be recorded so that they could be fitted in on a single page.

What started out as Respondent's attempt to impeach Colarusso's credibility on a technically material (but by no means a collateral) matter, yet one that might not necessarily reach vital elements of her overall credibility, soon developed into Colarusso's clearly false, but unshakable, insistence that she kept the diary on a daily basis. Her self-contradictions and the implausibility of her testimony demonstrated that she was untruthfully describing the log, its purpose, and perhaps its contents. Thus, what started out as a relatively minor matter, eventually developed, over a lengthy examination caused principally by her own implausibility, into a substantial impediment, leading to my reevaluating any and all contradicted testimony.

Lastly, it should be noted that Respondent's termination letter (G.C. Exh. 6) to Colarusso, dated 8 April 1986, lists many reasons for the discharge, some of which are true and some untrue. Among them are (1) counseling an employee (i.e., Deborah Savoia) that she was being made ill by toxic levels of arsenic; (2) disregarding results of Respondent's air tests that showed no unsafe levels of chemicals in the office area; (3) her disregard of advice of the plant physician regarding potential exposures in the office area. In addition, (4) she acted without authorization in obtaining dust samples and transmitting them to the Kirby Health Center and (5) purposely withheld the Kirby Health Center report from management; (6) she questioned maintenance supervision about a citation received from the Pennsylvania Department of Environmental Resources accusing management of pumping arsenic into the office system despite test results to the contrary; (7) she lied to her supervisor concerning the arsenic level, being "200," as "negligible."

At the hearing, however, as reasons supporting the discharge, Respondent relied principally on Colarusso's untruthfulness in three instances[19] and her refusal to provide a copy of the Kirby Health Center report (Tr. 504–507). Shank admitted that the three "lies," dispositive of the discharge, were not mentioned in the above termination letter (Tr. 510). On the other hand, two of the three "lies" were first mentioned in his testimony in the unemployment compensation hearing on 29 May 1986, 2 months after the discharge letter.

[19] The three alleged "lies" (Tr. 494–495) were: (a) accusing Guffrovich of ordering McHale to clean the vents, switching to McHale cleaning the vents, and then saying she had "misunderstood"; (b) Garcia-Pons truthfully contradicted her assertion that he had suggested contacting OSHA; and (c) refusing to identify the other employees displaying arsenic symptoms she mentioned to Richardson.

IV. DISCUSSION AND CONCLUSIONS

A. *The Prima Facie Case*

Respondent, in citing Board precedent, particularly *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*) remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986) (*Meyers II*), enfd. 835 F.2d 1481 (D.C. Cir. 1987), argues in its brief that (a) Colarusso was not engaged in concerted protected activities, and (b) in any event, was discharged because she was caught in blatant untruths and because of her insubordinate refusal to turn over the test report from the Kirby Health Center (R. Br. 5–6).

To determine whether the Board would find that Colarusso was engaged in "concerted activities" and, ultimately, in concerted activities protected by Section 7 of the Act, I note that the Board has determined, in its *Meyers Industries I*, above, that:

> In general, to find that an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. [*Meyers I*, 268 NLRB at 497.]

A corollary to the above *Meyers Industries* rule appears in *Monarch Water Systems*, 271 NLRB 558 fn. 3 (1984), in which the Board held (Chairman Dotson dissenting) that:

> Threats made and actions taken by an employer against an employee based on the employer's belief that the employee engaged in or intended to engage in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity.[20]

There can be little question that the effort of Colarusso in contacting OSHA, whether or not encouraged by Garcia-Pons, and in separately sending out the sample of dust, with Savoia's knowing assistance, to the Kirby Hospital were each a *protected* activity because they each related to a health matter concerning potentially toxic

[20] The Board has subsequently cited *Monarch Water Systems* favorably for the same proposition in *Daniel Construction Co.*, 277 NLRB 795 (1985). Accord: *Independent Stations Co.*, 284 NLRB 394(1987). Thus, it would appear that under *Monarch Water Systems*, supra, the dispositive issue with regard to an employer's motive in a discharge under these circumstances hinges on the Respondent's *perception* of whether the employee or employees are engaged in concerted protected activities rather than on the fact of whether they were so engaged. Alternatively, regardless of the employer's perception, a violation occurs if the employer discharges an employee for engaging in concerted protected activities which, in turn, hinges on whether the employees were actually engaged in concerted protected activities and the employer knew it. See *Independent Stations Co.*, supra.

working conditions in Respondent's plant. Compare: *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), *Serendippity-Un-Ltd.*, 263 NLRB 768, 774–775 (1982), *Alleluia Cushion Co.*, 221 NLRB 999 (1975), and *Meyers Industries*, supra, with *Every Woman's Place*, 282 NLRB 413 (1986), and *Tamara Foods*, 258 NLRB 1307 (1981). The facts that the taking of the sample and the OSHA contact were unauthorized are not material under the Act. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978).

Regarding whether this protected activity is also *concerted*, the evidence shows that Respondent *perceived* that Colarusso was engaged in *concerted* activity. For, as appears in Respondent's 31 March letter to the Kirby Hospital Center (R. Exh. 6) demanding a copy of the test results, Respondent stated:

> On or about 13 March 1986, Owens-Illinois became aware of the fact that Ms. Louis Colarusso, *or other salaried employees*, acting without authorization and on *their own behalf*, acquired sample(s) of materials from our operation and presented these sample(s) to Kirby Memorial Health Center for analysis. [Emphasis added.]
>
> . . . .
>
> I would also request that Kirby Memorial Center provide me with the results of all sample analysis submitted to you by Ms. Colarusso *or other unauthorized employees*. [Emphasis added.]

I therefore conclude, on the basis of the above letter, that Respondent, as early as 13 March 1986, *perceived* that more than one sample had been sent to Kirby Health Center for analysis; and that Colarusso was acting with other employees (Zabrovia, Slavoski, and Savoia) in submitting these samples to the hospital for analysis. In fact, she was. Each of these employees (Zabrovia, Slavoski, and Savoia) knew that other, co-employees were concerned about dust problems and each collected and then submitted the samples with such knowledge. In such circumstances, I conclude that Respondent perceived that its employees were acting "together," therefore "in concert" and therefore that they were engaged in "concerted activities" within the meaning of Section 7 of the Act. *Meyers Industries I* and *II*, supra. In addition, the employees were actually engaged in a concerted activity.

Having already concluded that the employees were also engaged in protected activities because they were concerned with their health in the Pittson plant, I draw the inference from Respondent's letter to the Kirby Health Center (R. Exh. 6) that the concerted activity of these employees in submitting the samples was for the purpose of analyzing the samples to see if there were noxious or corrosive substances in them. I therefore need to go no further to conclude that, within the meaning of *Tamara Foods*, supra (1981), *Monarch Water Systems*, supra, and *Independent Stations Co.*, supra, Respondent knew that Colarusso and other employees were engaged in *protected, concerted activities* within the meaning of Section 7 of the Act when, without authorization, they "acquired sample(s) of materials from our operation and presented these sample(s) to Kirby Memorial Health Center for analysis."[21]

The underlying facts, of course, show that on or about 12 February 1986, Colarusso, Savioa, and Slavoski submitted the samples because of Slavoski's complaints, Colarusso's alleged symptoms, and Savoia's urinalysis showing arsenic toxicity, and because of coughing, headaches, and sore eyes in the machine shop department. Indeed, in late December or early January, when, after Debbie Savoia had visited the company doctor concerning her arsenic poisoning, Colarusso told Peggy Guffrovich of the reason why Debbie Savioa had seen the doctor, Guffrovich said that she *knew* about it.

Furthermore, Respondent apparently knew or believed, as a result of Nardone and Guffrovich reporting back to Shank on their 13 March conversation with Guffrovich (they reported back on the day they spoke to Colarusso, 13 March), that more than one sample had been submitted to the Kirby Health Center. There would be no reason for Shanks to state (in his letter to Kirby Health Center of 31 March) that he believed that *on 13 March* more than one sample may have been submitted if that were not then known to him.

B. *Respondent's Motive for the Refusal to Grant the Pay Increase, for the Suspension and for the Ultimate Termination of Colarusso*

I conclude that, in the prima facie case, two elements of animus regarding Colarusso's engaging in the protected concerted activities are manifested in the record. The uncontradicted and credited Colarusso testimony is that Respondent maintains a strict "chain of command" system of subordinates reporting only to their superiors. Similarly, Respondent is adverse to its employees contacting OSHA concerning perceived unhealthy working conditions especially in view of Respondent's in-house analytical expertise. (1) Respondent resented Colarusso violating its strict corporate system, manifested in the Pittston plant, of the "chain of command." (Tr. 588.) Thus Colarusso's uncontradicted and credited testimony convinces me that Respondent maintained such a strict chain of command system in the Pittston plant that it would amount to an employee, as Colarusso testified, placing her neck "in the guillotine" if she circumvented the chain of command by going around the employee's own immediate supervisor. This had been true in Colarusso's 19 years of experience with the Company. Wholly consistent with, and as I view the evidence, dispositive of this conclusion is Peggy Guffrovich's testimony (Tr. 443, et seq.) that she was "stunned" when Colarusso told her that she had submitted a dust sample to the Kirby Health Center for testing of toxic substances and had gone outside the Company for this purpose. In a similar vein, as Shanks testified, when Guffrovich and Nardone reported back to him of their 13 March conversation with Colarusso, they reported that Colarusso had taken a dust sample and submitted it to an "outside laboratory"

[21] As noted above, this was one of the reasons listed for the discharge (G.C. Exh. 6) and constitutes evidence of unlawful motivation under the present facts.

(Tr. 284). Shank's repeated questioning of Colarusso on this point shows that, like Guffrovich, he was incredulous that she had done so when Respondent had such great "in house expertise" (Tr. 297; 534). (2) Perhaps an even more significant support for a finding of Respondent's animus is that Colarusso not only violated the chain of command and went outside to the Kirby Health Center with a dust sample showing toxic conditions inside the plant, but she went to OSHA to determine the significance of the level of arsenic.

Shank testified that Respondent would not look favorably on a company official "blowing the whistle" and going to OSHA (Tr. 515) and admitted that it would be a "serious matter" for an employee to report the Company's arsenic violations (Tr. 514). While Shank understandably testified that it is not company policy to discharge employees for going to OSHA (Tr. 514), he admitted that for Colarusso, Respondent's nurse, part of Respondent's "safety team," to report the matter to OSHA, especially before the going to the "in house people" was "a little treasonous" (Tr. 534). He could not—would not—answer whether, if Garcia-Pons suggested that Calarusso contact OSHA, he would be discharged.

I therefore conclude on the basis of the uncontradicted testimony of Colarusso, and the admissions of Guffrovich and Shank, that Respondent harbored animus against Colarusso, both for sending the dust samples to the Kirby Health Center and contacting OSHA concerning the significance of the Kirby Health Center arsenic report.

Regarding the *timing* of the termination, it appears that Respondent was fully aware of Colarusso engaging in protected concerted activities by 13 March 1986. Shank then conducted at least two telephone conversations with management officials both within and outside the Pittston plant[22] concerning discipline of Colarusso. Colarusso was told of Respondent's decision to discipline her on 18 March by depriving her of the 6-percent pay raise and on 20 March of the decision to suspend and discharge her.

By 13 March 1986, Nardone and Guffrovich had reported to Shank that Colarusso had, on her own, without authority, collected and dispatched a dust sample to Kirby Health Center for analysis and had thereafter contacted OSHA to determine the significance of the numbers from the Kirby Hospital Center report (Tr. 284). By 14 March, the next day, Colarusso had reneged on her promise to give Guffrovich a copy of the Kirby Health Center report (G.C. Exh. 7). Since there were two telephone conversations between Shank and higher officials, including Respondent's attorney, in the period of 13 through 18 March (in which Shank notified them that Colarusso had contacted OSHA and was telling employees of arsenic in the ventillation system, Tr. 285–287), I find that all company officials, certainly no later than 16 or 17 March, were aware of the facts as stated above, concerning Colarusso's activities and Colarusso's refusal to turn over a copy of the report. After the 18 March deprivation of the 6-percent pay raise, Shank notified her on 20 March that she was to be suspended pending discharge. Thus the period between Respondent first learning of Colarusso engaging in protected concerted activities (13 March) and the determination to suspend and discharge her (20 March) occurred in a period of 1 week. The decision to discharge was the result of telephone conversations with higher management during that period. I therefore conclude, on the basis of the nature of Colarusso's activities, Respondent's animus, and the speed of Respondent's action, that the General Counsel has proved a prima facie case that Respondent discriminated against Colarusso in denying the pay increase on 18 March and ultimately terminated the employment of Colarusso (commencing 20 March) because of her protected concerted activities of sending the samples to Kirby Health Center and contacting OSHA, which actions constitute violations of Section 8(a)(1) of the Act. *Meyers II*, supra.

C. *Respondent's Defense*

In Respondent's timely brief, it takes the position that Colarusso was not engaged in *concerted* activity within the meaning of the Act. As part of the discussion of the prima facie case above, I have found to the contrary, and reject Respondent's position that Colarusso was concerned only for her personal safety and her own fear that she was suffering from arsenic poisoning in submitting the dust sample to the Kirby Health Center and in contacting OSHA. Respondent's perception of Colarusso's conduct was that she was acting with others, as indeed she was.

Respondent, following Shank's testimony, next takes the position that Respondent desired only to deprive Colarusso of her 6-percent pay increase as a result of conversations between Shank and other top management officials in the period 13 through 18 March. Respondent states that it was only events, i.e., lies and continued insubordination, which came to light during the meetings of 18 and 19 March 1986. The above Respondent position is not consistent with the position as set forth in the Respondent's termination letter of 8 April 1986, where no lies are mentioned. Respondent has also abandoned Shank's 20 March assertion that Colarusso was being discharged, in part, because she wrote an anonymous letter to the local newspaper accusing the plant of sponsoring nepotism. Such omissions and shifting defenses do not inspire confidence in the reasons advanced for the discharge. That "lies," as a reason for discharge first appear 2 months later in the unemployment compensation hearing, only makes matters worse. Such late rationalization smacks of careful rethinking—perhaps a lawyer's intervention.

It was clear, as Shank testified (Tr. 300 et seq.) that Colarusso's conduct prior to 18 March was insufficient to cause her being suspended and discharged; and it was Shank's and Respondent's intent to discipline Colarusso, on the basis of her conduct prior to 18 March, only with the deprivation of the 6-percent wage increase (R. Br. 6; Tr. 293). It was that further lies came out of the 18

[22] None of the company officials in Toledo who participated in the decision to terminate Colarusso were called to testify and therefore give the reasons for the termination. Shank testified that he alone did *not* make the determination to suspend and then terminate Colarusso after depriving her for the 6-percent pay raise.

March meeting (Tr. 291 et seq.). The conduct that formed the basis of the decision to deprive her only of her 6-percent pay raise included not only the 13 March report that Shanks had received back from Nardone and Guffrovich regarding the submission of the sample to Kirby Health Center and the contacting of OSHA (Tr. 297), but Colarusso's conduct in going to McHale and asking about the DER citation, her false accusation of Guffrovich in cleaning the vent, and the conversation with Diane Gubbiotti. Moreover, at the 18 March meeting, various bits of Colarusso's conduct were also taken into account and were deemed by Shanks to be insufficient to cause discipline further than the deprivation of the pay increase. These included Colarusso accusing Shanks of harassing her over Colarusso's conduct in advising employees not to take early retirement even though Shanks had previously told her that it was contrary to company policy for them to do so (Tr. 294 et seq.).

Respondent contends, however, that it was Colarusso's conduct commencing in the meeting of 18 March and thereafter that caused Respondent to terminate her. This conduct included blatant untruths of three particular types (a) lying in saying that Guffrovich cleaned the vents or Bill McHale told her that laborers had cleaned the vents; (b) regarding the fact that Garcia-Pons told her to call OSHA; and (c) telling Richardson that employees other than Deborah Savoia showed symptoms of arsenic poisoning and telling Shank that she did not know who they were (Tr. 495–496). Shanks testified *at the instant hearing* that these "lies," in conjunction with Colarusso's adamant refusal to surrender a copy of the Kirby Health Center report, demonstrated that Colarusso, part of Respondent's health team, was a liar who could no longer be trusted in employment. As above noted, the 8 April discharge letter is silent on "lies" as a basis for discharge; and at the 29 May unemployment compensation hearing, as the General Counsel points out (G.C. Br. 36), Shanks was equivocal on whether lies, alone, would have caused the discharge; and he nowhere relied on Colarusso's defamatory statements to Richardson at any time. I analyze the "lies" defense for principally remedial purposes.

1. Colarusso untruthfully testified regarding Bill McHale

In the meeting of 19 March, Guffrovich told Colarusso that she had spoken to McHale and McHale said that he had not cleaned the vents. This was after Colarusso denied accusing Guffrovich of having ordered the cleaning of the vents. When Colarusso then insisted that McHale told her that he cleaned the vents, Shank called in McHale and McHale, speaking to Colarusso, said: "No, G—d Damn it, I told you so." Colarusso, according to Shanks, answered: "I must have misunderstood." (Tr. 298.) In spite of Colarusso's extensive rebuttal testimony, Shanks' version of this Colarusso confrontation with Maintenance Supervisor Bill McHale on 19 March, while not corroborated by Guffrovich, and only partly corroborated by McHale, was never *denied*. Nothing in Guffrovich's or McHale's demeanor or testimony showed untrustworthiness. I therefore conclude on the basis of demeanor testimony, certainly bolstered by Colarusso's failure in rebuttal to contradict Shanks' testimony, that McHale and Guffrovich were, on this point, truthful witnesses; and that Colarusso was untruthful in her testimony that McHale told her on or about 10 March that the laborers cleaned the vents in the medical office. I also conclude that she falsely accused Peggy Guffrovich of directing McHale to clean the vents (Tr. 448–449). None of this appears in the 8 April 1986 discharge letter (G.C. Exh. 6) and I am persuaded that Respondent was not seriously concerned with it in discharging her. That the lies first became a defense at the 29 May unemployment compensation hearing, almost 2 months after the 8 April enumeration of reasons is significant.

2. The alleged lie concerning Garcia-Pons

Based on the intrinsic probabilities of the events, I was, and am, prepared to conclude that Colarusso was truthful and Garcia-Pons was untruthful with regard to whether Garcia-Pons suggested to Colarusso that she contact OSHA in order to get an interpretation of the significance of the arsenic numbers.[23] Thus, I do not credit Shank's testimony that in her 19 March conversation with Colarusso, he asked her why she had gone to OSHA (Tr. 291). Rather, I credit Colarusso (Tr. 115) that Shank asked her why she had first spoken to Garcia-Pons and not Shank. Thus, I conclude that by 19 March, Garcia-Pons already had informed Shank that Colarusso had sent a dust sample to Kirby Health Center for testing. When Colarusso then told him that her contacting OSHA was Garcia-Pons' suggestion, Shank called in Garcia-Pons and got a denial. Under ordinary circumstances, there would be no reason for Colarusso, as a result of a conversation with a long-time friend (whom she rescued from alcoholism) like Garcia-Pons, to independently seek out OSHA if the long-time friend suggested that she speak to Dr. Campenella or environmentalist Nardone. On the other hand, given Respondent's inhospitable attitude toward employees—particularly supervisors—particularly high supervisors—like Garcia-Pons who suggest that employees contact OSHA with regard to poisonous elements on Respondent's premises, there would be every reason for Garcia-Pons to seek to minimize his role once his connection to the OSHA matter was exposed. Hence, it is clearly consistent that between 6 March and 18 March, he would tell Shanks that Colarusso submitted the dust sample to Kirby Health Center and then deny to Shanks, on Shanks' later direct inquiry, that Garcia-Pons recommended the OSHA route to Colarusso.

In short, Colarusso did not disclose to Shanks that she had contacted Garcia-Pons. Rather, it was Shanks who asked her why she had first spoken to Garcia-Pons about the "220." I conclude that even if Garcia-Pons denied to Shank suggesting OSHA to Colarusso, and even if Shank

[23] This issue, of course, relates not only to credibility but to whether Shank relied on Garcia-Pons's version. Regardless of whether Garcia-Pons recommended that Colarusso contact OSHA, the fact that she did contact OSHA and that Respondent knew about it nevertheless constitutes part of the prima facie case.

believed him, such a Colarusso "lie" would be unlawful reason to form a basis for termination. For Colarusso did have a right to go to OSHA. And discharging her for lying that her conduct was authorized by Garcia-Pons—has the same effect as discharging an employee for any other extraneous "lie" concerning engaging in protected activities: discharging an employee for lying about attendance at a union meeting. In any event because this lie was not mentioned in the 8 April 1986 discharge letter (G.C. Exh. 6), and notwithstanding that it was mentioned in Shank's unemployment compensation testimony 2 months later, I do not regard it as a matter on which Respondent seriously relied in the discharge.

3. The lies allegedly made to Terry Richardson

At the hearing, as I understood him, Shanks testified that the third problem was two lies that Richardson disclosed. The first was that Richardson told him on 18 March that Colarusso had admitted that she, herself, had cleaned the vents. Richardson also told him Colarusso knew of other employees, besides Savoia, who showed arsenic toxicity symptoms. Shanks *testified* that he believed Richardson when Richardson told him of these statements; and that McHale's contradiction, and Colarusso's failure to actually name other employees showing arsenic symptoms, fortified Shank's belief that Colarusso was an inveterate liar and untrustworthy of employment. (Tr. 517.)

Regarding these latter "lies" as support for the discharge, it is clear that (1) on the basis of Michaelene Lyons' credited contradiction of Richardson concerning Colarusso and the "facetious" admission (that Colarusso and/or Lyons had cleaned the vents), I conclude that Richardson was untruthful in that regard. I also regard Richardson as untruthful in his testimony that Colarusso told him that he should not trust either Guffrovich or Shank because they did not have the welfare of the employees in mind. As noted, Shank would have taken immediate action on such a report. He failed to do so. I credit Colarusso that such a statement would border on the irrational, especially when made to a stranger to the chain of command on which Respondent was so insistent and which Colarusso observed for 19 years (except where her own health was at issue and where she already knew that Debbie Savoia was sick with apparent arsenic poisoning). Nevertheless, it might be argued that regardless of Richardson's motives and credibility in making these reports to his superior, Shanks might in good faith, rely on Richardson's reports. Yet, given the alleged gravity attached to these "lies" by Respondent in the discharge of Colarusso, it is of obvious importance that Shanks, in his testimony before the Pennsylvania Unemployment Compensation Commission hearing, nowhere mentioned either of these Richardson-based lies (Tr. 517).[24] Shanks' testimony as to why he omitted these Richardson-based lies from his testimony before the Unemployment Compensation Board, within 2 months of the discharge (29 May 1986) was merely that he could not explain it: "I don't know" (Tr. 517). Such an explanation is entirely unacceptable when, if Shank's testimony *at the hearing* is to be taken seriously, it formed such an important basis of the discharge.

Moreover, the lie concerning Colarusso and Lyons cleaning the vent does not appear in the discharge letter of 8 April (G.C. Exh. 6), not, perhaps even more important, does Richardson's report of other alleged defamatory statements by Colarusso ("don't trust Guffrovich and Shank") appear in any of the various bases of discharge. I therefore conclude that not only was Richardson falsely testfying with regard to his conversations with Colarusso but falsely relayed this information to Shank who, in any event, despite his testimony at the hearing failed to give it much, if any, weight in assigning them as reasons for discharge. Colarusso's alleged lies to Richardson allegedly formed one of three sets of Colarusso lies causing the discharge (Tr. 505). I do not believe Richardson's testimony and I do not believe Shank on the point. I conclude that, in any event, Respondent relied on a false basis for these lies and that if the "lies" were ever transmitted to Shank, they formed a false basis for the discharge. The fact that Shank never used the alleged "lies" in the discharge letter and two of them first appear in his Unemployment Compensation Board testimony, 2 months after the discharge, underlines the lack of force, at the time of the 20 March suspension and 8 April enumeration, which Respondent itself deemed the three "lies" to present. (Tr. 508–510.)

4. Colarusso's failure to deliver a copy of the Kirby Health Center report

The fourth and final support for Respondent's suspension and termination of Colarusso was her failure to deliver a copy of the report to Shanks on his demand. Shank testified that in Respondent's 8 April discharge letter (G.C. Exh. 6) he wrote that Colarusso "lied" about the results being "negligible" because she admitted that there were 220 micograms of arsenic per gram in the dust. Shank testified (Tr. 530) that even though the Company knew of the 220 micograms per gram in the dust sample, and even though he knew it was not an air sample (which would be the critical factor), Respondent did not know of the several other numbers and values that appeared in the report (G.C. Exh. 7) that Garcia-Pons had seen and told Shank about.[25] Thus Shank testified that, although he knew of the 220 microgram figure, he did not know of the three other figures. Shank was also concerned because the 220 microgram finding escaped Respondent's Del Cragle analysis. This was a further reason why Shank wanted the report.

Colarusso refused to turn over a copy of the report to Guffrovich on 13–14 March and again refused to turn it over on 18–20 March to Shank because of an irrelevant reason (because she feared that Shank would use it to

[24] At one juncture, Shank testified the "lie" was failing to divulge the names of employees with arsenic symptoms (Tr. 495); while later he testified that the "lie" was Colarusso whispering that she cleaned the vents. (Tr. 515).

[25] Garcia-Pons failed to testify regarding his 19 March interview with Shank. Shank's testimony on the event is not detailed.

further coerce her into taking early retirement). However, she later testified that she did not turn it over because she had already told Garcia-Pons what the figure was and she felt that Shank should have "trusted" her (Tr. 624). Whether "trusted her" refers to the figures or her conclusion (based on OSHA's estimate) that the arsenic concentration was "negligible" is not clear. In addition, she ultimately admitted that she herself thought that the report was a matter of importance to the Company (Tr. 624) and that she was sure that Shank should have been given a copy of the report (Tr. 626).[26] To refuse Shank's request, as I have observed, is insubordinate.

On the other hand, as the General Counsel points out in his argument that the demand for the Kirby Health Center results was a mere pretext to cover Respondent's prior decision to discharge Colarusso for having gone outside the chain of command and contacting OSHA as part of a concerted protected activity, Respondent was clearly able to perform a similar test on dust which Colarusso had performed at the very same place and to satisfy itself concerning the possible danger emanating from the dust or any air borne dust. As a matter of fact, it did this very thing in the Richardson tests of 18 and 19 March 1986 and found the dust to be of insufficient toxicity to trigger further activities. Indeed, Respondent's use of Richardson's expertise and Colarusso's cooperation in his testing seems to me to make the Kirby report academic in large part and *tends* to support a finding that Shank's insistence on receiving the report was pretextual.

Notwithstanding the Respondent itself could and did conduct tests which tend to render substantially academic Colarusso's failure to deliver a copy of the results to Respondents, I do not believe that these factors demonstrate that Colarusso's refusal to deliver the copy was a mere pretext, as the General Counsel argues. Nor am I persuaded that Shank's testimony in May 1986 before the Pennsylvania Unemployment Compensation Board, that the Colarusso's failure to give a report was not the only element causing the discharge, demonstrates the pretextual nature of the failure to give the report (Tr. 519). Any argument that the failure to surrender the report created a pretext to mask an unlawful discharge far overshoots the mark.

There was no question that Respondent was seriously concerned, commencing with its knowledge from Guffrovich's 13 March interview of Colarusso, about the apparent presence of arsenic dust in the administrative offices. It was so concerned that Division Industrial Relations Director Herron forthwith caused Richardson to be sent to the Pittson plant to check on the quality of the *air* in the medical office. There is also no question, as the General Counsel pointed out, that Respondent would have to be fearful of its possible liability to the 1000 plant employees were it to disregard a report of arsenic in the dust in the ventilation system in that administrative offices Thus, the failure of its own nurse, part of the health team, to promptly supply it with a copy of the report which she knew showed arsenic and which, even in her own estimation, wasimportant to turn over to Respondent (especially in view of the illness of Debbie Savoia), shows that, whatever its weight, it cannot be regrded as a mere pretext excuse on which to pin an unlawful discharge.

[26] I regard as inexplicable and bordering on the unintelligible Colarusso's testimony that she believed that Shanks did not want to hear about the arsenic in the dust at the same time that he was demanding a copy of the Kirby Health Center report (Tr. 623–625).

V. SUMMARY AND CONCLUSIONS

The rules concerning the burden of proof of alleged unlawful conduct, including the status (as found above) of the prima facie case, is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 959 (1982), as favorably adopted by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401–403 (1983). As the court of appeals recently restated the rules in *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1266 (7th Cir. 1987), enfd. 279 NLRB No. 175 (1986) (not reported in Board volumes).

> The General Counsel carries the burden of proving the elements of a section 8 unfair labor practice . . . . Thus, the General Counsel must establish that the discharge or other adverse labor practice was "based in whole or in part on antiunion animus—or . . . that the employee's protected conduct formed a substantial or motivating factor in the [employer's] adverse action. . . . The employer, however, may avoid liability by showing that his actions would have been the same "regardless" of his forbidden motive.

It seems to me that in deciding the ultimate motive for Respondent's actions (both deprivation of the 1 April 6-percent wage increase and the 20 March–8 April suspension—discharge), the pivotal evidence in determining the *strength* of the General Counsel's overall proof, as opposed to the existence of a mere prima facie case, is certain Shank and Colarusso testimony. I have credited Colarusso who testified that at the 18 March disciplinary meeting, Shank told ner, inter alia, that she could expect further discipline. I have discredited Shank's testimony that he did not mention the possibility of further discipline because, as of March 18, he wanted the matter of discipline "put to bed" by the imposition of only loss of the 6-percent increase; that it was occurrences at the 18 March meeting that led to the further discipline of suspension and discharge.

He testified that, as a result of the 18 March meeting he decided to investigate (1) why Colarusso contacted OSHA; (2) why she submitted the dust samples to Kirby Health Center; and (3) the question of cleaning of ducts (Tr. 304–305).

Yet Shank already knew (from the Guffrovich-Nardone 13 March report) that Colarusso, in fact, had submitted samples to Kirby Health Center and contacted OSHA. If his 18 March desire was truly to put the matter to rest—and if he did not already know *why* she had contacted OSHA—why did he testify that he wished to determine the further question of *why* she contacted OSHA and submitted samples to Kirby Health Center. To further examine her motives is to exacerbate the

problem. To raise with her the question *why*, mentioning Respondent's in-house expertise, is to open the way for further confrontation and not to put the matter to rest.

Hence, the significance of credibility resolution that, on 18 March Shank told her that "further action" might be taken against her (Tr. 114). I discredit his denial (that he did not say that Colarusso could expect further discipline) and I discredit his testimony concerning his desire, as of 18 March, to put the matter of discipline "to bed."

I conclude that, whether the impetus came from Shank's 13–17 March phone calls to divisional superiors or otherwise, Respondent (Shank included) had decided by 18 March to discharge Colarusso and was looking for further grounds.

If Shank's testimony—that Colarusso's pre-18 March conduct was found to be insufficient for discharge, is credited then the matters Shank later unearthed, the basis of the discharge according to Shank's testimony at the hearing, are insufficient to support the subsequent discharge: the Garcia-Pons lie, the McHale confrontation, and the spurious Richardson reports. They are insufficient because, in discharging Colarusso, none of these elements appear in Shank's own all-inclusive, carefully crafted 8 April discharge letter (G.C. Exh. 6). Respondent had 18 days (20 March–8 April) to construct the written reasons for discharge in its 8 April letter and failed to mention any of these "lies." And 2 months later, in Shank's unemployment compensation testimony, the defamatory Richardson-reported lies were still not mentioned.

The Colarusso refusal to hand over the Kirby report, on the surface, is patently insubordinate. It cannot be rationalized as in any way a device protective of concerted activities. The refusal was based only on the personal (and irrelevant) ground of Colarusso's fear that Shank would use it to further coerce her into early retirement—a position that Shank, at all times, was privileged to pursue. On the other hand, in determining the position of that element in the lawfulness of the discharge, it is not Colarusso's insubordinate attitude but Respondent's perception of that attitude that is controlling.

Shank long (since 14 March) knew of, and did not act on, Colarusso's insubordinate refusal to surrender a copy to Guffrovich. Ensuing phone calls to divisional and plant superiors resulted only in the 18 March decision to withhold the 6-percent wage increase. Thus the insubordinate refusal to surrender a copy of the report, according to Respondent's decision, would result only in loss of the pay raise. It was only thereafter (19 March et seq.), in conjunction with alleged further evidence of Colarusso "lies," that Shank demanded—and was himself refused—a copy of the report. But he knew of the 220 microgram section of the report and, with Respondent's in-house expertise, could duplicate the Kirby Hospital analysis. Indeed, because Richardson's actual subsequent testing showed no dangerous level of arsenic or other noxious elements, it tends to make Shank's insistence or receiving a copy of the Kirby report—to the point of discharging Colarusso on refusal—to be a suspicious effort.

I have concluded that, as evidenced by Herron's hurried dispatch of Richardson (on or about 14 March) to do further air sampling in the Pittson administrative offices (on 18 March), Shank's divisional superiors were seriously concerned by the news which Guffrovich and Nardone reported to Shank on 13 March. Such a conclusion, however, is entirely consistent with the parallel conclusion that Respondent unlawfully terminated Colarusso. For (and this is central to the conclusions in this case), Respondent's hierarchy's immediate, genuine concern, with the health implications of Shank's report to them around 13 or 14 March, of arsenic-laden dust in the administrative office's ventillation system, is in no way incompatible with my finding that, as Shank testified, Respondent would not look favorably on an employee (a fortiori, a person associated with management—a member of Respondent's "safety team," (Tr. 534) "blowing the whistle" by informing OSHA (Tr. 515). Colarusso's recourse to Kirby Health Center and OSHA was like "calling the cops" a little bit of treason (Tr. 534).

Thus, while the record does not show, for instance what, if any, instructions Herron gave Richardson (after Herron's being briefed of Colarusso's OSHA contact and her submitting samples to Kirby Health Center) other than to do further air sampling, yet Richardson's false testimony,[27] designed to be, or knowing the effect of being, so destructive of Colarusso's credibility, provides support for the conclusion that by the time of Richardson's 18 March conversations with Colarusso (*before*, not after, Shank had Guffrovich call her into Shank's office, later on 18 March), Colarusso's goose was cooked.

How else to explain Richardson's testimony: that Colarusso told him, a total stranger, not to trust Shank or Guffrovich concerning arsenic exposure because neither was concerned with the health and welfare of the plant employees (Tr. 345). Because, as above noted, Richardson reported the allegedly whispered (morning of 18 March) Colarusso admission[28] (of Michalene Lyons and Colarusso secretly cleaning the vents) to Guffrovich and Shank (Tr. 341–349; 405–406), it is incredible that he apparently failed to report Colarusso's other, simultaneous hostile and defamatory (morning of 18 March) statement to Shank and Guffrovich: that neither was to be trusted because of lack of concern for the health of plant employees. None of Shank's nor Guffrovich's testimony alludes to such corrosive statements and, as might be expected, the discharge letter is silent as to such statements.

In short, I conclude that there is no mention of these malignant Colarusso statements (made to Richardson) in Respondent's defense—in the discharge letter or in Shank's testimony before the Unemployment Compensation Commission because Colarusso never made them. Richardson's false testimony describing them demonstrates, it seems to me, such separate, overwheening animus as to independently support the conclusion that, at a divisional level, Respondent was out to "get" Colarusso. Contacting OSHA was "treasonous."

If, however, there is a doubt that Shank was going to discharge her before the 18 March meeting, there could

[27] His overall credibility indeed his veracity, was undermined by the credited and, on this record, wholly ingenuous testimony of Michalene Lyons, Respondent's own witness—still in Respondent's employ.

[28] Michalene Lyons specifically denied cleaning the vents, with or without Colarusso's help.

be no doubt of his resolve following the 19 March meeting. There, facing Shank and Guffrovich, Colarusso took the appallingly self-righteous, if legal, position that she had the "right" not only to contact OSHA, but to accompany the OSHA investigator to the place of contamination (Tr. 120). Little is left to the imagination how such statement sat with Shank and Guffrovich who viewed her original OSHA contact as "treason" to Respondent. When, on 19 March, she then reaffirmed her "right" to use the OSHA weapon, to a supervisor with Shank's predisposition, Colarusso was "out" even if a prior decision to fire her had not been made.[29]

Even if Colarusso's failure to hand over a copy of the report was not a pretext, yet, considering the strength of the prima facie case, including the degree of animus, and the falseness or late invention of many of Respondent's ("lies") reasons for the discharge, I am not convinced, under the *Wright Line* test, that such insubordination would have caused the suspension and discharge apart from Colarusso's conduct protected by the statute. I conclude that the denial of the 18 March wage increase, the 20 March suspension, and the 8 April discharge violated Section 8(a)(1) of the Act, as alleged. See *Delta Gas*, 282 NLRB 1315 (1987) (Chairman Dotson dissenting).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Glass, Pottery, Plastics and Allied Workers International Union, Local 243 is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent, by refusing to grant its employee, Louise Colarusso, a pay raise on or about 1 April 1986, by suspending her on 20 March and by discharging her on 8 April, all because she engaged in protected concerted activities, violated Section 8(a)(1) of the Act, thereby unlawfully interfering with, restraining, and coercing employees in activities protected by Section 7 of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent is engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Respondent has taken the position that it discharged Colarusso, inter alia, for three sets of lies. In rejecting that defense, I have nevertheless agreed with Respondent that Colarusso lied in falsely accusing Guffrovich and McHale of cleaning the vents. I have determined, however, only that that lie was not sufficient to discharge her. Put another way, while I have concluded that Respondent discharged Colarusso unlawfully, I have not suggested that Colarusso did not lie.

The transcript record, however, shows other instances of Colarusso's untruthfulness. I regard her testimony concerning whether Shank asked her for a copy of the Kirby Health Center report to be evasive to the point of untruthfulness (compare: Tr. 123 to Tr. 623–625). I have also concluded that, in the face of Slavoski's repeated denials, Colarusso lied in testifying that Slavoski told her that machine shop employees were complaining of tiredness, burning eyes, or headaches due to air quality (compare: Tr. 40–41 to Tr. 50). The transcript shows that, for a statutorily irrelevant reason, Colarusso facilely lied to Guffrovich regarding the destruction and unavailability of the Kirby Health Center report.

This record of Colarusso's untruthfulness, however, pales in comparison to her obdurate insistence, at the hearing, on her having kept the back portion of her diary on a daily basis. Neither continued examination, admonitions, exhortations, nor warnings could sway her from her untruthfulness.

Colarusso, the head nurse, was part of Respondent's Pittson health team—a position of considerable responsibility and consequence considering the extraordinary toxins with which the manufacturing process regularly deals. As a professional employee dealing with the health of 1000 employees, and given Colarusso's propensity for untruthfulness (granting her great personal, and reasonable, concern based on Savoia's toxic level, particularly for her own health) I cannot and do not recommend to the Board that she be reinstated. To this extent, Respondent is rid of Colarusso. It is, however, neither profiting from its unfair labor practices nor put in the happily anomalous position of having tried and failed to terminate her, inter alia, for untruthfulness and yet being *not* compelled to reinstate her for the same reason.

The "lies" which I have found insufficient to support Respondent's defense were either not lies or not actually the motivating factor in the discharge. The examples of untruthfulness on which I recommend a remedy, other than Colarusso's reinstatement, are not those on which Respondent relied for its unlawful actions. There are different statutory ends to be served, on one hand, in my recommending an order against a repetition of Respondent's unlawful conduct concerning its other employees and, on the other hand, in this peculiar case, remedying that conduct, inter alia, by not returning to employment, in a professionally delicate and fiduciary position, an employee who has demonstrated certain conduct not consistent with Respondent's and Respondent's employees' unlawful interests.[30]

[29] Thus, where Shank repeatedly testified that it was Colarusso's interviews of 18–20 March caused him to seek further discipline, it was not the newly revealed "lies," but her insistence on OSHA rights that caused Shank's reevaluation. Guffrovich already had been "stunned" by the OSHA contact.

[30] The precedents relating to cases involving false testimony where the recommendation was against reinstatement with backpay (following unlawful discharge), of course, are fact-specific. There is no question, as I read the cases, that the Board rule appears to be that forfeiture of the reinstatement-backpay remedy will be entertained, not merely where the false testimony is deliberate and willful, but only where it amounts to "a malicious abuse of the Board's processes." *Service Garage*, 256 NLRB 931 (1981); *Iowa Beef Packers*, 144 NLRB 615, 622 (1963). The courts of appeals do not accept that standard and appear to find that repeated lying "severely impede[s] the fact-finding process" and does "not effectuate the

Continued

Regarding affirmative relief to Colarusso, I recommend to the Board that the 1 April pay raise be reinstituted and that Colarusso be made whole for any loss of earnings that she may have suffered by reason of this deprivation and her being unlawfully suspended and discharged on 8 April 1986, by paying to her a sum of money equal to that which she should have received from her suspension on 20 March to the date of her termination on 8 April 1986. Interest is to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[31]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, Owens Illinois, Inc., Pittston, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or suspending any employee, or depriving any employee of a pay raise, or otherwise disciplining any employee because the employee or other employees engage in concerted activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Louise M. Colarusso by immediately paying to her, with interest, the amounts of wages or earnings of which Respondent deprived her commencing with her suspension on or about 20 March 1986, until her discharge of 8 April 1986 as set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Pittston, Pennsylvania place of business, copies of the attached notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint, in all other respects, shall be dismissed.

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policies of the Act," *NLRB v. Magnusen*, 523 F.2d 623 (9th Cir. 1975), denying enf. *North Star Refrigerator Co.*, 207 NLRB 500, 504 (1973); *Iowa Beef Packers v. NLRB*, 331 F.2d 176, 184–185 (8th Cir. 1964), enfg. 144 NLRB 615 (1963). As I have tried to point out, however, here the distinguishing factors are that the employee is a professional and occupies a delicate position in the health field where employer and employee confidence are concerned, cf. *NLRB v. Western Clinical Laboratory*, 571 F.2d 457 (9th Cir. 1978); and that the primary inquiry should be whether, under the circumstances "reinstatement would create an undesirable employment situation" and thereby "frustrate the purposes of the NLRA." *NLRB v. Jacob E. Decker & Sons*, 636 F.2d 129 (5th Cir. 1981).

[31] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Pomeroy Co. *and* Service Employees International Union, Local 32B–32J, AFL–CIO. Case AO–263

September 22, 1988

ADVISORY OPINION

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, CRACRAFT, AND HIGGINS

Pursuant to Sections 102.98 and 102.99 of the National Labor Relations Board's Rules and Regulations, on July 13, 1988, the Pomeroy Company (the Petitioner) filed a petition for an advisory opinion as to whether the Board would assert jurisdiction over it based on the Board's current jurisdictional standards.

In pertinent part, the petition alleges as follows:

1. The Petitioner is a limited partnership that owns and operates residential apartment buildings located at 520, 522, 524, 526, and 530 West 123d Street, as well as other residential apartment buildings in New York, New York.

2. A representation proceeding (Case No. SE–56694) is currently pending before the New York State Labor Relations Board (the SLRB) in which the Service Employees International Union, Local 32B–32J, AFL–CIO (the Union) is seeking to be certified as the exclusive bargaining representative of the Petitioner's service and maintenance employees at its 520, 522, 524, 526, and 530 West 123d Street locations.

3. During the preceding year, which period is representative of its operations generally, the Petitioner had gross revenues in excess of $500,000 and purchased goods and materials valued in excess of $50,000 directly from sources located outside the State of New York.

4. The Union has indicated to the Petitioner that it lacks sufficient information to admit or deny the aforesaid commerce data, and the SLRB has to date taken no action with respect to the representation petition pending before it.

5. There is no representation or unfair labor practice proceeding involving the same dispute currently pending before the Board.

Although all parties were served with a copy of the petition for advisory opinion, none has filed a response thereto as permitted by Section 102.101 of the Board's Rules and Regulations.

On the basis of the foregoing, the Board is of the opinion that it would assert jurisdiction over the Petitioner. The Board has established a $500,000 discretionary standard for asserting jurisdiction over residential apartments.[1] As the Petitioner alleges that its gross annual revenues exceed that amount, assuming the Petitioner is a single employer with respect to its several apartment buildings, it would satisfy the Board's discretionary standard.[2] Further, as the Petitioner's alleged annual out-of-state purchases are more than de minimis, it would also satisfy the Board's statutory standard for asserting jurisdiction.

Accordingly, the parties are advised that, based on the aforesaid allegations and assumptions, the Board would assert jurisdiction over the Petitioner.

[1] See *Parkview Gardens*, 166 NLRB 697 (1967).

[2] The Board has traditionally aggregated the gross revenues derived from all apartment buildings operated by an employer in determining whether to assert jurisdiction in a labor dispute arising at any one of them. See, e.g., *R & C Management Co.*, 264 NLRB 873 (1982); *Marlake Associates*, 231 NLRB 335 (1977).

Waste Systems Corp. *and* United Steelworkers of America, AFL–CIO, CIC. Cases 18–CA–10233 and 18–CA–10293

September 23, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On May 25, 1988, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a cross-exception and a supporting and reply brief. The Charging Party filed a letter in support of the General Counsel's position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's ruling, findings,[1] conclusions as modified and to adopt the recommended Order as modified.[2]

The judge found that the Respondent violated Section 8(a)(5) by refusing to execute an agreement reached in September 1987, and by instituting unilateral changes in November 1987. We adopt only the finding of the violation for refusing to execute the agreement.

The judge found that the Respondent and the Union reached agreement on a new contract on September 9, 1987, which was recapitulated in a subsequent phone conversation to clarify and correct the draft agreement the Respondent had prepared following the final bargaining session. This agreement, with the corrections agreed to by the Respondent, was ratified by the Respondent's employees on September 14, 1987. The Respondent has refused to sign or implement the agreement.

The statutory obligation to bargain in good faith established in Section 8(a)(5) of the Act includes the obligation to reduce to writing and sign any agreement reached during the course of collective bargaining. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). Therefore, we agree with the judge that the Respondent's refusal to sign and abide by the agreement violated Section 8(a)(5) and (1) of the Act.

The judge also concluded that workplace regulations instituted by the Respondent in November 1987 were unlawful unilateral actions.[3] The changes, however, according to the testimony of the union representative, were permitted under the management-rights of the contract. We believe, given the union agent's admission, that the judge's unilateral changes finding is inconsistent with his finding that there was a contract between the parties. Under that contract, which we find the Respondent must execute and abide by, the Respondent was privileged to make the work rule changes. Accordingly, we dismiss the complaint allegation that the Respondent violated the Act by changing the loitering and lunchtime credit work rules.

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 4 and renumber the subsequent paragraph.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Waste Systems Corp., Albert Lea, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(b), 2(c), and 2(d) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent's exceptions implicitly challenge the judge's crediting of uncontradicted testimony as a basis for his findings. It is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel excepts to the judge's failure to find an additional 8(a)(5) violation based on the Respondent's attempt to withdraw its final offer to the Union. We agree with the judge that the contract was in effect at the time of the attempted withdrawal. As the remedy for the Respondent's unlawful refusal to execute the contract effectively encompasses a remedy for the additional violation sought, we find it unnecessary to pass on the General Counsel's cross-exception.

[2] We amend the judge's remedy to provide that the Respondent shall pay backpay as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).

[3] The judge based this conclusion on equitable grounds, denying the Respondent the opportunity to contest the existence of the contract and at the same time attempt to take advantage of the contract's management-rights clause.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Accordingly, we give you the following assurances.

WE WILL NOT fail and refuse to acknowledge and sign a collective-bargaining agreement reached with United Steelworkers of America, AFL–CIO, CLC, the exclusive bargaining representative of our employees in the following unit:

> All full-time and regular part-time production and maintenance employees employed at or out of our facilities in Albert Lea, Austin, Blue Earth and Fairmont, Minnesota and Lake Mills, Iowa; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL sign the contract reached with the Union in September 1987 and honor that contract through its life.

WE WILL make employees whole for any and all losses they have suffered because of our failure to acknowledge, sign, and honor our contract with the Union, and WE WILL pay interest on those losses.

WASTE SYSTEMS CORP.

James L. Fox, Esq., for the General Counsel.
David R. Hols, Esq. (Felhaber, Larson, Fenlon & Vogt, P.A.), of Minneapolis, Minnesota, for the Respondent.
John G. Engberg, Esq. (Peterson, Engberg & Peterson), of Minneapolis, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard these consolidated cases in trial on January 26, 1988, in Minneapolis, Minnesota. The matter arose as follows. The United Steelworkers of America, AFL–CIO, CLC (the Charging Party) filed a charge docketed as Case 18–CA–10233 on September 24, 1987. Following an investigation of the charge, the Regional Director for Region 18 issued a complaint and notice of hearing in Case 18–CA–10233 on November 6, 1987. The Charging Party filed Case 18–CA–10293 on November 23, 1987. Following an investigation, the Regional Director for Region 18 issued an order consolidating cases, consolidated and amended complaint, and notice of hearing on December 31, 1987, consolidating the two cases for hearing.

The consolidated amended complaint alleges and the answer denies that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by failing and refusing to execute a written contract embodying an agreement reached with the Charging Party on September 17, 1987. The complaint further alleges that Respondent violated Section 8(a)(5) and (1) of the Act by making certain changes in terms and conditions of employment of represented employees without affording the Charging Party an opportunity to meet and bargain concerning the changes and, finally, alleges that in November 1987 Respondent wrongfully withdrew its contract proposals during negotiations with the Charging Party because the Charging Party had filed an unfair labor practice with the National Labor Relations Board (Board), and notwithstanding the fact that the parties had reached previous agreement with respect to those proposals, thereby violating Section 8(a)(5) and (1) and Section 8(d) of the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including briefs from the General Counsel, Respondent, and the Charging Party, and my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The consolidated amend complaint alleges and the answer admits that at all times material, Respondent has been an Iowa corporation with its principal office and place of business located in Albert Lea, Minnesota, with additional facilities located in Lake Mills, Iowa, and Austin, Fairmont, and Blue Earth, Minnesota, where it has been engaged in the business of transporting, storing, and disposing of solid waste and waste recycling. During the calendar year ending December 31, 1987, Respondent, in the course and conduct of its business operations, sold and shipped from its facilities located within Minnesota products, goods, and materials valued in excess of $50,000 directly to points outside the State of Minnesota. Further, during the same period, in the course of its business operations, Respondent purchased and received at its facilities located within Minnesota products, goods, and materials valued in excess of $50,000 directly from points outside the State of Minnesota. The pleadings establish, and I find, that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Evidence Concerning Collective-Bargaining Negotiations*

1. Background

At relevant times Respondent's president has been Ron Roth, whose offices are located in St. Paul, Minnesota.

During the same period Respondent's vice president and general manager was David Bergan. At relevant times, Respondent's counsel assisting during the course of negotiations was David R. Hols of Minneapolis, Minnesota. Representing the Charging Party during the relevant events was Paul Hanson of Albert Lea, Minnesota, for many years the staff representative of the Charging Party.

On September 24, 1986, the Charging Party was certified as the exclusive collective-bargaining representative of employees in the following unit (the unit):

> All full-time and regular part-time production and maintenance employees employed at or out of Respondent's facilities in Albert Lea, Austin, Blue Earth and Fairmont, Minnesota and Lake Mills, Iowa; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

The pleadings establish and I find that the unit is appropriate for purposes of collective-bargaining within the meaning of Section 9(b) of the Act. The pleadings further establish and I find that at all times since September 24, 1986, the Charging Party, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of unit employees for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

2. The bargaining[1]

Following the Board's certifiction of the Charging Party as representative of unit employees, Respondent and the Charging Party commenced bargaining. Face-to-face bargaining commenced in December 1986 and ended on September 9, 1987, totaling approximately 16 meetings. Paul Hanson of the Charging Party was the spokesman for the Union's negotiating team, assisted by two employees. Ron Roth was the spokesman for Respondent's negotiating team, assisted by David Bergan and, on one occasion, by William Paul.

Hanson testified that he was made aware that Respondent's negotiating committee was being advised by Counsel Hols. Hanson testified, however, that Hols did not physically participate in the negotiations nor at any time did Roth ever suggest that any agreements in negotiations were subject to the approval of Hols. Hanson recalled that Roth mentioned in later negotiation sessions that Hols had made suggestions for changes in language already agreed to, but at no time did Roth advise that the suggestions were preconditions to a final agreement.[2]

At the negotiation session on July 23, 1987, Respondent submitted a written proposal to the Charging Party, which included proposed language on contract articles 5.04 and 8.14(D). At a later bargaining session on August 5, 1987, Roth proposed certain modifications in article 5.04 and Hanson agreed to those modifications if certain changes could be made in section 8.14(d). Agreement was reached. Hanson presented a summary of the agreement reached as to article V to Roth at the next bargaining session on August 20, 1987. At that session Roth reviewed the doucment and made a comment in Hanson's recollection, "I may have agreed to that too soon." Roth proposed additional language changes that were further discussed at the next bargaining session on September 2, 1987. Further agreement was reached on additional modifications to those clauses. Hanson testified that he told Roth at this bargaining session that he would rewrite article V in light of the agreed-upon changes. At the bargaining session on September 9, 1987, Hanson submitted to Roth a draft, submitted into evidence as General Counsel's Exhibit 8, which was a written form of the agreed-upon article V language. Hanson testified without contradiction that Roth "received it and agreed with it." Hanson recalled Roth's specific term of approval was "Okay."

Several matters of substance separated the parties at the commencement of the September 9 bargaining session, including issues of union shop and the wage rate for the classification rear loader leadman. At the conclusion of the bargaining session, agreement had been reached with respect to all matters. Hanson raised with Roth the proper form for signature lines on the signature page of the written contract and provided Roth with the sample form. Hanson testified that the meeting ended with everyone in agreement.

> Mr. Roth said that if the committee recommended [the contract as agreed to], he would agree to what we wanted and include the checkoff and union shop language, and the committee said that they would recommend the contract in its entirety to the rank and file. We all said, thank you, we had good meetings, we shook hands and left. The Company, Mr. Roth was going to compile drafts that would include all of the changes we had discussed on the

[1] The great bulk of the testimony respecting bargaining was supplied by Paul Hanson, called as a witness by the General Counsel. David Bergan, appearing on behalf of Respondent, testified only regarding a specific document. Bergan testified to the submission of a document at the commencement of a negotiation session, as discussed in detail infra, which Hanson did not recall. Each witness gave every appearance of honesty and directness and presented a straightforward and convincing demeanor. I credit each witness concerning the matters testified to. With respect to the timing of the submission of the document testified to by Bergan, I credit his testimony and find, consistent with Hanson's testimony, that Hanson simply did not recall the event in question. The testimony of these individuals, coupled with the unchallenged documentary evidence, is the basis of the following factual recital.

[2] Hanson testified as follows under cross-examination by counsel for Respondent:

Q. Okay. Mr. Roth told you at the start of negotiations that he himself was a layman, not a professional negotiator, is that right?

A. As I recall it, Mr. Roth had told me that he had negotiated contracts and that he was the chief spokesman for this negotiations.

Q. Did Mr. Roth tell you from time to time he was getting legal review between meetings of what was done in the bargaining?

A. As I recall, at the beginning, he told me something like, "Paul, you know that I am dealing with Mr. Hols as an attorney but I will be handling these negotiations."

Q. Well, in point of fact, Mr. Roth did from time to time tell you across the table that something had to be changed because he had gotten a legal opinion, is that correct?

A. Yes, he came back and said that he talked to [Counsel Hols] on a couple of occasions and says he advised me to try to get these changes.

September 9 meeting, get three copies to the Union, and we said when we saw those, if it was all in order we would set a ratification meeting. I think we talked about having a ratification meeting as early as Monday, which would be the 14th [of September 1987]. I think we weren't sure at that time and Mr. Roth asked me to send him a letter on it.

On September 10, 1987, Hanson sent Roth a letter including a sample signature page and asking Roth to make arrangements so that certain employees working the night shift could attend the "scheduled contract ratification meeting on Monday, September 14, at 6:30 p.m." Hanson sent Roth a second letter on the same day with the following text:

> This letter will confirm our agreements reached yesterday afternoon resulting in a complete contract proposal.
>
> Company will make all necessary changes and provide three (3) complete copies to the Union for review.
>
> If all is in order the Union plans to have a membership meeting at 6:30 p.m., Monday, September 14 at the Union center in Albert Lea to present the final proposal for ratification.
>
> The Union committee and myself have agreed to support and recommend the final proposal as agreed upon in yesterday's meeting for acceptance.
>
> I wish to thank you personally for the understanding and professional manner in which you addressed the concerns of your union employees during the negotiations.

Respondent prepared three copies of the draft agreement, which, by means of the employee-members of the negotiating committee, were transmitted to Hanson who received the copies on September 14. Hanson testified that on reviewing the draft agreement, he discovered that articles 5.04 and 8.05 did not include certain language proposed by Respondent and agreed to by the Union. Hanson then called Roth at his workplace and had a telephone conversation with him. Hanson testified that he told Roth that he had reviewed the draft contract and had some questions. Initially the conversation returned to contract language respecting overtime wage rates, and some questions Roth had on a variation between overtime and weekend wage rates. Roth asserted that the draft reflected their agreement and Hanson accepted this characterization. The conversation then turned to article 5 which Hanson contended reflected certain of the changes agreed to, but did not include certain qualifying languages and certain language addressing a 5-day working trial. Hanson continued in his testimony regarding Roth's response:

> He seemed to review his notes on that end of the phone, looked at it and understood what I said. He said, the secretary must have missed that, left it out. And he said, put in the page as we agreed to.
>
> I then said that Section 8.05 is the same way, that was the section that reads in the draft that there shall be no split shift. I said, you and [sic] requested and agreed to adding the words "unless mutually agreed to by the parties." I said, that is an omission. He said that the secretary must have missed that too. Put it in.
>
> I said that we were going to have a ratification meeting that afternoon at 6:30 and that I would present the contract as we had just agreed to it.

Hanson testified that there were no new proposals made during the course of the telephone conversation and that at its end he was aware of no areas of disagreement between the parties.

Later that day at the ratification meeting, employees voted to accept the agreement. Hanson attempted to report this to Roth but was unable to reach him. On September 16, 1987, Hanson mailed Roth a letter with the following text:

> As I have not been able to reach you by telephone, I will advise you by this letter that final Company proposal of the Labor Agreement reached on our meeting on Wednesday, September 9, 1987, was ratified at a meeting of Waste Systems' employees on Monday, September 14, 1987. We, therefore, consider your final proposal acceptable and in force effective as of September 1, 1987.
>
> Please call upon me at your earliest convenience so that we can make the necessary arrangements to sign the completed document.

On September 17, 1987, the union committee signed the collective-bargaining agreement draft attaching the earlier prepared recapitulation of article 5 and further attaching a cover letter with the following handwritten cover sheet signed by Hanson to Roth:

> This agreement was presented and accepted as changed by including "new" 5.04 section (attached).
>
> And by adding the words "unless agreed to by the parties" to Section 8.05 "THERE SHALL BE NO SPLIT SHIFTS" as per our telephone conversation on Monday, September 14, 1987.
>
> I and the committee have signed to indicate our approval.
>
> I will expect to hear from you early next week.

Later that day, Roth and Hanson spoke by telephone. Roth informed Hanson that Bergan had received "something from the National Labor Relations Board, and he knew something was going on with employees, but he didn't know what."[3] Hanson asked Roth "what he wanted to do about signing the contract." Roth told Hanson he would "get them to Mr. Bergan and Mr. Bergan will get them to me. I'll see [Bergan] by Monday. I'll pass [the contract] on to Mr. Hols to review and will get them signed."

Following several attempts to contact Roth by telephone, Hanson reached him on October 8, 1987. Roth informed Hanson he was going to meet with Hols the fol-

[3] A decertification petition had been filed with the Regional Office of the National Labor Relations Board. It was subsequently dismissed for being out of time.

lowing Friday or Monday and that "he would get back to me after that meeting." Hanson reached Roth again by telephone on October 14, 1987. Roth informed Hanson that he was just leaving the office and that he would see Hols the following day and get back to him. Roth and Hanson had no subsequent communication regarding the contract sent by Hanson to Roth. Hanson testified that neither Roth nor any other agent of Respondent at any time informed him or to his knowledge any other agent of the Union that the document transmitted by the Union to Respondent did not completely reflect the agreement reached during bargaining.

On September 24, 1987, the initial charge in this matter was filed, and on November 6, 1987, the original complaint issued. On November 6, 1987, Roth sent Hanson a letter with the following text: "Waste Systems' previous contract offer to USW No. 3539 is hereby withdrawn." There have been no subsequent negotiation sessions or other communication between the parties as of the date of the hearing.

3. Evidence concerning the alleged unilateral changes

Apparently, since January 1, 1985, a date preceding the date of certification of the Charging Party, Respondent has maintained an employee policy handbook that contains the following language under the heading *Payperiod and Timecards:*

> One-half hour will be deducted each day to cover time for lunch for hourly paid employees who are not able to punch in and out, such as drivers and mechanics working away from the shop. NO EXCEPTIONS!! All other hourly paid employees working at the shop area are required to punch in and out.
>
> Falsification of timecard information will be grounds for *immediate dismissal.* Loitering by the timeclock while still punched in will be viewed similarly. Acts such as these are dishonest and will not be tolerated.

David Bergan testified that sometime in early or midsummer 1987 Respondent posted a memo that "because there were a lot of people writing 'no lunch' on their timecards, that if that was to be allowed for payroll purposes that it be approved by someone in supervisory capacity." There is no dispute that unit employees took advantage of this policy and regularly obtained supervisory approval to receive pay without deduction for lunch under appropriate circumstances. Bergan testified concerning Respondent's change of this practice in November 1987:

> Well, the situation of not getting approval on the timecards was getting out of hand. I was getting a lot of questions on Monday from the personnel department about should I or should I not pay this person for the time indicated as a "no lunch" and there was no initials by it authorizing it. So, we felt the situation was getting out of hand, at the staff meeting, the following staff meeting, we decided that we were going to go back to what the employee handbook said on a "no exception" basis to eliminate the problem.

Respondent posted an intercompany notice to employees on or about November 18, 1987, with the following text:

> As of Novemeber 30, 1987, all employees will be REQUIRED to take their one-half hour lunch period. This time will be deducted from the timecards *without* exception. Employees who work in or around the shop will continue to punch out for lunch as they presently do.

There was no dispute that the Union was never notified of this change in practice that constituted, in effect, a restoration of the personnel manual rule.

David Bergan testified that in early November he had occasion to observe employees loitering in the work areas after punching out their time cards. He noticed in particular one driver who would spend an excessive amount of time in the shop after his work had been completed and he had punched out. Noticing this, Bergan had a notice to be posted, which stated in part:

> It has been brought to my attention that there is a need to clarify three important rules.
>
> . . . .
>
> Loitering in the shop areas prior to punching in and after punching out is not allowed. Depart promptly from the shop areas after punching out. Engaging in casual conversations with other employees while still clocked in is disruption to them and interferes with their ability to concentrate on their work. Please respect your fellow employees in this regard.
>
> This notice would not have to be posted if these rules were not being abused.
>
> Failure to heed the items listed above will result in disciplinary action.

There is no disputes that the Union was neither notified of nor provided an opportunity to bargain concerning the content of the notice. As of the time of the hearing no disciplinary action had been initiated with respect to either notice.

The various contract proposals that are the subject of the dispute regarding the existence of a binding agreement, as described above, all contain a management-rights paragraph, that, inter alia, provides Respondent the right to establish reasonable rules covering employee conduct. All the collective-bargaining proposals also contain grievance and binding arbitration language. Under examination by counsel for Respondent, Hanson conceded that the management-rights language contained in the proposals would, in his view, allow Respondent to institute the types of rule changes described in the notices quoted above.

4. Analysis

a. *Allegation that Respondent is bound to sign the collective-bargaining agreement*

The parties are not at essential disagreement concerning the case law applicable to the issue in dispute. Thus, the Supreme Court long ago approved the doctrine that the statutory obligation to bargain in good faith established in Section 8(a)(5) of the Act includes the obligation to reduce to writing and sign any agreement reached during the course of collective-bargaining negotiations. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). The General Counsel makes the following additional argument on brief:

> Where a portion of the agreement is reduced to writing, additional terms may still be found based on oral agreements not included in the written agreement. *Fashion Furniture Manufacturing, Inc.*, 279 NLRB No. 95 (April 30, 1986), ALJ slip op. at 1. The ultimate determination of whether agreement has been reached is a question of fact to be decided on the basis of an evaluation of whether the parties have engaged in conduct manifesting an intention to be bound. *Capitol-Husting Co.*, 671 F.2d at 243; *Pittsburgh-Des Moines Steel*, 202 NLRB at 888.

Respondent points out that the Board has further held, however, that mere surmising concerning portions of an agreement does not establish sufficient meeting of minds to obligate any party to sign such an agreement. *Mercedes-Benz of North America*, 258 NLRB 803 (1981). The issue is essentially one of fact.

Turning to the facts of the case, Hanson's uncontradicted testimony regarding the conclusion of the September 9, 1987 bargaining session supports a finding, which I make, that the parties believed they had reached complete agreement on a collective-bargaining agreement. In this regard I reject Respondent's argument that the parties understood that any agreement Roth undertook at the bargaining table was subject to the subsequent approval by Respondent's counsel.

It is true, however, that not all the agreement had been reduced to a single writing as of September 9. Respondent argues on brief:

> The meeting ended on a note that these tentative agreements were to be written up and submitted for review. This is clearly not a meeting of the minds on a contract. In point of fact, when the written language was submitted, it was not agreed upon. The areas of disagreement were significant and substantive.

The difference between the Union's position and Respondent's position, insofar as it was manifested in the draft sent to the Union after the September 9 negotiation session, was the subject of the important telephone call between Hanson and Roth on September 14. Respondent argues on brief that any agreement manifested in that conversation was simply an agreement to review and study the Union's proposed changes and that Roth, engaged in other business at his office during the conversation, could not reasonably be held to have approved in any final sense the statements of Hanson. I reject this argument on the facts. Hanson, who was the sole person to testify regarding the conversation, and who has been credited elsewhere, persuasively testified that he did not propose new language to Roth, but merely indicated that some sort of typographical omission had occurred and that previously written out protions of the contract had not been included in the complete final draft. Further, Hanson attributes to Roth a complete approval of the suggestions Hanson had proposed. On this credited testimony, I reject Respondent's contention that there was some type of ambiguity that prevented a meeting of the minds on these issues. Rather, like Respondent's argument that any agreements reached by Roth were subject to later review and approval by Hols, I find the position is not supported by the facts.

In reaching this decision regarding the agreement reached on September 9 and recapitulated on September 14, I have considered the entire bargaining process as revealed on the record as a whole and find that the General Counsel has clearly met her burden of establishing that a final and binding agreement was reached by the parties.

Having made these factual determinations and applying the case law cited above, I find that Respondent was obligated to sign and abide by the collective-bargaining agreement as of September 14, 1987, and that its failure thereafter to do so constitutes a violation of Section 8(a)(5) and (1) of the Act.[4]

b. *The unilateral change allegations*

The unilateral change allegations are, like the dispute concerning whether agreement was reached, not subject to serious disagreement concerning the controlling case law. The General Counsel correctly cites the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962), for the proposition that a unilateral change in represented employees' terms and conditions of employment is a violation of Section 8(a)(1) and (5) of the Act irrespective of the subjective good or bad faith of the employer. The General Counsel further cites case law for the proposition that work rules are terms and conditions of employment and mandatory subjects of bargaining within the meaning of the *Katz* decision, citing *Timken Roller Bearing Co.*, 70 NLRB 500, 502 (1946), enf. denied on other grounds 161 F.2d 949 (6th Cir. 1947).

Respondent makes the following argument on brief:

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[4] The General Counsel further contends that Respondent's actions following the September 9 agreement were based on a desire to end its relationship with the Charging Party in reliance on certain decertification activity undertaken by the employees, which was ultimately held to be without force or effect by the Regional Director. Respondent did not assert any conduct by employees in justifying a withdrawal of recognition of the Charging Party. Rather, Respondent has at no time in this litigation challenged the Charging Party's representative status concerning employees in the unit. Inasmuch as the allegation turns on whether an agreement was reached, rather than whether Respondent acted in good or bad faith in refusing to sign the collective-bargaining agreement, I shall make no findings respecting the General Counsel's further allegations in this regard.

> With regard to the alleged unilateral changes in work rules, the record establishes that there was no change at all. The work rules were in existence at all times material. The memos were posted pursuant to some growing abuses of these rules by the employees.
>
> In any event, if these were changes in the rules, they were not unilateral changes. The Union and the Employer had already agreed upon contract language which gave the Employer the right to institute rules without prior negotiations with the Union. Accordingly, the unilateral change allegations must fail.

Respondent's argument that there was a previously existing rule covering the matters in question fails with respect to the antiloitering notice. The employee handbook, relevant sections that are quoted above, deals with loitering when punched in. That rule may not fairly be read to cover the state of affairs following an employees' punching out. The employee handbook therefore gives Respondent no shelter as to that allegation. The handbook does explicitly cover the luncheon period rule. There is no doubt, however, that this rule had been changed both by practice and by an explicit memo posted by Respondent. The later return to the strict handbook policy was therefore a change in work rules backed by the threat of discipline, that had a potentially significant effect on employees' wages.

Respondent's final argument is that the Union and the Company had agreed to contract language giving Respondent the right to set rules such as those under challenge here. This defense may be further augmented by the fact that I have found, supra, the collective-bargaining agreement was agreed to in September and was binding on Respondent and the Charging Party before the November memos that are under challenge here. If there had been no collective-bargaining agreement but, rather, only a partial agreement as to the management-rights clause as part of a collective-bargaining agreement not yet fully agreed to, Respondent's defense would fail. One may not rely on partial agreements concerning an as yet unexecuted collective-bargaining agreement. Thus, absent some specific agreement to the contrary, the parties must await a complete agreement before relying on partial agreements preceding the final resolution. Accordingly, Respondent's argument that the management-rights clause had been agreed to even if the remainder of the contract had not been agreed to is not a defense to the unilateral change allegations.

It remains to be resolved, however, in light of my findings that the contract was in effect, whether Respondent may assert a contract defense while simultaneously denying that the contract was in effect. I find that Resonent is not entitled to the benefits of the collective-bargaining agreement that might otherwise accrue to it while simultaneously denying the contract's existence. In essence Respondent may not have its cake and eat it too. The very nature of an acknowledgement of the existence of a binding collective-bargaining agreement establishes a stability and security to a collective-bargaining relationship that is absent when one party denies such a contract exists. Thus, for example, whereas the management-rights clause may in fact allow rule changes, a denial of the validity of the contract as a whole constitutes a denial of the efficacy of the grievance and arbitration clause, and in essence seeks to assert rights under the document without conceding any matching obligations. Such an asymmetry is inequitable and may not be allowed to prevail. Thus, this argument gives no defense to Respondent.

In summary then, I have found that in November 1987 Respondent made two significant changes in work rules concerning unit employees which, backed by the threat of discipline, had a significant impact on unit employees. I have further found, and the parties do not dispute, that the Union was at no time notified or provided an opportunity to bargain respecting these changes. Accordingly, pursuant to the cases cited supra, Respondent's actions violated Section 8(a)(5) and (1) and Section 8(d) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes of the Act, including the posting of remedial notices in English, and should the Regional Director determine under the circumstances at the time of the posting warrant additional languages.[5]

Having found that Respondent at all times since September 14, 1987, has failed and refused to acknowledge and sign the collective-bargaining agreement reached between the parties on September 9, 1987, I shall order Respondent to execute the agreement and supply the Charging Party with signed copies of the contract. Further, I shall order Respondent to retroactively apply the terms of the collective-bargaining agreement from the date of its effective term, making whole, as necessary, all employees who lost wages or other benefits because of Respondent's failure to apply the terms and conditions of the contract in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be included on the monetary losses involved, with interest calculated in accordance with the policy of the Board set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall further be ordered to rescind the unilateral changes in company rules and practices made in November 1987 rescinding as necessary any and all discipline or other adverse actions following from employee breaches of the unilaterally changed rules. Respondent shall expunge from its records any and all references to breaches of these unilaterally changed rules and practices by employees and shall notify those employees and the Charging Party, in writing, that such expunction has occurred and that previous breaches will not be the basis of subsequent adverse action against the employees. *Sterling Sugars*, 261 NLRB 472 (1982). This remedy will include restoring employees who lost lunch

[5] *Laborers Local 383*, 266 NLRB 934, 939–940 fn. 9 (1983).

deduction waivers and will include interest on all losses pursuant to the cases cited supra.

The Charging Party, on brief, requests that the election bar arising from the certification on September 24, 1986, be extended and continued until the collective-bargaining agreement is executed. Such an action is unnecessary inasmuch as the Board normally does not entertain elections during the time that an employer is engaging in unremedied violations of Section 8(a)(5) of the Act rising to the level of repudiation of a collective-bargaining agreement. Further, the collective-bargaining agreement, found to be effective here even if it is not as yet signed, precludes an election under normal circumstances.

The General Counsel has sought a visitatorial clause in its proposed remedy. The Board in its recent decision, *Cherokee Marine Terminal*, 287 NLRB 1080 (1988), established standards for the inclusion of such relief in a normal remedy. Those standards have not been met here. Accordingly, I shall not include the relief sought.

On these findings of fact and the entire record, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by, at all times since September 14, 1987, failing and refusing to execute the collective-bargaining agreement reached with the Charging Party on September 9, 1987.

4. Respondent violated Section 8(a)(5) and (1) and Section 8(d) of the Act by making unilateral changes in employee work rules in November 1987 concerning:

(a) Employee presence in the facility following punching out; and

(b) Denying employees the opportunity to obtain credit for lunchtime worked.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Waste Systems Corp., Albert Lea, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to execute a collective-bargaining agreement reached on September 9, 1987, with the Charging Party concerning employees in the following unit:

> All full-time and regular part-time production and maintenance employees employed at or out of Respondent's facilities in Albert, Lea, Austin, Blue Earth and Fairmont, Minnesota and Lake Mills, Iowa; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Changing rules and practices governing employee presence in work areas after punching out and employee practices concerning credit for lunches worked with supervisory approval without providing notice and an opportunity to the Charging Party to bargain concerning the rules.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute and return to the Charging Party copies of the contract reached on September 9, 1987, with the Charging Party concerning the employees in the unit.

(b) Apply the contract retroactively to its commencement date, making employees whole, with interest, for any loss of wages and other benefits that would have been received or accrued but for Respondent's failure to apply the collective-bargaining agreement from its effective date.

(c) Restore the status quo ante, rescinding the personnel rules and practice changes made in November 1987 concerning employee payments for lunchtime not taken and for rules and practices governing remaining in the work areas after punching out, making employees whole with interest.

(d) Rescind and expunge all references to any employee violations of the rule implemented in November 1987, as described above, notifying those employees and the Charging Party, in writing, that this has been done and such violations will not be used as a basis for future action against the employees.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at all of its facilities where unit employees are employed copies of the attached notice marked "Appendix."[7] Copies of the notice, and translations in other languages determined by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Stern Entertainment System, Inc. t/a Heaven *and* A. Blane Volovich, Jacqueline M. Fritz, Truman Fees, Carl Morris, and William Croft, Jr. Cases 6–CA–14978 and 6–CA–15011

September 23, 1988

DECISION AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On February 25, 1983, the Regional Director for Region 6 of the National Labor Relations Board issued an amended consolidated complaint in Cases 6–CA–14978 and 6–CA–15011 containing allegations from the charges in Cases 6–CA–15030, 6–CA–15031, and 6–CA–15038, which had been dismissed by the Regional Director on February 23, 1983.[1] On March 7, 1983, the Respondent filed a Second Motion for Partial Summary Judgment, alleging that the General Counsel had improperly included allegations from the dismissed charges in Cases 6–CA–15030, 6–CA–15031, and 6–CA–15038, and had improperly reinstated the previously dismissed charge in Case 6–CA–15011. On April 6, 1983, the Regional Director referred the Respondent's second motion to the Board.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We shall deny the Respondent's Second Motion for Partial Summary Judgment and allow the General Counsel to litigate the allegations involving employees Croft, Fees, Fritz, and Morris. For the reasons set forth in our decision in *Redd-I, Inc.*, 290 NLRB 1115 (1988), we do not find the withdrawal and dismissal of earlier timely charges concerning these employees relevant in deciding whether the allegations are closely related to the allegations of the pending timely filed charge involving employee Volovich. At this stage in the proceeding, we find these allegations are not barred under Section 10(b) because the alleged violations occurred within 6 months of the timely Volovich charge and they *appear* to be factually and legally related to the allegations of that charge. Therefore, we shall permit the parties to present evidence on all the complaint allegations so that a judge can decide whether the otherwise untimely allegations are closely related to the Volovich charge.

The relevant procedural history of these allegations is as follows. On October 6, 1981, a charge was filed in Case 6–CA–14978, alleging that A. Blane Volovich had been discharged on October 6, 1981, because of his union activities. On October 19, 1981, a charge was filed in Case 6–CA–15011 alleging that Jacqueline M. Fritz had been refused a promotion because of her union activities. On October 26, 1981, the charge in Case 6–CA–15011 was amended to include, inter alia, the allegation that Fritz had been discharged on October 23, 1981, because of her union activities. On October 23, 1981, a charge was filed in Case 6–CA–15030 alleging that Truman Fees had been discharged on October 22, 1981, because of his union activities. On October 23, 1981, a charge was filed in Case 6–CA–15031 alleging that Carl Morris had been discharged on October 22, 1981, because of his union activities. On October 26, 1981, a charge was filed in Case 6–CA–15038 alleging that William Croft, Jr. had been discharged on October 22, 1981, because of his union activities.

On December 29, 1981, the charge in Case 6–CA–14978 was amended to allege that Volovich had been discharged because of his protected concerted activities. On January 28, 1982, the Acting Regional Director issued a complaint in Case 6–CA–14978 alleging, inter alia, that the Respondent violated Section 8(a)(1) by discharging Volovich for his protected concerted activities. On the same date, the Acting Regional Director approved withdrawals of the charges in Cases 6–CA–15030 (Fees), 6–CA–15031 (Morris), and 6–CA–15038 (Croft) and dismissed the charge filed by Fritz in Case 6-CA–15011.

On August 3, 1982, alleging newly discovered evidence, the Regional Director revoked his earlier approval of the withdrawals in Cases 6–CA–15030 (Fees), 6–CA–15031 (Morris), and 6–CA–15038 (Croft), rescinded the dismissal in Case 6–CA–15011 (Fritz), and reopened the matter for further investigation into the alleged charges. On October 8, 1982, the Acting Regional Director issued a consolidated complaint in all of these cases alleging, inter alia, that the Respondent violated Section 8(a)(1) by discharging Volovich and that it violated Section 8(a)(1) and (3) by discharging Fees, Morris, Croft, and Fritz.

On February 4, 1983, the Respondent filed a Motion for Partial Summary Judgment, contending that under *Winer Motors*, 265 NLRB 1457 (1982), the Regional Director was precluded from reinstating the withdrawn charges filed by Fees, Morris, and Croft in Cases 6–CA–15030, 6–CA–15031, and

[1] On February 4, 1983, the Respondent had filed a Motion for Partial Summary Judgment contending that the Regional Director had improperly reinstated the withdrawn charges in Cases 6–CA–15030, 6–CA–15031, and 6–CA–15038 and the dismissed charge in Case 6–CA–15011. On February 16, 1983, the above-entitled proceeding had been transferred to the Board. On February 23, 1983, the Regional Director had dismissed the charges in Cases 6–CA–15030, 6–CA–15031, and 6–CA–15038, thus rendering the Respondent's motion moot. On February 25, 1983, the Acting Regional Director issued this amended consolidated complaint, which included the allegations from the three dismissed charges.

6–CA–15038. The Respondent further argued that while *Winer Motors* allowed the General Counsel to reinstate dismissed,[2] as opposed to withdrawn, charges the Regional Director in this case nevertheless improperly reinstated the charge filed by Fritz in Case 6–CA–15011 because he failed to disclose the newly discovered evidence on which he purportedly relied. On February 15 and 16, 1983, the charges in Cases 6–CA–14978 (Volovich) and 6–CA–15011 (Fritz) were amended to include the discharges of Fees, Morris, Croft and Fritz, and to allege that all the discharges, including Volovich's, violated Section 8(a)(1) and (3). On February 23, 1983, the Regional Director dismissed the charges in Cases 6–CA–15030, 6–CA–15031, and 6–CA–15038 under *Winer Motors*, thereby rendering moot the Respondent's motion to dismiss those charges. On February 25, 1983, the Regional Director issued an amended consolidated complaint in Cases 6–CA–14978 (Volovich) and 6–CA–15011 (Fritz), which included the allegations concerning Fees, Morris, and Croft that had been contained in their dismissed charges and which alleged that all five employees had been discharged because of their union activities in violation of Section 8(a)(1) and (3).

In her February 28, 1983 response to the Respondent's first Motion for Partial Summary Judgment, the General Counsel contended that the Regional Director had properly included the allegations contained in the Fees, Morris, Croft, and Fritz charges in the consolidated complaint in Case 6–CA–14978, which was based on a timely filed charge that had never been withdrawn or dismissed. The General Counsel argued that the allegations in the Fees, Morris, Croft, and Fritz charges were closely related to the allegations in the charge still pending on behalf of Volovich in Case 6–CA–14978 and were properly included in the pending complaint under the "closely related" test set forth in *Gocat Inc.*, 257 NLRB 270 (1981). *Gocat* holds that a complaint based on a timely filed charge may allege violations not alleged in the charge if they are closely related to the violations named in the charge and occurred within 6 months before the filing of the charge.

In response to the General Counsel, the Respondent filed a Second Motion for Partial Summary Judgment on March 7, 1983. It contends that the Board's intent in *Winer Motors* would be subverted if the February 25, 1983 amended consolidated complaint is permitted to be litigated; that the charges filed by Fees, Morris, Croft, and Fritz related to their union activity and thus cannot be attached to the charge filed by Volovich, which was based on concerted activity predating the arrival of the Union; and that the General Counsel reinstated Fritz' charge based on the discovery of new evidence without disclosing the nature of this evidence. On April 25, 1983, the General Counsel filed a response to the Respondent's second motion reiterating her contentions that the pending complaint based on Volovich's charge was properly amended to include Fees, Morris, Croft, and Fritz as additional discriminatees, because their discharges occurred during the same organizational campaign as the discharge of Volovich.

We find merit in the General Counsel's argument that the "closely related" test is applicable here. In *Redd-I*, supra, the Board held that in deciding whether allegations are closely related, it would apply the traditional "closely related" test to determine if an otherwise untimely allegation is factually and legally related to the allegations of a timely charge, without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed.

In this case, we find that the bare allegations do not provide enough information for us to determine whether the allegations meet the traditional "closely related" test described in *Redd-I*. Clearly, the discharges of Fees, Morris, Croft, and Fritz[3] occurred within 6 months before the filing of Volovich's timely charge. Further, it appears that the otherwise untimely allegations are of the same class as the allegations in the Volovich charge because they all involve discharges in retaliation against union activities in violation of Section 8(a)(3).[4] However, we cannot tell whether all the discharges arose from the same factual situation or sequence of events. The complaint alleges that all the discharges involve similar conduct during the same 2-week period, and the General Counsel contends that they all have the same object because they all arose out of the same organizational campaign.

[2] See *Winer Motors*, supra at 1459–1460, former Member Zimmerman's concurring opinion.

[3] As noted earlier, the Regional Director, in accord with *Winer Motors*, supra, dismissed the charges filed by Fees, Morris, and Croft that had been withdrawn. Regarding Fritz, the Regional Director found that because her charge had not been withdrawn but dismissed, *Winer Motors* did not preclude its reinstatement. However, the Board has subsequently reversed that aspect of *Winer Motors*. Thus, in *Ducane Heating Corp.*, 273 NLRB 1389 (1985), the Board found that withdrawn and dismissed charges should be treated alike and, absent fraudulent concealment of unlawful activity, neither can be reinstated outside the 6-month limitations proviso of Sec. 10(b). Here, there is no contention of fraudulent concealment concerning Fritz' charge which would warrant extending the limitations proviso. Accordingly, the Regional Director erred in reinstating the charge in Case 6–CA–15011. However, for the reasons set forth in this decision, the dismissal of Fritz' charge does not foreclose litigation on the merits of the allegations contained in her charge if they prove to be closely related to the allegations contained in the charge timely filed by Volovich.

[4] The original Volovich charge as well as the second amended charge in his case allege his discharge was for union activities.

However, we have no other information about the circumstances surrounding these discharges, such as the reasons given or the events leading up to the discharge of each employee. On this record it would be premature to decide whether all of the allegations are closely related. Therefore, we will allow litigation on the merits of all the allegations in order to decide if they are closely related.

ORDER

It is ordered that the Respondent's Second Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that the charge in Case 6–CA–15011 is dismissed.

IT IS FURTHER ORDERED that the proceeding is remanded to the Regional Director for Region 6 to arrange a hearing and issue notice to the parties.

CHAIRMAN STEPHENS, dissenting.

In accord with the views expressed in my dissenting opinion in *Redd-I, Inc.*, 290 NLRB 1115 (1988), I find that the circumstances presented in this case call for granting the Respondent's Second Motion for Partial Summary Judgment regarding allegations as to employees Fritz, Fees, Morris, and Croft. Even assuming that the "closely related" doctrine would permit consideration of the allegations as to these four employees under the Volovich charge if the charges in Cases 6–CA–15011, 6–CA–15030, 6–CA–15031, and 6–CA–15038 had never been filed in the first instance, the sequence of charge filings and withdrawals here is such that the Respondent would not reasonably have believed at the expiration of the 10(b) period that it might have to litigate allegations pertaining to these four employees.

In my view, the critical facts are these. The first unfair labor practice charge filed on October 6, 1981, alleged that Volovich had been discharged on that day because of union activities, in violation of Section 8(a)(3) and (1). Later that same month, charges were filed as to employees Fees, Croft, and Morris, alleging that they were discharged on October 22 for their union activities in violation of Section 8(a)(3) and (1). Charges were also filed in late October on behalf of employee Fritz for a denial of a promotion followed by a discharge on October 23—both alleged to be based on union activities in violation of Section 8(a)(3).

On December 29, however, Volovich's October 6 charge was amended so as to replace the 8(a)(3) allegation with an allegation that he had been discharged, in violation of Section 8(a)(1), for engaging in protected concerted activity. On January 28, 1982, complete withdrawals were accepted on three of the other employees' charges; the fourth employee's charge was dismissed; and a complaint issued based solely on the Volovich 8(a)(1) charge. No further charges were filed by any of these employees in 1982. Thus, when the 10(b) period had run in April as to the charges filed on behalf of the employees other than Volovich, the Respondent knew that the Regional Director had considered and rejected claims that the Respondent had discharged employees in October 1981 to discourage the union organizing campaign, and it would not reasonably have contemplated litigating any matter other than Volovich's discharge allegedly for engaging in a concerted protest over working conditions. Accordingly, for these reasons, I would grant the Respondent's Second Motion for Partial Summary Judgment.

Madison Industries, Inc. *and* Sheet Metal Workers' International Association, Local Union No. 108, AFL–CIO *and* Martin H. Hansen, Petitioner. Cases 21–CA–24902 and 21–RD–2169

September 26, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On a charge filed by Sheet Metal Workers' International Association, Local Union No. 108, AFL–CIO on August 14, 1986, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing in Case 21–CA–24902 on May 4, 1987, alleging that the Respondent (the Employer) has engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act. The Respondent filed an answer denying the commission of any unfair labor practices.

On November 2, 1987, the Respondent, the Union, the General Counsel, and the Petitioner filed with the Board a Stipulation of Facts, with certain attachments, and entered a Joint Motion to Transfer Proceedings Directly to the Board. The parties waived a hearing and issuance of a decision by an administrative law judge and indicated their desire to submit the case directly to the Board for findings of fact, conclusions of law, and a decision and order. The parties also agreed that the stipulation of facts, with certain attachments, would constitute the entire record before the Board. On March 2, 1988, the Board issued an order granting the parties' motion, approving the stipulation, and transferring the proceedings to the Board. Thereafter, the General Counsel and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and the briefs in this proceeding, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation engaged in manufacturing prefabricated structures and operates a facility located at 1900 East 64th Street, Los Angeles, California. In the normal course and conduct of its business operations the Respondent annually purchases and receives goods and materials valued in excess of $50,000 directly from suppliers outside the State of California. The parties stipulated and we find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Stipulated Facts*

The following employees of the Respondent constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All metal building industry journeymen, apprentices, janitors, steel shop leadmen, finish line leadmen and painters employed by the Employer at its facility located at 1900 East 64th Street, Los Angeles, California; excluding all other employees, office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

Since about August 1976, and at all times material, the Union has been the duly designated exclusive collective-bargaining representative of the Respondent's employees in the above-described unit, and since about August 1976 the Union has been recognized as that representative by the Respondent. Recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from July 1, 1983 to June 30, 1986.

Since about August 1976 the Union has been the representative for the purposes of collective-bargaining for a majority of the employees in the above-described unit and by virtue of Section 9(a) of the Act is the exclusive representative of all employees in that unit for the purposes of collective-bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

At all times material, Sam Frey has been president of the Respondent, and John Frey Jr. (John Frey), has been general manager of the Respondent. Each of them is a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(2) and (13) of the Act.

Pursuant to a Stipulated Election Agreement, a decertification election by secret ballot was conducted on May 16, 1986,[1] among the employees of the Employer in the above-described unit. The results of the election were 38 votes for the Union, 8 against, with an insufficient number of challenged ballots to affect the outcome.

[1] All dates are 1986 unless otherwise indicated.

On May 22 the Employer filed timely objections to the election. On June 5 and 9 the Employer, the Union, and the Petitioner entered into a stipulation and agreed that a second election be conducted. In accordance with the parties' stipulation, on June 18, the Regional Director issued a Report on Objections recommending to the Board that the May 16 election be set aside, and that a second election be conducted. On July 11 the Board in its Decision, Order, and Direction of Second Election adopted the Regional Director's recommendation and ordered that a second election be held. The second election was scheduled for August 8.

About August 6 the Respondent, at its facility, without notice to the Union, hand distributed directly to all of its employees in the unit a copy of a document that included a cover letter that was addressed to each unit employee individually. The cover letter stated:

> The attached document was prepared by Madison Industries for all non-union employees. The document and the assurances contained within it are your guarantee of fair treatment. The future of Madison Industries depends on good relations with the company personnel. The future of the company also depends on establishing reasonable costs for wages and benefits. This company does not feel that either of these two can be accomplished with the 108 Sheetmetal Union. The management views this Union as a parasite. Your union dues and the company's benefit payments support the union bosses without any benefit to you or this company. I urge you to take this document as a commitment between you and this company and vote NO on August 8, 1986. It is time to step out of the union past and into the profit sharing present.

The document presented a number of terms and conditions of employment different from those of the Union's most recent contract, which had expired on June 30, along with provisions concerning holidays and vacation taken directly from the expired agreement. It contained a new medical plan, which the Respondent characterized as providing medical benefits equivalent to or better than those available under the medical plan of the previous collective-bargaining agreement, and included a "written guarantee" that wages would not be reduced from existing levels and would be indexed to the Government's cost of living index with no decrease in the event of a drop in the index. The Respondent further offered the employees an undefined profit-sharing and stock ownership plan in lieu of a traditional pension plan. The document also contained provisions regarding seniority and layoffs that differed from those contained in the most recent collective-bargaining agreement. Thus, the Respondent intended to make "seniority" solely a function of the employees' willingness and ability to perform the work required; layoffs would be contingent on an employee's ability and willingness to perform the work at hand, with the least able employees laid off first. This was a change from the most recent agreement that made chronological seniority the determining factor in deciding which employees of equal ability should be laid off.

The document also differed from the recently expired agreement by specifying offensive conduct for which employees could be discharged, extending the period during the day in which the employees' shift could be scheduled, and offering merit wage increases to those employees who could meet certain general guidelines regarding ability and willingness to work, attendance, and tardiness during the prior year. Finally, the Respondent made its implementation contingent on the Union's defeat in the upcoming decertification election. In this regard, the proposal stated:

> This document shall remain in force indefinately if utilized. This document will expire and become null and void if the union is not voted out.

On August 7, within 24 hours of the election scheduled for August 8, the Respondent, through Sam Frey and John Frey, conducted a meeting at its plant among approximately 30 to 40 employees. At this meeting, Sam Frey and John Frey spoke for approximately 5 minutes and made the following statements:

(1) That the Respondent's competition was nonunion and that the Respondent would have difficulty competing because of the Union.

(2) That the Union would make the Respondent "go broke."

(3) That it did not matter who won the election, because whichever side lost would protest the election.

(4) That John Frey would not sign a contract with the Union any more.

On August 8, 1986, the Board conducted the second decertification election (among the employees in the above-described unit). The results of the election were 12 votes for the Union, 27 against, with an insufficient number of challenged ballots to affect the outcome.

On August 14 the Union filed the instant unfair labor practice charges and objections to the August 8 election. On May 20, 1987, the Acting Regional Director issued a supplemental report on objections and order directing hearing and order consolidat-

ing cases and notice of hearing in which he concluded that the issues raised in Case 21–RD–2169 by the Union's Objections 1, 2, and 4 were closely related to the issues involved in Case 21–CA–24902 and could best be resolved in a consolidated proceeding. The Acting Regional Director also approved the Union's withdrawal of all other objections.

B. *Contentions of the Parties*

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union in good faith when it bypassed the Union and sought to bargain directly with its employees by presenting them with a collective-bargaining proposal on August 6. The General Counsel further contends that the written statements contained in the cover letter and collective-bargaining proposal distributed to each employee individually on August 6 and the oral statements made by Sam Frey and John Frey during a meeting with employees on August 7, unlawfully restrained and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

Thus, the General Counsel asserts that the August 6 document and cover letter to employees contained promises of benefits if employees voted against the Union, and a threat of plant closure unless the Union was voted out (i.e., because of what the Respondent implied was the Union's anticipated unwillingness to agree to cost-reduction steps proposed by the Respondent). The General Counsel contends that the August 7 remarks of Sam and John Frey to employees also influenced and coerced employees to vote against the Union by (1) threatening that the Respondent could not compete, would "go broke," and would go out of business unless the employees voted the Union out, and (2) by threatening to file objections to the election, and threatening not to sign a contract, if the employees voted to keep the Union, thus conveying to the employees the futility of voting for the Union.

Finally, the General Counsel argues that the Respondent's actions on August 6 and 7, are sufficiently egregious to warrant the issuance of a bargaining order as established in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In this regard, the General Counsel asserts that during the period prior to and including the August 8 election day the Union continued to enjoy the presumption of majority support of the bargaining unit, and that the Respondent's unlawful conduct was within a category of violations that the Board has found to have a lingering effect on employees, and to be more resistant to the Board's traditional remedies. More specifically, the General Counsel emphasizes that the Respondent offered, through its August 6 contract proposal, wage guarantees and benefits expressly conditioned on the Union's ouster; that during the August 7 meeting both the Respondent's president and general manager explicitly threatened plant closure and flatly refused to sign a contract with the Union; that the Respondent denigrated the Union in its August 6 letter, and verbally expressed on August 7 the futility of the employees selecting a representative when the Respondent had no intention of bargaining with any representative chosen; and that most of the unit employees witnessed the Respondent's unlawful conduct.

The Respondent does not claim that it did not engage in the preelection conduct described above. Moreover, the Respondent does not contest the presumed continuing majority status of the Union as of August 8. Rather, the Respondent asserts that "the Board is being requested to decide a narrow issue: Whether the facts as stipulated warrant the extreme remedy of a *Gissel* bargaining order." The Respondent argues that the most appropriate method of redress is not a *Gissel* bargaining order, but a new election, thereby allowing for employee free choice in selecting a collective-bargaining representative.

The Respondent contends that its August 7 remarks to the employees (1) that the Respondent's competition was nonunion and that the Respondent would have difficulty competing because of the Union; and (2) that the Union would make Respondent "go broke" are permitted under *Gissel* as objective statements of economic fact based on the Respondent's knowledge and experience. The Respondent further asserts that its August 7 remarks (1) that it did not matter who won the election, because whichever side lost would protest the election; and (2) that John Frey would not sign a contract with the Union any more, constitute only minor, less extensive, unfair labor practices that would have only a slight impact on the election process and would therefore not warrant a *Gissel* bargaining order.

Finally, the Respondent contends that the document and cover letter, hand distributed to each of its employees on August 6 was not a promise of benefits but a comparison of its benefits plan with that plan offered by the Union and that even if its statements were promises, they were not so extraordinary as to be incapable of being erased by traditional remedies.

C. *Discussion and Conclusions*

1. Violation of Section 8(a)(5) and (1)

We find that the Respondent refused to bargain with, and attempted to bypass and undermine the Union, and deal directly with its employees by unilaterally presenting to the employees a document that was, in effect, a contract proposal. As noted above, the Union has been the exclusive collective-bargaining representative of the unit employees since August 1976. The Respondent, therefore, had a duty to bargain with the Union and to refrain from dealing directly with unit employees over terms and conditions of employment. The August 6, 1986 letter and attached contract proposal, which was hand-delivered to each unit employee, proposed changes in such terms and conditions of employment as the health care benefits plan, pension plan, and the Company's policy on seniority and layoffs. The contract proposal made clear that the terms it contained would become null and void if the Union was not voted out. The document went beyond merely comparing the terms the Respondent could offer with the terms of the recently expired contract with the Union because, as fully set forth above, the document made an offer contingent on the ousting of the Union. We conclude that by such conduct, the Respondent has bargained directly with the unit employees and sought to undermine the status of the Union as their exclusive collective-bargaining representative in violation of Section 8(a)(5) and (1) of the Act. See *Coast Engraving Co.*, 282 NLRB 1236, 1250 (1987); *Gentzler Tool Corp.*, 268 NLRB 330 (1983), enfd. 778 F.2d 1211 (6th Cir. 1985).

2. Violations of Section 8(a)(1)

Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. An Employer violates Section 8(a)(1) of the Act if its actions would tend to coerce a reasonable employee, without regard to intent or whether an employee is actually coerced. *Hanes Hosiery*, 219 NLRB 338 (1975). However, Section 8(c) of the Act provides that the expression of any view will not be an unfair labor practice, if it contains no threat of reprisal or promise of benefit.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–619, the Supreme Court balanced the requirements of these statutory provisions as follows:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in [Section] 7 and protected by [Section] 8(a)(1) and the proviso to [Section] 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.
>
> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, fn. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof. 397 F.2d 157, 160.

Examining the Respondent's conduct and statements in light of these standards, we find that the Respondent has made threats and promises that exceed the expression of views permitted by Section 8(c) of the Act.

On August 6, 1986, 2 days before the decertification election, the Respondent provided to its employees a document that was, in effect, a contract proposal containing numerous changes and improvements in the terms and provisions of the recently expired collective-bargaining agreement. The Respondent expressly conditioned implementation of these proposed new terms and provisions on the employees' rejection of the Union in the election. By this conduct the Respondent has unlawfully promised benefits in return for the ouster of the Union, in violation of Section 8(a)(1) of the Act. *Collectramatic, Inc.*, 267 NLRB 866, 870 (1983).

The next day, August 7, Sam and John Frey, the Respondent's president and general manager, respectively, told the employees that if the Union was not voted out the Respondent would have difficulty—indeed, the employees were told that continued unionization would cause the Respondent to "go broke." We find that the Respondent has effectively predicted plant closure if the Union was not voted out.

As the Supreme Court has held, predicting plant closure is not a statement of fact permissible under Section 8(c) of the Act unless the eventuality of plant closure is capable of proof—a circumstance that the Court considered to be "most improbable." Here, the Respondent's prediction of plant closure—i.e., that it would "go broke"—if the Union was retained was clearly not "carefully phrased on the basis of objective fact" (395 U.S. at 618) and most certainly cannot be said to convey the Respondent's "belief as to demonstrably probable consequences beyond [the Respondent's] control." (395 U.S. at 618.) The stipulated record sets forth no facts on which the Respondent could be said to have based an objective belief that plant closure was a demonstrably probable consequence of continued unionization. Accordingly, we find that the Respondent's prediction that the Union would make it "go broke" constituted an unlawful threat of plant closure if the employees voted to keep the Union. *Walter Garson, Jr. & Associates*, 276 NLRB 1226, 1231–1232 (1985); *Engineered Control Systems*, 274 NLRB 1308, 1313 (1985). Cf. *Churchill's Restaurant*, 276 NLRB 775 (1985) (the prediction that the employer would go out of business if union won the election is not unlawful where the employer expressly provided objective support for its prediction: previous experience with particular wage demands of the union or specific decline in business).

In their August 7 remarks, the Freys also told the employees that regardless of the outcome of the election, that if the Union won the election the Respondent would file objections, and that in any event, John Frey would not sign another contract with the Union. These statements not only indicated to the employees the short-term futility of their engaging in the representation process but also the long-term futility of retaining the Union as their collective-bargaining representative. These remarks reveal the Respondent's unwillingness to recognize and bargain in good faith with the Union, which is coercive, for it had the effect of discouraging the organizational efforts of the employees. These statements intimidated and coerced the employees in their choice of whether to continue to be represented by the Union. We find that the Respondent's remarks in this regard violated Section 8(a)(1) of the Act. See *Without Reservation*, 280 NLRB 1408 1412 1418 (1986).

3. Objectionable conduct

As noted above, Objections 1, 2, and 4 to the August 8, 1986, second decertification election are closely related to the unfair labor practice allegations. We have found above that the Respondent violated the Act during the 2 days prior to the election by bypassing the Union and dealing directly with the employees; by promising benefits and threatening plant closure; and by threatening to bargain in bad faith with the Union by never signing a contract with the Union. It is well established that conduct violative of the Act is conduct that interferes with free choice in an election. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). Consequently, we will set aside the results of the August 8 election. See *SDC Investment, Inc.*, 284 NLRB 131, 134 (1987).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers' International Association, Local Union No. 108, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All metal building industry journeymen, apprentices, janitors, steel shop leadmen, finish line leadmen and painters employed by the Employer at its facility located at 1900 East 64th Street, Los Angeles, California; excluding all other employees, office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

4. At all times since about August 1976, including all times material, the Union has been and is now the duly designated exclusive representative of the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to bargain with the Union, bypassing it and dealing directly with its employees in unilaterally presenting the employees with a contract proposal, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

6. By promising employees potentially improved benefits and terms and conditions of employment if the employees voted to decertify the Union; by indicating to employees the futility of selecting the Union as their collective-bargaining representative; and by threatening to close the plant if the employees voted for continued union representation, the Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 in violation of Section 8(a)(1) of the Act.

7. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, we will order that it cease and desist and that it take certain affirmative action to effectuate the policies of the Act.

The Respondent has not contested the fact that it engaged in the conduct discussed above, and has not argued against setting aside the August 8, 1986 decertification election based on that misconduct. Nor has the Respondent challenged the presumptive continued majority status of this incumbent Union. Rather, the Respondent maintains that the most appropriate method of redress for its misconduct is not the bargaining order sought by the General Counsel under authority of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), but another decertification election.[2] For the reasons discussed below, we find, in agreement with the General Counsel, that the nature of the unfair labor practices engaged in by the Respondent effectively precludes the holding therefore warranted.

In *Gissel*, the Court approved the Board's use of bargaining orders in cases when unfair labor practices, although perhaps not "outrageous" or "pervasive," nonetheless have the tendency to undermine a union's majority strength and impede the election process, and when the possibility of erasing the effects of unfair labor practices and ensuring a fair election is slight. Id. at 614. We find this to be such a case.

There is no question that the Respondent's misconduct was pervasive. The Respondent's contract proposal, which contained an unlawful promise of benefits, was hand delivered to every employee in the unit. Thus, every employee was not only the immediate recipient of an unlawful promise, but also was the target of the Respondent's unlawful bypassing of the Union. Furthermore, the threats never to sign a collective-bargaining agreement and to close the plant were made at an employee meeting of some 30 to 40 employees in a unit of approximately 58 employees.

These pervasive unfair labor practices were committed by the President and the General Manager, the Respondent's highest management officials. The Board has held that the effect of unlawful conduct is heightened when it is committed by top management officials who are readily perceived as representing company policy. See, e.g., *Cartridge Actuated Devices*, 282 NLRB 426 (1986).

In addition to the pervasiveness of the misconduct, the effect of which is heightened by the participation of top management officials, the nature of the misconduct indicates that traditional remedies are not likely to be effective. It is well settled that threats of plant closure are one of the most coercive actions an employer can take in seeking to influence an election. *Long-Airdox*, 277 NLRB 1157, 1160 (1985). As the Supreme Court stated in *Gissel*, these threats are among the types of unfair labor practices that "destroy election conditions for a longer period of time than others." *Gissel*, above, 395 U.S. at 611 fn. 31. In addition, the Respondent's unlawful remarks conveyed to employees its disregard for the very traditional remedy it now asserts is sufficient to cure the effects of its misconduct. Its president and its general manager told the employees that the election process would resolve nothing and that regardless of the eventual outcome, the Respondent would not sign a contract with the Union. Thus Sam and John Frey told unit employees that the election results would be contested, no matter what the result, and that the Re-

[2] *NLRB v. Gissel Packing Co.* involved an attempt by the Union to secure initial recognition. In that case the Court found that in certain circumstances the employee sentiments expressed in union authorization cards were better protected by the issuance of a bargaining order. Here, the General Counsel has established that a majority of the unit employees desire to be represented by the Union on the basis of a rebuttable presumption arising from the Union's initial recognition and successive collective-bargaining agreements with the Union. The Respondent does not question the continuing majority status of the Union, nor is there evidence to suggest that the presumption of continued majority support has been rebutted. In these circumstances, a *Gissel* bargaining order may be used to remedy unfair labor practices when appropriate. See, e.g., *Michigan Products*, 236 NLRB 1143 (1978).

spondent would not sign another contract with the Union. It is highly improbable that these remarks would not still be of concern to employees entering a third decertification election.

In light of the violations we conclude that the possibility of erasing the effects of the Respondent's unfair labor practices and of conducting a fair election by the use of traditional remedies is slight. Requiring the Respondent simply to refrain from unlawful conduct will not eradicate the lingering effects of the violations. Correspondingly, it is not likely that a third election would reliably reflect genuine, uncoerced employee sentiment. We conclude therefore that the employees' representational desires would, on balance, be better protected by the issuance of a bargaining order than by traditional remedies.[3]

Accordingly, we will order the Respondent to recognize and bargain with the Union, on request, as the exclusive collective-bargaining agent of the employees in the unit found appropriate and, if an understanding is reached, embody it in a written, signed agreement.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Madison Industries, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively in good faith with Sheet Metal Workers' International Association, Local Union No. 108, AFL–CIO as the exclusive bargaining representative of its employees in the following appropriate unit:

> All metal building industry journeymen, apprentices, janitors, steel shop leadmen, finish line leadmen, and painters employed by the Employer at its facility located at 1900 East 64th Street, Los Angeles, California; excluding all other employees, office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

(b) Attempting to bypass and undermine the Union and deal directly with its employees by unilaterally presenting to the employees a contract proposal containing changes in the terms and conditions of their employment.

(c) Promising employees potentially improved benefits and terms and conditions of employment in the form of a written agreement if they vote to decertify the Union.

(d) Announcing to employees its intent to refuse to bargain in good faith with the Union if the Union is selected to represent the employees, by making statements to employees that no future contracts will be signed with the Union and indicating to employees that selecting the Union as their exclusive collective-bargaining representative is a futility.

(e) Threatening to close the plant if the employees vote for continued union representation.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain collectively in good faith with Sheet Metal Workers' International Association, Local Union No. 108, AFL–CIO as the exclusive bargaining representative of the employees in the appropriate unit found above with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed written agreement.

(b) Post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election in Case 21–RD–2169 is set aside and the petition in that case is dismissed.

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[3] Of course, this order does not lock in the Union as the bargaining representative. As the Supreme Court noted in *Gissel*, supra 395 U.S. at 615: "There is, after all, nothing permanent in a bargaining order, and, if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition."

[4] The General Counsel requests a visitatorial clause. We deny the General Counsel's request as unnecessary here. *Cherokee Marine*, 287 NLRB 1080 (1988).

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively in good faith with Sheet Metal Workers' International Association, Local Union No. 108, AFL–CIO as the exclusive bargaining representative for the employees in the following appropriate unit:

All metal building industry journeymen, apprentices, janitors, steel shop leadmen, finish line leadmen and painters employed by the Employer at its facility located at 1900 East 64th Street, Los Angeles, California; excluding all other employees, office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

WE WILL NOT attempt to bypass and undermine the Union and deal directly with our employees by unilaterally presenting to them a contract proposal containing changes in the terms and conditions of their employment.

WE WILL NOT promise our employees potentially improved benefits and terms and conditions of employment in the form of a written agreement if they vote to decertify the Union.

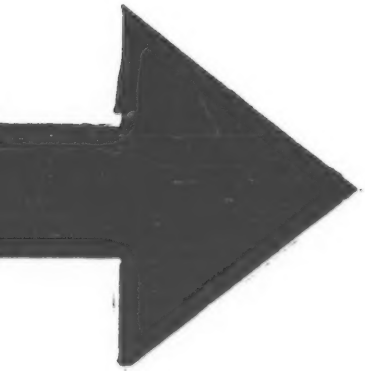
WE WILL NOT announce to employees our refusal to bargain with the Union if the Union is selected as their collective-bargaining representative by making statements to our employees that no future contracts will be signed with the Union or by indicating to them that selecting the Union as their exclusive collective-bargaining representative is a futility.

WE WILL NOT threaten to close the plant if our employees vote for continued union representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively in good faith with Sheet Metal Workers' International Association, Local Union No. 108, AFL–CIO as the exclusive bargaining representative of our employees in the appropriate unit set forth above, with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed written agreement.

MADISON INDUSTRIES, INC.



Mode O'Day Co. *and* Joanne D. Suffredini and General Warehousemen's Union, Local 598, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO,[1] Party to the Contract. Case 31-CA-15199

September 26, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On June 6, 1986, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[2] in which the Board adopted the administrative law judge's findings that the Respondent had violated Section 8(a)(2) and (1) of the Act by requiring Charging Party-employee Joanne D. Suffredini to execute a union-checkoff authorization on her first day of employment. The Board also adopted the judge's recommendation that the Respondent be ordered to reimburse Suffredini, with interest, all moneys deducted from her wages during the first 30 days of her employment by virtue of this invalid authorization. Thereafter, on December 23, 1986, the Board notified the parties that it had decided to reconsider its decision and the case was returned to the Board.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has decided to reaffirm its finding that the Respondent violated Section 8(a)(2) and (1) by requiring Suffredini to execute the checkoff form, but to reverse its earlier determination that the Respondent must reimburse her for amounts deducted from her pay as initiation fees pursuant to that checkoff during the first 30 days of her employment. In so doing, we adhere to the long-established remedial approach expressed in *Campbell Soup Co.*, 152 NLRB 1645 (1965), and do not rely on *General Instrument Corp.*, 262 NLRB 1178 (1982), cited by the judge.

In *Campbell Soup*, as in the instant case, the employer and the union were parties to an agreement containing a lawful union-security clause requiring employees to become union members after 30 days of employment. The employer's practice was to advise newly hired employees that union membership was a condition of employment and to provide them immediately with union membership forms and dues-checkoff authorizations. This resulted invariably in the employees promptly signing the forms and the employer deducting initiation fees and dues as of their date of hire. The Board found that because this procedure unlawfully coerced employees to join the union and to make payments of dues and initiation fees sooner than they were required to do under the union-security clause, employees were entitled to have those amounts deducted as dues during the first 30 days refunded to them. This is so because no dues properly were owing during the 30-day grace period. However, the Board also determined that any moneys deducted during the first 30 days that were attributed toward the initiation fee did not have to be returned to employees who worked beyond the grace period and who would, therefore, have been liable for payment of the initiation fee. Only those individuals who did not work at least 30 days were entitled to have the prematurely deducted initiation fees refunded to them. This approach results in the parties being placed in the posture they would have been in had no unfair labor practices occurred; that is, those employees who retained employment beyond the grace period and became subject to the union-security provision did not have duly owed initiation fees returned to them; those employees who worked fewer than 30 days and never became liable for the initiation fee were refunded that money; and all employees who had dues—an incidence of membership—deducted from their wages during the 30-day grace period were given back those moneys.[3]

The evidence in this case, as the judge fully sets forth, shows that the Respondent coerced Suffredini to sign a checkoff authorization on her first day of work and to begin deducting installment payments toward the union initiation fee with her first paycheck. Over Suffredini's repeated protests, the Respondent continued to deduct $25 from each of her first 5 weeks' paychecks. Suffredini voluntarily left the Respondent's employ after approximately 6 weeks.[4] It is undisputed that the entire amount of these several deductions was applied toward the Union's $200 initiation fee and none was attributed to dues. Under the rule set forth in *Campbell Soup*, we find that because Suffredini worked beyond 30 days, albeit only a short time thereafter, she became subject to the requirements

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] 280 NLRB 253.

[3] Accord: *Zidell Explorations*, 175 NLRB 887 (1969); *Electrical Workers IUE Local 60 (Westinghouse Electric)*, 180 NLRB 1062 (1970); *Playskool, Inc.*, 205 NLRB 1009 (1973); *Machinists Local 1198 (Interstate Food)*, 278 NLRB 154 (1986).

[4] There is no allegation or evidence that Suffredini's leaving her job was related in any way to these deductions or otherwise resulted from unlawful conduct by the Respondent.

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of the lawful union-security clause, including the payment of an initiation fee. Accordingly, contrary to the judge and the remedial scheme of *General Instrument* on which he relied,[5] we will not require the Respondent to reimburse Suffredini any part of the moneys withheld from her wages.[6] We shall issue a new order in lieu of the one previously entered in this proceeding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mode O'Day Company, Division of Wickes Companies, Inc., Burbank, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Delete paragraph 2(a) and reletter the subsequent paragraphs accordingly.

3. Substitute the attached notice for that of the administrative law judge.

MEMBER JOHANSEN, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(2) and (1) by requiring Charging Party Joanne D. Suffredini to execute a union-checkoff authorization on her first day of employment. Under the particular facts of this case, however, I cannot agree with the majority that the Respondent need not reimburse Suffredini for any initiation fees it deducted from her wages.

The majority finds that Suffredini is not entitled to reimbursement of initiation fees that the Respondent prematurely withheld from her paycheck because, under *Campbell Soup Co.*, 152 NLRB 1645 (1965), and its progeny, Suffredini became liable for the fees once she had worked more than 30 days. Thus, according to the majority, by denying her reimbursement, they placed Suffredini "in the posture [she] would have been in had no unfair labor practices occurred." I disagree.

The Respondent informed Suffredini orally and in writing, in her interview for employment and on her first day of work, that she was required to belong to the Union, that there was a $200 union initiation fee payable by $25 weekly deductions from her paycheck, and that no deductions would begin for 30 days. Notwithstanding these representations, however, the Respondent immediately deducted $25 per week from the Suffredini's wages and continued to do so for 5 weeks until Suffredini informed the Respondent that she was resigning and asked that the deductions cease. Suffredini thereafter quit the Respondent's employ, some 6 weeks after her hire.

Under these facts, it is clear that had Suffredini not been coerced into prematurely signing the union-checkoff authorization card, she would not have had any moneys deducted from her paycheck until her 31st day of employment, and fewer deductions would have been made prior to her leaving the Respondent's employ. On this basis, in order to place Suffredini in the position she would have been in but for the Respondent's unfair labor practices, it is necessary to require the Respondent to reimburse her any amount over and above that which should have had deducted between her 31st day of employment and her resignation. In fashioning this remedy, I do not reject *Campbell Soup*, on which my colleagues rely, but find that its principles cannot be woodenly applied to deny reimbursement where, as here, initiation fees were payable by periodic installments and the discriminatee quits before the date when all installments would have been paid.

Contrary to my colleagues' assertions, the fact that Suffredini was liable for the entire $200 initiation fee on her 31st day of employment is not dispositive of the remedy issue in this case. Although Suffredini might have been required to tender the entire initiation fee after 30 days in the Respondent's employ, this was not the case. The Respond-

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[5] In *General Instrument*, the Board ordered reimbursement of dues and initiation fees that had been deducted unlawfully. However, the precedent cited in that case for this remedy involved the unlawful deduction of dues only. Thus, to the extent that *General Instrument* can be read to authorize the reimbursement of unlawfully deducted initiation fees to employees who remain employed beyond the grace period, it is not supported by precedent and is at odds with the Board's well-recognized and accepted nonpunitive, make-whole status quo ante remedial policy.

[6] Had the first 30 days' deductions been apportioned between initiation fee and dues, that part attributable to the dues obligation would have properly been refunded to the Charging Party. See *Interstate Food*, supra at fn. 1.

Despite our dissenting colleague's assertions to the contrary, his partial reimbursement formula not only fails to follow *Campbell Soup*, but is tantamount to a repudiation of its essential underlying principle; that is, once employees work beyond the grace period provided for by the union-security agreement, they are liable for the full amount of the designated initiation fee. This is so irrespective of any installment payment plan that might exist. Periodic payments are merely a matter of convenience and serve to lessen the impact of full payment from one paycheck early in employment. The fact remains that once the 30 days is up the initiation fee is payable and the employee subject to that valid union-security requirement is not entitled to a refund of any part of that fee even if it was withheld prior to its having become due. This essentially was the situation in *Campbell Soup* and is the situation here; and the Respondent's reneging on its "assurances" to Suffredini that it would not make any deductions for the initiation fee during the first 30 days is relevant only to the question whether a violation occurred and not to the remedial issue addressed in *Campbell Soup*. In both cases it was improper for any deduction to be made prior to the 30-day grace period, but in both cases, once the 30-day grace period had passed, the entire amount was owed without regard to what had gone before. With respect to liability for the initiation fee, the employee was in the same position he or she would be in even if there had been no violation.

ent repeatedly assured Suffredini that no moneys would be deducted for 30 days, and then only in $25 weekly installments. To restore the status quo ante, Suffredini needs to be placed precisely in the position she would have been in but for the Respondent's unlawful conduct. By remunerating Suffredini for fees unlawfully extracted within the first 30 day, the status quo would be preserved.

Nor do I agree with the majority's claim that my position eviscerates the principles of *Campbell Soup*. As, admittedly, some of the prematurely withheld initiation fees in *Campbell Soup* were periodic payments, there was no evidence that, as here, the employer provided assurances that periodic payment would not begin for 30 days, or that discriminatees who were not reimbursed quit before the entire initiation fee was to be paid.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT contribute support or assistance to General Warehousemen's Union, Local 598, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, or any other labor organization, by encouraging or requiring newly hired employees to sign dues-checkoff authorizations in favor of that Union as part of our employment procedures.

WE WILL NOT deduct from the wages of our employees union initiation fees and dues in favor of the Union, or any other union, pursuant to any authorization not freely and voluntarily given by the employees in favor of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

MODE O'DAY COMPANY, DIVISION OF WICKES COMPANIES, INC.

Venture Packaging, Inc. *and* **Angela S. Enderby.** Case 8–CA–19989

September 26, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On April 27, 1988, Administrative Law Judge Marvin Roth issued the attached decision. The General Counsel filed exceptions, a supporting brief, and a motion to consolidate.[1] The Respondent and the Glass, Pottery, Plastics and Allied Workers International Union, AFL–CIO–CLC, the Charging Party in the cases the General Counsel wishes to consolidate with this case, each filed an opposition to the motion to consolidate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel's motion seeks to consolidate the present case with Cases 8–CA–19242, 8–CA–19371, and 8–CA–19438, all of which are presently pending before the Board. As the Charging Party and the issues in this case differ from those in the pending cases, and in the interest of expeditious resolution of this case, the General Counsel's motion is denied.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Frank D. Motil, Esq., for the General Counsel.
Frederick R. Post, Esq., of Toledo, Ohio, for the Respondent.
Joshua M. Spielberg, Esq., of Haddonfield, New Jersey, for the Charging Party in Cases 8–CA–20046 and 8–CA–20318.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Sandusky, Ohio, on November 5 and 6, 1987.[1] The charge was filed on April 7 by Angela S. Enderby, an individual. The complaint, then consolidated with Cases 8–CA–20046 and 8–CA–20318, which issued as amended on October 20, 1987, alleges that Venture Packaging, Inc. (Respondent or the Company) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. The gravamen of the complaint, insofar as pertinent to Case 8–CA–19989, is that the Company violated Section 8(a)(1) and (3) by discharging Enderby because of her union and protected concerted activities, and in order to discourage employees from engaging in such activity, and by unlawful interrogation. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel, the Company, and Glass, Pottery, Plastics and Allied Workers International Union, AFL–CIO, CLC (the Union), Charging Party in Cases 8–CA–20046 and 8–CA–20318, each filed a brief.

On the entire record in this case[2] and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, an Ohio corporation with an office and place of business in Monroeville, Ohio, is engaged in the manufacture of plastic food containers. In the course of its business, the Company annually ships from its Monroeville facility goods valued in excess of $50,000 directly to points outside Ohio. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

On August 8, 1986, following a Board-conducted election, the Board certified the Union as collective-bargaining representative of the Company's production and maintenance employees. The Company has refused to recognize and bargain with the Union. The Company contends that the election was invalid because "lead foremen," who the Company contends are supervisors under the Act, were permitted to vote in the election. On September 12, 1986, the General Counsel issued an amended consolidated complaint in *Venture Packaging*, Cases 8–CA–19242, 8–CA–19371, and 8–CA–19438, alleging that the Company was violating Section 8(a)(1), (3), and (5) of the Act. The case was heard before Administrative Law Judge Lowell Goerlich on November 12 to 15 and January 6 to 8. On June 17, 1987, Judge Goerlich issued his decision and recommended Order,

[1] All dates are for the period May 1, 1986, through April 30, 1987, unless otherwise indicated.

[2] Certain errors in the transcript are noted and corrected.

finding and concluding that the Company violated Section 8(a)(1), (3), and (5). Judge Goerlich found in sum that: the Company, and in particular its president, John Rathbun, was strongly and bitterly opposed to the Union; the Company unlawfully failed and refused to recognize and bargain with the Union; the Company made numerous unilateral changes in violation of its bargaining obligations with the Union, and also in reprisal for the employees' union activity or to undermine the Union's position; the Company constructively discharged an employee because of her union activity; and the Company committed other violations of Section 8(a)(1). The Company, the Union, and the General Counsel filed exceptions to Judge Goerlich's decision, and the case is presently pending before the Board. At the present hearing I granted summary judgment in favor of the General Counsel on the allegations in Cases 8–CA–20046 and 8–CA–20318, all of which, as amended, involved alleged violations of the Company's bargaining obligations. I further directed that the *Enderby* case (8–CA–19989) be severed from the other cases for decision and further processing before the Board. On January 29, 1988, I issued a decision and recommended Order in Cases 8–CA–20046 and 8–CA–20318. All parties filed exceptions and those cases are presently pending before the Board. However, the parties did not except to severance of the *Enderby* case.

B. *Alleged Interrogation and Discharge of Angela Enderby*

Angela Enderby began working for the Company on November 11 as an office clerical employee, a nonunit position. The Company terminated Enderby on February 10, at the end of her 90-day probationary period. The General Counsel contends that the Company discharged Enderby "because of [its] perception that in the event of a strike, they could not count on Enderby's loyalty, and, in particular, that they could not count on Enderby being willing to work behind the picket line during such a strike." (Br. 19.) Before discussing the events of Enderby's tenure, I shall first discuss a telephone conversation between Enderby and Company President Rathbun, which took place shortly after her discharge. If the General Counsel has presented a prima facie case, then such case necessarily rests on that conversation. As will be discussed, that conversation constitutes virtually the only credible evidence that might indicate that Enderby was discriminatorily discharged.

Enderby testified in sum as follows: After her discharge she telephoned the Company and tried to speak to John Rathbun's son. He was not in so she spoke to John himself. Enderby asked if Rathbun knew that she was let go, and he answered that he heard about it. Enderby argued that it was not fair because she was not allowed to try to do the work. Rathbun responded by offering to give Enderby "a little advice," namely: "The next time you get a job at a place that is having as many union problems as we are, don't go shooting your mouth off about how you will not cross a picket line, and what a big union man your husband is." Enderby denied saying this. She explained that she said she would be afraid to cross a picket line alone, but if necessary, could work in the printing department. This was the substance of their conversation. Rathbun, who was called as a General Counsel witness, did not deny having the conversation, although his version differed slightly from that of Enderby. Rathbun testified in sum as follows: Enderby asked him if he knew what happened. He said that he understood she was no longer with the Company. Enderby said that she wanted to tell her side, that the Company was not fair, that she did a good job, and could not understand why the Company thought otherwise. Rathbun answered that he did not know anything about it, was not familiar with her work, and could not help her. Enderby asked what Rathbun thought of her as a person, or whether he had anything against her. Rathbun answered: "The only thing I've ever heard that disappointed me a little bit, was the fact that you made the statement in front of the whole office, after you started to work, that you understood that this company had a lot of union problems, and that you would never come across a union picket line . . . if you ever have another job, don't volunteer that kind of information, because if you don't tell people, and they never have a strike, you never have to say whether you will or not. That's the only thing that I think you did here that, you know, didn't impress me." Rathbun explained that "You supposedly made the statement to the people upstairs that your husband was very strong for unions, and you would never cross a picket line, no matter what." Enderby responded that Rathbun misunderstood her, and that she meant only that she was afraid to cross a picket line. Rathbun testified that early in Enderby's employment he learned of her remark from his wife, who worked in the office, and who told him that Enderby told some of the office personnel that she would never cross a picket line. Rathbun testified that the remark did not bother him, but that he did not think it was smart of Enderby to say it. Rathbun further testified that he did not discuss Enderby's remark with comptroller Brett Bauer, who discharged Enderby, that he was not familiar with her work performance, and that he was not involved in Bauer's decision to terminate her. It is undisputed that Rathbun was out of town at the time of Enderby's termination. Rathbun further testified that he told Enderby that in his opinion, part of the problem was that the work really called for a college graduate, i.e., an accountant, although Bauer disagreed.

Enderby testified that when she began her job, comptroller Bauer asked her how she would feel about crossing a picket line. She answered: "Why? Is there going to be a strike?" Bauer responded that he did not know, and just wanted to know how she felt about it. Enderby said she would probably be afraid, and asked if there was a way into work other than the main driveway. Bauer said there was not. One of them said that they would worry about it when the time came, and Bauer resumed teaching her the work. Enderby further testified about a conversation during the first week of her employment with accounting clerk Susan Bellard, with whom she was assigned to work. Enderby mentioned that her husband injured his back while working for the railroad. Bellard asked if he needed a lawyer. Enderby answered that he

got one through his union. Shortly thereafter, Bellard asked Enderby if her husband would let her cross a picket line if there were a strike. Enderby answered that he would not want her to work behind a picket line and that she would be afraid to cross a picket line, but that if necessary she could work in the printing department. Bauer testified that in late November there were rumors in the plant of a strike. He told Enderby and Bellard that he did not think there would be a strike, but if it occurred, he would try to notify them at home and would provide safe transportation across the picket line. Bauer testified that there were no questions or comments. Bellard, who was also presented as a company witness, corroborated Bauer's testimony. She testified that he did not ask them any questions, but that after he left, Enderby said that she did not know whether she would cross a picket line. Bellard told her not to worry about it because "the guys will make sure we get in safely." Bellard testified that this was their only conversation about the matter. She testified that she did not tell either Rathbun or his wife about the conversation but that she did tell Deborah Iscman, another office employee. Iscman was presented as a company witness, but was not asked about the matter.

Other than Rathbun, who was called as an adverse witness, Enderby was the General Counsel's only witness. Enderby did not impress me as a credible witness. She was argumentative. Enderby displayed a tendency to ramble on, giving answers to questions not asked, injecting her alleged subjective feelings or hearsay concerning statements by other employees, and to avoid direct answers to questions on cross-examination. Enderby's testimony was in certain respects contradicted by her own writings. Enderby testified that when hired she was not given a copy of the Company's personnel policy manual. Subsequently she asked Susan Bellard about employee fringe benefits. According to Enderby, about 15 minutes later comptroller Bauer came into her office and threw a copy of the manual on her desk, saying that the Company did not have a manual pertaining to the office and "this is strictly for the plant, but I hope this clears things up." Bauer, in his testimony, denied that alleged incident occurred. Bauer testified in sum that in accordance with usual company procedure, he gave Enderby a copy of the manual when she was hired, that most of the manual provisions pertain to both office and plant personnel, and that he explained some of the provisions to Enderby and told her to read the manual. Bellard testified that employees were normally given a copy of the manual within 1 or 2 days of starting employment. Enderby's personnel file contains a form acknowledgment, dated November 14 and signed by Enderby, indicating that she received a copy of the manual and was responsible for familiarizing herself with the rules and regulations in the manual. If Enderby received the manual in the manner she described, there would be no such acknowledgment in the file. The manual, which was introduced in evidence, contains provisions that obviously or expressly pertain to both office and plant personnel, e.g., hospitalization and life insurance coverage (Enderby signed a waiver of coverage).

A major factual issue presented in this case was whether Bellard trained Enderby to do invoicing, which was one of Bellard's normal tasks. Enderby testified in sum that after their conversation about a picket line, Bellard kept putting off training on invoices and never trained Enderby to do that work. According to Enderby, about February 1 Bellard gave her incomplete written instructions on invoicing, but told her that she did not want Enderby doing invoices. Enderby testified that Bellard said she might do something else, like "terminations," thereby inferring that Bellard had advance knowledge that Enderby would be terminated. Documents presented in evidence, including entries in Enderby's handwriting, confirmed Bellard's testimony to the effect that she gave Enderby adequate training on invoicing. The Company presented in evidence four pages of notes, which Enderby admitted that she wrote while watching Bellard show her invoicing. The notes pertain to computer input, which is the last phase of the work. It is unlikely that Bellard would have taught Bellard this phase of invoicing without first showing her the preparation, which is the bulk of the work. The Company also presented in evidence extensive written information and instructions on preparation for invoicing. Enderby in her testimony reluctantly admitted having seen at least some of the written material, which includes her own marginal notes. Enderby testified that the written material contained a directive to ask Bellard about something. However, the material in evidence contains no such entry. I also have a problem with Enderby's version of her conversation with President Rathbun. Even if the Company were discriminatorily motivated, it is unlikely that Rathbun would have ignored Enderby's defense of her work, and proceeded directly to the matter of picket lines. Rathbun probably would have made at least a token reference to the Company's professed reason for her discharge.

I have no comparable reservations regarding the testimony of the other witnesses. (I have taken into consideration the fact that in the first unfair labor practice proceeding, Judge Goerlich did not credit the testimony of Rathbun and Bauer in certain respects.) I credit Rathbun's version of his conversation with Enderby. Unless otherwise indicated, I do not credit Enderby's testimony when it conflicts with that of the other witnesses. As I do not credit Enderby's testimony that Bauer asked her how she would feel about crossing a picket line, it follows that I am recommending that the complaint allegation of unlawful interrogation be dismissed.

The Company's answer asserts that Enderby "was discharged for just cause based on her inability to perform her assigned job duties, her attendance and tardiness problems and other legitimate nondiscriminatory business reasons."

Comptroller Bauer testified in sum as follows: The Company employed an accountant (Kim Wood) in its office. She left in September 1986. Bauer, himself a CPA, felt that he had developed enough experience in running the financial end of the business to dispense with any need for another accountant (Bauer became comptroller in August 1985). However, as the Company was grow-

ing, he felt that he needed another clerical employee in the accounting office. President Rathbun felt that the Company still needed another accountant, but he let Bauer have his way. Bauer placed a blind newspaper ad to screen applicants (I do not regard this fact as demonstrating that the Company sought to screen out union adherents). Enderby responded to the ad. Bauer interviewed and hired her. Bauer planned that Enderby would prepare the payroll and assist Bellard with invoicing. He anticipated that Enderby would normally spend all day Monday and about 2 hours on Tuesday preparing the payroll. She would spend the rest of the week working with Bellard on invoicing. By learning to do the invoicing, Enderby could back up Bellard, doing the work in her absence and enabling her to perform other tasks. Bauer emphasized to Enderby that it was important for her to be at work on Mondays in order that payroll preparation proceed on schedule so that paychecks could be distributed on Thursday without a last-minute rush. Bellard, a nonsupervisory employee, was primarily responsible for training Enderby. Bauer supervised both, although he followed a practice of minimal involvement in their day-to-day work. Bauer anticipated that he would evaluate Enderby's performance at the end of her 90-day probationary period, which he regarded as an adequate period of time to enable her to learn and perform the work. From time to time Bauer asked Bellard how Enderby was doing. Bellard invariably answered that Enderby was not picking up the work fast, but they should give her more time and she probably would come around. By the 60th day of Enderby's employment, Bauer was concerned. He pressed Bellard for more information. Bellard admitted that Enderby had trouble doing the work, and had made several serious errors in preparing billings. Bauer also learned from Bellard and Deborah Iscman that when Bellard was absent from work, Enderby failed to perform work assigned to her and left early or wasted time when there was work to be done, thereby leaving the work for others. Bauer also checked Enderby's timecards, and concluded that her absences were excessive. Her total record indicated that she was absent 6-1/2 days, left early on 4 days, and was late 1 day. However, Bauer regarded as most significant that she was absent or left early on 5 of 13 Mondays during her tenure. Bauer did not compare her record with that of other past or present office employees. However, he did not recall any such attendance problems with other employees, and the Company's records confirm his opinion. (In light of Bauer's testimony, I do not regard his failure to compare Enderby's attendance record with those of other employees as demonstrating a discriminatory motive.)

Bauer testified that at the beginning of February he tentatively decided to terminate Enderby at the end of her probationary period. On Monday, February 9, Enderby called to say that she would not come in to work because of snow conditions. By noon the roads were cleared, but Enderby did not come in at all that day. (Enderby in her testimony never explained why she could not come in for the afternoon.) Bauer then made a firm decision to terminate her. The next day Bauer told Enderby that she was not progressing well, not performing the work in a timely fashion, and that her attendance contributed to, but was not the main reason for, her termination. Bauer testified that although pressed by Enderby, he did not go into detail because he saw no need to humiliate her. For the first time, Enderby told Bauer that she was not given an opportunity to do invoicing. Bauer testified in sum that he terminated Enderby because of her poor performance, that the decision was his own, and that he did not consult with Rathbun before terminating her. Subsequently Bauer assigned another employee to prepare the payroll. The employee did not perform well, and was also terminated. Eventually Bauer assigned Bellard to prepare the payroll, and he found no need for another employee.

Ballard and Iscman corroborated Bauer's testimony concerning Enderby's poor performance. Bellard testified in sum that Enderby was very slow in performing the work, had difficulty in catching on how to do it, and failed to perform work assigned to her when Bellard was absent. As a result Bellard fell behind on her own work. Bellard felt sorry for Enderby (whose husband was not working) and tried to teach her. About February 1 Bauer asked Bellard how Enderby was doing. As usual Bellard said that Enderby was very slow, but they could work around it. Bauer asked whether Enderby could back her up if something happened. Bellard conceded that she could not.

I find that Enderby's conversations with Bellard concerning Enderby's husband and the impact of a picket line made their way through the office grapevine, among the clericals, to Rathbun's wife, and then to Rathbun, reaching him in a disturbed and exaggerated version. The evidence indicates that such gossip spread quickly around the plant, and was not always accurate, e.g., the rumors of a strike. Rathbun's statements to Enderby were at least arguably unlawful in that they could reasonably be interpreted as a threat that the Company would not hire an employee who volunteered that he or she would not cross a union picket line. However, the General Counsel does not allege the statements themselves as an unfair labor practice. Rather, the General Counsel contends that the statements demonstrate that the Company discharged Enderby because they were not sure she would work behind a picket line. I find that the General Counsel presented a prima facie case, in that Rathbun's remarks were susceptible of an interpretation that Enderby was discharged at least in part because she indicated that she might not cross a picket line in the event of a strike at the plant.[8] However, on the basis of all the evidence, I find that the Company has met its burden of proving that it would have discharged Enderby in the absence of her protected activity, and specifically that Enderby was discharged because of poor job performance during her probationary period, and not for discriminatory reasons. First, the evidence indicates that

[8] Enderby's comments to Bellard constituted protected activity under Sec. 7 of the Act. See *United States Steel Corp. v. NLRB*, 711 F.2d 772, 775–776 (7th Cir. 1983). If the Company discharged Enderby because of her comments or because of Rathbun's interpretation of her comments, i.e., that she would show support for a strike, then her discharge would be unlawful.

Rathbun was not involved in her discharge. Rathbun left the hiring and firing of accounting department personnel to comptroller Bauer. Rathbun so demonstrated when he permitted Bauer to hire a clerical employee notwithstanding his own view that that job required an accountant. Rathbun had no knowledge of Enderby's job performance and was not even around when she was discharged. Rathbun expressed his opinions to Enderby in strong terms, and probably in an unlawful manner, but he did not tell Enderby that she was fired for this reason, or suggest that he was involved in her termination. Second, the evidence indicates that by the end of the first week of Enderby's employment, the Company knew all that it would ever know about her views concerning picketing, strikes, or other union activity. Indeed, Enderby testified that during her job interview she told Bauer that her husband was a union member. If the Company were discriminatorily motivated against Enderby, then it probably would have discharged her in November, or at the earliest possible opportunity. Enderby's poor work performance provided the Company with ample opportunities to terminate her, if it were seeking a pretext. Nevertheless the Company kept her on until the end of her probationary period.

In an effort to explain away this factor, the General Counsel advanced the theory that after the first week of her employment, the Company kept Enderby on for nearly 3 months, doing little or no useful work, and without giving her adequate training, all in order to provide an excuse for terminating her in February. The General Counsel's theory also rests on the premise that accounting clerk Bellard, although a nonsupervisory employee, acted as the Company's union-busting agent in the office by deliberately sabotaging Enderby's career. (The complaint does not allege that Bellard was a company agent.) The theory fails on the facts. The credible evidence indicates that Bellard was sympathetic to Enderby, that she tried to train her, that Enderby was given adequate training, and that the Company gave her the benefit of the doubt by retaining her through her entire probationary period in order to permit her to demonstrate an ability and willingness to perform the work. Therefore the factors of timing and the Company's overall course of conduct toward Enderby weigh against finding a discriminatory motive. Third, Enderby's job performance, including her attendance, did not measure up to the Company's standards. Enderby demonstrated her own indifference by failing to show up at all to work on February 9, although she knew how important it was for her to be at work on Mondays. After her termination, Bauer tried unsuccessfully to employ another person to do the work, and then simply dispensed with the idea by assigning Bellard extra duties (which she performed). I have taken into consideration the Company's animus toward unionization, the unlawful conduct as documented by Judge Goerlich, and my own findings in the severed cases.[4] However, I find for the reasons discussed that the Company did not violate the Act by discharging Enderby.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company has not violated the Act as alleged in Case 8–CA–19989.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint in Case 8–CA–19989 is dismissed.

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[4] As indicated, Judge Goerlich's decision is still pending on exceptions filed with the Board. In the absence of a Board decision, I have accorded a presumption of validity to Judge Goerlich's credibility resolutions and findings of operative fact. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494 (1951).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

West Point Pepperell, Inc. *and* Local 305T, Amalgamated Clothing, and Textile Workers Union, AFL–CIO, CLC. Case 1–CA–25192

September 26, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On June 23, 1988, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, West Point Pepperell, Inc., Biddeford, Maine, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(a) and (b).

"(a) Failing and refusing to timely furnish Local 305T, Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC, with requested information that is relevant and necessary to the performance by the Union of its obligations as statutory bargaining representative of the Respondent's employees.

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Local 305T, Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC, as the exclusive representative of our employees in the appropriate unit by failing and refusing, on request, to timely furnish it with information relevant and necessary to the performance of its obligations as collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish Local 305T, Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC as exclusive representative to all employees in the appropriate unit, the information that it requested in the grievances filed on May 21, 1987, and September 2, 1987, and in its letter of October 6, 1987, to wit: the names and average piece rate earnings of each of the employees working on piece rate, in each group, on a monthly basis.

WEST POINT PEPPERELL, INC.

Don Firenze, Esq., for the General Counsel.
Rodger W. Lehr Jr., Esq. (Herbert H. Bennett & Associates, P.A.), of Portland, Maine, for the Respondent.
Ralph Oliver, Manager, of Biddeford, Maine, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law judge. This matter was tried before me at Boston, Massachusetts, on May 3, 1988, based on a charge filed by Local 305T, Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC (the Union), on December 30, 1987, as amended on January 26, 1988, and a complaint issued by the Regional Director of Region 1 of the National Labor Relations Board (the Board), on February 24, 1988. The complaint alleged that West Point Pepperell, Inc. (Respondent), violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by refusing to supply the Union with requested information relevant to the

[1] We agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) by refusing the Union's request for the names and average earnings records of piece rate employees on a monthly basis. Because we agree with the judge that the Union had legitimate reasons for its information request, we find it unnecessary to pass on the judge's alternative finding that even if the Union sought this information for the same reasons that the binders had previously sought weekly posting of individual earning averages (i.e., to embarrass the high producers), a conclusion of bad faith would not be warranted. We also do not rely on the judge's discussion of *Scofield v. NLRB*, 394 U.S. 423 (1969), and 393 F.2d 49 (7th Cir. 1968).

[2] The judge inadvertently misstated the Union's name in his recommended Order and notice. We shall modify the Order and issue a new notice to correct these errors. We shall also modify the judge's narrow cease-and-desist language to conform to that customarily used by the Board.

Union's performance as exclusive collective-bargaining representative of Respondent's employees. Respondent's timely filed answer denied the commission of any unfair labor practice.

All parties were afforded full opportunity to examine and cross-examine witnesses, argue orally, and submit briefs. Counsel for the General Counsel's oral argument and Respondent's brief have been carefully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is a corporation with an office and place of business in Biddeford, Maine, where it is engaged in the manufacture and sale of blankets, comforters, and related products. Jurisdiction is not in dispute. The complaint alleges and Respondent has admitted facts sufficient to establish jurisdiction. I therefore find and conclude that Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent has admitted, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Collective-Bargaining History*

The Union has represented Respondent's employees in the following collective-bargaining unit, admitted to be appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act, since the early 1940s:

> All production and maintenance employees employed at the Biddeford facility but excluding all executives, managers, general superintendents, general foremen, office clerical employees, laboratory employees, firemen, guards and supervisors as defined in the Act.

Respondent's recognition of the Union has been embodied in a series of collective-bargaining agreements, the most recent of which is effective for the period of June 16, 1986, to June 18, 1989.

There are approximately 275 employees in the unit; about 75 percent of these, including those in the binder category, work on piece rates.

In 1982, in settlement of a grievance over the downward adjustment of certain piece rates, and to remedy what Respondent saw as a problem of "runaway" piece rates, Respondent and the Union entered into an agreement, supplementing their then-current contract. That settlement provided, inter alia:

> 1. All piece rates shall be set to yield expected earnings of 120% of average standard guaranteed base rates.
>
> 2. Whenever group monthly average earnings for any job classification equal or exceed 130% of the standard guaranteed base rate, the COMPANY shall have the right to reduce the piece rates for that job classification to yield a group average of 125% of the standard guaranteed base rate for that classification. Such downward adjustments in piece rates shall be made without the necessity of time studies.
>
> 3. THE COMPANY shall supply the UNION with monthly reports on the group average earnings, as a percentage of standard guaranteed base rates, for all piece rate job classifications, exclusive of Learners.

The foregoing provisions have been embodied in each subsequent contract and are set forth in the current agreement as articles 9.4, 9.6, and 9.7 respectively.

The information that the Respondent supplies to the Union each month pursuant to article 9.7 of the contract provides the group piece rate averages, specifically the amount by which the group has exceeded the hourly rate, for each month. Respondent does not regularly supply the Union with the piece rate averages of any of the individuals in the group.

B. *The Dispute*

1. Background

During 1986, Respondent made two downward adjustments in the binder's piece rates, pursuant to article 9.6 of the contract, when the monthly averages for that group exceeded 130 percent of the standard. On January 9, 1987,[1] 27 binders signed a grievance (grievance 1, G.C. Exh. 8) requesting that the Employer post the incentive earnings over base rate of each of the binders on a weekly basis. As the employees told Ralph Oliver, the Union's business manager, "they were sick and tired of being cut . . . they want to know who . . . was making the high or causing the . . . rate to be inflated . . . some of them felt they didn't know how they were doing it. To them, it felt impossible . . . . They wanted to know who was the cause of the [downward] adjustments in the rates . . . creating the problem." Binder and Union Shop Steward Joanne Dusseault similarly explained that the binders were "tired of being cut," i.e., of having their rates adjusted downward. Weekly posting, the binders believed, would embarrass those who were the cause of the downward adjustments, the highest producers, and cause them to be "very careful."[2]

A second-step grievance meeting was held on February 19 regarding grievance 1. At that time, Dusseault explained

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[1] All dates hereinafter are 1987 unless otherwise specified.

[2] Both Oliver and Dusseault testified that even without postings, the employees in the department knew who the fastest workers were.

> Four of twenty-two binders are exceeding one hundred and thirty percent. They are affecting the slower operators . . . that have to work that much harder. Pretty soon . . . we will all have tendonitis. All binders agree to posting . . . . If posted, the ones over a hundred and thirty percent said they'd slow down.

She denied that the intent was to pressure those higher producers but acknowledged that something akin to embarrassment would help prevent further downward adjustments.

Respondent refused to post the individual averages on a weekly basis. However, on March 17, in response to grievance 1, it furnished the Union with the average earnings deviation for each of the binders, by name and number, for the 13-week quarter ending on December 28, 1986, and the 4-week period ending February 22, 1987. The Union is not pursuing the demand for weekly posting of individual averages.

2. The current information requests

On May 21 the Union filed grievance 8, alleging that the Respondent had failed to include five low-producing binders in calculating the group averages that resulted in the downward adjustments of June 23, 1986 (4.09 percent) and December 29, 1986 (3.98 percent). It sought restoration of the rates and backpay. Additionally, it sought the following, which is the basis for the instant charge and complaint:

> The Union is also requesting . . . the names and the average piece rate earnings of each individual employee that's on piecework, in each group, be submitted on a monthly basis to the Union in order for the Union to calculate the average earning accurately and to assure that no employee was omitted from the group.

Respondent denied the grievance, asserting that all the appropriate employees had been included in the group. Only learners, those employees not achieving base rate, had been excluded, it stated. (The issue of who is a learner is now pending arbitration.) Respondent further rejected the Union's demand for monthly lists of the incentive earnings of all employees by named individuals, asserting that it was providing all the information required by the contract. Respondent did, however, furnish the Union with the average piece rate earnings of the binders for the 4-week periods preceding each of the downward adjustments. It agrees now that it will furnish such information each time there is a downward adjustment.

On September 2 and October 6 the Union reiterated its demand for monthly listings of the average piece rate earnings of all employees working on incentive. The Respondent rejected both requests, insisting that it will only provide the information required by contract. As noted, the Employer has also agreed to furnish individual earnings information of the employees in affected departments subsequent to any downward adjustments.

Respondent's personnel director, Carl Frechette, testified that it is to the Employer's economic benefit to have fewer employees working faster and producing more pieces per individual than to have a greater number of employees working more slowly, even if the hourly earnings of both groups are the same. The savings, he claimed, is in fringe benefits.

C. *Analysis and Conclusions*

The General Counsel correctly asserts, and Respondent does not dispute, that the information requested by the Union, the names of the unit employees performing work on piece rate and their incentive earnings averages, is wage data that is presumptively relevant and generally must be furnished to the Union on request. That principle is too well established to be argued again. See, for example, *WCCO Radio v. NLRB*, 844 F.2d 511 (8th Cir. 1988); *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983); *Proctor & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979); and *Whitin Machine Works*, 108 NLRB 1537 (1954). The General Counsel further correctly asserts, and Respondent does not appear to dispute, that a union does not waive its statutory right to such information by agreeing to a contract providing that the employer will furnish something less. *Southwestern Bell Telephone Co.*, 247 NLRB 171 (1980); *General Electric Co.*, 173 NLRB 164 (1968). A waiver of a statutory right must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 698 (1983); *Univis, Inc.*, 169 NLRB 37, 39 (1968).

Respondent contends, however, that the Union's right to such information is not absolute. Information sought in bad faith, for the purpose of harassing the employer or employees, it argues, need not be furnished. *NLRB v. A. S. Abell*, 624 F.2d 506 (4th Cir. 1980), denying enf. 230 NLRB 112 (1977); *Boston Herald-Traveler Corp. v. NLRB*, 223 F.2d 58 (1st Cir. 1955); *Whitin Machine Works*, supra. In this case, Respondent, on whom the burden of proof on this issue falls,[3] argues that the facts establish that the Union sought the piece rate earnings of the individual employees for a bad-faith purpose, to effect a slowdown and prevent future downward adjustments of piece rates. Such bad faith on the part of the Union, Respondent asserts, legitimizes its insistence that it will only furnish the group averages on a monthly basis, as required by contract, and provided information about individual earning averages after it imposes a downward adjustment. The record does not support Respondent's contention that the Union's request was made in bad faith.

Respondent's defense is premised on statements about why the employees in the binder classification filed grievance 1, seeking weekly posting of individual earning averages, e.g., to embarrass the high producers into restricting their productivity. The request for weekly posting, however, was dropped and those statements carry significantly less weight now. The Union presently seeks only that Respondent furnish *it* with the monthly averages, identified by individuals. Oliver explained that he sought that information "to calculate the average earning

[3] See *Washington Gas Light Co.*, 273 NLRB 116 (1984); *Pfizer, Inc.*, 268 NLRB 916 (1984).

accurately and to ensure that no employees was omitted from the group." Where, as here, the Respondent has previously made downward adjustments in the piece rates that were based on questionable assumptions (the alleged exclusion of certain low-producing binders from the group), the Union need not await the next such downward adjustment to question the Employer's calculations and assumptions. It is entitled to seek to avoid, not merely prosecute, grievances. The Union has thus proffered credible and valid reasons for *its* pending information requests; no inference of bad faith is warranted from the employees' earlier voiced reasons for wanting the averages publicly posted.

Even if one were to assume that the Union sought this information for the same reasons that the binders had sought weekly posting, however, a conclusion of bad faith would not be warranted. Unions have traditionally opposed or sought to impose ceilings on piecework for a variety of reasons related to the obligation to promote the welfare of the greater number of their members. Such reasons include fears that the employees will work themselves out of their jobs by overproduction, that (as here) higher productivity will result in lowered rates and compensation for actual production, that there will be morale-threatening jealousies, and (again as here) that the higher pace required to maintain earnings might threaten the employees' health. *Scofield v. NLRB*, 393 F.2d 49, 53 (7th Cir. 1968). These are legitimate union interests that contravene no national policy or statutory scheme. *Scofield v. NLRB*, 394 U.S. 423, 436 (1969). Moreover, while Respondent alludes to the prohibition of slowdowns set forth in the contract's no-strike clause (art. 25) as evidencing a bad-faith motive here, *Scofield* teaches that a ceiling on piecework is not necessarily a slowdown as that term is used in the context of a strike or partial strike. I note that neither the Union nor the employees sought the information to bring about a "slowdown" as a means of adjusting a "dispute, difference or grievance," the conduct prohibited by the no-strike clause. I note further that the Union has expressly sought the information for legitimate purposes and it is only Respondent's surmise, from an earlier request, that the Union's intention is to cause a "slowdown."

In the instant case, the Union requested presumptively relevant wage data and supported that request with legitimate explanations of its need for that information. Respondent rejected that request, asserting a fear that the information would be used to its disadvantage, the slowing down of production by a few of its highest producers. That fear, while not mandated by the record, was not totally unreasonable or unwarranted and the interest Respondent sought to protect, higher production, was legitimate. Respondent's rejection of the Union's request, moreover, was not absolute. Respondent conditionally offered to disclose the information after any downward adjustment in rates, rather than on a regular monthly basis as requested by the Union. Thus, even with Respondent's "bad faith" contention rejected, there remains the question of whether Respondent's conditional offer satisfied its statutory obligations. In *Detroit Edison v. NLRB*, 440 U.S. 301, 314–315 (1979), the Supreme Court, faced with substantial confidentiality concerns held, with respect to one class of requested information (aptitude tests and answers), that both the duty to supply information and the type of disclosure required to satisfy that duty turned on "circumstances of the particular case." With respect to a second class of information, clearly confidential test scores, it stated at 318

> The Board's position [requiring the employer to furnish the inofrmation] appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interest, however legitimate. But such an absolute rule has never been established, and we decline to adopt such a rule here. There are situations in which an employer's conditional offer to disclose may be warranted.

The Court required the Board to balance the Union's need for information against "any legitimate and substantial" confidentiality interests established by the employer, accommodating the parties' respective interests insofar as feasible in determining the employer's duty to supply the information." *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30 (1982).

Assuming, arguendo, the applicability of the *Detroit Edison* balancing test to information requests that do not involve confidentiality,[4] I cannot conclude that Respondent's conditional offer to furnish individual earnings averages only after there has been a downward adjustment satisfies its statutory obligations. First, I note that the Union, by requesting that the information be furnished on a monthly basis, seeks to avoid grievances, a salutary objective. If the Respondent's position here were to prevail, the employees could be subject to reductions in their piece rates which, although ultimately reversed, would cause them to earn less or work faster to maintain their prior earnings. This, in turn, could exacerbate tensions in the workplace, lower morale, and expose those employees to unnecessary physical injury. Even a subsequent reduction in the rates and the payment of backpay after successful prosecution of a grievance might not fully restore the status quo ante. Second, Respondent's proposed compromise would not necessarily achieve its stated objective. As the General Counsel's witnesses pointed out, the employees know, at least generally, who the highest producers are. If they desire to cause those employees to "slow down," they can "embarrass" or "harass" them as well without the records or on the basis of records furnished after an adjustment, as they can on the basis of records furnished on a regular monthly basis. Third, Respondent only surmises that the information might be used to reduce productivity; that is not evident from the current requests or any impermissible conduct described in this record. These latter two points convince me that Respondent's concerns, while legitimate, are not substantial. (Cf. *Detroit Edison*, supra.)

[4] Compare *New Jersey Bell Telephone Co. v. NLRB*, 720 F.2d 789 (3d Cir. 1983), and *Washington Gas Light Co.*, 273 NLRB 116 (1984), with *E. W. Buschman Co.*, 277 NLRB 189 (1985); *Carpenters Local 608 (Various Employers)*, 279 NLRB 747 (1986); and *Roadway Express*, 275 NLRB 1107, 1110 (1985).

Finally, it takes no great leap of the imagination to see that the regular receipt of individual earnings records might enable the Union to discern patterns or trends from which it might formulate new bargaining proposals, a purpose implicit in any request for wage data. The Union might, for example, notice a wide disparity in earnings over an extended period of time and seek an adjustment in the rates, reassignment of employees, or greater training. It might conclude and propose that the use of the median, rather than the average, as the basis for a rate adjustment, would better protect the majority of its unit members. It might bargain for a different definition of learner. The irregular receipt of the earnings records might arguably be insufficient for these valid bargaining purposes.

Accordingly, I must conclude that by refusing the Union's request for the average earnings records, naming individual employees, on a monthly basis, Respondent has failed to fulfill its statutory bargaining obligation, in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By failing and refusing to timely furnish the Union with the records and information it requested, which are relevant and necessary to the performance of the Union's duties as statutory bargaining representative of Respondent's employees in an appropriate collective-bargaining unit, Respondent has violated Section 8(a)(5) and (1) of the Act.

2. The unfair labor practices set forth in paragraph 1, above, affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(5) and (1) as set forth above, I recommend that it be required to cease and desist from such conduct or related conduct. Affirmatively, in order to effectuate the policies of the Act, I recommend that Respondent be required to furnish the Union with the names and average piece rate earnings of each of the employees working on piece rates in each group each month.

On these findings of fact and conclusions of law, I issue the following recommended[5]

ORDER

Respondent, West Point Pepperell, Inc., Biddeford, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to timely furnish Local 305T, Amalgamated Clothing and Textile Workers Union of America, AFL–CIO, CLC with requested information that is relevant and necessary to the performance by the Union of its obligations as statutory bargaining representative of Respondent's employees.

(b) In any like or related manner interfering with the efforts of the Union to bargain collectively with it on behalf of the employees in the appropriate unit.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish Local 305T, Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC as exclusive representative of all employees in the appropriate unit, the following information heretofore requested by the Union: the names and average piece rate earnings of each of the employees in each group who work on piece rates, on a monthly basis, as requested in grievance 8, dated May 21, 1987, grievance 13, dated September 2, 1987, and its letter of October 6, 1987.

(b) Post at its plant in Biddeford, Maine, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Accurate Die Casting Company and its Alter Ego, Accurate Die Casting Company, Debtor-in-Possession *and* Local 491, United Automobile, Aerospace and Agricultural Implement Workers of America. Cases 3–CA–13434, 3–CA–13646, 3–CA–13832, 3–CA–13902, 3–CA–13954, 3–CA–14124, and 3–CA–14253

September 26, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On December 30, 1987, the Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing alleging that the Respondents violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act.[1] On January 15, 1988, the Respondents filed an answer to this complaint. On January 21, 1988, the Regional Director issued an order further consolidating cases, amended consolidated complaint, and notice of hearing, which alleged additional violations of the Act to those alleged in the prior complaint.[2] On February 25, 1988, the Respondents filed an amended answer to the amended consolidated complaint. On April 26, 1988, the Regional Director issued an order further consolidating cases, second amended consolidated complaint, and notice of hearing, which alleged additional violations of Section 8(a)(1), (3), and (5).[3] On May 24, 1988, the Regional Director informed the Respondent that no answer had been received to the second amended complaint and that if one was not received by June 1, 1988, a Motion for Summary Judgment would be filed. By a letter to the Regional Director dated May 26, 1988, the Respondents' attorney stated that the Respondents no longer exist, that all assets had been seized by the secured creditor, and that there was no client on whose behalf he could answer. On July 20, 1988, the General Counsel filed a motion to transfer case to and continue proceeding before the Board and for summary judgment. On July 22, 1988, the Board transferred the proceeding to the Board and issued a Notice to Show Cause to the Respondents. The Respondents have not responded to the Notice to Show Cause. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

In its Motion for Summary Judgment the General Counsel contends that the Respondents have failed to file an answer to the second amended complaint and that under Sections 102.24 and 102.50 of the Board's Rules and Regulations the Board should find all the allegations of the second amended consolidated complaint to be true and issue an order on such findings. The Respondents, however, filed answers to the original consolidated complaint and the amended consolidated complaint. The Respondents' amended answer denies the commerce allegations, supervisory status allegations, antiunion motive allegations, the retaliation for cooperation with the Board motive allegation, the unilateral change allegations, and the alleged union requests for bargaining and for information, as well as many of the allegations of the Respondents' conduct.

That answer also denies the supervisory status of all those alleged to have committed the additional unfair labor practice set out in the second amended consolidated complaint. There is no evidence that the answer or amended answer was withdrawn. Accordingly, we find that the Respondents' answers to the consolidated complaint and the amended consolidated complaint satisfy their obligation under Section 102.20 to file a timely answer, and we decline to grant the Motion for Summary Judgment. *Auburn Die Co.*, 282 NLRB 1044 (1987), *Marko Contractors*, 269 NLRB 990 (1984).

ORDER

It is ordered that the General Counsel's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that the proceeding be remanded to the Regional Director for Region 3 for further appropriate action.

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[1] This complaint was based on a charge filed by the Union in Case 3–CA–13434 on September 16, 1986, and amended on September 23 and October 20, 1986; a charge filed by the Union in Case 3–CA–13646 on February 2, 1987; a charge filed by the Union in Case 3–CA–13832 on June 8, 1987; a charge filed by the Union in Case 3–CA–13902 on August 4, 1987; and a charge filed by the Union in Case 3–CA–13954 on September 4, 1987.

[2] The amended consolidated complaint was based on a charge in Case 3–CA–14124 filed by the Union on December 18, 1987, and an amended charge filed on January 7, 1988, as well as the charges described earlier.

[3] The second amended consolidated complaint was based on charges in Case 3–CA–14253 filed by the Union on March 14, 1988, as well as the charges described earlier.